



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Professional Aviation Maintenance & Management  
Services, Inc.  
**File:** B-232078  
**Date:** October 13, 1988

### **DIGEST**

1. A bidder's failure to acknowledge a material amendment normally requires the rejection of the bid as nonresponsive. However, an amendment may be considered constructively acknowledged where the bid itself includes one of the essential items appearing only in the amendment, such that the bid clearly indicates that the bidder received and agreed to the terms of the amendment.
2. Protest against alleged apparent solicitation impropriety (failure to issue as a small business set-aside) must be filed prior to bid opening date.

### **DECISION**

Professional Aviation Maintenance & Management Services, Inc. (ProAMMS), protests the award of a contract to Beech Aircraft Corporation by the Mike Monroney Aeronautical Center of the Federal Aviation Administration (FAA), under invitation for bids (IFB) No. DTFA-02-88-B-00016, issued for the rental of various aircraft. The protester contends that Beech's bid should have been rejected as nonresponsive for failure to acknowledge two amendments to the IFB, and that the FAA acted improperly by failing to set aside the procurement for exclusive small business participation.

We deny the protest in part and dismiss it in part.

The solicitation, which originally called for bid opening on June 1, 1988, was amended on May 5, and again on May 20. Amendment 1, distributed at a pre-bid conference at which representatives of Beech were present, primarily added requirements for aircraft public and passenger liability insurance and clarified the Save Harmless and Indemnity Agreement clause, to show that there was no conflict between it and the Transportation Acquisition Regulation risk and

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indemnities clause 1252.228-73. Amendment 2 extended the bid opening date to June 21, and made several changes, most of which merely clarified language in the IFB, or reduced requirements. Beech failed to formally acknowledge either amendment.

Because of Beech's failure to formally acknowledge the amendments, the contracting officer initially rejected Beech's bid as nonresponsive. However, after Beech protested to the FAA, and upon further review of the record, the agency determined that Beech had constructively acknowledged both amendments. Accordingly, the agency's initial determination of nonresponsiveness was rescinded and the contract was awarded to Beech. ProAMMS then protested to our Office.

As a general rule, a bidder's failure to acknowledge a material amendment requires the agency to reject the bid as nonresponsive. This rule is based on the fact that acceptance of a bid when an amendment has not been acknowledged would afford the bidder the opportunity to decide, after bid opening, whether to furnish extraneous evidence showing that it had considered the amendment in formulating its price or to avoid award by remaining silent. See N.B. Kenney Co., Inc., B-220436, Feb. 4, 1986, 86-1 CPD ¶ 124. Moreover, if such a bid were accepted, the bidder would not legally be bound to perform in accord with the terms of the amendment, and the government would bear the risk that performance would not meet its needs. See Doyan Construction Co., Inc., B-212940, Feb. 14, 1984, 84-1 CPD ¶ 194. However, an amendment may be constructively acknowledged where the bid itself includes one of the essential items appearing only in the amendment, thus, evidencing the bidder's receipt of, and intent to be bound by, the amendment. See C Construction Co., Inc., B-228038, Dec. 2, 1987, 87-2 CPD ¶ 534. The submission of the bid on the extended bid opening date, without more, is not sufficient to show that the bidder agreed to comply with the terms of the amendment. Id.

In the present case, Beech's bid clearly indicates that it received the amendments and that it intended to perform in accordance with the terms of the amendments. Beech constructively acknowledged amendment 1 by stating in its bid cover letter that "Beech Aircraft Corporation is including aircraft liability insurance for both schedules 1 and 2. A certificate of insurance shall be delivered to the contracting officer at the appropriate time." This specifically acknowledges compliance with the insurance requirement which was not contained in the original IFB, and was added by amendment 1. Beech's bid cover letter also

explicitly indicates knowledge of and intent to conform to the two material provisions added in amendment 2, one of which is that the aircraft be serviced at the FAA Aeronautical Center. Beech's letter states that: "service for these aircraft will be performed at your [FAA] facilities at Will Rogers by United Beechcraft." Will Rogers Airport is the site of the FAA Aeronautical Center. Beech's bid also evidenced compliance with the other material requirement under the amendment, which pertained to the types of aircraft which were acceptable, by offering planes which complied with the amended specifications pertaining to year of manufacture and type of aircraft required. The remaining changes to the solicitation in amendment 2 were merely for purposes of clarification, further description, or the relaxation of certain requirements, and had no affect on price, quantity, quality, or delivery. Accordingly, the FAA properly concluded that Beech had constructively acknowledged the two amendments.

ProAMMS' second basis of protest, that since the procurement was previously successfully conducted as a set-aside, it was required to be set aside for exclusive small business participation, is untimely. The IFB indicated that the procurement was not a small business set-aside. ProAMMS failed to protest this until after bid opening. Since this objection involves an apparent alleged solicitation defect which should have been raised prior to bid opening this basis of protest is untimely and will not be considered. See 4 C.F.R. § 21.2(a)(1) (1988).

ProAMMS asserts that we should consider this aspect of its protest under the significant issue exception in our Bid Protest Regulations, 4 C.F.R. § 21.2(b). However, this exception is limited to considering untimely protests that raise issues of widespread interest to the procurement community which have not been considered on the merits in previous decisions. Alpha Parts & Supply, B-225401, Jan. 15, 1987, 87-1 CPD ¶ 62. We have considered protests concerning an agency's failure to set aside a requirement that has been successfully acquired through a small business set-aside, and we have held that the contracting agency has discretion to withdraw the set-aside when it determines that there is no reasonable expectation of receiving bids from at least two responsible small businesses, or that award

cannot be made at a reasonable price. See Computer Tomography Repair Service, Inc., B-228050, Nov. 2, 1987, 87-2 CPD ¶ 428; Abel Converting, Inc., B-224223, Feb. 6, 1987, 87-1 CPD ¶ 130. Accordingly, we will not consider this issue under the significant issue exception.

The protest is denied in part and dismissed in part.

*for Seymour Spas*  
James F. Hinchman  
General Counsel