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DECISION

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

FILE: B-212940 **DATE:** February 14, 1984

MATTER OF: Doyon Construction Co., Inc.

DIGEST:

1. Bid must be rejected as nonresponsive where bidder fails to acknowledge material solicitation amendment.

2. Amendment which adds information for bidders' knowledge, but merely reiterates requirements of original IFB, is not material.

3. Amendment which requires contractor to perform in a different manner than under the initial IFB is material.

4. Amendment is material where the performance requirements added by the amendment will affect the quality of completed structure.

Doyon Construction Co., Inc. (Doyon), protests a contract award under the Army Corps of Engineers (Corps) invitation for bids (IFB) No. DACA85-83-B-0025 to Landmark Commercial Contractors, Inc. (Landmark). Doyon alleges that Landmark's low bid should be rejected as nonresponsive because Landmark failed to acknowledge a material amendment to the IFB.

The protest is sustained.

The IFB, including amendment 0001, which made a number of changes to the IFB, was issued on June 27, 1983, to solicit bids to construct an aircraft hangar and a steam generator system. Bid opening took place on July 27. On July 28, the Corps determined that Landmark's low bid should be rejected as nonresponsive because Landmark failed to acknowledge amendment 0001. However, after Landmark protested this decision, the Corps reviewed the amendment and decided that it did not make material changes to the IFB. Consequently, the Corps decided that Landmark's failure to acknowledge the amendment could be waived as a minor informality and Landmark was declared the low, responsive bidder. Doyon protests that the amendment made material

changes to the IFB and that, therefore, Landmark's bid is nonresponsive.

Where a bidder fails to acknowledge a material IFB amendment, the bid must be rejected as nonresponsive. El Greco Painting and General Contractors Company, Inc., B-208215.2, November 30, 1982, 82-2 CPD 492. However, the failure to respond to a nonmaterial amendment can be waived as a minor informality. An amendment is material if it affects the bidder's price or the quantity, quality or delivery terms of the IFB in more than a trivial or negligible manner. Defense Acquisition Regulation § 2-405 (Defense Acquisition Circular No. 76-17, September 1, 1978); M. C. Hodom Construction Company, Inc., B-209241, April 22, 1983, 83-1 CPD 440. Doyon alleges that three changes made by amendment 0001 are material.

Doyon first alleges that amendment 0001 altered section 02220, paragraph 8.3, in a material way. Originally, paragraph 8.3 read:

> "Drainage: Excavation shall be performed in the dry. The excavations and the area immediately surrounding each excavation for a distance of 10 feet, including slopes and ditches, shall be continually and effectively drained away from the excavation. The excavation for inlet, outlet, and diversion ditches and the furnishing and operating of unwatering equipment, as necessary, shall be performed under this specification at no additional cost to the Government. Suitable precautions shall be taken to prevent any erosion from undercutting previously concreted footings and slabs. Excavations shall be kept free from ponding until the permanent work in the excavations have been completely backfilled. Such ground water level information as appears in the contract documents is for general information only, and shall not constitute a basis for claim for differing site conditions. Actual water levels encountered may vary widely from those shown."

Pages 9 through 17 of section 02220 gave the depths for the building excavation and the ground water. These levels were taken from test hole drillings which were performed in December of 1982.

Amendment 0001 added the words "and Dewatering" to the title of paragraph 8.3. The amendment also listed the water table elevations which were taken from March through June

1983 at one bore hole. Finally, the amendment reiterated that the ground water levels were for the bidders' information only and would not provide a basis for the contractor to claim differing site conditions.

Doyon claims that this section of the amendment materially affected the price and quality of performance because it added a dewatering requirement to the IFB. Doyon states that the elevations given in the unamended IFB showed that in December of 1982, the water levels were slightly below the point of excavation and, normally, the water levels would decrease by approximately 2 feet in June, the time when excavation would begin, and then rise again in late summer. Doyon therefore did not include dewatering costs based on the unamended IFB because Doyon concluded that the water level would follow its normal course and not interfere with excavation. Doyon states that, in contrast, the amended IFB showed that from March through June, the water level had dropped only seven-tenths of a foot and, therefore, in late summer the level would rise from a much higher point. Based on this fact, Doyon concluded that the water would interfere with the excavation unless dewatering was performed and it added $9,721 to its bid to cover the cost of dewatering.

We find that amendment 0001 did not add a dewatering requirement to the IFB. As noted by Landmark and the Corps, the original IFB required excavation to be performed in the dry and specified that the given water levels were for the bidders' information only and that actual levels could vary widely. We thus believe that a fair reading of the original IFB notified bidders that it was up to them to judge if dewatering was required. Amendment 0001 did not change paragraph 8.3 to make dewatering a mandatory requirement. Rather, while the amendment provided additional information on the water level in one specific ground hole, it still left it up to the bidder to determine the need for dewatering. Accordingly, since amendment 0001 did no more than reiterate the requirements of paragraph 8.3, it did not affect the IFB in a material way. See Abhe & Svoboda, Inc., B-202493, July 27, 1981, 81-2 CPD 63.

We do agree with Doyon, however, that the amendments to section 07410, paragraph 6.9, and to drawings A-4 and A-5 were material to the IFB. Section 07410, paragraph 6.9, contains detailed design specifications for roof subgirt assemblies. As it was originally written, section 07410, paragraph 6.9, required that the subgirts be designed to permit the roof panels to deflect. The amendment to this section requires that the assembly be a thermally responsive clip assembly which permits two-directional movement. The

original drawings showed that the completed roof parapet would be straight. The drawings were amended to require that the roof parapet covering be bent.

The Corps and Landmark respond that these changes were not material to the IFB because they do not affect the cost of performance. Price, however, is not the only dispositive factor in determining if an amendment is material. See Versailles Maintenance Contractors, Inc., B-203324, October 19, 1981, 81-2 CPD 314. Rather, an amendment also is deemed material to an IFB if the amendment adds requirements to contract performance which were not contained in the original IFB. Id.; McKenzie Road Service, Inc., B-192327, October 31, 1978, 78-2 CPD 310. The Corps argues that a thermally responsive clip assembly capable of two-directional movement is inherent in the construction of metal buildings in a cold climate and that the requirement that the roof parapet be bent only changed a minor construction detail. These statements, however, do not alter the fact that the amendment changed the performance requirements which the contractor will have to meet and that the bidder would not be legally obligated to follow these changed requirements unless the bidder acknowledged the amendment. Thus, if a contract was awarded to a bidder who did not acknowledge the amendment, the Corps would bear the risk that the completed structure would not meet its needs as they are stated by the amended IFB. See El Greco Painting and General Contractors Company, Inc., supra; Mills Manufacturing Corporation, B-188672, June 15, 1977, 77-1 CPD 430.

Further, an amendment is material if it affects the quality of performance in more than a negligible way. See M. C. Hodom Construction Company, supra. In this respect, Doyon states, and neither Landmark nor the Corps disputes, that a thermally responsive clip assembly with two-directional movement permits roofing material to expand and contract in varying weather conditions and also aids in insulating the building. The purpose of a bent roof parapet is to increase the wind resistance of the roof. Given these purposes, we find that the changes will materially affect the quality of the completed structure.

Consequently, since the amendment made material changes to the IFB, Landmark's bid should have been rejected as non-responsive. The Corps has informed us that an award has been made to Landmark and that notice to proceed has been given. However, performance has not started. We thus

recommend that the Corps terminate its contract with Landmark and award to Doyon, the second low bidder, if Doyon is otherwise determined eligible to receive a contract award.

Since this decision contains a recommendation for corrective action, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with 31 U.S.C. § 720, as adopted by Public Law 97-258 (formerly 31 U.S.C. § 1176 (1976)). This section requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

for Milton J. Socolar
Comptroller General
of the United States