



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Harvey Honore Construction Company, Inc.

File: B-262071.2

Date: January 31, 1996

James F. Nagle, Esq., Oles, Morrison & Rinker, for the protester.

Lester Edelman, Esq., and Brian R. Kennedy, Esq., Department of the Army, for the agency.

Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid that acknowledges all amendments to an invitation for bids (IFB), but which contains only the original version of the bid schedule, which was modified by an amendment to increase the estimated quantity of dirt to be excavated, is nonresponsive because the bid is ambiguous regarding whether the bidder intends to be bound to the original or amended estimate.

DECISION

Harvey Honore Construction Company, Inc. (Honore) protests the Corps of Engineers' rejection of its bid submitted in response to invitation for bids (IFB) No. DACW29-95-B-0051 as nonresponsive. We deny the protest.

Issued on April 27, 1995, the IFB solicited bids for constructing 8 miles of hurricane protection levee. Among other things, the contractor will be required to clear the construction area and to dispose of the debris. The contractor will also be required to excavate and transport large quantities of dirt for use as fill in constructing the levee and to dispose of excavated material that is unsuitable for use. Five bids were received by the June 14 bid opening. Honore's bid of \$4,155,250 was the lowest bid; Dragon Limited's bid of \$4,651,500 was the second lowest; the government estimate was \$4,160,011.

By letter of June 19, Honore notified the contracting officer that it had made a mistake regarding the extended price of one line item in its bid. Honore explained that its bid erroneously included the IFB's original schedule instead of the revised schedule provided with amendment 0002. For line item 0003, Embankment, Semicompacted Fill, the original bid schedule required both a unit price per cubic yard of material and an extended price based upon an estimated quantity of 290,000 cubic yards. Thus, Honore's bid contained a unit price of \$8.67 per cubic yard and an extended price of \$2,514,300 for this line item. However, amendment 0002

changed the estimated quantity for line item 0003 to 320,000 cubic yards, an increase of 30,000 cubic yards. Honore asked permission to correct the mistake by increasing its extended price for line item 0003 by \$260,100 (30,000 additional cubic yards of fill times its original bid price of \$8.67 per cubic yard). The correction would increase Honore's total bid price to \$4,415,350.

Initially, the contracting officer recommended that the Corps' Division Office allow Honore to withdraw its bid because, while there was sufficient evidence that the bid was mistaken, there was no convincing evidence that Honore's unit price of \$8.67 was its intended price for the greater quantity of fill represented by amendment 0002. Subsequently, after discussions within the Corps, the contracting officer determined that Honore's bid was nonresponsive because it was ambiguous regarding whether the firm was committed to excavating and using only the original estimated quantity of 290,000 cubic yards or the amended quantity of 320,000 cubic yards in building the levee. Honore protested to our Office and the agency reports that it will not award the contract until the protest is resolved.

Honore argues that, despite including the original bid schedule, its bid was responsive. Honore states that its bid specifically acknowledged that Honore had received amendment 0002 and thus acknowledged that the firm was aware of and would be bound by the amendment, including the increase in the estimated amount of fill for line item 0003. Honore points out that the quantities in both the original and amended bid schedule were merely estimates of the amount of fill, that the difference between the original and amended estimate for line item 0003 was only about 10 percent, and that the contractor will be required to perform all work necessary to complete the entire levee project regardless of the actual amount of fill required. Consequently, Honore contends that, since the IFB requires and its bid unequivocally offers to perform all of the work necessary to complete the levee project, the bid is responsive.

The Corps contends that the bid is ambiguous regarding how much dirt Honore is committed to excavating and using as fill in performing line item 0003. Because Honore acknowledged the amendment, the Corps believes that Honore might have intended to commit to using the larger amount of dirt (320,000 cubic yards) as fill; however, because Honore set forth its prices on the original bid schedule, the Corps believes that the bid only commits Honore to using the smaller amount of dirt (290,000 cubic yards) as fill. The Corps points out that under the IFB's Variation in Estimated Quantities (VEQ) clause, Federal Acquisition Regulation § 52.212-11, if the actual quantity of the semicompacted fill required in line item 0003 is 15 percent more than the estimated quantity, Honore would be entitled to an equitable adjustment in the contract price. Thus, if Honore is committed to the original estimated quantity of only 290,000 cubic yards, then Honore would be entitled to an equitable adjustment if the actual quantity of fill exceeds 333,500 cubic yards. However, if Honore is committed to the amended estimated quantity of 320,000

cubic yards, then Honore would be entitled to an equitable adjustment only if the actual quantity of fill exceeds 368,000 cubic yards.

Generally, where a bidder does not submit its price on a revised bid schedule listing additional work, but instead submits its bid on the original schedule, the mere acknowledgment of the amendment containing the revised bid schedule is not sufficient to bind a bidder to perform the additional work because it is not clear that the bidder has committed itself to perform the extra work for the price set forth in the bid. See Penn Perry, Inc., B-241777, Mar. 1, 1991, 91-1 CPD ¶ 235, and cases cited. Application of that rule leads us to the conclusion that the Corps properly found Honore's bid to be nonresponsive.

Amendment 0002 added 30,000 cubic yards to the estimate of fill that was to be excavated by the contractor, and, while Honore acknowledged the amendment, the bid failed to include either a unit or extended price for the increased quantity. It is thus not clear from the face of Honore's bid whether Honore intended to bid based upon the greater estimate. Thus, even though under this solicitation Honore would be required to complete the entire levee project if awarded the contract, the Corps correctly points out that the estimated quantity is critical for determining when an equitable adjustment in price or an extension of time is warranted under the IFB's VEQ clause. Since it is not clear from the bid whether Honore intended to be committed to the amendment's larger estimate or the original schedule's lesser estimate for this purpose, we can only conclude that on its face Honore's bid is not a firm commitment to what the IFB as amended envisions as the legal relationship between the parties under the VEQ clause and therefore is nonresponsive. To the extent that Honore now contends that its stated unit price for the original estimated quantity represents its unit price for the amended estimated quantity and that it intends to be bound to the greater quantity estimate for the purpose of equitable adjustment claims under the VEQ clause, post-bid opening explanations may not be used to make a facially nonresponsive bid responsive. See Environmental Health Research & Testing, Inc., B-246601, Mar. 10, 1992, 92-1 CPD ¶ 274.

The protest is denied.

Comptroller General
of the United States