DECISION

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

60342

FILE: B-184308 DATE: December 30,1975

MATTER OF: Ira Gelber Food Services, Incorporated

099 280

DIGEST:

1. Low bidder, after bid opening, cannot "cure" its failure to acknowledge receipt of an IFB amendment because to do so would be tantamount to permitting the submission of a second bid. Bidder's alleged non-receipt of amendment does not appear to have been the result of a deliberate effort to exclude bidder from competition.

2. Bidder's contention that amendment to IFB only repeated obligation required under original IFB's "Site Visit" clause, and therefore, its failure to formally acknowledge receipt thereof should be waived as a minor informality is without merit for while clause required bidders to inspect site so as to acquaint themselves with general and local conditions affecting cost of performance, clause did not impose legally enforceable obligation under IFB for bidder to provide bus transportation for employees as required by amendment and thus did not give Government same rights against bidder as it would possess under amendment.

3. Where only estimate as to value of invitation amendment is bidder's unsupported, self-serving statement, rejection of its bid for failure to acknowledge such amendment was proper, for in determining whether amendment has only "trivial" or "negligible" effect on bid price to permit waiver, it would be inappropriate to permit bidder seeking waiver to determine value as it would give him option to become eligible for award by citing costs that would bring him within de minimis rule or to avoid award by placing larger cost value on effects of amendment.

PUBLISHED DECISION
55 Comp. Gen. .....

Ira Gelber Food Services, Incorporated (Ira Gelber) protests the rejection of its bid and the subsequent award of a contract to another bidder under invitation for bids (IFB) No. N00612-75-B-0069, issued by the Naval Supply Center, Charleston, South Carolina. The invitation solicited bids for the furnishing of mess attendant services at the Naval Air Station, Key West, Florida. Amendment 0001 to the IFB added the following "Employee Transportation (NAS Boca Chica only) (Item 0002)" clause to Section F.2 of the invitation:

> "Since NAS (Boca Chica) is considered an inconvenient, inaccessible and outlying area to the labor market, the Contractor shall furnish transportation for his employees to NAS (Boca Chica), on a no-cost-to-the-employee basis. Such cost shall in no way be transferred to the employee or affect his take-home pay in any manner. The Contractor shall provide for transportation to pick-up each employee at a specified point not more than two city blocks from the employee's place of residence and return the employee to the same place upon completion of his work shift. The transportation provided must be for the sole purpose of transporting employees to Building 515 at NAS (Boca Chica) and return. Since satisfactory public transit service is not available, the Contractor shall not attempt to require the employee to obtain public transportation on a reimbursable basis. The Contractor may arrange to reimburse an employee who drives his own car and transports fellow employees to the NAS (Boca Chica) galley or provide other suitable transportation in kind at his discretion. Suitable transportation is defined as pick-up within two blocks of place of residence not more than one hour before working hours and transport to and from NAS (Boca Chica) with return to pick-up point not more than one hour after end of working hours in a closed passenger carrying vehicle such as a bus or automobile." (Emphasis supplied.)

The bids of Ira Gelber (the low bidder) and of T & S Service Associates (the next low bidder) were rejected as nonresponsive for failure to acknowledge receipt of the above amendment. Ira Gelber protests the rejection of its bid contending that it did not receive the amendment, and, therefore, it did not have the opportunity to acknowledge it. Moreover, the protester emphasizes that even had it received the amendment, the failure to acknowledge receipt thereof did not constitute a basis to reject its bid because the original IFB, specifically its "Site Visit" clause, required the

furnishing of transportation for employees and therefore the amendment only repeated an obligation required under the original solicitation. Alternatively, Gelber contends that the amendment was trivial or negligible in nature and therefore the failure to acknowledge it could have been waived under the provisions of Armed Services Procurement Regulation (ASPR) § 2-405(iv) (B) (1974 ed.).

Addressing first the failure of Ira Gelber to receive the amendment, generally, if a bidder does not receive and acknowledge a material amendment to an IFB and such failure is not the result of a conscious and deliberate effort to exclude the bidder from participating in the competition, the bid must be rejected as nonresponsive. Hyde & Norris/ t/a Traveler's Inn Motor Lodge, B-180360, May 20, 1974, 74-1 CPD 272; 40 Comp. Gen. 126, 128 (1960). In his report upon the protest, the contracting officer states that the amendment was mailed on the date of issuance to all firms that had received copies of the invitation. There were 17 bids received in response to the IFB and 13 bidders acknowledged receipt of the amendment. Therefore, we have no reason to believe that the failure of Ira Gelber or any other bidders to receive the amendment was the result of a deliberate attempt on the part of the Navy to exclude them from competition. Torotron Corporation, B-182418, January 30, 1975, 75-1 CPD 69.

The protester has further alleged that the T & S representative present at bid opening has stated that contrary to usual practice, nothing was said about any amendment or anyone's failure to acknowledge it. We think it is clear that even if the bid opening officer had mentioned the amendment at bid opening and had informed those bidders present of their failure to acknowledge receipt thereof, the results of the bid evaluation would not have been altered since neither Ira Gelber nor any other bidder would have been permitted a post-bid opening opportunity to acknowledge the amendment. Even though Ira Gelber may have intended to be bound by all the terms and conditions of the solicitation, the determining factor is not whether the bidder intends to be bound, but whether this intention is apparent from the bid as submitted. It has been the consistent position of this Office that the responsiveness of a bid must be determined from the face of the bid itself, for to allow a bidder to alter or clarify his bid in order to make it responsive would be tantamount to permitting the submission of a second bid. Sheffield Building Co., Inc., B-181242, August 19, 1974, 74-2 CPD 108. To permit a post bid-opening acknowledgement would be precisely the "two bites at the apple" situation that the bid responsiveness rules are intended to preclude. Veterans Administration re Welch Construction Inc. B-183173, March 11, 1975, 75-1 CPD 146.

Ira Gelber next asserts that there was no need for it to acknowledge the amendment since it had bid on the basis of the original invitation's "Site Visit" clause, which the protester contends required the furnishing of a bus to transport its employees to and from the work site. The "Site Visit" clause reads in pertinent part as follows:

> "Bidders are urged and expected to inspect the site where services are to be performed and to satisfy themselves as to all general and local conditions that may affect the cost of performance of the contract, to the extent such information is reasonably obtainable. * * *"

In this regard, Ira Gelber states that as a former contractor fully acquainted with the local conditions at the Key West site it knew that local public transportation was almost non-existent and that personnel would not work at NAS Boca Chica without being furnished transportation. Therefore, Ira Gelber contemplated the use of a bus in performance of the work the cost of which was fully included in its bid and accordingly, its bid as submitted, obligated the firm to comply with the requirements of the amendment without a formal acknowledgement thereof.

In support of its position, the protester cites our ruling in Genest Baking, Inc., B-180999, July 12, 1974, 74-2 CPD 25, which held that where an amendment to an IFB does not impose on the bidder any additional obligations from those required under the original solicitation, the failure to acknowledge such an amendment may be waived. We have reviewed the case and we do not agree with Ira Gelber's analogy of that case to the facts and circumstances of the instant protest. In Genest, supra, the amendment was issued to apprise bidders of the inadvertent omission of the unit of issue (pounds) for four of the items being procured and to instruct them that these items must also be offered on a pound basis as were all the other items. In effect, the amendment merely reiterated the original IFB instructions regarding the unit of issue on which bid prices were to be based. However, in the instant case, we believe the amendment in question imposed an additional obligation on the bidder, not legally enforceable under the original solicitation; namely, that the contractor supply bus transportation for its employees at no cost to them.

While the IFB's "Site Visit" clause required that bidders inspect the site and acquaint themselves with the general and local conditions that could affect their cost of performance, nowhere does the clause either directly or indirectly obligate a potential contractor to furnish bus transportation for its employees. Admittedly, the lack of public transportation may well in fact be a local condition that could adversely affect the cost of performance and may well have been taken into consideration in formulating a bid price, but, the clause itself does not specifically impose any legally enforceable obligation under the original solicitation for a bidder to furnish bus transportation.

Although Ira Gelber may have intended to comply with the terms of amendment 0001, and formulated its bid price accordingly, such an intention was not apparent from the face of its bid. The IFB's "Site Visit" clause did not give the Government the same enforceable rights against the bidder as it would possess under the amendment. Any resultant contract with Ira Gelber would not bind it to assume the costs agreed to by those bidders acknowledging the amendment and acceptance of its bid would therefore be prejudicial to them. Accordingly, since we do not believe, as the protester contends, that the amendment only repeated an obligation already required under the IFB's "Site Visit" clause, Ira Gelber's failure to acknowledge the receipt thereof was fatal to the responsiveness of its bid.

Alternatively, Ira Gelber takes the position that the amendment had a "trivial" or "negligible" effect on the total price of the contract. The protester therefore contends that its failure to acknowledge the amendment did not affect price, quality or quantity, or delivery, or the relative standing of the bidders, and that such a deviation constituted a minor informality which could be waived in accordance with ASPR § 2-405(iv) (B) (1974 ed.). In this regard, the general rule as to the effect of a bidder's failure to acknowledge an amendment to an invitation for bids is that when the amendment affects, in other than a "trivial or negligible" manner, the price, quantity, or quality of the procurement, the bidder's failure to acknowledge the amendment in compliance with the terms of the invitation or amendment cannot be waived. See ASPR § 2-405 (1974 ed.). The basis for this rule is the principle that the acceptance of a bid which disregards a material provision of an invitation, as amended, would be prejudicial to other bidders. Clarification of the bid after opening may not be permitted because the bidder in such circumstances would have the option to decide to become eligible by furnishing extraneous evidence that the amendment had been considered, or to avoid award by remaining silent. 41 Comp. Gen. 550 (1962).

In support of its position, Ira Gelber states that its bid included an allowance of $170 per month ($2,040 per year) for all travel, including the cost of a bus, and therefore the value of the amendment when compared with the difference between Ira Gelber's bid and that of the successful contractor was "trivial or negligible" and did not alter their respective standing for award. In further support of its position, Gelber refers to our previous decisions, Algernon Blair, Inc., B-182626, February 4, 1975, 75-1 CPD 76, and Flippo Construction, Co., Inc. B-182730, March 7, 1975, 75-1 CPD 139 which cite 52 Comp. Gen. 544 (1973), wherein we stated that the failure to acknowledge receipt of an amendment may be waived in circumstances where the monetary change effected by the amendment is trivial or negligible in relation to the scope of the overall work and the difference between the two low bid prices. In 52 Comp. Gen. 544, supra, we agreed with the procuring activity that the failure to acknowledge receipt of an amendment could be waived as a minor informality since the value of the amendment was estimated by the Government as $966.00 or 0.138 percent of the overall $702,000 bid for the work (as compared with the protester's estimated value of the amendment in the present case of $2,040 per year or .635 percent of the overall $304,900 bid for the work), and 5.682 percent of the $117,000 difference between the two lowest bids (as compared with the protester's estimate of 7.432 percent of the $27,446.40 difference between its bid and that of the contractor).

However, all the above cited cases are clearly distinguishable from the present case since in each of those referenced decisions there was a Government estimate of the value of the amendment in question providing a basis from which our Office could apply the rule (standard) enunciated in 52 Comp. Gen. 544, supra, so as to determine whether the change affected by the amendment was trivial or negligible. Here, the contracting officer reports that the activity was unable to estimate the value of the amendment in view of the number of variables present. In the present case, the only estimate as to the value of the amendment are the protester's unsupported self-serving statements. In this regard, we believe that in determining whether the value of an invitation amendment is such as to allow waiver of the failure to acknowledge receipt thereof, it would be inappropriate to accept the value placed upon it by the bidder seeking the waiver. 53 Comp. Gen. 64, 66 (1973). To allow that would be to revert to the situation wherein a bidder after publication of bid prices could have the option to decide to become eligible for award by citing costs which would bring him within the de minimis doctrine,

or to avoid award by placing a larger cost value on the effects of the amendment.

Since there is no Government estimate of the value of the amendment, we have no basis to conclude that the award was improper, and since the award was made six months ago, we do not believe any useful purpose would be served in now obtaining an independent estimate of the cost of complying with the amendment. However, we are requesting of the Secretary of the Navy that in future procurements where the application of the de minimis rule is in question, our Office be furnished the procuring activity's best estimate of the value of the unacknowledged amendment. While we recognize that the formulation of an estimate may in certain instances be extremely difficult, it is nevertheless imperative that we have the benefit of such information in order to determine whether the aforementioned rule is to be applied so as to permit or deny waiver of the bidder's failure to acknowledge an amendment.

Accordingly, the protest is denied.

Deputy Comptroller General
of the United States