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DECISION



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

50868

FILE: B-183549

DATE: July 2, 1975

MATTER OF: Mike Cooke Reforestation

DIGEST:

Low bid which failed to acknowledge amendment to invitation for bids which made revision in method of payment was properly rejected as nonresponsive since amendment affected contract price and is, therefore, material and not subject to waiver. Furthermore, since agency states that copy of amendment was timely mailed to all bidders, protesting bidder's failure to receive and acknowledge amendment cannot be viewed as result of conscious and deliberate effort to exclude bidder from competition.

On January 13, 1975, the United States Forest Service, Deschutes National Forest, Bend, Oregon, issued invitation for bids (IFB) No. R6-1-75-26 for auger tree planting in various areas within the Fort Rock Ranger District.

Amendment No. 1 to the IFB was issued on February 4, 1975, and deleted section 430, "Method of Payment" paragraph in the IFB and substituted a new paragraph therein.

Mike Cooke Reforestation (Cooke) was the low bidder under the IFB but its bid was rejected for failure to acknowledge and return the above amendment. Cooke protested this rejection to the contracting officer contending that (1) it had not received the amendment, and (2) that the amendment did not materially affect the IFB. Following a denial of the protest by the contracting officer, the matter was presented to our Office for decision.

Addressing first the failure of Cooke 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. 40 Comp. Gen. 126, 128 (1960). In its report regarding the protest, the contracting officer states that the amendment was mailed to all

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bidders 10 days prior to the scheduled bid opening in accordance with its normal mailing practice. Other bidders received and acknowledged the amendment. Therefore, we have no reason to believe that the failure of Cooke to receive the amendment was the result of a deliberate attempt on the part of the Forest Service to exclude it from competition. Torotron Corporation, B-182418, January 30, 1975.

The following is the original "Method of Payment" provision in the IFB:

"430 Method of Payment

431 Payment, not to exceed the bid price, will be based on the number of satisfactorily planted trees divided by the number of plantable spots times 100. This percentage, plus the variance allowed, times the bid price, will equal the pay rate per acre planted. The pay rate per acre times the unit acreage will equal the amount earned."

This was deleted by amendment No. 1 and the following substituted:

"430 - Method of Payment

431 - Payment will be made for all completed acres at the unit bid price wherever the quality of planting is 90 percent or above, based on inspections as outlined in Division 300. Where inspection indicates planting quality to be less than 90 percent, a 3 percent reduction in pay will be made from the contractor's pay for each 1 percent the quality is below 90 percent."

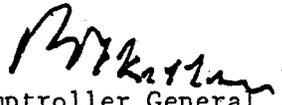
The reason for the above change was that the IFB did not state what the variance allowed would be.

The established rule as to the effect of a bidder's failure to acknowledge an amendment to an invitation for bids is that when the amendment affects, in other than a "trivial or negligible" manner, the price, quality, quantity or delivery schedule of the procurement, the bidder's failure to acknowledge the amendment in compliance with the terms of the invitation or amendment cannot be waived. See Federal Procurement Regulations § 1-2.405 (1964 Ed., Cir. 1).

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As the above amendment affects the amount which a contractor would be paid under the contract, it could have an effect on the manner in which a bidder computes his bid and, therefore, the amendment does have an effect on price. Accordingly, we must hold that the amendment was material and the failure of Cooke to acknowledge it rendered its bid nonresponsive.

Therefore, the protest is denied.


Deputy Comptroller General
of the United States