



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Arboreal, Inc.
File: B-231941
Date: October 17, 1988

DIGEST

A low bidder's failure to acknowledge an amendment to an invitation for bids soliciting bids for tree thinning under which the government has marked the trees to be left, which adds a requirement that pruned trees also not be cut, cannot be waived as a minor informality, where the amendment affects the bidder's legal obligation to perform and could have an impact on the cost of performance in a situation where the second low bid of \$123,240 is only \$104 or .0845 percent higher than the low bid.

DECISION

Arboreal, Inc., protests the award of a contract to C.W. Contracting, Inc., by the Forest Service pursuant to invitation for bids (IFB) R6-1-88-305. The IFB solicited bids to thin trees and perform associated disposal and clean up services in certain designated areas in the Fort Rock Ranger District of the Deschutes National Forest.

We sustain the protest.

The IFB, issued on May 26, 1988, requested line item prices for thinning and associated services for two specified areas. Each area consisted of a number of units of acreage to be thinned. The IFB permitted bidders to bid on one or both line items and provided that multiple awards could be made if it would result in the lowest aggregate cost to the government. The IFB also required the contractor to pay for merchantable timber, as defined in the IFB, at the rate of \$5 per thousand board feet. On the first line item, the estimated value of the merchantable timber was \$11,170. For that first line item, which is the one at issue here, the IFB stated that the government would mark the trees that were to be left and the contractor was required to cut all other trees in the designated areas above a certain

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specified height and less than a specified diameter.^{1/} On June 17, 1988, amendment No. 1 was issued modifying the IFB as discussed below.

On June 27, bids were opened and C.W. Contracting submitted the low bid of \$123,136 on the first line item. Arboreal submitted the second low bid on this line item at \$123,240. However, C.W. Contracting's bid did not acknowledge amendment No. 1.

On July 9, award was made to C.W. Contracting.^{2/} On July 11, Arboreal protested to our Office claiming that C.W. Contracting's bid was nonresponsive since it had not acknowledged a material amendment. The Forest Service position is that the amendment is immaterial, such that C.W. Contracting's failure to acknowledge can be waived as a minor informality under Federal Acquisition Regulation (FAR) § 14.405 (FAC 84-12).

A bidder's failure to acknowledge a material IFB amendment renders the bid nonresponsive, 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. Adak Communications Systems, Inc., B-228341, Jan. 26, 1988, 67 Comp. Gen. 88-1 CPD ¶ 74. An amendment is material where it would have more than a trivial impact on the price, quantity, quality, or delivery of the item or services bid upon or on the bidder's legal obligation to perform. FAR § 14.405(d)(2); Power Systems Diesel Inc., B-224635, Nov. 24, 1986, 86-2 CPD ¶ 599; Customer Metal Fabrication, Inc., B-221825, Feb. 24, 1986, 86-1 CPD ¶ 190. In determining whether an amendment has a trivial impact, such that a bidder's failure to acknowledge it can be waived as a minor informality, the approximate increase in the cost of performance engendered by the amendment, as well as the relative closeness of the

^{1/} Under the second line item, the contractor was responsible for selecting the trees to be left in accordance with specific guidance in the IFB specifications.

^{2/} A third firm submitted the low bid on the second line item and under the IFB award criteria multiple awards were most advantageous to the government.

bid prices, is to be considered. Marino Construction Co., 61 Comp. Gen. 269 (1982), 82-1 CPD ¶ 772; Power Systems Diesel, Inc., B-224635, *supra*; Vertiflite Air Services, Inc., B-221668, Mar. 19, 1986, 86-1 CPD ¶ 772; Hodom Construction Co., Inc., B-209241, Apr. 22, 1983, 83-1 CPD ¶ 440.

In this case, amendment No. 1 made four changes including adding a requirement that "[t]rees that have been pruned shall not be cut." Arboreal claims that the provision that pruned trees not be cut is an additional obligation affecting both cost and quality. In this regard, Arboreal notes that under the terms of the contract, a contractor will be financially penalized if it cuts down or damages a tree required to be left.

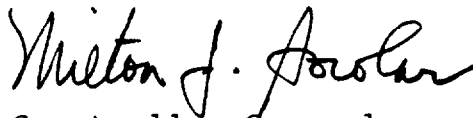
The Forest Service claims that this requirement does not relate to the first line item, where all trees to be left "have been marked" by the government; the Forest Service claims that this change only relates to the second line item where the contractor selects which trees will be left. The Forest Service also states that since a thinning operation only removes competitive smaller trees and leaves larger trees to grow unobstructed, it does not consider this requirement to affect quality or price.

However, contrary to the Forest Service's argument, the IFB does not limit to the second line item the requirement that pruned trees be left. Indeed, the IFB section to which this requirement was added applies to both line items. A clear implication of this change, even if this is not what was intended by the agency, is that there are within the first line item area unmarked pruned trees that the Forest Service does not want thinned. This means that the contractor must be more careful to screen the area to ascertain if there are any unmarked, pruned trees to assure it does not cut them down. This imposes a new legal obligation on the contractor since both marked trees and pruned trees are now required to be left. See Comet Cleaners Co., B-219993.2, Dec. 24, 1985, 85-2 CPD ¶ 707. Moreover, since a thinning operation necessitates working around the left trees, which can be more expensive than simply cutting down all trees in the area, this additional obligation could mean a less efficient execution of the thinning work. Also, if the pruned trees, which the contractor otherwise would have cut down, are merchantable, it may be that the contractor would be deprived of material it otherwise would have been entitled to receive under the contract. Accordingly, we view the amendment as material since it affects the bidder's legal obligation to perform the resultant contract and, in view of the extremely close difference between C.W. Contracting's low bid and

Arboreal's bid, also could have an impact on the price of performance and the relative standing of bidders. Therefore, we find that C.W. Contracting's failure to acknowledge amendment No. 1 cannot be waived.

We sustain the protest.

We recommend that C.W. Contracting's contract, performance of which has been suspended, be terminated for the convenience of the government and award be made to Arboreal if otherwise eligible. Arboreal is also entitled to the costs of filing and pursuing its protest. Kirila Contractors, Inc., B-230731, June 10, 1988, 67 Comp. Gen. ___, 88-1 CPD ¶ 554.



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