

DOCUMENT RESUME

03647 - [A2723920]

[Rejection of Bid Due to Failure to Acknowledge Solicitation Amendment]. E-189330; B-189619. September 23, 1977. 5 pp.

Decision re: Cibro Petroleum; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel; Procurement Law II.
Budget Function: General Government: Other General Government (806).

Organization Concerned: Department of Defense: Defense Fuel Supply Center, Alexandria, VA.

Authority: Truth in Negotiations Act. A.S.P.R. 7-2003.14(b)(3).
A.S.P.R. 7-104.22. A.S.P.R. 2-405. 55 Comp. Gen. 615. 42
Comp. Gen. 502. 50 Comp. Gen. 11. B-183549 (1975). B-182418
(1975). E-184169 (1975). B-184192 (1975). Executive Order
11246. Executive Order 11375.

The protester objected to the rejection of its bid as nonresponsive for failure to acknowledge receipt of an amendment to the solicitation. The bidder's failure to acknowledge the amendment was not excused on the basis that the bidder did not receive the amendment from the agency prior to bid opening; the evidence did not indicate a deliberate attempt by the agency to exclude the bidder from competition. The bidder's failure to acknowledge the amendment was not waived as a minor informality since the amendment included mandatory clauses on subcontracting. (Author/SC)

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J. Brown
Proc. J.

DECISION



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

FILE: B-189330, B-189619

DATE: September 23, 1977

MATTER OF: Cibro Petroleum

DIGEST:

1. Bidder's failure to acknowledge IFB amendment may not be excused on basis that bidder did not receive amendment from agency prior to bid opening where evidence does not indicate deliberate attempt by agency to exclude bidder from competition.
2. Bidder's failure to acknowledge IFB amendment may not be waived as minor informality where amendment included mandatory clauses on subcontracting which, in the event they became operative during contract performance, would materially alter legal obligations of contractor, notwithstanding bidder's contention that it did not intend to use subcontractors in performing contract.
3. Bidder's agreement to comply with clause in IFB which requires contractor to notify agency of subcontractor noncompliance with equal employment opportunity (EEO) requirements does not satisfy requirements of clause in IFB amendment requiring contractor to obtain clearance from agency on subcontractor's compliance with EEO requirements.

Cibro Petroleum, Inc. (Cibro) protests the rejection of its bid under invitation for bids (IFB) No. DEA-600-77-B-0003, issued on March 7, 1977, by the Defense Fuel Supply Center (DFSC), Alexandria, Virginia.

The invitation solicited bids for furnishing items of motor gasoline, distillates and fuel oils for Military and Federal Civil agencies in various geographic locations. Amendment 0001 to the IFB issued on March 30, 1977, added two mandatory Armed Services Procurement Regulation (ASPR) clauses to Section J of the invitation. Clause J54 entitled "Subcontracts" imposes the obligation to provide certain information to the Government in advance of

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subcontracting under unpriced modifications to fixed-price contracts. Clause J55, entitled EQUAL OPPORTUNITY PRE-AWARD CLEARANCE OF SUBCONTRACTS, states:

"Notwithstanding the clause of this contract entitled 'Subcontracts,' the Contractor shall not enter into a first-tier subcontract for an estimated or actual amount of \$1,000,000 or more without obtaining in writing from the Contracting Officer a clearance that the proposed subcontractor is in compliance with equal opportunity requirements and therefore is eligible for award." (ASPR 7-104.22)

The amendment also stated that failure to acknowledge the amendment would result in rejection of the bid.

Bid opening was held on April 12, 1977, and Cibro was low bidder on Items 1345-55. However, its bid was rejected as nonresponsive for failure to acknowledge receipt of the amendment. Cibro protests the rejection of its bid contending that it did not receive the amendment, and, therefore, it did not have the opportunity to acknowledge it. Moreover, the protester claims that its failure to acknowledge the amendment is a minor irregularity which may be cured or waived under ASPR 2-405 (1976 ed.). Alternatively, Cibro contends that the original solicitation already contained a provision, entitled Equal Opportunity Compliance, which was nearly identical to Clause J55 of the amendment, and, therefore, obviated the need for acknowledgment of the amendment.

Concerning the failure of Cibro to receive the amendment, generally, if a bidder does not receive and acknowledge a material amendment to an IFB and such failure is not the result of a conscious and deliberate effort to exclude the bidder from participating in the competition, the bid must be rejected as nonresponsive. Porter Contracting Company, 55 Comp. Gen. 615 (1976), 76-1 CPD 2; Mike Cooke Reforestation, B-183549, July 2, 1975, 75-2 CPD 8. In the report on the protest, the contracting officer states that the amendment was mailed to Cibro on the date of its issuance. We have no reason to believe that the failure of Cibro to receive the amendment was the result of a deliberate attempt on the part of DFSC to exclude Cibro from competition. Torotron Corporation, B-182418, January 30, 1975, 75-1 CPD 69.

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Clause J54 and Clause J55 impose legal obligations with regard to subcontracts. Cibro states that it does not employ subcontractors and did not intend to employ subcontractors for the performance of the contract. Therefore, Cibro claims, the obligations imposed by the clauses would not apply to Cibro, there would be no effect on the price of the contract, and Cibro's failure to acknowledge the amendment should be waived as immaterial.

We do not believe that Cibro's practices with regard to subcontracting are controlling. In a similar situation, a protester claimed that because it had been a regular supplier of the Government for many years and had never taken exception to any clause of a contract, its failure to formally acknowledge an amendment should be waived. We held that the bidder's intentions must be determined from the bid as submitted. 42 Comp. Gen. 502 (1962). See also Kuckenbergs-Arenz, B-184169, July 30, 1975, 75-2 CPD 67, where failure of the protester to acknowledge an amendment containing clauses relating to wage determinations rendered the bid nonresponsive, despite the fact that wages in the bidder's region were greater than those required by the amendment. Cibro acknowledges these precedents, but argues that they are examples of form over substance, since requiring Cibro's acknowledgment of an amendment which would not affect its bid is a minor informality.

We have held, however, that where the effect of an amendment is to alter the legal relationship of the parties the failure to acknowledge the amendment may not be waived as a minor informality, even though the contract performance is not changed by the amendment and the possible effect on price, if any, is speculative and cannot be determined. 50 Comp. Gen. 11 (1970). In that case a bidder did not receive and, therefore, did not acknowledge an IFB amendment which imposed or clarified legal obligations pertaining to the Truth-In-Negotiations Act. This Act does not apply to advertised awards but generally does apply to contract modifications exceeding \$100,000 under advertised awards. While the proposed award in that case involved almost \$4 million, it was argued that there was not much likelihood of a contract modification subject to the Act. Nevertheless, we concluded that the failure to acknowledge the amendment could not be waived since its provisions could become operative during performance of the contract. We noted in this connection that a

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contract warranty provision might or might not become operative during contract performance but that the failure of a bidder to acknowledge such a material provision could not be waived. On the other hand, we have recognized that the failure to acknowledge an IFB amendment containing a wage determination could be waived where it was clearly shown that the wage determination was inapplicable to the work required under the IFB. Prince Construction Co., B-184192, November 5, 1975, 75-2 CPD 279.

Here the contracting officer points out that the total estimated dollar amount of the contract before escalation is \$1,130,360, and that an increase in the price of oil could drive the contract price up dramatically because of the IFB escalation clause. Thus, while Cibro states that it does not intend to subcontract, it is clear that in the event of an award Cibro could subcontract all or a substantial portion of the delivery such that Clause J55 would be applicable if included in the contract. Moreover, we note that the clauses set forth in the amendment are required by ASPR 7-104.22 and 7-104.23 to be included in all fixed-price type contracts. Under the circumstances, we cannot regard the failure to acknowledge the amendment as a minor informality.

With regard to Cibro's alternative contention that the IFB already provided for equal employment opportunity of subcontractors, Clause B1.02 reads:

"By submission of this offer, the offeror represents that, to the best of his knowledge and belief * * *, up to the date of this offer no written notice such as a show cause letter, a letter indicating probable cause, or any other formal written notification citing specific deficiencies, has been received by the offeror from any Federal Government agency or representative thereof that the offeror or any of its divisions or affiliates or known first-tier subcontractors is in violation of any of the provisions of Executive Order No. 11246 of September 24, 1965, Executive Order No. 11375 of October 13, 1967, or rules and regulations of the Secretary of Labor (41 CFR, Chapter 60) and specifically as to not having an acceptable affirmative action program or

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being in noncompliance with any other aspect of the Equal Employment Opportunity Program. It is further agreed that should there be any change in the status or circumstances between this date and the date of expiration of this offer or any extension thereof, the Contracting Office will be notified promptly. [emphasis supplied]. (ASPR 7-2003.14(b)(3))."

Cibro claims that because of this clause it has already agreed to comply with EEO requirements for subcontractors when it submitted its bid. However, unlike Clause J55, Clause B1.02, does not impose a legal obligation on the contractor to obtain clearance of the subcontractor's compliance with EEO requirement. Clause B1.02 only requires notice of subcontractor noncompliance with EEO requirements when the contractor is aware of such noncompliance.

Padroni Fuel Company has protested against any award to Cibro under the subject IFB. In view of this denial of Cibro's protest where we uphold the agency's rejection of Cibro's bid Padroni's protest is moot.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States