

DECISION

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

24966

FILE: B-209241**DATE:** April 22, 1983**MATTER OF:** M. C. Hodom Construction Company, Inc.**DIGEST:**

1. Where estimated cost increase, occasioned by amendment, constituted, at minimum, approximately 11.25 percent of difference between low and second low bid prices, amendment had more than trivial or negligible effect on standing of bidders, and failure of bidder to acknowledge receipt of amendment prior to bid opening was valid basis for determining bid to be nonresponsive.
2. Fact that amendment acknowledged by bidder referenced portion of earlier unacknowledged amendment did not constitute incorporation of former amendment into later or acknowledgment of all previously issued and unacknowledged amendments.
3. Even assuming protest was filed prior to award and contracting officer did not comply with requirements in DAR § 2-407.8(b)(3) (1976 ed.) before making award, such failure is procedural defect and does not affect validity of otherwise valid award.

M. C. Hodom Construction Company, Inc. (Hodom), protests the rejection of its bid as nonresponsive for its failure to acknowledge receipt of amendment No. 0002 under Griffiss Air Force Base invitation for bids No. F30635-82-B-0066.

We deny the protest.

Three amendments were issued by the Air Force. Amendment No. 0001 merely extended the bid opening date and is not material. Amendment No. 0002 contained addendum No. 1 to the technical specifications. Amendment No. 0003 added addendum No. 2 to the specifications and substituted one building for a building added by addendum No. 1, but left unchanged other specification changes included in addendum No. 1. Hodom acknowledged only amendment No. 0003.

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Hodom argues, first, that its bid was responsive since, by acknowledging receipt of addendum No. 2 in its bid, it thereby acknowledged receipt of, and agreed to be bound by the provisions in, amendment Nos. 0001, 0002 and 0003. Hodom alleges it knew of the provisions in amendment No. 0002 and considered these in formulating its bid price. Hodom further argues that the following language in addendum No. 2 incorporates amendment No. 0002 into the invitation and gives clear indication that Hodom knew of and intended to be bound by the provisions in amendment No. 0002:

"Substitution: From Addendum #1, dated 23 July 82; substitute 'B/430' for 'B/436' in deletion requirement for all exterior and interior work."

Second, Hodom contends that its failure to acknowledge amendment No. 0002 was immaterial and may be waived since the value of the increased work required by that amendment equals only about 0.25 percent of the cost of the entire contract. That amount, Hodom states, is trivial when compared to the additional \$10,000 incurred by the award to the second low bidder.

The contracting officer argues that rejection of the Hodom bid was correct because of the materiality of that amendment. Amendment No. 0002 changed various technical requirements of the specifications and the Government estimate of the cost impact is approximately \$9,156. The contracting officer also believes that the Hodom acknowledgment of amendment No. 0003 can in no way be construed as constituting an acknowledgment of the receipt of amendment No. 0002.

The general rule concerning the effect of a bidder's failure to acknowledge an amendment prior to bid opening is that such a failure cannot be waived if the amendment affects in other than a trivial or negligible manner either (1) the price, quantity, quality, or delivery requirement or (2) the relative standing of the bidders. Defense Acquisition Regulation (DAR) § 2-405(iv)(B) (1976 ed.). In determining the effect of an amendment, we consider the cost increase occasioned by the amendment vis-a-vis, in the first instance, the total cost of the contract work and, in the second instance, the price difference between the low bid and the second low bid. Assuming the correctness of the agency's estimate of the increased cost, the amendment could

not be considered to affect the relative standing of the bidders in a trivial or negligible manner. However, we believe the same may be said as regards the cost that Hodom would assign to the amendment. Even assuming the amendment would increase the cost of the Hodom bid by only 0.25 percent, this would constitute approximately 11.25 percent of the \$9,600 difference between the Hodom low bid price and the price of the second low bidder. We consider the difference to be material. See Navaho Construction, B-192620, January 16, 1979, 79-1 CPD 24, where the difference was 13.34 percent.

We do not agree with Hodom's contention that since a portion of addendum No. 1 (amendment No. 0002) was referred to in addendum No. 2, either this reference constituted an incorporation of the entire addendum into amendment No. 0003 or, by acknowledging amendment No. 0003, Hodom also acknowledged the receipt of all previous amendments. While the mention of addendum No. 1 in addendum No. 2 may have placed Hodom on notice that addendum No. 1 existed, we cannot conclude that Hodom was bound to comply with addendum No. 1 in its entirety merely because it acknowledged receipt of addendum No. 2. Addendum No. 1 included changes (mechanical) to the specifications other than those connected with the substitution of one building for another. As to the argument that by acknowledging amendment No. 0003, Hodom was also acknowledging all previous amendments, we have held that acknowledgment of a later amendment does not constitute acknowledgment of prior amendments. B-175559, May 30, 1972.

Finally, Hodom has raised the issue of the contract being awarded prior to the final resolution of its protest by our Office. Even assuming that Hodom's protest may be considered as one filed with the contracting agency and our Office prior to award, the failure of the contracting officer to handle the protest as a preaward protest as provided for in DAR § 2-407.8(b)(3) (1976 ed.) is merely a procedural deficiency which does not affect the validity of a properly awarded contract. Dumont Oscilloscope Laboratories, Inc., B-190528, March 6, 1978, 78-1 CPD 172.

The protest is denied.

for *Harry R. Van Cleave*
Comptroller General
of the United States