



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Dutra Construction Co. Inc.

File: B-241202

Date: January 31, 1991

Robert D. Johnston for the protester.

Craig R. Schmauder, Esq., Office of the Chief of Engineers,
Department of the Army, for the agency.

John Formica, Esq., and John Brosnan, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

An amendment which incorporates into an invitation for bids the amount which is to be assessed as liquidated damages is material because it imposes a legal obligation different than that imposed by the original solicitation; thus, a bidder's failure to acknowledge with its bid the amendment renders the bid nonresponsive.

DECISION

Dutra Construction Co. Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DACW05-90-B-0074, issued by the United States Army Corps of Engineers for construction of bulkhead berms for riverbank protection for the Sacramento River. Dutra contends that the contracting officer improperly rejected the firm's bid as nonresponsive for failure to acknowledge an amendment to the solicitation.

We deny the protest.

The IFB was issued on July 23, 1990, with bid opening scheduled for August 22. The solicitation, which contained the liquidated damages clause as set forth at section 52.212-5 of the Federal Acquisition Regulation, in essence provided that the contractor would be liable for liquidated damages in the event the firm failed to complete the work required within 60 calendar days of receipt of a notice to proceed. The liquidated damages clause, however, left blank the space where the dollar amount per day of liquidated damages was to be included.

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On August 15, the Corps issued amendment No. 0002 to the solicitation which among other things specified that liquidated damages would be \$400 per day. Bids were opened on August 22 and Dutra submitted the low bid. Its bid, however, failed to contain an acknowledgment of amendment No. 0002. Since the Corps viewed the amendment as material, it rejected Dutra's bid as nonresponsive.

A bid that does not include an acknowledgment of a material amendment must be rejected because, absent such an acknowledgment, the bidder is not obligated to comply with the terms of the amendment, and thus its bid is nonresponsive. Favino Mechanical Constr., Ltd., B-237511, Feb. 9, 1990, 90-1 CPD ¶ 174. Even where an amendment may not have a clear effect on price, quantity, or quality, it nonetheless is considered material where it imposes legal obligations different from those imposed by the original solicitation or previous and acknowledged amendments. Id. Where, as here, the amendment first includes the amount of liquidated damages to be assessed and thus actuates the liquidated damages clause, we would generally conclude that the amendment imposes a new legal obligation as it places further liabilities on the contractor. Reliable Bldg. Maintenance, Inc., B-211598, Sept. 19, 1983, 83-2 CPD ¶ 344.

Nevertheless, Dutra argues that the amendment was not material to the solicitation. The protester points to a State of California Resources Agency--Reclamation Board policy which it asserts prohibits the performance of the work contemplated by the solicitation from November 1 through April 15. The protester states that in preparing its bid it thus planned to complete performance by November 1, despite its assumption that the Corps would make award in mid to late September. The protester explains that in planning its work schedule, it disregarded the 60-day period allowed for performance, which would result in a mid to late November completion date, because to take that much time for performance would place the contractor in violation of the Board policy, and expose it to potential liability for flood-related damages. The protester concludes that the liquidated damage assessment was "irrelevant as State Reclamation Board requirements overrode the completion schedule."

Since bids were opened on August 22 and there was no requirement in the solicitation that award would be made at a particular date such that the 60-day completion period would necessarily extend past November 1, thereby resulting in a completion extension until after April 15, there was no assurance that the Reclamation Board policy would have any impact at all on performance of the contract. For example, if the agency made award by late August 1990, the solicitation's 60-day performance requirement would result in a late October

date for completion of performance. Under such circumstance, the contractor's failure to complete the project would invoke the liquidated damages clause and liability for liquidated damages would not be impacted by the Board's bar on performance after November 1. Therefore, the protester's failure to acknowledge the amendment which contained the amount of liquidated damages clearly would have a significant impact on the legal obligations imposed by the solicitation. Further, the fact that Dutra may have planned to avoid the application of the liquidated damages is not relevant to whether amendment No. 0002 imposed a new legal obligation on all the bidders and was therefore material to the solicitation. See Universal Parking Corp., 69 Comp. Gen. 31 (1989), 89-2 CPD ¶ 367. Therefore, Dutra's failure to acknowledge the amendment by bid opening was a fatal defect in its bid and the bid was properly rejected as nonresponsive. Favino Mechanical Constr., Ltd. B-237511, supra.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel