

DECISION



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

FILE: B-218248

DATE: March 28, 1985

MATTER OF: Power Service, Inc.

DIGEST:

Contracting officer properly accepted bid that failed to acknowledge a solicitation amendment with changes which either had only a minimal impact on cost, relaxed a portion of the agency's requirements or restated a requirement essentially contained in the solicitation as issued.

Power Service, Inc. (PSI), protests the award of a contract to Capaldi Brothers (Capaldi) for work on a sewerage system at the Naval Education and Training Center (Center), Newport, Rhode Island, under invitation for bids (IFB) No. N62482-81-B-0462, issued by the Department of the Navy. PSI asserts that Capaldi's low bid and that of the next low bidder, D'Ambra Construction (Ambra), should have been rejected as nonresponsive because these bids failed to acknowledge an amendment to the IFB.

We deny the protest.

The amendment at issue contains three essential parts. It restricted the contractor to working on the sewerage system, which was divided into five sites, to one site at a time and stated that all work must be completed at one site before work beginning at the next site. A second provision states that the contractor would be provided a designated area 100 feet by 100 feet for temporary storage of his materials and equipment, and that equipment and materials could not be stored anywhere else at the Center. Finally, the amendment required a shoring and sheeting plan which would include detailed drawings and calculations by a registered professional engineer. PSI argues that each of the additions to the IFB materially affect either the work to be performed or the cost of the project and, thus, the failure to acknowledge the amendment renders the two low bids nonresponsive. PSI states that, as a result of the amendment, it increased its bid by \$66,275.

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The Navy asserts that, while the amendment may impact the contractor's cost of performance, when considered in the context of the government's estimate of \$1,534,000 and the spread of approximately \$300,000 between the awardee's bid of \$946,043 and the protester's bid of \$1,270,000, the cost impact of the amendment is de minimis. Further, the Navy argues that the protester's allegation that failure to include the amendment in the contract significantly affects the Navy as to performance of the work is inaccurate.

A bidder's failure to acknowledge a material IFB amendment renders the bid nonresponsive and thus unacceptable since, absent such an acknowledgment, the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. See Jose Lopez & Sons Wholesale Fumigators, Inc., B-200849, Feb. 12, 1981, 81-1 C.P.D. ¶ 97. An amendment is material, however, only if it would have more than a trivial impact on the price, quantity, quality, delivery, or the relative standing of the bidders. Federal Acquisition Regulation, 48 C.F.R. § 14.405 (1984). An amendment is not material where it merely clarifies an existing IFB requirement. A bidder's failure to acknowledge such an amendment is waivable as a minor informality. See Four Seasons Maintenance, Inc., B-213459, Mar. 12, 1984, 84-1 C.P.D. ¶ 284.

The amendment at issue added a new subparagraph:

"e. The contractor shall restrict his work on the sewerage system to one site at a time. NAVFAC Dwg 2055240 shows 5 separate site plans on the location plan. All work shall be completed at one site before work begins at another site."

PSI argues that this requirement is material as to cost. PSI states that under the original solicitation, bidders could perform work at each site simultaneously and, thus, take advantage of economies of scale associated with working on all five sites at the same time. According to PSI, this would substantially lower the contractor's labor and equipment cost. Also, PSI contends that, since the work area includes the Naval Hospital and streets surrounding it, working on five sites at the same time would interrupt or impede access to the hospital. PSI thus concludes that the failure to acknowledge the amendment could result in life-threatening situations by blocking access to the hospital.

The Navy responds that the drawing of the site included in the IFB as issued showed the hospital and, thus, bidders knew the work was to be performed near a hospital. Also, the IFB required that a contractor obtain permission from the Navy to interrupt any access roads at least 15 days prior to the desired date of interruption and required that a minimum of one-way traffic be maintained at all times on roads and streets crossed by trenches. It further required the contractor to submit a work schedule for approval to the office in charge of construction (OICC). The Navy asserts that a prudent bidder would not expect the OICC to approve a schedule which impeded access to the hospital or otherwise did not conform to road access requirements. Thus, the Navy concludes that, while the work phasing requirement makes it easier to prevent interference, the amendment was not necessary to provide hospital access, and that bidders were actually on notice that the work would have to be on a staggered basis based on the IFB as issued and should have bid on that basis.

In light of the solicitation provisions already included in the IFB, we think the phasing requirement amendment did not impose any additional obligation on the bidder than it already had. The bidder was already obligated to provide access to the existing facilities including the hospital and was also aware that the Navy had final approval over the work plan. In effect, under the IFB, in order to provide access to facilities, all sites could not be worked simultaneously. Thus, a bidder would have to consider in its bid price the possibility that it could not work all sites simultaneously with or without the amendment. Therefore, we think the amendment merely clarified requirements that already existed in the solicitation. Also, since the bidder had to consider the access requirements and the preparation of a plan which would provide access satisfactory to the Navy, its price would necessarily have included consideration of the need to provide access. Four Seasons Maintenance Inc., B-213459, supra.

PSI also contends that the following amendment provision which imposed a new requirement on the contractor is material:

"23. CONTRACTOR STORAGE AREA: An area 100 ft. by 100 ft. near building 65 shall be temporarily provided to the contractor for storage of his materials and equipment. Materials and equipment shall be stored no where else on the station. The exact location of this area shall be provided to the Contractor at the Pre-Construction Conference."

PSI points out that this provision limits storage facilities. As a result, PSI asserts that a bidder who acknowledged the amendment and is required to accept the limited storage would have materially increased costs for transporting materials and equipment to the jobsite. We disagree.

The original IFB, specifically the site drawings, did not provide for a storage area. Thus, in our view, a bidder reasonably should have assumed no storage was provided and the bidder would have to make some other arrangement for adjacent storage or ship all materials and equipment to the site on a daily basis. Thus, Capaldi's price presumably was based on a greater obligation, not a lesser one. In this sense, the amendment, by providing onsite storage, appears to be a less restrictive, more beneficial provision than the IFB as issued. Under such circumstances, where a bidder fails to acknowledge an amendment that relaxes the agency's requirements, and thus a bidder is obligated to perform in a more cost restricting way than is required under the solicitation, its bid may be properly accepted as responsive. G. C. Smith Construction Company, B-213525, July 24, 1984, 84-2 C.P.D. ¶ 100; Abhe & Svoboda, Inc., B-202493, July 27, 1981, 81-2 C.P.D. ¶ 63.

The third amendment change concerns shoring of earthwork excavation.

The original IFB contained the following provision:

"1.6 PROTECTION:

"1.6.1 Shoring and Sheeting: Provide shoring and sheeting where required.

"1.6.1.1 In addition to Section XXIII A and B of the Army Corps of Engineers Manual EM-385-1-1 meet the following requirements:

- "a. Prevent undermining of pavements and slabs.
- "b. Banks may be sloped where space permits and as directed.
- "c. Where shoring and sheeting materials must be left in place in the completed work to prevent settlements or damage to adjacent structures or as directed, backfill the excavation to 3 feet below the finished grade and remove the remaining exposed portion of the shoring before completing the backfill."

By amendment, the following was added after subparagraph "c":

"1.6.1.2 Shoring and Sheeting Plan: Shall include detailed drawings and the following:

- "a. Calculations by a Registered Professional Engineer with all data and references used
- "b. The sequence and methods of installation and removal
- "c. The materials, sizes, and arrangement of members proposed for use of shoring."

PSI simply states that the awardee was not obligated to use the services of a professional engineer or to incur the costs of providing shoring according to a shoring and sheeting plan developed by a professional engineer. PSI asserts the Navy may be exposing itself to liability to third parties because of its inability to impose the more stringent safety requirements imposed by the amendment.

The Navy believes that this additional amendment language has no significant effect on the Navy. The Navy argues that the original solicitation terms provide the Navy with sufficient basis to ensure that the shoring and sheeting plan is safe. In this connection, the Navy points out that the IFB requires contractors to follow the United

States Army Corps of Engineers (Corps) safety and health requirements manual which provides detailed safety requirements which must be followed regardless of whether a professional engineer designs the contractor's shoring and sheeting plan. The Navy states it has the resources to ensure the contractor's safe performance of the work and, thus, the contractor's failure to be obligated to provide shoring in accordance with a professional engineer's plan will have negligible impact on the Navy's safety requirements.

Here, while the professional engineering requirement arguably would have a cost impact on Capaldi's bid, we cannot say that, with regard to the objective of safe shoring, the amendment materially changes the bidder's obligation to perform the shoring safely and in accordance with applicable detailed engineering standards as provided for in the Corps manual. Thus, as to ultimate contract performance, we are not prepared to say that Capaldi is under any lesser obligation to provide a safe shoring plan. Therefore, we do not find the failure to be obligated to provide a plan by an engineer to materially lessen Capaldi's obligations to provide safe shoring under the contract. Moreover, we also note that PSI's own estimate of the cost of meeting the requirement is \$6,500, and, thus, in our view, is de minimis as to price given the total cost of the work and the difference between PSI's and Capaldi's bids. See G. C. Smith Construction Company, B-213525, supra. Therefore, in our view, this requirement properly could be waived as a minor informality.

for *Seaman Efron*
Harry R. Van Cleve
General Counsel