



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

B-178171

May 31, 1973

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D.E.W., Incorporated  
216 Harweck Drive  
San Antonio, Texas 78213

Attention: Mr. D. E. Wursbach  
President

Gentlemen:

Reference is made to your telegram of March 12, 1973, and subsequent correspondence protesting the rejection of your bid under Invitation for Bids (IFB) DACA63-73-B-0048, issued February 6, 1973, by the Department of the Army, Office of the District Engineer, Fort Worth District, Corps of Engineers, Fort Worth, Texas.

The subject IFB solicited bids to remodel bathrooms at Harris Heights, Fort Sam Houston, San Antonio, Texas. The record states that since it was uncertain whether there were sufficient funds for all the work desired, the bidding schedule was so constituted as to request bids on a Base Bid and six deductives. Prior to bid opening, funds available for the project were recorded in the amount of \$309,682.

The evaluation clause provided that the low bidder would be the one offering the low aggregate amount for the Base Bid, plus or minus those additive or deductive bid items providing the most features of work within the funds determined by the Government to be available before bid opening.

Upon the opening of bids at 2:00 p.m. on March 6, 1973, it was noted that all Base Bids exceeded the funds available. After subtracting Deductive No. 1, it was again determined that no bidder was within the funds available. Consequently, Deductive No. 2 was then subtracted, leaving your firm as the low bidder at \$278,276, followed by Wardroup and Associates at \$278,711, and Robert L. Guyler Company at \$283,829. It was then observed that after subtracting Deductive No. 2, there remained some \$31,406 between the low bid and the available funds. Prior to a study

[Protest of Bid Rejection as Nonresponsive]

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of Amendment No. 0001, it is reported that an erroneous assumption was made that deductives could be skipped rather than be taken in progression, and it was announced that a preliminary evaluation based on the Base Bid less Deductives Nos. 1 and 4 indicated a bidder status of D.E.W. at \$297,702, Wardroup at \$300,711, and Guyler at \$300,878. Subsequently, a detailed perusal of Armed Services Procurement Regulation (ASPR) 2-201(b)(xii) and the provisions on completion and anticipated delay set out in Amendment No. 0001 indicated that the skipping of deductives was precluded, with a consequential determination that a proper evaluation must be on the Base Bid less Deductives Nos. 1 and 2. Therefore, your firm was reportedly evaluated low on that basis.

It was noted however, that your bid failed to acknowledge receipt, prior to bid opening, of Amendment No. 0001 issued on February 23, 1973. It was determined that several of the changes in that amendment were material and that the failure to acknowledge receipt could not be considered a minor irregularity which could be waived pursuant to ASPR 2-403(iv)(B). Accordingly, you were advised by letter of March 8, 1973, that your bid must be considered nonresponsive, and it was therefore rejected.

You have protested that the amendment in question should not be applicable or enforceable in that it was not harmonious with the manner in which the schedule required bids to be evaluated since it does not state the number of calendar days allowed for completion when the award is to be made on the Base Bid less Deductives Nos. 1 and 4.

You further contend that the provisions of Amendment No. 0001 would have no effect or merely a trivial effect on the price of the procurement, and since the relative standing of the bidders would not be affected, the failure of the contracting officer to receive an acknowledgment prior to bid opening of your receipt of the amendment should be waived under ASPR 2-403(iv)(B).

Finally, you have submitted evidence that you did acknowledge receipt of the amendment prior to bid opening in the form of a copy of a Western Union telegram bearing a time stamp of 10:40 a.m. on March 6, 1973, which was purportedly submitted three hours and twenty minutes prior to bid opening. You contend that there is no obligation that the Government receive the acknowledgment prior to bid opening as long as the bidder effects an act of acknowledgment prior to bid opening. You maintain that the instructions to bidders

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provided in Standard Form 22, which was included in the bid package, do not mention that the rules pertaining to late bids, modifications and withdrawals of bids should also apply to the acknowledgment of amendments.

With regard to your allegation that the evaluation of the amendment on the basis of a Base Bid less Deductives Nos. 1 and 4 would be at variance with the evaluation procedure stipulated in the IFB, the contracting agency agrees with you and, as noted above, stipulates that the proper evaluation method is the Base Bid less Deductives Nos. 1 and 2. In view thereof, it would appear that this element of your protest has become moot and is not relevant to our consideration of the merits of the basic ground of your protest.

ASPR 2-405(iv)(B) permits the waiver of the failure of a bidder to acknowledge receipt of an amendment if the amendment clearly would have no effect or merely a trivial or negligible effect on price, quality, quantity or delivery.

We note that the subject IFB, prior to amendment, required completion of the work not later than 390 calendar days after receipt by the contractor of a notice to proceed. Amendment No. 0001, however, on the basis of the specified evaluation (Base Bid less Deductives Nos. 1 and 2), would require delivery of the units ready for use not later than 330 calendar days after receipt of a notice to proceed.

Inasmuch as the time of performance was shortened by 60 days, we are unable to conclude that this revision did not affect delivery, and therefore we must regard the amendment as material. See B-171169, March 10, 1971. In connection with the shortened delivery period, the amendment also required liquidated damages at \$205 for each day beyond 330 calendar days by which completion was unexcusably delayed. Therefore, the acceptance of your bid on the basis of a 390 day completion period would have been prejudicial to other bidders who were bidding on the basis of the amended delivery period, and who were exposing themselves to the possible penalty for each day delivery was delayed beyond 330 days. Inasmuch as we have determined these provisions of the amendment to be material, we do not consider it necessary to consider any of the other changes made therein.

The contracting officer states that he has no reason to believe that your telegram was not filed with Western Union at 10:40 a.m. on March 6, 1973, as indicated on the confirmation copy. In this

regard, your attention is directed to Paragraph 7 of Standard Form 22, Instructions to Bidders, which was included in the IFB. While Paragraph 7 is stated in terms of late bids and modifications or withdrawals thereof, and does not specifically refer to amendments, inasmuch as the subject amendment materially changed the IFB provisions, we are unable to consider a timely acknowledgment of receipt of the amendment to be anything less than a modification of your previously submitted bid, and the requirements of that paragraph are for application.

Paragraph 7 requires that bid modifications received after the exact time set for opening of bids will not be considered unless (where submitted by telegram) it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation. The mere act of acknowledgment by a bidder before bid opening will not suffice. The acknowledgment must be received by the agency by the time set for bid opening. In any event, bidders were also specifically warned by Paragraph 9 of the IFB, and by the amendment, that failure to timely acknowledge all amendments may cause the rejection of the bid.

The record states that your telegraphic amendment acknowledgment was received at 4:48 p.m. on March 7, 1973. Prior to rejection of your bid, an investigation was made and it was determined that no telegram was delivered by Western Union from your firm on March 6, 1973, by telephone or any other method of delivery. The record reveals that an attempt was made to obtain information from Western Union as to how your telegram was dispatched, but that Western Union refused to disclose information to anyone but the sender.

In view thereof, the record is devoid of any tangible evidence which would enable us to determine that the late receipt was due to mishandling on the part of the Government after receipt at the Government installation, as required by the referenced provision of Standard Form 22 in order for your telegraphic acknowledgment to be eligible for consideration.

Accordingly, your protest is denied.

Sincerely yours,

PAUL G. DEMBLING  
Acting Comptroller General  
of the United States