

DECISION

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

FILE:

B-220574

DATE: December 26, 1985**MATTER OF:**

West Alabama Remodeling, Inc.

DIGEST:

1. Although protester filed a copy of the protest with the contracting officer 1 day late, GAO will consider the merits of the protest since the contracting agency had prior knowledge of the basis of the protest and completed the report before the report was due and was not prejudiced in the preparation of the report by the protester's delay.
2. Bidder's failure to acknowledge a material IFB amendment renders bid nonresponsive.
3. Overstatement of government's needs is a material solicitation deficiency requiring cancellation of the solicitation and resolicitation.

West Alabama Remodeling, Inc. (West Alabama), protests the contract awarded to B. F. Carvin Construction Co., Inc. (Carvin), under invitation for bids (IFB) No. N62467-85-B-7249 issued by the Southern Division, New Orleans Area, Naval Facilities Engineering Command (NAVFAC), for the replacement of roofing on family housing and other work.

Carvin failed to acknowledge in its bid amendments to the IFB that, among other things, upgraded the class of roofing shingles from "C" to "A" and increased the warranty on the shingles from 15 to 20 years.

The protest is sustained.

NAVFAC contends that we should not consider the protest because the protester filed a copy of the protest with the contracting officer 1 day late. However, despite the late receipt of the copy, the contracting agency report indicates that the contracting agency had prior knowledge of the basis of protest because the protester discussed the award and expressed its intention to file a protest with the

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agency prior to filing the protest here. Further, the contracting agency completed the report 1 day early. Thus, the contracting agency was not prejudiced in the preparation of the report by the protester's delay. Therefore, we will consider the merits of the protest. See Colt Industries, B-218834.2, Sept. 11, 1985, 85-2 C.P.D. ¶ 284.

NAVFAC waived the failure to acknowledge the amendments as de minimis. Essentially, the basis for this determination with respect to the shingles was that a class "A" shingle was no more expensive than a class "C" shingle and that the class "A" installation cost was less expensive than the class "C" installation cost. In that regard, NAVFAC reports that the class "C" shingle would have been adequate for its purpose, but that an investigation indicated that class "C" shingles were not generally available. Therefore, NAVFAC states that, since the class "A" shingle would do the job as well, the IFB was amended to require the class "A" shingle to promote competition.

However, it is unnecessary for us to consider the waiver on the foregoing basis. In our view, the increase in warranty from 15 years to 20 years was a material change in quality. While NAVFAC dismisses the increase in warranty as merely a contractual obligation, the effect of the warranty is to guarantee that the shingle will last 5 years longer and, therefore, represents a significant enhancement in quality. Further, we have held that the terms of a warranty are material and that an offer of a shorter warranty than is required by an IFB is a material qualification rendering the bid nonresponsive. Champion Road Machinery International Corp., B-216167, Mar. 1, 1985, 85-1 C.P.D. ¶ 253.

In the circumstances, Carvin's bid should have been rejected as nonresponsive. Performance on the contract awarded to Carvin has not started. NAVFAC should terminate the contract.

Ordinarily, we would recommend that award be made to West Alabama if it was eligible for award. However, NAVFAC has indicated that class "C" shingles with a 15-year warranty would have been adequate for its needs and that the purpose of the amendment was to increase competition. If this is the case, the specifications should have been open to alternative classes with standard manufacturer's warranties rather than restricted to a single class with a 20-year warranty. The restriction was an overstatement of

the government's needs. Overstatement of the government's needs is a material solicitation deficiency requiring cancellation of the IFB and resolicitation. The Burgmeier Company; Artec, a Division of Kimball International, B-209710, B-209710.2, May 23, 1983, 83-1 C.P.D. ¶ 552.

for *Wilton J. Jordan*
Comptroller General
of the United States