

DECISION

2515

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

FILE:

B-208877

DATE: May 17, 1983**MATTER OF:**

Law Brothers Contracting Corporation

DIGEST:

Where a bidder fails to acknowledge the receipt of an amendment to a solicitation which changes the applicable wage rate and extends the bid opening date, the bidder's failure to acknowledge receipt, either actually or constructively, cannot be waived as a minor irregularity and bid must be rejected.

Law Brothers Contracting Corporation protests the rejection of its low bid under invitation for bids DACA51-82-B-0098, issued by the U.S. Army Corps of Engineers, for the construction of four steel arch magazines for the storage of ammunition at Fort Drum, New York.

We deny the protest.

The solicitation was issued on June 30, 1982. Amendment nos. 1 and 2 revised the wage rates applicable to trades needed to perform the contract. Amendment No. 2 also changed the bid opening date and time from 2:00 p.m. on July 29 to 11:00 a.m. on August 4. The Army also issued amendment No. 3 which revised two provisions in the specifications. Ten bids were submitted and Law Brothers was the apparent low bidder. The Army, however, rejected Law Brothers' bid as nonresponsive and made award to John R. Dudley Construction, Inc., because Law Brothers did not acknowledge amendment No. 2.¹

¹Since it decided Law Brothers' bid was nonresponsive because that firm failed to acknowledge amendment no. 2, the agency made no determination whether Law Brothers' failure to also acknowledge amendment No. 3 rendered its bid nonresponsive. Amendment No. 3 did not change the bid opening date.

025595

Law Brothers argues that its bid is responsive because it constructively acknowledged the amendment and, in the alternative, that the amendment was immaterial as the new wage rates would have only a trivial effect on its costs and would not have caused it to change its price. In support of its position that it constructively acknowledged the amendment, the protester has submitted telephone bills and an affidavit by its president. According to the affidavit, on July 22 Law Brothers sent its bid forms to its agent in New York City, which is where the bids were to be delivered. It had written the original bid opening date on the bid forms prior to sending them to New York. On July 28 Law Brothers received amendment No. 2 and subsequently instructed its agent by telephone not to deliver the bid on July 29. The protester failed, however, to tell its agent to acknowledge the amendment on the bid form. On August 3, the day before bid opening, Law Brothers telephoned its agent in order to coordinate delivery of the bid, and on the morning of August 4 Law Brothers again telephoned its agent, this time to convey its final bid price. The agent delivered Law Brothers' bid on August 4 as planned.

The Army states only that the envelope containing Law Brothers' bid was not postmarked or time-date stamped and therefore it is unable to determine when the bid was received by the contracting officer. The agency further states that there was no indication in the bid that Law Brothers' received amendment No. 2 because the bid listed the bid opening date as July 29, the originally scheduled date, instead of August 4, the extended date.

A bidder's failure to acknowledge the receipt of an amendment which modifies a wage rate determination generally renders its bid nonresponsive and ineligible for award. Vin Construction Company, Inc., B-206526, July 30, 1982, 82-1 CPD 637. Contrary to the protester's argument, this failure may not be waived even though the possible impact on the bid price may be de minimus because absent acknowledgment the bidder normally could not be required to pay the specified wages to its employees. Air Services Company, B-204532, September 22, 1981, 81-2 CPD 240. A bidder's failure to acknowledge such an amendment may only be waived where the impact of the wage rates in the amendment on the bid price is minimal and the bidder's employees are already covered by a collective bargaining agreement which requires the bidder to pay them at the wage

rate included in the amendment. Brutoco Engineering & Construction, Inc., B-209098, January 4, 1983, 62 Comp. Gen. _____, 83-1 CPD 9. Here, there is no evidence that such an agreement exists.

Where a material amendment extends the bid opening date, as is the case here, the submission of a bid bearing the extended bid opening date establishes that the bidder received the amendment and constitutes constructive acknowledgment of the amendment. See Artisan Inc., B-186601, August 6, 1976, 76-2 CPD 132. Under appropriate circumstances, even the submission of the bid on the extended opening date may indicate constructive notice. See Arrowhead Linen Service, B-194496, January 17, 1980, 80-1 CPD 54.

Law Brothers' bid, however, lists the bid opening date as the originally scheduled date of July 29 rather than the extended date of August 4, and does not include any indication that the firm did in fact receive the amendment. While the protester asserts that it submitted the bid, on the revised opening date, the record does not establish that fact. As stated above, the bid is not time/date stamped and the Army apparently has no other record of when the bid was actually received. Moreover, the fact that the protester's telephone bills show that it made calls to New York on August 3 and 4 does not establish that the bid was submitted on August 4; such calls could have been made for any number of business reasons.

Therefore, we fail to find either actual or constructive acknowledgment of the amendment. Thus, the Army properly rejected Law Brothers' bid.

The protest is denied.

Milton J. Aoulan
for Comptroller General
of the United States