

DECISION



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

FILE: B-208688

DATE: September 8, 1982

MATTER OF: Gomez Electrical Contractors, Inc.

DIGEST:

1. Failure of a bidder to acknowledge a material amendment to a solicitation may not be waived on the basis that the bidder did not receive the amendment where evidence does not indicate a deliberate effort by agency to exclude the bidder from competing on the procurement.
2. Allegation by bidder made after bid opening that it considered the requirements of an amendment it failed to acknowledge in preparing its bid does not cure the nonresponsiveness of its bid because without the acknowledgment the bidder is not legally bound to perform the material requirements of the amendment.

Gomez Electrical Contractors, Inc., protests the rejection of its bid for failure to acknowledge amendment 0001 to invitation for bids (IFB) No. F30636-82-B-0027, issued by the Department of the Air Force. The IFB solicited bids for a contract in support of the laser fence project at Plattsburgh Air Force Base, New York. According to Gomez, the amendment added a contract provision requiring the contractor to furnish utility connections at its own expense.

We summarily deny the protest.

Since it is clear from Gomez's submission that the protest is without legal merit, we are deciding the matter without further development of the case. Shipco General, Inc., B-204259, August 20, 1981, 81-2 CPD 161.

Gomez contends that the reason it failed to acknowledge the amendment was because it was never received. Gomez argues that it should not be penalized by the Government's alleged failure to properly transmit the amendment.

We consistently have 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 to exclude the bidder from the competition, the bid must be rejected as nonresponsive. Jose Lopez and Sons Wholesale Fumigators, Inc., B-200849, February 12, 1981, 81-1 CPD 97.

Here, the Air Force informally has advised us that amendment 0001 was mailed 20 days prior to the bid opening date to all 18 firms who had been mailed the basic IFB, including Gomez. The Air Force further noted that it received four responses to the IFB; two of which acknowledged receipt of the amendment, and two which failed to do so. Based on this information, we cannot conclude that there was any conscious or deliberate effort on the part of the Air Force to exclude the protester from competing. Therefore, Gomez's failure to acknowledge the amendment, even though the company allegedly never received it, rendered its bid nonresponsive. Central Delivery Service, B-186413, August 4, 1976, 76-2 CPD 125.

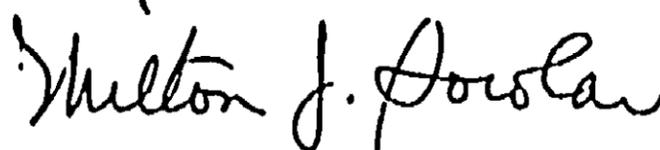
After bid opening, Gomez requested that the contracting officer waive its failure to acknowledge the amendment as a minor informality. The Air Force responded to Gomez that it could not waive the failure to acknowledge, citing Defense Acquisition Regulation § 2-405 which defines a waivable or correctable minor informality as one which has "no effect or merely a trivial or negligible effect on price, quality, quantity or delivery of the supplies or performance of the services being procured * * *."

We believe the Air Force properly refused to waive Gomez's failure to acknowledge amendment 0001 because that amendment, which added a provision requiring the contractor to bear the expense of furnishing utility connections, was material, that is, it had an effect on

the price. Gentiray and Associates, B-204013, November 30, 1981, 81-2 CPD 431. Gomez in effect concedes this when it also asserts that the Air Force should not have rejected its bid for failure to acknowledge the amendment because it advised the contracting officer after bid opening that its bid did incorporate the costs covered in amendment 0001 despite the fact that the amendment was never received. Gomez notes that it included these costs because it recognized the need for providing utility connections after performing a site inspection.

With respect to this final point, we need only point out that 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 3, 1979, 79-2 CPD 339. Therefore, even if Gomez did consider the requirements of amendment 0001 in preparing its bid, it still would have to formally acknowledge the amendment. Marino Construction Company, Inc., B-204970, February 25, 1982, 61 Comp. Gen. _____, 82-1 CPD 167. Otherwise, Gomez would not be legally binding itself to comply with the amendment's requirements. Navaho Corporation, B-192620, January 16, 1979, 79-1 CPD 24.

The protest is denied.



Acting Comptroller General
of the United States