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DECISION



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

FILE: B-187277

DATE: December 23, 1976

MATTER OF: McAlister & McQuinn Construction Co., Inc.

DIGEST:

Failure to acknowledge amendment which required contractor to install track system for panel partitions within 10 days after notice to proceed, balance of contract to be performed within original performance period, may not be waived under ASPR § 2-405(iv)(B) as a minor informality. Bid was nonresponsive since bidder who failed to acknowledge amendment was subject to less demanding requirements than those bidders who acknowledged amendment. Such nonresponsiveness may not be cured after bid opening by bidder's agreement to be bound by terms of the amendment. However, since contract has been substantially performed no meaningful relief can be granted.

By mailgram of August 23, and letter of August 24, 1976, McAlister & McQuinn Construction Co., Inc. (McAlister), protested the award of a contract to another firm under invitation for bids DAAR03-76-B-0105, issued by the United States Army Missile Command, Redstone Arsenal, Alabama.

The above invitation for the installation of panel partitions in Building 111 at Redstone Arsenal was issued on July 23, 1976, to 13 prospective bidders. Four bidders submitted bids in response to the invitation. Dixie Acoustical Contractors, Inc. (Dixie), was the low bidder with a bid of \$8,864, while McAlister was second low with a bid of \$10,868. The low bidder, Dixie, failed to acknowledge and return amendment 0001 which had been mailed to the prospective bidders on July 30, 1976. This amendment added the following language to the statement of work in the specifications:

"Contractor will install the door track within 10 days after notice to proceed in order to coordinate with alteration work by others. Panels can be installed later."

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The contracting officer was of the view that Dixie's failure to acknowledge the amendment had no effect on price, quantity or delivery, but only on internal scheduling and, as such, it could be waived as a minor informality pursuant to Armed Services Procurement Regulation (ASPR) § 2-405(iv)(B) (1975 ed.), which provides for waiver where:

"the amendment clearly would have no effect or merely a trivial or negligible effect on price, quality, quantity, delivery, or the relative standing of bidders * * *."

Dixie was allowed to cure the deficiency and contract DAAH03-76-C-0174 was awarded to it on August 13, 1976.

McAlister contends that amendment 0001 had a major effect on price and delivery and, thus, Dixie's failure to acknowledge the amendment was not a minor informality which could be waived under the cited ASPR provision. The protester states that according to its panel partition supplier, the track system would have to be fabricated at the supplier's shop at an increased cost in order to comply with amendment 0001. The protester estimates that the additional cost resulting from having to manufacture the track system locally will amount to \$604. Also, the protester states that in order to cover the possibility of late delivery, it was necessary to include a provision in its bid for liquidated damages amounting to \$1,660 (\$166 per day for 10 days). The protester further states that the total of these two amounts (\$2,264) is more than the difference between its bid and the amount of Dixie's bid.

Therefore, we agree that the amendment was material since it had a substantial effect on price. Johnson's Auto Parts, B-104035, September 22, 1975, 75-2 CPD 166, and cases cited therein. Bidders who acknowledged amendment 0001 were obligated to install the track system within the 10-day period, while Dixie, who failed to acknowledge the amendment, was not obligated to do so. We are of the view that Dixie's failure to acknowledge the amendment rendered its bid nonresponsive. Such nonresponsiveness may not be cured after bid opening by the bidder's agreement

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to be bound by the terms of the amendment. B-173416, September 13, 1971. Thus, the contracting officer should not have waived this failure.

Since it is our belief that Dixie's failure to acknowledge the amendment rendered its bid nonresponsive, we see no necessity to address the issues of whether the amendment would cause an additional delay in performance, or whether the bidders were given sufficient time in which to consider and acknowledge the amendment.

For the above reasons, McAlister's protest is sustained. However, due to the fact that the contract has been substantially performed we are unable to grant any meaningful relief.

Deputy

R. F. Kellum
Comptroller General
of the United States