

DECISION



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

FILE: B-183529

DATE: August 19, 1975

MATTER OF: Square Deal Trucking Company, Incorporated

DIGEST:

1. Protest against bidder's failure to formally acknowledge IFB amendment may be filed up to five working days after notice of the Government's acceptance of such a bid. Although amendment was deficient for failure to include the required notification for acknowledgment, protest is against acceptance of bid containing an allegedly unacknowledged amendment and need not be filed prior to bid opening as required for protests against solicitation improprieties.
2. Submission of bid which on its face reflects knowledge of essential element of solicitation amendment (extended bid opening date) constitutes constructive acknowledgment of receipt of the amendment so as to bind bidder to perform all changes enumerated in the amendment.

Square Deal Trucking Company, Incorporated, protests the award of a contract to Bevard Brothers, Incorporated, under invitation for bids (IFB) No. 0443-AA-23-N-5-RB, issued by the Bureau of Materiel Management, Government of the District of Columbia (District). Essentially, the protester contends that Bevard's bid was nonresponsive since it did not include an acknowledgment of a material amendment to the solicitation. Square Deal initially protested to the District against any award to Bevard and notwithstanding the protest the District awarded the contract to Bevard on March 21, 1975. By letter of March 26, 1975, Square Deal filed this protest.

The solicitation, as issued on March 6, 1975, called for the hauling and disposal of sludge for the period March 23, 1975 through June 22, 1975. Prospective contractors were advised that this was a negotiated procurement. Offers were to be submitted by 10:00 a. m. on March 13, 1975.

Prior to receipt of offers, the District was advised by the United States Department of Labor that the applicable wage determination included in the solicitation was incorrect. In order to permit substitution of a new determination, and to allow revision and clarification of other aspects of the solicitation, the District decided to issue an amendment to the solicitation. The District advises that all prospective contractors were notified telephonically prior to March 13, 1975,

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that the deadline for submission of bids had been changed from March 13, 1975 to March 18, 1975, and that an amendment to the solicitation would be forthcoming.

On March 13, 1975, the District issued Addendum No. 1 to the solicitation. The amendment formally extended the date for submission of offers to March 18, 1975 at 10:00 a. m. ; deleted the notification that the procurement was to be negotiated with no public opening; substituted wage determinations of the Department of Labor; and made several other changes to the solicitation documents. The amendment further informed bidders that telegraphic bids were authorized, that any telegram must reference the IFB number, quantities, unit prices, and must include a statement that the bidder agrees to all the terms, conditions, and IFB provisions. Telegrams were also required to indicate acknowledgment of the amendment by signature. There was no other statement in the amendment regarding acknowledgment.

It is Square Deal's position that Bevard's bid is nonresponsive because of its failure either to acknowledge receipt of a material amendment or to attach it to its bid. Also, Square Deal argues that the record does not establish constructive acknowledgment of the amendment by Bevard. In response, the District indicates that in reaching its decision to award to Bevard it considered evidence as to surrounding circumstances and the conduct of the parties. In concluding that the Bevard bid was responsive, the District took into account that the amendment did not indicate that acknowledgment was required, that a Bevard representative was at the public bid opening stipulated in the amendment, that the Bevard representative stated at the bid opening that Bevard bid with full knowledge of the amendment and intended to be bound by it, and that the Bevard representative apparently had a copy of the amendment with him at the bid opening.

The District argues that Square Deal's protest to this Office is untimely since the protester should have been aware, prior to bid opening, that the amendment failed to require acknowledgment, and since it did not protest this defect prior to bid opening. It is true that a protest against an apparent solicitation impropriety is required to be filed either with the procuring agency or this Office prior to bid opening. 4 C. F. R. § 20.2(a) (1975). However, Square Deal's protest concerns the Government's acceptance of an allegedly nonresponsive bid. Under our procedures cited above, the initial protest was required to be filed with the agency no later than five working days after notice of award. Since Square Deal protested to the District, prior to award, and it protested to this Office within five days of notification of the initial adverse agency action, that is, notice of award to Bevard, the protest is timely under our procedures.

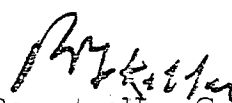
As a general rule, a bidder's failure to formally acknowledge receipt of an amendment may be waived or corrected after bid opening if the

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bid, as submitted, clearly indicates that the bidder received the amendment or if the amendment involved only a matter of form or is one which has little effect on price, quantity, quality, or delivery of the item bid upon. District of Columbia Materiel Management Manual (D. C. Manual) § 2620.14(B)(4)(a), (b) (1974 ed.).

It is clear that the amendment in this case made material changes in the solicitation since it sought to incorporate a revised minimum wage determination. B-178997, October 10, 1973. However, Bevard's bid was dated March 17, 1975, thereby reflecting the extended bid opening date incorporated in the amendment. Thus, the bid as submitted establishes that the bidder had knowledge of an essential element in the amendment. In our opinion submission of a bid which on its face reflects knowledge of an essential element included in a solicitation amendment constitutes constructive acknowledgment of receipt of the amendment so as to bind the bidder to perform all of the changes enumerated in the amendment. Inscop Electronics Corporation, 53 Comp. Gen. 569 (1974) and Imperial Fashions, Inc., B-182252, January 24, 1975. The protester argues that the rule of constructive acknowledgment is not applicable here because the procuring activity orally advised Bevard of the March 18 opening date. However, we think the rule is applicable since the bidder also was advised during the same conversation that a solicitation amendment was forthcoming. In the circumstances, we believe the Bevard bid incorporated the amendment.

Therefore, the District properly waived Bevard's failure to acknowledge the addendum as a minor informality under D. C. Manual § 2620.14(B)(4)(a) (1974 ed.). However, we have advised the District Government that future addenda should contain the notification required by D. C. Manual § 2620.7(B)(4) (1974 ed.) for acknowledgment.


Acting Comptroller General
of the United States