

01327

*L. Kozhalevskaya
Proc. 1*

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-186191

DATE: November 23, 1976

MATTER OF: Northwestern Construction, Inc.

DIGEST:

1. Bidder's failure to acknowledge solicitation amendment containing a number of changes may be waived since changes which increased cost were de minimus.
2. Since protester has not submitted any probative evidence contrary to Government's position that amendment did not materially increase cost of performance, protester has not met burden of affirmatively proving case.

Invitation for bids (IFB) No. DACW85-76-B-0025 was issued on February 20, 1976, by the Corps of Engineers, Alaska District. On March 12, 1976, an amendment No. R-1 was issued to the prospective bidders. Two bids were received on March 23, 1976: Green Construction Company (Green) at \$1,432,280, and Northwestern Construction, Inc. (Northwestern), at \$1,625,211. The Government estimate was \$1,359,480.

Green failed to acknowledge receipt of the amendment. Initially, the contracting officer determined Green to be nonresponsive for failing to acknowledge a material amendment. The materiality of amendment No. R-1 was reflected in the Findings and Determination of March 30, 1976. However, on April 1, 1976, the contracting officer reversed his decision on the materiality of the amendment. Green's failure to acknowledge the amendment then was waived as a minor informality. Green's protest to this Office was subsequently withdrawn when award was made to it on April 5, 1976. Northwest immediately filed a protest with our Office alleging that amendment No. R-1 was indeed material.

Generally, if a bidder does not receive and acknowledge a material amendment to an IFB and such failure is not the result of a conscious and deliberate effort to exclude the bidder from participating in the competition, the bid must be rejected as nonresponsive. Porter Contracting Company, 55 Comp. Gen. 615 (1976), 76-1 CPD 2. There is nothing in the record which indicates that the failure of Green to receive the amendment was the result of a deliberate attempt on the part of the agency to exclude it from competition. Thus, the sole issue to be resolved is whether amendment No. R-1 was a material change.

The record indicates that the Board of Award was divided on the question of whether amendment No. R-1 was material.

Essentially, amendment No. R-1 made the following changes to the specifications:

- (1) Changed the borrow area;
- (2) Added requirement of shaped slopes in the borrow area and removal of debris;
- (3) Increased quantities of culvert pipe and gates;
- (4) Increased thickness of first layer of embankment from 24 inches to 36 inches; and
- (5) Changed soil information and testing requirements.

Except for the increase in culvert pipes and gates, the parties are in disagreement as to the materiality of the changes. The agency takes the position that most of the other changes were clarifications of the specifications and would only affect the contractor's method of operation and type of equipment and not materially affect price. Northwestern, on the other hand, contends the amendment had a material effect on price.

Changes in Borrow Area

Northwest contends the amendment reduced the borrow area from 152 acres to 22 acres, thereby materially increasing the cost of obtaining borrow material and transporting it to the embankment.

Initially, the solicitation provided "all embankment material shall be obtained from Goose Island and vicinity." The drawings clearly showed Goose Island and a nearby area designated "Borrow Area." The revision provided "all embankment material shall be obtained from the area designated on the drawings." The newly designated borrow area was increased from the previously marked "Borrow Area."

The Government states that the amendment actually increased the borrow area and should have decreased the contractor's cost. In this connection, it is pointed out that drill logs for soil were located in the area originally designated "Borrow Area" on the drawings and not on Goose Island. The Government contends the borrow area never included Goose Island but was only the nearby area designated "Borrow Area."

Requirement of Shaped Slopes in Borrow Area

The amendment provided that "at the end of the contract period, the borrow area shall be left in a neat, orderly condition, with uniformly shaped slopes not steeper than 1V on 2H." Northwest alleges this requirement necessitated the employment of labor and equipment to shape the slopes which would add several thousand dollars to the cost of the work.

The Government contends that any increase in sloping of the borrow area walls would depend on the contractor's method of operation and factors such as the area and depth, and would not, therefore, necessarily result in a cost increase.

Increase Thickness of First Layer of Embankment

The first layer of the embankment, berm, and road crossing to be placed on the existing ground surface was increased by the amendment from an average of 24 inches to 36 inches. Initially, Northwestern allegedly planned to use belly dump trucks to haul the embankment material. After the amendment, Northwestern switched to the use of scrapers to haul the embankment material as belly dump trucks cannot efficiently lay down a 36-inch lift. Scrapers, on the other hand, can lay down the 36-inch lift but are less economical at the hauling distances on this project, resulting in a cost increase.

The Government states that its initial cost estimate was prepared on the basis of using scrapers. Accordingly, the Government did not adjust its estimated cost. The reason given for the increased first lift on the levee embankment was that Northwestern had previously experienced a pumping action through a 24-inch lift and had requested permission to increase the lift to 36 inches.

Changes in Soil Information

The original invitation contained exploration logs for 18 test holes. These exploration logs showed the material from the test holes in accordance with the standard soils classification and the percentage of gravel, silt and sand in each sample. The amendment furnished 32 separate sieve analyses on 8 of the test holes.

Northwestern contends that the sieve analyses of soils provided significantly more soils data than that originally provided in the exploration logs which caused an increase in its bid.

The Government states the extensive soils information supplied by the amendment served to clarify the information in the soils logs as the sieve analyses supplied no additional information but merely supplied the same information in a different manner. The Government estimator did not consider the sieve analyses to be an item which would affect cost.

Changes in Testing Requirements

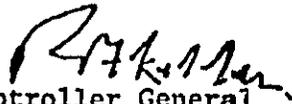
The amendment deleted graduation testing of materials at the borrow pit but added graduation testing of embankment materials. Additionally, the contractor was required to furnish the Government with one laborer per work shift to assist in the sampling and testing performed by the Government.

Concerning Northwestern's contention that these changes result in a cost increase, the Government states that the specification changes pertaining to testing offset one another and would not change the contract cost or inconvenience the contractor.

From the record in this case it is clear that there is an irreconcilable conflict between the agency and the protester. In this circumstance, it is the protester who has the burden of proof. While we are not persuaded by the agency's position that the amended requirements concerning shaped slopes in the borrow area and the increased thickness of the first layer of embankment did not affect cost, the protester, while alleging that these two changes had a material effect on cost, has not furnished any cost estimates concerning these changes. Northwestern has only stated that they would add "several thousand dollars" to the cost of the work, which, incidentally, had been fully performed prior to the case being fully developed by the parties to the protest. Where, as here, conflicting statements of the agency and the protester constitute the only available evidence, we do not believe the protester has met this burden. Reliable Maintenance Service, Inc., --request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. The agency indicates that the amendment would cause an estimated increase in cost of \$4,210 (for the culvert pipes and gates) and a decrease in cost of \$3,520, resulting in a net increase of \$690.

In cases involving an amendment which both increases and decreases the contract requirement, we consider the increasing and decreasing portions of the amendment separately. Spartan Oil Company, Inc., B-185182, February 11, 1976, 76-1 CPD 91. A two-fold test is applied to determine the materiality of an amendment which increases cost. First, the percentage of the total cost increase is compared to the total bid. Second, the cost increases are compared to the difference in the two low bids. 52 Comp. Gen. 544, 545 (1973). The increase in cost of performance (as indicated by the agency's figures caused by amendment No. R-1 (without benefit of any offset of concurrent decreases) is \$4,210 or 0.29 percent of Green's low bid (\$1,432,280) and 2.2 percent of the difference between the two low bids (\$192,931)). Applying the materiality tests, supra, we view the \$4,210 increase in cost under amendment No. R-1 as de minimus and therefore subject to waiver by the contracting officer. See Spartan Oil Company, Inc., supra, and cases cited.

Accordingly, Northwestern's protest is denied.


Deputy Comptroller General
of the United States