



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: DeRalco, Inc.

File: B-232989

Date: December 8, 1988

DIGEST

Bid which fails to acknowledge material amendment must be rejected as nonresponsive. Agency may not waive failure to acknowledge as minor informality where amendment imposes substantially different performance obligations on contractor which have a potentially significant impact on price.

DECISION

DeRalco, Inc., protests the award of a contract to Pope Construction Company, Inc., by the United States Army Corps of Engineers, Savannah District, under invitation for bids (IFB) No. DACA21-88-B-0041, for the construction of a chapel at Fort Stewart, Georgia. Pope's bid failed to acknowledge a 160-page amendment to the IFB which made numerous changes relating primarily to fill dirt to be used in performing the contract, and to the use of a government-owned borrow pit from which this fill may be obtained. DeRalco protests that the amendment imposed material changes and that the Corps improperly waived Pope's failure to acknowledge as a minor informality.

We sustain the protest.

The IFB, issued on August 15, 1988, called for prices for the construction of a 300-seat chapel (line item one), and for associated site preparation and development, including utilities (line item two). On September 1, an amendment was issued modifying the IFB as discussed below. On September 16, bids were opened and Pope was found to have submitted the low bid of \$963,832, consisting of \$921,924 for line item one and \$41,908 for line item two. Pope's bid failed to acknowledge the amendment. DeRalco submitted the next low bid of \$1,091,296, consisting of \$925,796 for line item one and \$165,500 for line item two.

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The Corps evaluated the amendment and determined that it was immaterial. As a result, the Corps permitted Pope to "correct" its bid, i.e., to confirm its price and acknowledge the amendment, after bid opening, as a minor informality under Federal Acquisition Regulation (FAR) § 14.405 (FAC 84-12), and awarded the contract to Pope on September 27.

A bidder's failure to acknowledge a material IFB amendment renders the bid nonresponsive. 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 ¶ 274. 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. We have made clear, moreover, that the materiality of an amendment that imposes new legal obligations on the contractor is not determined by the circumstance that the amendment may have little or no effect on the bid price or the work to be performed. American Sein-Pro, B-231823, Aug. 31, 1988, 88-2 CPD ¶ 209.

In this case, the amendment made numerous changes including, among other things: (1) specifying the borrow pit to be used to obtain fill; (2) increasing the type of material which was unsatisfactory to be used as fill; (3) requiring that all excavation of borrow had to be dug to a minimum depth of 15 feet, regardless of water table elevation; (4) requiring that all debris had to be cleared and a clear zone approximately 50 feet wide had to be graded around the perimeter of the borrow area; (5) requiring that a minimum of 200 feet be left between the borrow area and bordering highways; and (6) providing soil boring logs.

The protester contends that these changes imposed new risks and requirements on the contractor and that these new obligations substantially increased the cost of the site preparation work under the contract. In support of its allegation that these changes are material, DeRalco points out that Pope's site preparation price of \$41,908 is more than \$65,000 under either the next low bidder's price of \$108,800, or the government estimate, which was \$129,280.

In its report, the Corps argues that the bulk of the material in the amendment serves only to clarify requirements stated or implied elsewhere in the IFB. However, as the Corps concedes, the requirement to excavate the borrow area to a minimum of 15 feet constitutes a change from the 10-foot excavation depth requirement originally contained in the IFB. DeRalco, in its comments, does not address any of the various requirements which the Corps specifically argues are merely clarifications, and thus may be considered to have abandoned these issues. PacOrd, Inc., B-224249, Jan. 5, 1987, 87-1 CPD ¶ 7. However, DeRalco does point out that the 15-foot excavation depth requirement is a significant and material change, particularly since the Corps boring log shows that the borrow area water table is located at an average depth of 9.3 feet below the surface. Therefore, the amendment requires the contractor, if he uses the borrow area, to excavate an additional 5 feet of fill below water, which entails substantial increased risk and cost.

The Corps argues that DeRalco has not established the actual price impact of the increased obligation and risk associated with this change. In addition, the Corps points to the fact that the amendment did not change the government estimate as evidence that the cost impact of the amendment was negligible compared with the scope of the project.

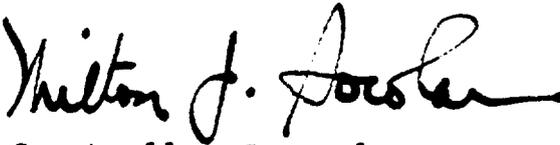
First, as noted above, if, as is the case here, the amendment imposes new obligations on the bidder, it is material even if it has little effect on the bid price. American Sein-Pro, B-231823, supra. Therefore, there is no requirement that DeRalco establish that the amendment have a substantial cost impact. In any event, we do not find it of any significance that the amendment failed to increase the government estimate, particularly in view of the fact that Pope's bid for the work affected by the amendment was less than one-half of the low bid for the affected site preparation work, and was approximately one-quarter of DeRalco's bid for this work. Further, in our view, it is obvious that the imposition of a requirement for substantially increased excavation work below a water table imposes significant risk and cost on the contractor. At a minimum, the work is more time consuming since the wet fill is required to be dried before it may be used. In addition, the presence of water between the 10- and 15-foot level makes it more difficult to see and work with the fill being removed, and the mud and water present access problems and generate increased stress and maintenance on the excavation machinery.

The Corps also argues that the contractor is not required to obtain fill from the borrow pit, but may also use fill from

other approved sources. However, this does not alter the fact that the IFB gives the bidders the right to utilize the borrow pit, and that the original IFB provides this right on the basis of substantially different and more favorable obligations than does the IFB as amended. Pope's bid improperly left Pope free to impose the 10-foot excavation depth on the government, despite the amendment which indicated the government's need for a 15-foot depth requirement, and this renders the bid nonresponsive, even though use of the borrow area is at the bidder's discretion. See MIBO Construction Co., B-224744, Dec. 17, 1986, 86-2 CPD ¶ 678. Accordingly, we find that Pope's failure to acknowledge the amendment could not properly be waived or corrected.

We sustain the protest.

We recommend that Pope's contract, performance of which has been suspended, be terminated for the convenience of the government and award be made to DeRalco if otherwise eligible. In this regard, we note that since DeRalco's price is more than 15 percent above the government estimate, as provided by the engineer supplement to the FAR § 14.404-2(a)(1), approval by the division engineer will be required in order to make the award to DeRalco. DeRalco 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.

for 
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