

# DECISION



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

2702

FILE: B-213551

DATE: December 13, 1983

MATTER OF: Great Lakes Dredge & Dock Company

## DIGEST:

1. A bidder's failure to receive a material solicitation amendment and its resulting failure to acknowledge the amendment does not render award under the invitation for bids to another bidder improper where the agency dispatched the amendment in sufficient time to permit prospective bidders to consider the information in preparing their bids, the agency received six bids acknowledging the amendment, and there is no indication that the failure to receive the amendment resulted from a conscious and deliberate agency effort to exclude the bidder.
2. A bidder's failure to acknowledge receipt of a material amendment which increased the number of days of weather delays which a construction contractor must suffer before it would be entitled to a time extension renders the bid nonresponsive since acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amended solicitation.
3. Given the absence of a showing of resulting prejudice, the mere existence of an allegedly ambiguous solicitation term does not provide a compelling reason to cancel a solicitation and readvertise after bid opening.
4. A protest filed after bid opening alleging that two provisions of an invitation for bids arguably conflicted, thereby creating an

123075  
027432

ambiguity, is untimely and GAO will not consider the merits of the issue. Protests based on solicitation improprieties apparent prior to bid opening must be filed before bid opening.

5. The public interest in strictly maintaining the competitive bidding procedures required by law outweighs any pecuniary advantage which the government might gain in a particular case by making award to a bidder who failed to acknowledge receipt of a material amendment, i.e., by making award in violation of the rules.

Great Lakes Dredge & Dock Company protests the Corps of Engineers' rejection of its bid as nonresponsive to invitation for bids DACW 64-83-B-0019 for the construction of jetties at the mouth of the Colorado River, Gulf Intracoastal Waterway, Texas. The Corps found Great Lakes' bid to be nonresponsive for failure to acknowledge the receipt of an amendment to the solicitation. We deny the protest.

As issued on May 9, 1983, the IFB required that work under the contract be completed by the contractor not later than 1,000 days after the date of receipt by it of notice to proceed. General provision No. 5 (GP-5) provided that the government could terminate the contract for default if the contractor failed to prosecute the work with such diligence as would ensure completion within 1,000 days, or any extension thereof, but that:

"(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to . . . unusually severe weather. . . ."

The IFB further provided in special provision No. 1A (SP-1A) that:

"1A. ANTICIPATED NORMAL WEATHER DELAYS. The time established . . . for completion of the entire work ready for use includes 18 days for anticipated delays due to normal weather conditions not excusable under GP-5(d). No time extension for delays due to weather will be allowed until and unless such delays exceed the time included above for normal weather delays which are beyond the control and without the fault or negligence of the Contractor within the meaning of GP-5(d). (SWDGC Ltr. 12 Aug 71)."

By amendment No. 4, dated May 31, the Corps amended SP-1A to change the "18 days" to "194" days.

When bids were opened on June 9, the bid of the joint venture of Midwest Construction Co. and Luhr Bros. for \$9,228,134 appeared low, that of Great Lakes for \$12,850,670 appeared second low, and that of Misener for \$13,246,744 appeared third low. After Midwest received permission to withdraw its bid because of a mistake in bid, Great Lakes became the apparent low bidder. However, Great Lakes, unlike the other six bidders, had failed to acknowledge amendment No. 4. The Corps determined that since amendment No. 4 was a material amendment, Great Lakes' failure to acknowledge it rendered its bid nonresponsive. Great Lakes thereupon protested to the Corps and, upon the denial of that protest, filed this protest with our Office.

Great Lakes claims that it did not receive a copy of amendment No. 4 and maintains that, in any case, its failure to acknowledge the amendment was a minor informality not rendering its bid nonresponsive. Great Lakes argues that the amendment did not affect price, quantity, quality, delivery or the relative standing of the bidders because the government's time and cost estimates already included 194 days for normal weather delays, and because the fact that a contractor would be entitled to a time extension only for "unusually severe weather" or other such cause specified in GP-5(d) and not for merely suffering weather delays in excess of that specified in SP-1A rendered it

meaningless whether SP-1A specified 18 or 194 days. Great Lakes maintains that, at most, SP-1A as it appears in the IFB merely created an ambiguity to the extent that a reading of it might suggest that normal weather delays could constitute unusually severe weather under GP-5(d), although it nevertheless denies that award under the IFB would prejudice bidders. Great Lakes further argues that it is to the advantage of the government to accept Great Lakes' bid since the bid was nearly \$400,000 less than that of Misener.

A contracting agency is not an insurer of the prompt delivery of amendments to each prospective bidder. The agency discharges its responsibility when it issues and dispatches an amendment in sufficient time to permit all the prospective bidders to consider the information in preparing their bids. Therefore, unless the failure to receive the amendment in a timely manner results from a conscious and deliberate effort by the contracting agency to exclude a prospective bidder from participating in the competition, the prospective bidder bears the risk of untimely receipt or nonreceipt. See CMP Incorporated, B-209179, October 29, 1982, 82-2 CPD 390; Rockford Acromatic Products Company, B-208437, August 17, 1982, 82-2 CPD 143; 52 Comp. Gen. 281 (1972).

Agency records indicate that Great Lakes was on the list of prospective bidders to whom copies of the amendment were mailed. Great Lakes has not alleged, nor does the record indicate, that the Corps failed to mail a copy of amendment No. 4 to it, much less that any such failure was motivated by a conscious and deliberate agency effort to exclude it from competition. Neither does Great Lakes allege, nor does the record indicate, that the amendment was not dispatched in sufficient time for prospective bidders to consider it in preparing their bids. We note in this regard that at least six other bidders received copies of amendment No. 4 in time to acknowledge receipt thereof. Accordingly, Great Lakes' failure to receive a copy of the amendment does not render the procurement improper.

A bidder's failure to acknowledge receipt of a material amendment to an IFB generally renders the bid nonresponsive and requires its rejection since acceptance of the bid would not legally obligate the bidder to meet

the government's needs as identified in the amended solicitation. See Aerial Service Corporation, B-209761.2, May 24, 1983, 83-1 CPD 559. An amendment having more than a trivial effect on price, quality, quantity or delivery relative to the cost and scope of the services being procured is material. Id.

Amendment No. 4 had more than a trivial effect on the time specified for contract performance and therefore was material. Under the provisions of GP-5, a contractor is entitled to a time extension where it can show that work controlling the overall completion of the contract was delayed by weather which was unusually severe, i.e., weather which was unforeseeable. See Robert Builders, Incorporated, ASBCA No. 24069, 81-1 BCA § 15,071; Essential Construction Co., Inc. & Himount Constructors, Ltd. A Joint Venture, ASBCA Nos. 18491 et al., 78-2 BCA § 13,314. The time extension will be granted to the extent that the actual weather delays exceeded the normal weather delays which were actually contemplated, see Carney General Contractors, Inc., NASA BCA No. 375-4, 80-1 BCA § 14,243; R&R Construction Company, VACAB No. 1101, 74-2 BCA § 10,857, or should have been foreseen, see Carney General Contractors, Inc., NASA BCA Nos. 375-4, 875-7, 79-1 BCA § 13,855, by the parties when they agreed upon the performance schedule. Accordingly, if a contractor suffered 194 days of weather delay, it would be entitled to a time extension of 176 days under the solicitation as issued but of no days under the solicitation as amended. Therefore, while Great Lakes argues that a change from 18 to 194 days did not reduce the time potentially available for completion since the performance schedule anticipated 194 days of normal weather delays, if the government accepted Great Lakes' offer defining normal weather delays as those not in excess of 18 days, it would have been obliged to extend the 1,000-day performance time in the event weather delays exceeded 18 days.

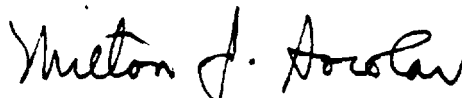
We need not consider whether the ambiguity alleged by Great Lakes indeed existed since there has been not only no showing of prejudice, but Great Lakes in fact has denied that the ambiguity prejudiced bidders. The mere existence of a defect in the solicitation does not, absent a showing of prejudice, provide a compelling reason to cancel a

B-213551

solicitation and readvertise after bid opening. See Hydro Power Equipment Co., Inc., B-205263, May 17, 1982, 82-1 CPD 466; Cummings Marine Systems, Inc., B-197506, August 21, 1980, 80-2 CPD 136. In any case, Great Lakes' post-bid opening allegation that SP-1A created an ambiguity is untimely. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b) (1) (1983), require that protests based on solicitation improprieties apparent prior to bid opening, such as that alleged here, must be filed before bid opening to be timely. See Gas Turbine Corporation, B-210411, May 25, 1983, 83-1 CPD 566.

With regard to the protester's claim that award to Misener will result in a higher cost to the government, it has been our position that the public interest in strictly maintaining the competitive bidding procedures required by law outweighs any pecuniary advantage which the government might gain in a particular case by a violation of the rules. See Mactek Industries Corp., B-211675, June 1, 1983, 83-1 CPD 592.

The protest is denied.

  
for Comptroller General  
of the United States