

FAILURE TO ACKNOWLEDGE A MATERIAL AMENDMENT-WHAT IS MATERIAL, AND HOW DO I MAKE NO MISTAKES?

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For as long as this writer can remember, the Government Accountability Office (“GAO”) has hewed to a hard and fast rule about amendments to solicitations: an offeror’s failure to acknowledge a *material* amendment makes the proposal (or bid) unacceptable and the proposal or bid may not form the basis for award. This same rule was applied in *TTCC, Inc.*, B-412874, May 17, 2016. On the other hand, if a non-material amendment is not acknowledged, the agency may waive this minor informality in accordance with FAR 14.405. *TTCC* also states the GAO long held position that “[w]hile no precise rule exists as to whether a change required by an amendment is more than negligible, such that failure to acknowledge the amendment renders the proposal unacceptable, an amendment is material where it imposes legal obligations on a party that are different from those contained in the original solicitation, or if it would have more than a negligible impact on price, quantity, quality or delivery.” *Id.*

In TTC, the Air Force rejected TTCC’s proposal for grounds maintenance services because the company failed to acknowledge Amendment 3. The GAO denied the protest, holding that Amendment 3 made a material change to the scope of work by stating that 10,500 linear feet of new fencing lacked a gravel barrier/mowing strip. Furthermore the Air Force explained that the amendment added 168 man hours per year, or 840 man months over the life of the contract, to maintain the 10,500 foot strip.

This explanation by GAO is reasonable enough to demonstrate how it interprets the guidance on material/non-material amendments. Here are some other examples of material and non-material amendments found in GAO decisions:

MATERIAL AMENDMENTS

- (1) Amendment added an annual basis requirement to the previously established requirement that offerors submit proposals for at least 50 percent of the task order proposal requests for which they are eligible or risk being “off-ramped” via termination for convenience. *Veteran Technologists Corp.*, B-409628, 2014 CPD ¶ 189, June 25, 2014.
- (2) Amendment changed the time within which an option could be exercised, and this changed the rights of the parties and was therefore material. *Mowa Barlovento, LLC-JV*, B-408445, 2014 CPD ¶76, Sept. 12, 2013.
- (3) Amendment added new contractor obligations to coordinate with the utility company to minimize electrical outages which affected the legal relationship of the parties and therefore is material. (The effort to plan for electrical outages can be complex and convoluted. Thus, unless the RFP imposed a requirement to coordinate outages with the local utility, the contractor and the local utility could schedule their outages independently of each other to maximize the efficiency of each one’s work, which would not minimize the outages). *MG Mako, Inc.*, B-404758 2011 CPD ¶ 88, Apr. 28, 2011.
- (4) Amendment significantly altered the guaranteed minimum quantity the agency would purchase for the base year from 63 assemblies to 250 assemblies; agency’s legal

obligation as a result of such amendment was significantly greater than that contained in the original solicitation, and had the potential for more than a negligible impact on offerors' prices. Accordingly, the amendment was material in nature. *Eci Def. Grp.*, B-400177, 2008 CPD ¶ 141, July 25, 2008.

NON-MATERIAL AMENDMENTS

- (1) Amendment to contract for construction of a spillway channel changed one section regarding the rock/stock from "one fractured face" to "three fractured faces." Agency was correct that the original requirement that the fractured field stone or quarried rock be "rectangular" necessarily meant that the rip rap must have at least three fractured faces, and this was not a material change. *Morris, Inc.*, B-407296, 2012 CPD ¶ 330, Nov. 28, 2012.
- (2) Offeror acknowledged amendment 2, but NOT amendment 1. GAO deemed this immaterial because although amendment 1 required off-site shredding, amendment 2, which was acknowledged, also contained these requirements and provided even more detail. Acknowledgement of amendment 1 was not necessary. *Infoshred LLC*, B-407086 October 26, 2012, 2012 CPD ¶ 298.
- (3) Amendment was not a material amendment because the inclusion of the Schedule for Finishes in Amendment 8 did not constitute a change in the legal obligations of the bidders to meet the government's requirements. The references to the Schedule for Finishes in Amendment 5 put bidders on notice that the Schedule for Finishes existed as a contract requirement which they were obligated to fulfill. *Cedar Elec., Inc.*, B-402284.2 2010 CPD P 79, Mar. 19, 2010.

HOW CAN YOU AVOID MISTAKES?

Most of the distinctions that GAO finds make a good deal of sense. Rarely, it may be more difficult to determine if an amendment is material or non-material. But there is a very simple way for offerors to avoid a problem—*always ensure that your offer acknowledges ALL the amendments*. This is a very simple thing to do, and can be accomplished in any of the following three ways:

- (1) On the amendment form itself, Standard Form ("SF") 30, also referred to as FAR 53.301-30, you may sign all amendments on the bottom and include them in your proposal or bid. This is your acknowledgement of receipt of all amendments.
- (2) On the cover page of the solicitation, SF 33, FAR 53.301-30, there is an "acknowledgement of amendments" section where you can list the number of each amendment and acknowledge your receipt. Your signature appears at the bottom of the SF 33.
- (3) You can include a cover letter with your offer that lists all amendments and states that you acknowledge them.

As long as you have acknowledged *all* amendments, regardless of whether they are material or not, your offer can never be disqualified for failure to acknowledge a material amendment.

