

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548****FILE:** B-209535**DATE:** April 15, 1983**MATTER OF:** S&D Mechanical Contractors**DIGEST:**

Low bid was improperly rejected as nonresponsive for failure to acknowledge material amendment because only reasonable construction of bid indicates that bidder was aware of amendment and intended to perform its terms.

S&D Mechanical Contractors (S&D) protests the Defense Electronics Supply Center, Defense Logistics Agency (DLA), rejection of its low bid under invitation for bids (IFB) No. DLA910-82-B-5296, for construction work.

We sustain the protest.

The IFB originally set a July 23, 1982, bid opening date. Amendment No. P00001, issued July 23, 1982, extended the bid opening date to August 13, 1982. Amendment No. P00002, issued August 11, 1982, further extended bid opening to September 3, 1982, and it notified bidders that changes would occur in the drawings and specifications in the near future. These changes were accomplished in amendment No. P00003, issued August 20, 1982. The materiality of the changes has not been questioned.

According to the bid abstract, S&D submitted two bids, the lowest received. One bid, dated July 23, 1982, for \$48,898, contained a copy of amendment No. P00001, signed on July 26, 1983. The other bid, dated September 3, 1982, for \$53,768, contained the following entries in the receipt of amendments section:

"Amendment No. 1
Date 8-11-82

Amendment No. 2
Date 8-20-82"

The contracting officer determined that the September 3 bid was a revised bid which effectively revoked the lower July 23 bid. Even if this were not the case, the contracting officer rejected the July 23 bid for failure to acknowledge the later-issued amendment No. P00003.

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The September 3 bid was also rejected for failure to acknowledge amendment No. P00003. Because S&D explicitly referenced amendments Nos. P00001 and P00002 with the corresponding issuance dates for amendments Nos. P00002 and P00003, the contracting officer concluded that the bid was ambiguous; if the dates are disregarded, only amendments Nos. P00001 and P00002 are acknowledged, while if the amendment numbers are disregarded, acknowledgment of amendment No. P00003 could be inferred. Therefore, applying our decisions that, where a bid is subject to two reasonable interpretations, under one of which it is responsive and the other nonresponsive, a bid must be rejected as nonresponsive, DLA argues that rejection was proper. See Singleton Contracting Corp., B-202646, August 4, 1981, 81-2 CPD 90. DLA finally concluded that the price increase in the September 3 over the July 23 bid did not clearly indicate an acknowledgment of amendment No. P00003, because the price increase could be the result of numerous other factors, such as increases in labor and material costs, regardless of any increased specification requirements.

S&D argues that amendment No. P00003 was acknowledged by the correct date which appeared on the September 3 bid and by the price increase over the bid originally submitted to DLA on July 23, 1982.

Generally, the failure of a bidder, prior to bid opening, to acknowledge the receipt of a material amendment or to demonstrate clearly an obligation to perform the amendment's requirements renders the bid nonresponsive. The basis for this rule is that acceptance of a bid which disregards a material provision of an invitation, as amended, would be prejudicial to other bidders; clarification of the bid after bid opening would permit the bidder to become eligible for award by furnishing extraneous evidence that the amendment had been considered, or to avoid award by remaining silent. Singleton Contracting Corp., supra.

Based on the following, we conclude that the S&D bid should not have been rejected. We do not agree with the agency's view that there are two reasonable interpretations of the S&D bid, resulting in a fatal ambiguity. Rather, we find only one reasonable interpretation--S&D's knowledge of and the requisite intention to be bound by the provisions of amendment No. P00003. While we recognize that DLA's arguments for a second reasonable interpretation are plausible, theoretically, that interpretation is unreasonable taking into account S&D's bidding pattern.

In our view, S&D did not submit two separate bids. Instead, S&D did nothing more than submit one bid and a modification to that bid. At the September 3 bid opening,

DLA had the July 23 bid, an acknowledgment of amendment No. P00001 dated July 26, 1982, and the September 3 bid modification acknowledging amendments Nos. P00001 and P00002, but with the exact dates of amendments No. P00002 and P00003. That modification was at an increase in price over the July 23 bid and specifically referenced the material amendment's date. Given the fact that amendment No. P00001 had already been acknowledged, it is clear to us that the bid evidences an obvious incorrect designation in the amendment numbers in the September 23 modification.

We find that Singleton Contracting Corp., supra, principally relied upon by DLA, is distinguishable. There, unlike here, the bid could reasonably have been interpreted as being submitted with no knowledge of a material amendment.

By letter of today, we recommend that DLA terminate the contract awarded to Staco, Inc., the next low bidder at \$55,990, for the convenience of the Government and award to S&D for \$53,768 based on the September 3 bid modification. In this regard, while the contract was awarded on September 20, 1982, notice to proceed is scheduled for issuance on or about April 15, 1983.

Since our decision contains a recommendation for corrective action, we have furnished copies to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (formerly 31 U.S.C. § 1176 (1976)), which requires the submission of written statements by the agency to those committees concerning the action taken with respect to our recommendation.

for 
Comptroller General
of the United States