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**DECISION**



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

*[Protest of Bid Rejection as Nonresponsive]*

FILE: B-201146

DATE: March 17, 1981

MATTER OF: MET Electrical Testing, Inc.

**DIGEST:**

Failure to acknowledge amendment in writing prior to bid opening usually renders bid nonresponsive and that failure cannot be cured by oral acknowledgment or discussions concerning amendment prior to bid opening. Prior decisions inconsistent with this rule are overruled.

MET Electrical Testing Company, Inc. (MET), protests the rejection of all bids and subsequent cancellation of solicitation No. N62477-80-B-8455 for maintenance servicing at the Washington Navy Yard. MET initially argued that its bid was improperly rejected as nonresponsive for failure to acknowledge an amendment to the solicitation containing revised wage rates. MET's position is that it orally acknowledged the amendment by telephone prior to the extended bid opening date, and that it was the low, responsive, responsible bidder.

Prior to filing a report with this Office, the Navy advised us that it believed the protester's case had merit and that it had decided to reject all bids submitted under the solicitation. MET then protested this action by the Navy. MET argues that if there is merit to its protest, it should be awarded the contract, and that resolicitation would be injurious to MET since the other two bidders now know MET's bid price.

The Navy sets forth these facts. Four days prior to the bid opening, an amendment was issued which incorporated a revised Department of Labor wage determination and extended bid opening to September 26, 1980, 4 extra days. Due to the time constraints involved, a contracting

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activity employee telephoned MET to advise it of the contents of the amendment and request acknowledgment. By that time, MET had already submitted its bid in response to the original bid opening date. The telegram acknowledging the amendment sent by MET was received late through mishandling by Western Union. However, the protester states that during the phone call initiated by the Navy on September 24, it orally acknowledged receipt of the amendment prior to bid opening.

The Navy states that failure to acknowledge the amendment, which contained wage rates, in writing prior to bid opening would render the bid nonresponsive. However, the Navy canceled the solicitation on the basis that insufficient time had been allowed for receipt and acknowledgment of the amendment.

MET concedes that its written telegraphic acknowledgment was late, but contends that its oral acknowledgment prior to bid opening was legally sufficient in that no requirement exists in the solicitation or amendment that the acknowledgment be written.

As the Navy correctly points out, amendments incorporating wage determinations pursuant to the Davis-Bacon Act are material. See McHenry Cooke, B-196138, January 28, 1980, 80-1 CPD 74; 51 Comp. Gen. 500 (1972). Thus, the issue to be resolved here is whether an oral acknowledgment of a material amendment, i.e., an amendment incorporating a wage determination, prior to bid opening is sufficient to permit acceptance of a bid which contains no other indication of acknowledgment.

We have previously indicated that an oral acknowledgment of a material amendment may be acceptable where the evidence used to show awareness of, or concurrence with, the amendment is, at the very least, independently verifiable evidence over which the bidder does not have exclusive control as to whether to submit it. 33 Comp. Gen. 508 (1954); United States Cartridge Company, 60 Comp. Gen. \_\_\_\_ (B-200481, February 11, 1981), 81-1 CPD \_\_\_\_; Nautical Manufacturing Company, B-185198, February 24, 1976, 76-1 CPD 129. This language would appear applicable to this case.

However, we have also held that the failure to acknowledge an amendment usually renders the bid nonresponsive and that the failure cannot be cured by oral discussion. MBAssociates, B-197566, June 4, 1980, 80-1 CPD 383; Aqua-Trol Corporation, B-191648, July 14, 1978, 78-2 CPD 41. We have also expressed our preference for written acknowledgment of material amendments in other cases, for example, 42 Comp. Gen. 490 (1963).

We believe the principle stated in MBAssociates, supra, and Aqua-Trol Corporation, supra, is the better rule and overrule Nautical Manufacturing Company, supra, and United States Cartridge Company, supra, to the extent these decisions are inconsistent with that rule.

Permitting oral acknowledgment of a material amendment is detrimental to the competitive bidding process in two ways. First, it allows a bidder "two bites at the apple," by giving it the sole discretion to accept or reject the contract after bid opening, by affirming or denying that it intended to be bound by the amendment and, hence, the agreement. See, National Investigation Bureau, Inc., B-191759, July 18, 1978, 78-2 CPD 44. Second, because of the bidder's failure to timely acknowledge the amendment in writing, the terms of the resulting contract are not clear since the written bid acknowledges the terms of the solicitation, but not relevant amendments. 42 Comp. Gen., supra.

Under these circumstances, we believe MET's bid was properly rejected as nonresponsive for failure to timely acknowledge a material amendment in writing.

Protest is denied.

  
Acting Comptroller General  
of the United States