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**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Pro Alarm Company, Inc.

File: B-240137

Date: September 20, 1990

David F. Riddle, for the protester.
Roberta M. Truman, Esq., Department of Justice, for the agency.
Jacqueline Maeder, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly rejected a bid that failed to acknowledge a solicitation amendment which was not material because it merely relaxed the agency's requirements by extending the time for performance from 30 to 60 days.

DECISION

Pro Alarm Company, Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. 247-0001, issued by the Federal Bureau of Prisons, Federal Prison Camp, Nellis Air Force Base, Nevada, for the installation of a building fire and smoke alarm system. Pro Alarm complains that the Bureau improperly rejected its bid as nonresponsive because the firm had failed to acknowledge the sole amendment to the IFB.

We sustain the protest.

The solicitation, issued on May 18, 1990, called for bid opening at 2:00 p.m. on Monday, June 18. By an amendment dated June 6 but not mailed until Tuesday, June 12, the Bureau extended the contract completion time from 30 to 60 days and included as an attachment the minutes of the pre-bid conference. The bid opening date was not extended.

Pro Alarm sent its bid via Federal Express to Nellis on Friday, June 15, and received the amendment on Saturday, the 16th. Unable to reach the contracting officer on Saturday, a representative of Pro Alarm called the contracting officer on Monday morning, stated that the protester had not received the amendment before it mailed its bid, and asked if a facsimile-

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transmitted acknowledgment would be acceptable. The contracting officer stated that it would not be necessary to "fax" an acknowledgment; he would simply notate Pro Alarm's acknowledgment on the bid form.

Of the five bids submitted, Pro Alarm's was the lowest at \$33,655; the second low bid was \$42,088. Pro Alarm, however, was the only bidder failing to acknowledge receipt of the amendment. When notified that its bid was rejected as nonresponsive for this reason, Pro Alarm filed this protest.

Pro Alarm argues that it is being unfairly penalized because of a mistake made by the contracting officer. The protester says that it inquired as soon as possible after receiving the amendment as to the best way to acknowledge its receipt in a timely manner, and notes that it offered to "fax" an acknowledgment and send a hard copy later, but was told by the contracting officer that he would simply note the oral acknowledgment on the bid form. Since the amendment required no adjustment to its bid price, Pro Alarm states, it believed that no other acknowledgment was necessary. Pro Alarm also argues that it did not have enough time in which to acknowledge receipt of the amendment because the Bureau failed to mail it sufficiently in advance of bid opening.

The Bureau argues that it treated all prospective bidders equally by mailing the amendment to them simultaneously, and in adequate time for them to respond, as shown by the fact that four of the five timely acknowledged receipt of the amendment. The protester also could have done so, the agency suggests, if on Saturday it had sent an acknowledgment by overnight mail rather than waiting until Monday to speak to the contracting officer. Although the Bureau concedes that the contracting officer erred when he advised Pro Alarm that on the basis of the firm's telephone call he could notate an acknowledgment on its bid form, the agency argues that the protester was not prejudiced by this advice because by the time it was given it was too late for the protester to have submitted a written acknowledgment.^{1/} The agency maintains that since the protester bore the responsibility for

^{1/} The IFB included the "Amendments to Invitation for Bids" clause found at Federal Acquisition Regulation (FAR) § 52.214-3 (FAC 84-56), which provides that bidders shall acknowledge receipt of an amendment (1) by signing and returning the amendment, (2) by identifying the amendment number and date in the space provided for this purpose on the form for submitting a bid, (3) by letter or telegram, or (4) by facsimile, if facsimile bids are authorized in the solicitation. Facsimile bids were not authorized by this solicitation.

acknowledging the amendment, since it did not do so, and since the amendment made a material change in the terms of the solicitation by extending the time for performance, Pro Alarm's bid properly was rejected as nonresponsive.

We need not decide the issue of whether the agency allowed sufficient time for bidders to respond to the amendment because we conclude it was not material and Pro Alarm's failure to acknowledge it may therefore be waived.

Generally, a bid which does not include an acknowledgment of a material amendment must be rejected because absent such an acknowledgment the bidder is not obligated to comply with the terms of the amendment, and its bid is thus nonresponsive. Gulf Elec. Constr. Co., Inc., 68 Comp. Gen. 719 (1989), 89-2 CPD ¶ 272. However, the failure of a bidder to acknowledge receipt of an amendment may be waived or allowed to be cured by the bidder where the amendment has either no effect or merely a negligible effect on price, quantity, quality, or delivery. FAR § 14.405(d)(2); Gentex Corp., B-216724, Feb. 25, 1985, 85-1 CPD ¶ 231. Whether a change required by an amendment is more than negligible is based on the facts of each case. De Ralco, Inc., 68 Comp. Gen. 349 (1989), 89-1 CPD ¶ 327.

In this case, the only change to the specifications made by the amendment was an extension of the time for contract performance from 30 to 60 days. Under the original solicitation, the contractor had to complete the installation of the fire and smoke alarm system within 30 days of receipt of the notice to proceed. Under the amended IFB, the contractor may take up to 60 days to complete the installation. Thus, the amendment, by allowing more time for contract performance, lessened the solicitation's requirements. Since Pro Alarm's bid was low even though it was based on the original, more stringent delivery requirement, award to Pro Alarm would not prejudice any other firm. Comet Cleaners Co., B-219993.2, Dec. 24, 1985, 85-2 CPD ¶ 707; Patterson Enters. Ltd., B-207105, Aug. 16, 1982, 82-2 CPD ¶ 133.

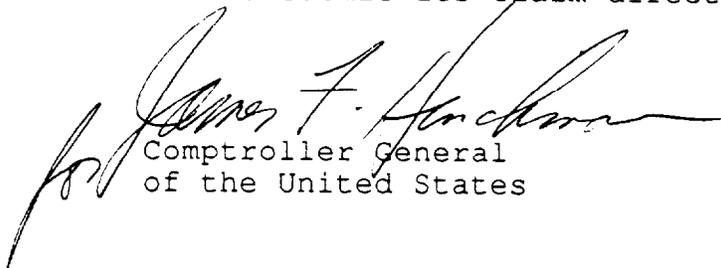
We find that the agency's primary reliance on Reliable Bldg. Maintenance, Inc., B-211598, Sept. 19, 1983, 83-2 CPD ¶ 344 and Customer Metal Fabrication, Inc., B-221825, Feb. 24, 1986, 86-1 CPD ¶ 190, is misplaced. In these cases, amendments were determined to be material because they placed additional obligations on contractors. In Reliable, an amendment incorporated by reference, among other clauses, a liquidated damages clause. Without a contractor's express agreement to the amendment, the firm would not be contractually bound to comply with that clause. Similarly, the amendment at issue in Customer Metal Fabrication extended the effective period

during which the government could issue delivery orders for winches by an additional 93 days and advanced the cut-off date after which the contractor was no longer required to make deliveries. Without acknowledging the amendment, a firm would not be bound to deliver any winches ordered after the last date for such orders as initially set by the IFB; nor would the firm be obligated to make deliveries through the advanced cut-off date for required performance established under the amendment.

In the case here, however, the amendment imposed no additional obligation on the contractor; it simply relaxed a portion of the agency's requirement by doubling the time available to the contractor to complete the work.

We therefore conclude that the amendment was not material and Pro Alarm's failure to acknowledge it was a minor informality in its bid which could be waived by the contracting officer. FAR § 14.405(d)(2); Loren Preheim, B-220569, Jan. 13, 1986, 86-1 CPD ¶ 29.

We recommend that the Bureau award the contract to Pro Alarm, if otherwise appropriate. We also find the protester to be entitled to the costs of filing and pursuing its protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1990). Pro Alarm should submit its claim directly to the agency.


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