

DECISION



G. Support
P. I
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

8217

FILE: B-192327

DATE: October 31, 1978

MATTER OF: McKenzie Road Service, Inc.

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 which set forth minority manpower utilization goals and timetables renders bid nonresponsive since bidder has not thereby committed firm to comply with material requirement of IFB.
3. Failure to acknowledge amendment which materially affects IFB requirements is not minor informality which may be waived or cured after bid opening.

McKenzie Road Service, Inc. (McKenzie), protests the rejection of its bid for failure to acknowledge receipt of amendment 0001 with its bid as required by invitation for bids (IFB) No. DACW38-78-B-0048, issued by the Department of the Army (Army), U.S. Army Engineer District, Vicksburg, Mississippi.

The IFB, issued May 5, 1978, contemplated the award of a contract for construction of Skyline Drive Paving and Relocation, Clark County, Arkansas.

Amendment 0001, issued May 24, 1978, added paragraph 19, pages 9 and 10, entitled "Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity (EEO) (Executive Order 11246)," which provided timetables and goals for female and minority participation in each trade under the subject solicitation and applied the goals to all construction

work of the successful contractor, both Federal and non-Federal, in the covered area. Amendment 0001 also deleted SP-24 entitled "Mississippi River and Tributaries Project Affirmative Action Plan" and replaced it with revised SP-24 entitled "Standard Federal Equal Employment Opportunity Construction Contract Specifications (Executive Order 11246)." Further, amendment 0001 made changes in section 2 of the culvert specifications.

Five bids were received at the June 6, 1978, bid opening. The low bid was submitted by McKenzie at \$473,090 and the second low bid was submitted by Mid-State Construction Co., Inc., at \$477,048.30. By letter dated June 13, 1978, the contracting officer advised McKenzie that its bid had been rejected as nonresponsive for failure to submit amendment 0001 with its bid, which the contracting officer states materially altered the IFB requirements.

Counsel for McKenzie protests the rejection of its bid stating that the firm never received the amendment prior to opening and, therefore, it did not have the opportunity to acknowledge it. Counsel also contends that the amendment would not have affected McKenzie's price and that its failure to acknowledge receipt of the amendment should be waived as a minor informality. Award was made on August 4, 1978, to Mid-State Construction Co. Inc., and McKenzie was notified of the award by letter of August 10, 1978.

Concerning the failure of McKenzie 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, F-183549, July 2, 1975, 75-2 CPD 8. The contracting activity reports that the amendment was mailed to McKenzie and all the other firms to which invitations had been furnished.

We have no reason to believe that the failure of McKenzie to receive the amendment was the result of a deliberate attempt on the part of the contracting activity to exclude McKenzie from competition.

The subject amendment materially modified EEO requirements by adding a new provision relating to timetables and goals for female and minority participation in each trade under the subject IFB and applied the goals to all construction work of the successful contractor in the covered areas. Counsel for McKenzie states that its client has always followed EEO guidelines and under no circumstances has McKenzie's bid price been affected by compliance with actions meant to insure equal employment opportunities.

We do not believe that McKenzie's practices with regard to EEO requirements are controlling. A bidder's intentions and commitment must be determined from the bid as submitted. See Kluckenburg-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 non-responsive, despite the fact that wages in the bidder's region, and presumably being paid by the bidder, were greater than those required by the amendment.


We have held that where the effect of an amendment is to alter the legal relationship of the parties, i.e., impose obligations not legally enforceable under prior provisions, 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. See 50 Comp. Gen. 11 (1970).

Here, it is clear that the amendment significantly changed the EEO obligations of the successful bidder and, therefore, we cannot regard the failure to acknowledge the amendment as a minor informality. Our Office has held that the failure of a bidder to commit itself, prior to bid opening, to the minimum

affirmative action requirements of the solicitation requires rejection of the bid as nonresponsive. See Burham Construction Company, B-183361, June 9, 1975, 75-1 CPD 348, and cases cited therein. Since McKenzie failed to acknowledge the amendment and its bid did not otherwise indicate a commitment to be bound to the timetables and goals set forth therein, its bid was properly rejected as nonresponsive.

In view of our conclusion, the materiality of the culvert modifications contained in the amendment need not be considered.

For the reasons stated, the protest is denied.


Deputy Comptroller General
of the United States