



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Doty Bros. Equipment Company

File: B-274634

Date: December 19, 1996

B. C. Brown for the protester.

Christopher M. Bellomy, Esq., Department of the Navy, for the agency.

Robert Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly rejected low offer for failure to acknowledge a solicitation amendment where the agency has not identified how the amendment, which eased performance requirements, reflected a minimum need and thus how the amendment was material.

DECISION

Doty Bros. Equipment Company protests the rejection of its low offer under request for proposals (RFP) No. N68711-96-R-2220, issued by the Department of the Navy for the construction of a replacement jet fuel pipeline in Los Angeles County, California. The protester asserts that the contracting officer improperly rejected Doty Bros.' low offer for failing to acknowledge an immaterial solicitation amendment.

We sustain the protest.

The RFP, which was issued on August 8, 1996, and closed on August 20, contemplated a contract for a construction project to replace a jet fuel pipeline including excavation, construction of a new line and removal of the old line, and backfilling the excavated areas. Competition was limited to four offerors based on the agency's determination that an unusual and compelling urgency required such a restriction. Offerors were to submit a firm, fixed price for the project and provide a completed set of standard representations and certifications. The RFP advised that the agency intended to make award to the responsible offeror whose conforming offer was most advantageous to the government considering price and other factors specified in the solicitation without conducting discussions; no "other factors" were specified elsewhere in the solicitation, hence the agency awarded on the basis of low price.

On August 15, amendment No. 0001 was issued which modified the specification with respect to backfilling the excavation; the closing date was not extended by the amendment and the changes set forth in the amendment were described as "technical."

Three offers were received as follows:

Doty Bros.	\$778,019
ARB, Inc.	\$998,395
Offeror A	\$1,283,084

Doty Bros. was the only offeror that failed to acknowledge receipt of Amendment No. 0001 and, accordingly, on August 28, the agency wrote to the firm as follows, rejecting its offer and advising it of the award to ARB¹:

"This is to advise you that your offer does not conform to the subject solicitation due to a failure to [a]cknowledge Amendment 0001 which has a significant impact on the work to be performed."

¹The agency also states that it rejected Doty Bros.' offer for failure to submit a completed set of standard representations and certifications. The protester states that it submitted a set to the agency with the rest of its offer. Assuming that the offer package which the agency received did not contain the representations and certifications, the agency's position that it could not have permitted Doty Bros. to correct this deficiency without being required to conduct discussions with all offerors is without merit. We have recognized that, even under sealed bid procurements, the failure of a bidder to complete standard representations and certifications is a minor irregularity which does not render its bid nonresponsive and the requisite information may be furnished after bid opening. Jettison Contractors, Inc., B-242792, June 5, 1991, 91-1 CPD ¶ 532. It follows then that correction of any failure by Doty Bros. to supply the representations and certifications with its offer would not trigger a requirement to conduct discussions with all offerors. (Federal Acquisition Regulation (FAR) § 15.607(a) (FAC 90-31) provides that communications with offerors to correct minor irregularities are clarifications, not discussions, within the meaning of FAR § 15.610.) While the set of missing representations and certifications here also includes a certificate of procurement integrity, that certificate may be obtained at any time prior to award without triggering the requirement to hold discussions with all offerors. Worldwide Servs., Inc./Perry Management Corp., a Joint Venture, B-261113, Aug. 18, 1995, 95-2 CPD ¶ 73.

Upon receipt of the letter, Doty Bros. contacted the agency on September 11 and asserted that its failure to acknowledge amendment No. 0001 should have been viewed as a minor informality or irregularity, suggesting that the agency should have called for clarification. According to Doty Bros., the agency representative explained that, given the contracting office's work load, there was often not time to make confirming telephone calls and, further, that the failure to acknowledge the amendment could not be viewed as a minor informality which could be waived or cured later without entering into discussions with all offerors--something the RFP did not contemplate. This protest to our Office followed on September 13, with Doty Bros. reiterating the argument it had presented to the agency on September 11. In response, the agency has basically reiterated the position it communicated to Doty Bros. 2 days before the protest was filed.

Prior to the issuance of the amendment in dispute, the RFP required that the excavated pipeline trench be backfilled to grade entirely with a mixture of cement, aggregate and water of a specified density known as "three-sack" slurry based on the amount of cement necessary to make a defined amount of the slurry mixture.² The amendment changed the requirement to a less expensive, thinner slurry, known as "one-sack"; it further provided for filling the trench with slurry only to a depth of 3 feet below grade and completing the backfill to the existing grade with the compacted earth available from the excavated jobsite.

The agency concedes that the amendment has virtually no effect on the price of the project. Nonetheless, the agency maintains that the amendment is material simply because it changes the manner in which backfilling is to be accomplished which, in and of itself, according to the agency, creates a "significant" impact on the quality of the work to be performed.

Doty Bros. maintains that the amendment is not material because it basically constitutes a relaxation of the original backfilling requirements, permitting the use of a smaller quantity of a thinner, less expensive slurry together with available excavated earth (which is less expensive than slurry) to top off the backfill. As a result, the protester maintains that its "technical" failure to acknowledge the amendment could have been, and should have been, the subject of a unilateral clarification falling short of triggering any requirement for discussions with all three offerors. We agree.

For negotiated procurements, FAR § 15.607 requires contracting officers to examine proposals for "minor informalities" and "irregularities" and specifically cross-references FAR § 14.405 (applicable to sealed bid procurements) for a definition of

²Some cuts could be filled with earth and compacted by rolling or tamping to a given degree of compaction as spelled out in the specification.

the same. Further, FAR § 15.607 provides that unilateral communications with an offeror to resolve such minor informalities and irregularities are "clarifications" and not "discussions" triggering the need to conduct discussions with all competitive range offerors. FAR § 14.405 (as read in the context of this negotiated procurement) provides as follows:

"A minor informality or irregularity . . . pertains to some immaterial defect in [an offer] or variation of [an offer] from the exact requirements of the [solicitation] that can be corrected or waived. . . . The defect or variation is immaterial when the effect on . . . quality . . . is negligible when contrasted with the total . . . scope of supplies or services being acquired. The contracting officer either shall give the [offeror] an opportunity to cure any deficiency resulting from a minor informality or irregularity in [an offer] or waive the deficiency, whichever is to the advantage of the Government. Examples of minor informalities or irregularities include failure of [an offeror] to . . . [a]cknowledge receipt of an amendment to [a solicitation], but only if . . . [t]he amendment . . . has either no effect or merely a negligible effect on . . . quality . . . of the item [offered]." (Emphasis added.)

As stated above, the agency has asserted that, solely because the amendment changes how performance is to occur, it is material and, therefore, a failure to acknowledge the amendment cannot legally be waived or corrected without holding discussions with all competitive range offerors.

There is no precise rule for determining whether a change in requirements is more than negligible, Innovation Refrigeration Concepts, B-271072, June 12, 1996, 96-1 CPD ¶ 277; rather, that determination is based on the facts of each case. Day and Night Janitorial and Maid and Other Servs., Inc., B-240881, Jan. 2, 1991, 91-1 CPD ¶ 1. The mere fact that requirements have been changed by an amendment does not render the amendment material and does not, therefore, provide a basis for rejecting a bid that does not acknowledge the amendment. See L & R Rail Serv., B-256341, June 10, 1994, 94-1 CPD ¶ 356 (protest sustained where agency did not provide support for its assertion that a change in requirements was material); Titan Mountain States Constr. Corp., B-183680, June 27, 1975, 75-1 CPD ¶ 393. In other words, in cases where price is not meaningfully affected by an amendment, for the amendment to be material something about the change must reflect a legitimate minimum need of the agency such that its requirements will not be met if the contractor performs to the unamended specifications. In such circumstances, where neither the text of an amendment nor the agency's explanation of the need for an amendment indicates what factors inherent in the changed method of performance are necessary or significant to meet the needs of the agency, the amendment cannot be viewed as material. Day and Night Janitorial and Maid and Other Servs., Inc., supra.

Here, there is nothing in the record indicating what minimum need of the agency is reflected in the unacknowledged amendment. Neither the text of the amendment nor the agency's bare assertion that the changed method of performance significantly impacts quality addresses why--aesthetically, structurally or otherwise--the use of less strong and cheaper backfilling materials in lieu of those originally specified in the solicitation is required to meet a legitimate minimum need of the agency. That being so, we must conclude that the amendment was not material and that the contracting officer therefore was obligated to either waive Doty Bros.' failure to acknowledge the amendment or permit the firm an opportunity to cure it. FAR § 15.607. Since the contracting officer instead rejected the offer, we sustain the protest.

Because the protest was not filed within 10 days after award, no statutory stay was in effect and performance has continued to date. In response to our inquiry, the agency reports that approximately 40 percent of the project is complete including excavation and installation of the new pipeline, with removal of the old pipeline and restoration to grade remaining to be performed. Under these circumstances it is impractical to recommend contract termination; we do, however, recommend that Doty Bros. be reimbursed for its proposal preparation costs and its reasonable costs of filing and pursuing this protest. Bid Protest Regulations, section 21.8(d)(1) and (2), 61 Fed. Reg. 39039, 39046 (1996) (to be codified at 4 C.F.R. § 21.8(d)(1) and (2)). The protester should submit its certified claim for costs to the contracting agency within 60 days of receiving this decision. Section 21.8(f)(1), 61 Fed. Reg. supra (to be codified at 4 C.F.R. § 21.8(f)(1)).

The protest is sustained.

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