

DECISION

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

FILE: B-220064, B-220182.2 **DATE:** December 13, 1985

MATTER OF: Western Roofing Service

DIGEST:

Amendment requiring performance of significant work by certain date is not material, and bidder's failure to acknowledge the amendment thus does not render its bid nonresponsive, since the amendment did not increase the bidder's obligations under the original invitation for bids.

Western Roofing Service protests the determination by the Corps of Engineers that the potential awardee under invitation for bids (IFB) Nos. DACA83-85-B-0243 and -0244 is responsive despite its failure to acknowledge an amendment to the IFBs. We deny the protests.

The IFBs, issued on August 7, 1985, called for reroofing of Moanalua Terrace Housing, Oahu, Hawaii. The IFBs were amended twice, on August 23 and 29. The second amendment provides as follows:

"FISCAL YEAR MAINTENANCE AND REPAIR PROJECT
For any fiscal year maintenance and repair project awarded in September 1985, the contractor is required to have completed significant contract work prior to January 1, 1986. Completion of contract work may be evidenced by performance of significant work at the site, or in the event the physical on-site evidence of performance does not exist, by documentary evidence that significant costs have been incurred or that materials have been ordered for the contract work. Failure, prior to January 1, 1986, to either perform significant work at the site or furnish documentary evidence that significant costs have been incurred or material has been ordered shall constitute failure to prosecute diligently the contract work within the meaning of the General Contract Clause entitled Default (Fixed-Price Construction)."

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According to the Corps, the amendment implemented an Army policy directive intended to ensure that work under the contract was for genuine needs of the fiscal year in which the contract was awarded and funded.

Bid opening was held on September 6. The low bidder under the IFBs, DeNarde Construction Company, failed to acknowledge amendment No. 2 under both IFBs. The contracting officer decided that DeNarde's bids were responsive despite its failure to acknowledge the amendment, based on his determination that it was not a material amendment. The protester challenges the contracting officer's determination, arguing that the amendment imposed additional legal obligations on the contractor and changed the legal relationship between the contractor and the government by revising the performance schedule to require significant work before January 1, 1986. Award has not yet been made pending resolution of the protest.

A bid that does not include an acknowledgment of a material amendment must be rejected because, absent such an acknowledgment, the bidder is not obligated to comply with the terms of the amendment, and its bid thus is nonresponsive. Great Lakes Dredge & Dock Co., B-213551, Dec. 13, 1983, 83-2 CPD ¶ 681. An amendment is material, however, only if it has more than a negligible effect on price, quantity, quality, or delivery of the item or services bid upon, Federal Acquisition Regulation, 48 C.F.R. § 14.405 (d)(2); Owl Resources Co., B-210094, Apr. 29, 1983, 83-1 CPD ¶ 461, or if the amendment changes the legal relationship between the parties as, for example, if the amendment increases the contractor's obligations. Versailles Maintenance Contractors, Inc., B-203324, Oct. 19, 1981, 81-2 CPD ¶ 314. Conversely, failure to acknowledge an amendment which imposes no substantial or different requirements on the bidders may be waived. Emmet R. Woody, B-213201, Jan. 26, 1984, 84-1 CPD ¶ 123.

In this case, the original IFBs set completion deadlines of 330 days for one project, 410 days for the other. With regard to the schedule for performance, the IFBs required that the contractor commence work within 7 days after receiving the notice to proceed and then "prosecute the work diligently." Under the amendment, the contractor is required to complete "significant contract work" before January 1, 1986; failure to do so is made a basis on which to terminate the contract for default.

The Corps argues that the amendment did not materially change the contractor's obligation with regard to the rate of performance in view of the original requirement that work be commenced within 7 days and performance proceed diligently. The protester disagrees, arguing that the amendment increased the contractor's obligation. We recognize that award was not made by September 30, 1985, and therefore the clause no longer applies to any contract awarded under the IFBs. The protester argues, however, that it had to consider the clause when it submitted its bids and that DeNarde gained an advantage because it did not have to adjust its bids to account for the increased obligation which the protester contends was added by the amendment.

We are unpersuaded by the protester's position because, while the protester argues that the amendment required accelerated performance, it has offered no evidence to show how its proposed work schedule, and, consequently, its bids, were affected by the requirement that significant work be performed by January 1. Moreover, while the amendment does not define the degree of work which constitutes "significant work," based on a reasonable interpretation of the term, we find that commencing work as required after the Corps' planned September 1985 award date, and proceeding diligently thereafter, would necessarily result in completion of significant work by the January 1 deadline. Accordingly, we find that the amendment was not material because it did not change the contractor's obligation under the original IFBs. As a result, DeNarde's failure to acknowledge the amendment did not render its bids nonresponsive.

The protests are denied.

Harry R. Van Cleve

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General Counsel