Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Firth Construction Company, Inc.

File: B-245516

Date: December 16, 1991

Lawrence W. Luecking, Esq., Laurence & Associates, for the protester.
Randy D. Florent, Esq., U.S. Army Corps of Engineers, New Orleans District, for the agency.
Sheila K. Ratzenberger, Esq., and Henry R. Wray, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging a competitor's lower bid as nonresponsive for failure to acknowledge an amendment to the solicitation is denied where the amendment merely corrected a typographical error to clarify a requirement already contained elsewhere in the solicitation, and thus is not material.

DECISION

Firth Construction Company, Inc., protests the failure of LMB Excavating Contractors, Inc., to acknowledge Amendment No. 0001 to the solicitation under invitation for bids (IFB) No. DACW29-91-B-0076, issued by the U.S. Army Corps of Engineers, New Orleans District, for levee erosion repair to the Mississippi River levees located in the Orleans Levee District, Orleans Parish, Louisiana. Firth contends that the amendment is material because it would affect price and therefore LMB's failure to acknowledge the amendment renders its bid nonresponsive.

We deny the protest.

The agency issued the IFB on July 22, 1991, advertising for sealed bids. The solicitation described the work as removing and disposing of damaged concrete slope pavement, placing and compacting levee embankment material, placing new concrete slope pavement, placing surfacing on levee crown and access ramps, and all other incidental work. The bidding schedule had five pay items. The first two items, Mobilization and Demobilization and Clearing and Grubbing, were both lump-sum pay items. The other three pay items

were listed as estimated quantities. Bidders were required to submit both a unit price and total estimated amount for each item.

The accompanying plans for the project indicated, on page 4 at the section entitled "Typical Sections, Typical Section 1," that the surfacing of the levee shall be 6 inches deep and 10 feet wide. According to the agency, the estimated quantity of crushed stone shown for line Item No. 0005, Surfacing (Crushed Stone), of the bidding schedule--480 cubic yards--was calculated on the basis that the surfacing would be 6 inches deep and 10 feet wide. However, the specifications for the project indicated at clause C5-5 that the surfacing of the levee shall be 7 inches deep. As a result of this discrepancy, the agency issued Amendment No. 0001 to the solicitation, correcting clause C5-5 to read "6 inches crushed limestone" rather than "7 inches crushed limestone."[1]

On August 22, 1991, the agency opened the seven bids received. Although LMB was the apparent low bidder, it failed to acknowledge receipt of Amendment No. 0001. By letter dated September 3, 1991, Firth filed a protest objecting to the bid submitted by LMB. Firth argues that Amendment No. 0001 was material, and that LMB's bid therefore should be rejected as nonresponsive, because the amendment imposed new, substantial obligations on the contractor.

Specifically, Firth argues that changing the thickness of crushed stone required to be placed upon the top of the levee from 7 to 6 inches increases the size of the area required to be covered with stone. Placing the estimated quantity of stone provided in Item No. 0005 of the bidding schedule over a greater area increases the placement, grading, and compaction efforts, resulting in different and additional contractual obligations which affect the price of the work.

The agency contends that the amendment imposed no material change to the solicitation in revising the depth of crushed stone from 7 inches to 6 inches. The agency states that it made this change because the 7 inches required by clause C5-5 was a typographical error and did not accurately reflect the project design, which was intended to require crushed stone surfacing 6 inches deep and 10 feet wide.

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[1] The amendment also changed the references to two manuals cited elsewhere in the solicitation to conform the references to the most recent versions. The information contained in the manuals did not change. The protester does not argue that the reference changes were material.

Further, the estimated quantity for crushed stone contained in Item No. 0005 of the bidding schedule was based on surfacing 6 inches deep, not 7 inches deep. The agency argues that the change in crushed stone depth made by the amendment merely brought paragraph C5-5 in line with required estimated quantities for crushed stone and project plans for the area to be covered by stone placement.

LMB likewise contends that the contract drawings clearly illustrate that the limestone surface is to have a thickness of 6 inches and a width of 10 feet. Thus, the amendment to the solicitation did not change the requirements, cost, or performance of work for the project and was, therefore, not material.

Generally, a bidder's failure to acknowledge a material amendment to an IFB renders its bid nonresponsive since without acknowledgement the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Star Brite Construction Co., B-228522, Jan. 11, 1988, 88-1 CPD ¶ 17. An amendment is material, however, only if it would have more than a trivial impact on the price, quantity, quality or delivery of the item bid upon, or would have an impact on the relative standing of the bidders. See Federal Acquisition Regulation § 14.405(d)(2); Star Brite Construction Co., supra.

An amendment is not material where it does not impose any legal obligations on the bidder different from those imposed by the original solicitation or previous and acknowledged amendments. See Maintenance Pace Setters, Inc., B-213595, Apr. 23, 1984, 84-1 CPD ¶ 457, affirmed on reconsideration, June 18, 1984, 84-1 CPD ¶ 635. An amendment which merely clarifies an existing requirement, therefore, is not material, and the failure to acknowledge it may be waived and the bid accepted. Head Inc., 68 Comp. Gen. 198 (1989), 89-1 CPD ¶ 82, request for reconsideration denied, B-233066.2, May 16, 1989, 89-1 CPD ¶ 461; DeRalco, Inc., 68 Comp. Gen. 349 (1989), 89-1 CPD ¶ 327.

We cannot accept Firth's argument that the language added by the amendment imposed any significant legal obligations different from those imposed under the solicitation as issued. The project plan accompanying the solicitation as issued clearly provided for a 6-inch layer of surfacing. The amendment changed the specifications to conform to the 6-inch depth referred to in the project plan, but made no change in the area to be covered or the estimated quantity of crushed stone required.

In view of the foregoing, there is no factual basis in the record to substantiate Firth's contention that the amendment

had the effect of changing the quantity of crushed stone required, the area to be covered, or any other aspect of the work. Instead, we accept the agency's statement that the 7 inches required by clause C5-5 of the solicitation was a typographical error which did not accurately reflect the project design, and that the amendment simply corrected this error.

We therefore conclude that, since the amendment had no impact on the price or quantity of the item bid upon or the relative standing of the bidders, it was not a material amendment and LMB's failure to acknowledge it was a minor informality in its bid which could be waived by the contracting officer.

Accordingly, Firth's protest is denied.

for James F. Hinchman
General Counsel