DECISION

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

FILE: B-219937 **DATE:** December 26, 1985

MATTER OF: Kinross Manufacturing Corporation

DIGEST:

1. Inquiries to a contracting agency by a congressional aide regarding rejection of a constituent's bid can reasonably be considered as a protest to the agency where the aide ostensibly represents the interests of the constituent and, while not expressly indicating an intent to protest, adequately conveys the constituent's dissatisfaction to the agency.

2. Protest filed with GAO before resolution of an initial protest filed with the contracting agency is timely under Bid Protest Regulations.

3. Failure of an agency simultaneously to furnish a copy of a protest report to the protester and to GAO does not warrant rejection of the report where the protester is not prejudiced by the agency's noncompliance with this procedural requirement.

4. A bid must be rejected as nonresponsive although the bidder indicates its awareness of one aspect of a solicitation amendment, i.e., the fact that the bid opening had been extended, where this action does not clearly indicate that the bidder received or even had knowledge of the other substantive changes made by the amendment.

5. A solicitation amendment is material where the requirements added by the amendment, although not affecting the overall price of performance, will affect the quality of the product being procured in more than a trivial manner.

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Kinross Manufacturing Corporation protests the award of a contract to Martin Electronics, Inc. under invitation for bids (IFB) No. DAAA09-84-B-0898, issued October 24, 1984 by the United States Army Armament, Munitions, and Chemical Command, Rock Island, Illinois. Kinross contends that the Army improperly rejected its low bid as nonresponsive for failure to acknowledge an amendment to the solicitation.

We deny the protest.

The Army issued four amendments to the solicitation, which was for a quantity of signal illumination kits used with Navy survival vests. Bidders were required to acknowledge all amendments when submitting their respective bids. Amendment No. 4, issued April 22, 1985, extended the bid opening date from April 23 to May 22, 1985. The amendment also referenced certain technical drawings and specifications that, according to the contracting officer, required that a "chamfered," or beveled, edge be added to the signal kit's case mouth. The amendment also required that an originally-prescribed clear enamel sealant be replaced with a varnish sealant.

Kinross, the apparent low bidder, expressly acknowledged receipt of only the first three amendments, returning them with its bid package on May 18, 1985. Instead of returning the fourth amendment, however, Kinross merely indicated, by means of a handwritten note in the appropriate box of the amendment acknowledgment form, that the opening date had been extended and that the extension was per a named agency official. Kinross indicated that the effective date of amendment No. 4 was April 29, 1985, 7 days after the actual effective date of that amendment.

After consulting the Naval Weapons Support Center as to the effect of amendment No. 4, the contracting officer determined that Kinross' bid should be rejected as nonresponsive for failure to acknowledge the fourth amendment. The Army subsequently awarded the contract to Martin Electronics, Inc.; performance has been delayed pending our resolution of the protest.

Timeliness

The Army contends that Kinross' protest is untimely and accordingly should be dismissed under our Bid Protest Regulations, which require protests to be filed not later than 10 days after the basis for them is known or should have been known, whichever is earlier. See 4 C.F.R. § 21.2(a)(2) (1985). Kinross, the Army maintains, was at

least on constructive notice of its basis for protest on July 18, when the contracting officer and several other agency officials met with an aide of the Congressman representing the district in which Kinross is located regarding the determination that Kinross' bid was nonresponsive. The Army contends that Kinross' protest should have been filed within 10 working days of July 18. In fact, our Office did not receive the protest, filed by the Member of Congress on behalf of Kinross, until August 13.

Kinross responds that the Army did not complete its review of the nonresponsiveness determination until August 15, the date of a letter from the Secretary of the Army to the Member of Congress. Kinross thus argues that its protest is timely.

We find the protest to our Office timely. Although the Army did not treat them as such, we believe the actions of the congressional aide, who expressed dissatisfaction with the rejection of Kinross' bid during the July 18 meeting and made further inquiries on July 23, can reasonably be regarded as an agency-level protest. The Army evidentally viewed the interest expressed as warranting further internal review, which was completed on August 15 when the Secretary of the Army concurred with the contracting officer's decision. This decision, in effect, constituted initial adverse agency action on the protest. Kinross' protest to our Office therefore, is timely, since it was filed on August 13, or 2 days before that adverse action was taken. See 4 C.F.R. § 21.2(a)(3), which permits protests to be filed here up to 10 days after a protester learns of adverse agency action on its protest to the agency.

In reaching the above conclusion, we recognize that the congressional aide never expressly advised the Army that he was filing a protest on behalf of Kinross. We note, however, that a protest need not be in any particular form, so long as it can be reasonably considered as lodging specific objections to the agency's actions. See Hill Industries, B-210093, July 6, 1983, 83-2 CPD ¶ 59. Here, the Army was aware that the aide was ostensibly representing the interests of Kinross. Moreover, the aide adequately conveyed Kinross' dissatisfaction with the rejection of its bid and requested that this decision be reviewed. See Worldwide Marine, Inc., B-212640, Feb. 7, 1984, 84-1 CPD ¶ 152; compare Lion Recording Services, Inc.--Reconsideration, B-188768, Nov. 15, 1977, 77-2 CPD ¶ 366 (letters sent by congressman to procuring activity did not constitute a protest when letters merely

initiated an informational exchange between the congressman and the agency concerning rejection of constituent's bid).

Kinross' Contentions

Preliminarily, Kinross argues that we should not consider the administrative report submitted by the Army in response to its protest because of the Army's failure to comply with section 21.3(c) of our Bid Protest Regulations. This section provides in pertinent part that the contracting agency "shall simultaneously furnish a copy of the report to the protester." Here, the Army submitted the report to our Office on September 26. Kinross, however, did not receive its copy, which was sent via regular mail and which was postmarked September 30, until October 4.

While the Army did not comply with this procedural requirement, its failure to do so does not warrant rejection of the report. Kinross was not prejudiced by the Army's actions, since under section 21.3(e) of our regulations, it still had 7 days from receipt of the agency report in which to file comments with our Office, and has done so.

Primarily, Kinross protests the Army's determination of nonresponsiveness, based on Kinross' failure expressly to acknowledge all aspects of amendment No. 4. Kinross, citing two decisions of our Office, Atlantic Scientific Corp., B-204895, Feb. 25, 1982, 82-1 CPD ¶ 166, and Algernon Blair, Inc., B-182626, Feb 4, 1975, 75-1 CPD ¶ 76, contends that it should nevertheless be considered as having done so implicitly. Alternatively, Kinross contends that its failure to acknowledge all aspects of amendment No. 4 should be waived as a minor informality, since the amendment is not material.

In each of the two cases cited by Kinross, the bidder failed expressly to acknowledge an amendment that made several changes to the terms of a solicitation, including an extension of the bid opening date. The bidder in each case nevertheless submitted its bid on the new opening date.

As a general rule, a bid, to be considered for award, must comply in all material respects to the terms of a solicitation. 48 C.F.R. § 14.405 (1985). Minor irregularities, however, may be waived. 48 C.F.R. § 14.405 (1985). For example, the failure of a bid to include an express acknowledgment of a material amendment does not preclude a contracting activity from considering the bid

for award where the bid "clearly indicates that the bidder received the amendment." 48 C.F.R. § 14.405(d)(1) (emphasis added). In the two cited cases, we determined that each bidder, although failing expressly to acknowledge an amendment, had clearly indicated its knowledge of the amendment. In this regard, we noted that each bidder's submission of its bid by the respective bid opening date reflected actual knowledge of the amendment and all the information contained therein. We concluded that this action constituted an implied acknowledgment of the amendment, thereby binding the bidder to perform all the changes set forth in the amendment at the prices stated in its bid.

We believe Kinross' actions are distinguishable. Kinross expressly indicated its awareness of one aspect of amendment No. 4, i.e., the fact that the bid opening date had been extended. In a handwritten note, Kinross indicated that its source of information as to the extension was an agency official, not the amendment itself. In addition, Kinross inserted an effective date that was different from the effective date of the amendment. We do not consider this action as clearly indicating that Kinross received or even had knowledge of the amendment. At most, the bid indicates that Kinross' knowledge was limited to the new bid opening date. We therefore cannot waive Kinross' failure to acknowledge amendment No. 4 as a minor irregularity. Consequently, we cannot charge Kinross with knowledge of the entire amendment, and we do not believe the firm could be legally required to provide the changes required by the amendment at its original bid price.

We find that the Army acted properly in rejecting Kinross' bid as nonresponsive, because it was neither an express nor an implied offer to provide the exact thing described in the solicitation, as amended. See McGraw Edison Co., et al., B-217311, et al., Jan. 23, 1985, 85-1 CPD ¶ 93.

We also reject Kinross' alternate argument that its failure to acknowledge the amendment should be waived as a minor informality. Essentially, Kinross argues that so far as the changes made by amendment No. 4 minimally affect the overall price of the contract, the amendment is not material. We note, however, that price is not the only dispositive factor in determining whether a particular amendment is material. Other factors, such as the effect of the amendment on quality of performance, must also be considered. See L.B. Samford, Inc., et al., B-215859, et al., Nov. 14, 1984, 84-2 CPD ¶ 533. Here, the change to

a new sealant apparently will not affect the quality of the signal kit. The record indicates that this change was only issued because the originally-prescribed sealant is no longer available. The Army, however, asserts that the addition of the chamfer, or beveled edge, affects the quality of this product. This requirement, the Army states, will facilitate the assembly of the signal kit's case mouth and permit better seating and sealing of the cap. Moreover, according to the Army, the Naval Weapons Support Center will not accept the signal kits without this change. Kinross has presented no evidence to the contrary.

The record therefore supports the Army's determination that the addition of the chamfer is material, and we agree that Kinross' failure to acknowledge the amendment in its entirety rendered its bid nonresponsive.

The protest is denied.

Harry R. Van Cleve
General Counsel