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**DECISION**



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

FILE: B-204970

DATE: February 25, 1982

MATTER OF: Marino Construction Company, Inc.

**DIGEST:**

1. Rejection of low bid which did not contain acknowledgment of amendment was proper
  - since, while amendment's cost effect was insignificant compared with total price of low bid, cost effect amounted to more than 11 times the difference between the two low bids. Therefore, waiver of protester's failure to acknowledge amendment would not be justified because amendment had more than a trivial or negligible effect on price. See DAR § 2-405(iv)(B) (1976 ed.).
2. Protester's estimate of cost increases produced by unacknowledged amendment may not be used to determine the materiality of amendment since this would permit protester to become eligible for award by citing costs that would permit waiver or to avoid award by placing a larger cost value on the effects of amendment.
3. Failure of bidder to acknowledge amendment may not be waived on basis that bidder was not sent amendment by agency where evidence does not indicate deliberate effort by agency to exclude bidder from competing on procurement. Also, allegation by bidder--that it was aware of contents of amendment because of discussions with subcontractors and considered amendment in preparing its bid--does not negate necessity for acknowledging amendment, since bid responsiveness must be determined from bid itself.
4. Protester's request for late modification of bid based on its statements after bid opening acknowledging receipt of amendment is rejected since bid is not otherwise acceptable.

5. Contracting officer's announcement at bid opening that protester was apparent low bidder did not constitute acceptance of protester's offer since acceptance by the Government must be clear and unconditional.
6. Possibility that Government might realize monetary savings in particular procurement if material deficiency is corrected or waived is outweighed by the importance of maintaining the integrity of the competitive bidding system.

Marino Construction Company, Inc. (Marino), protests the rejection of its bid for failure to acknowledge amendment 0003 to invitation for bids (IFB) No. DACA45-81-B-0203, issued by the Department of the Army, Omaha District, Corps of Engineers (Army). The IFB was for construction of an addition to a fire station at General Billy Mitchell Field in Milwaukee, Wisconsin. We find that the rejection was proper.

The Army states that on September 4, 1981, the third in a series of amendments to the IFB was issued. Essentially, amendment 0003 altered the solicitation by substituting a requirement for overhead steel doors in place of the IFB's wood door requirement and by changing certain specifications pertaining to mechanical and electrical work. On the September 18 bid opening, nine bids were received by the Army. Marino's bid at \$464,034 was determined to be the apparent low bid; the second low bid of \$465,000 was submitted by R.J. Prossen, Inc. (Prossen). Marino's bid contained an acknowledgment of the first two amendments, the latter of which established the September 18 bid opening date; however, Marino's bid did not acknowledge the third IFB amendment. On September 24, the Army notified Marino that its bid had been found nonresponsive for failing to acknowledge the third amendment.

The Army estimated that amendment 0003 would involve additions to the contract price totaling \$10,779 and deletions amounting to \$7,018. Relying on our decision in Spartan Oil Company, Inc., B-185182, February 11, 1976, 76-1 CPD 91, the Army considered only the estimated cost effect of the additions to determine whether Marino's failure to acknowledge the amendment could be waived.

Although the Army determined that the cost of the additions "amount[ed] to approximately 2 percent" of Marino's bid, it found that the additions' cost amounted to more than 11 times the difference between the two low bids. In view of the latter, the Army determined that the amendment had more than a trivial or negligible effect on price and that, therefore, Marino's failure to acknowledge the amendment could not be waived. See Defense Acquisition Regulation (DAR) § 2-405(iv)(B) (1976 ed.).

In support of its rejection of Marino's bid, the Army has cited several of our decisions, including AFB Contractors, Inc., B-181801, December 12, 1974, 74-2 CPD 329, and 53 Comp. Gen. 64 (1973). In the cited cases, our Office applied the principle that whether the value of an unacknowledged amendment is trivial or negligible depends on the amendment's estimated impact on bid price and the relationship of that impact to the difference between the two low bids; both tests must be satisfied in order to permit waiver. In AFB Contractors, we held that an unacknowledged amendment was not trivial or negligible with respect to price where the estimated increase in bid price was only 0.874 percent of the low bid, but was approximately 14.8 percent of the difference between the two low bids. Likewise, in 53 Comp. Gen. 64, above, we held that an estimated increase in bid price was not trivial or negligible where the increase was 0.434 percent of the actual bid, but was 20.9 percent of the difference between the two low bids.

Marino disputes the Army's determination that our decisions in AFB Contractors and 53 Comp. Gen. 64, above, are controlling. In this regard, the protester contends that there is an inconsistency between the decisions relied on by the Army and our holdings involving similar circumstances in 52 Comp. Gen. 544 (1973); Algernon Blair, Inc., B-182626, February 4, 1975, 75-1 CPD 76; Flipppo Construction Co., Inc., B-182730, March 7, 1975, 75-1 CPD 139; and Titan Mountain States Construction Corporation, B-183680, June 27, 1975, 75-1 CPD 393. In the latter decisions, we determined that the unacknowledged amendments' costs (amounting to 0.137, 0.037, 0.2, and 0.0075 percent, respectively, of the involved low bids) represented insignificant percentages (5.68, 2.47, 2.85, and 0.24 percent, respectively) of the differences between the low and the second low bids; therefore, waiver was permitted.

No precise standard can be employed in determining whether a change effected by an amendment is trivial or negligible in terms of price and, consequently, a determination must be based on the particular facts of each case. Nevertheless, given the above pricing facts, we reject Marino's argument that there is an inconsistency in our treatment of the cited cases. In other words, even if the value of the unacknowledged amendment is insignificant compared with the low bid (as was the circumstance in all six of the above decisions), waiver will not be permitted if the value is significant (as was the circumstance in AFB Contractors and 53 Comp. Gen. 64, above) compared with the difference between the two lowest acceptable bids.

In this case, we believe that amendment 0003 cannot be viewed as being trivial or negligible with respect to price. Although the estimated increase is only 2 percent of Marino's bid and, therefore, insignificant based on this comparison, it constitutes approximately 11 times the difference between Marino's and Prossen's bids. Therefore, Marino's failure to acknowledge amendment 0003 cannot be waived as a trivial defect under the above DAR provision or under the IFB which provided, in effect, that a bidder's failure to acknowledge an amendment involving a trivial matter would not cause rejection of the bid.

Marino further contends that the Army's determination of the amendment's materiality was based on invalid estimates. In this regard, the protester maintains that the amendment actually increased the contract price by only \$1,770.

We have held that the determination as to the cost significance of an amendment may not be based on the valuation placed upon it by the bidder seeking a waiver. 53 Comp. Gen. 64, above. To do otherwise would permit a bidder after publication of bid prices to decide to become eligible for award by citing costs which would allow waiver or to avoid award by placing a larger cost value on the effects of the amendment. Consequently, we must accept the Army's determination that the amendment increased costs by \$10,779.

In any event, we note that the contractor's estimate of increased costs represents more than 100 percent of the difference (\$966) between the two low bids.

Accordingly, a determination of cost impact based on the protester's estimates would still result in a finding that amendment 0003 had more than a trivial or negligible effect on price.

Marino, in addition to the above challenges to the materiality of amendment 0003, contends that the reason it did not acknowledge the amendment is because it was never received. In this regard, the protester asserts that it was not included in the initial mailing list and that the Army improperly transmitted the amendment by ordinary mail, instead of registered mail; moreover, Marino insists that amendments should be regularly sent by registered mail.

We have consistently held that the contracting agency is not an insurer of delivery of bid documents to prospective bidders, but that the risk of nonreceipt is on the bidders. G.E. Webb B-204436, September 21, 1981, 81-2 CPD 234. Therefore, if a bidder does not receive and acknowledge a material amendment, and there is no evidence that this failure is the result of a conscious or deliberate effort on the part of the contracting agency's part to exclude the bidder from the competition, the bid must normally be rejected as nonresponsive. Jose Lopez and Sons Wholesale Fumigators, Inc., B-200849, February 12, 1981, 81-1 CPD 97.

Here, the Army maintains that it mailed all bidders, including Marino, a copy of the amendment via regular mail; moreover, the Army notes that regular mail is used because if "all of the thousands of amendments issued every year by [the Omaha District] alone [were sent] by registered mail [this] would cost the taxpayer untold sums of money." Although it is unfortunate that Marino's name was not recorded on the bidders' list, we do not find anything in the record indicating that the error was other than an inadvertent mistake, or that it was occasioned by any deliberate attempt on the part of the procuring personnel to exclude the protester from participating in the procurement. Therefore, Marino's failure to acknowledge the amendment, even though the company allegedly never received the amendment, renders its bid nonresponsive. Central Delivery Service, B-186413, August 4, 1976, 76-2 CPD 125. Moreover,

we cannot question the Army's objection to the use of registered mail, which is not required for the transmission of amendments. See DAR § 2-208 (Defense Acquisition Circular No. 76-25, October 31, 1980).

Notwithstanding its failure to receive the amendment, the protester contends that its bid was based on subcontractors' telephone bids incorporating the third amendment. In support of this contention, Marino has submitted records of the bids including subcontractors' acknowledgments of amendment 0003.

The responsiveness of a bid, that is, a bidder's intent to be bound by all the terms and conditions of a solicitation, including amendments, must be determined from the bid itself. 51 Comp. Gen. 352 (1971). Therefore, to be effective, an acknowledgment of an amendment must be submitted prior to bid opening. Ira Gelber Food Services, Incorporated, 55 Comp. Gen. 599, 601 (1975), 75-2 CPD 415. In this connection, a bidder may not cure a bid which is nonresponsive on its face by demonstrating after bid opening that it was aware of the substance of an amendment. See Dover Elevator Co., B-194679, November 8, 1979, 79-2 CPD 339. Therefore, even if Marino was alerted to the contents of amendment 0003 prior to bid opening and considered the amendment in preparing its bid, it would still have to formally acknowledge the amendment. Dover Elevator Co., above. Otherwise it would not be legally binding itself to comply with the amendment's requirements. Navaho Corporation, B-192620, January 16, 1979, 79-1 CPD 24.

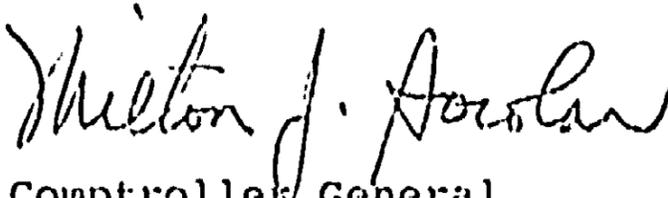
Marino also asks that we consider, pursuant to the IFB's bidding instructions, page 1B-3, paragraph 7, its recent statements acknowledging receipt of the amendment as a late modification of its bid to include the terms of amendment 0003. Paragraph 7(a) of the IFB's bidding instructions provides that a late modification of an otherwise acceptable bid which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted. Since Marino's bid was not otherwise acceptable, it cannot be modified. See Western Microfilm Systems/Lithographics, B-196649, January 9, 1980, 80-1 CPD 27.

Additionally, the protester argues, in substance, that the Army finally accepted its bid at bid opening when the contracting officer declared Marino the apparent low bidder and that the Army took an unreasonably long period of time (6 days) before informing Marino that its bid would be rejected. As a general rule, the acceptance of an offer by the Government must be clear and unconditional; it must appear that both parties intended to make a binding agreement at the time of the purported acceptance of the offer. See Donald Clark Associates, B-184629, March 24, 1978, 78-1 CPD 230. Here, the contracting officer informed all bidders that the low bid announced at bid opening would be "apparent only," and that all bids would be reviewed at a later time for "defects which could render them unacceptable." Moreover, the contracting officer insists that Marino was notified of the rejection of its bid "as soon as the decision had been rendered [and] that it took time to evaluate the amendment's effect and formulate a decision." In view of the contracting officer's statements, we cannot find that the Army has unconditionally accepted Marino's offer or that the Army took an unreasonably long period of time in notifying Marino of the bid rejection.

Marino points out that its bid would result in a \$966 monetary savings to the Government. However, the importance of maintaining the integrity of the competitive bidding system outweighs the possibility that the Government might realize a monetary savings in a particular procurement if a material deficiency is corrected or waived. Jose Lopez and Sons Wholesale Fumigators, Inc., above.

Finally, Marino maintains that the Army acted improperly by releasing the bid opening results to trade publications. We disagree. As pointed out by the agency, information pertaining to bidders' identities and the amounts bid is a matter of public record at the time of bid opening.

We deny the protest.

for   
Comptroller General  
of the United States