

DOCUMENT RESUME

02368 - [A1452465]

[Awardee's Failure to Acknowledge Solicitation Amendment].
B-188394. May 17, 1977. 5 pp.

Decision re: Universal Contracting and Brick Painting Co.; by
Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: National Defense: Department of Defense -
Procurement & Contracts (058).
Organization Concerned: Department of the Navy: Navy Yard,
Washington, DC; Mid-South Building Supply Co., Inc.
Authority: 33 Comp. Gen. 508. 52 Comp. Gen. 544. B-182626
(1975). A.S.P.R. 2-405. A.S.P.R. 2-405(iv) (E).

Bidder protested that awardee failed to acknowledge a
solicitation amendment and was thereby nonresponsive.
Non-acknowledgement was minor informality without effect on
competitive standing of bidders. Protest was denied. (DJM)

P.L. I
Feldman

DECISION



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

FILE: B-188394

DATE: May 17, 1977

MATTER OF: Universal Contracting and Brick Pointing Co.

DIGEST:

Failure of low bidder to acknowledge an amendment with an estimated value of \$820 which is 0.375 percent of the \$218,908 low bid may be waived as a minor informality where the value of the amendment is only 1.369 percent of the \$59,903 difference between the low bid and the next low bid, and had no effect on the competitive standing of the bidders.

Universal Contracting and Brick Pointing Co. (Universal), the second low bidder under invitation for bids (IFB) No. N62477-76-B-3627, issued by the Washington Navy Yard, protests the award of a contract to the low bidder, Mid-South Building Supply Co. Inc. (Mid-South), on the ground that the Mid-South bid, which failed to acknowledge receipt of amendment No. 1 to the IFB, was nonresponsive.

The IFB, issued on November 3, 1976, called for exterior improvements at the Bellevue Housing Project, Naval District Washington. Bids were originally scheduled to be opened on December 2, 1976, but by amendment No. 1 the bid opening date was extended to December 16, 1976. The amendment stated:

"Offerors must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended * * *. Failure of your acknowledgement to be received * * * may result in rejection of your offer."

Bids were opened on December 16, 1976, and five bids were received. Mid-South's base bid was \$218,808 while the second low bid, submitted by Universal, was \$278,711. Mid-South did not acknowledge receipt of the amendment on its bid.

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The record discloses that on December 1, 1976, the day before the original bid opening date, a representative of Mid-South hand-carried its bid to the officer in charge of construction. The clerk in the office advised the Mid-South representative that amendment No. 1 had postponed the bid opening to December 16, 1976, and handed the representative amendment No. 1. The Mid-South representative then retrieved its bid. The bid of Mid-South subsequently was resubmitted and was opened on December 16, 1976.

The record contains a statement of the Mid-South representative dated January 10, 1977, detailing the facts concerning the receipt of amendment No. 1 and the revision of the original bid figures to accommodate the changes made by the amendment. The representative states, "Although my bid is dated 1 December 1976, the original figures were changed after receipt of the amendment. I hand-carried my revised bid to Building 210 on 16 December 1976." The original Mid-South bid form shows that all bids had been revised by "whiting out" the original bid figures.

"Upon verification that amendment No. 1 had been received by Mid-South, failure to acknowledge the amendment was waived by the Navy as a minor informality and award was made to Mid-South in the amount of \$249,654 (Base Bid and Bid Item 2).

The Navy argues that the "whiting out" of the original bid is evidence of constructive receipt of amendment No. 1. Moreover, the Navy asserts that the receipt of the amendment by the Mid-South representative and the subsequent oral verification of receipt is sufficient to permit acceptance of a bid which contains no other indication of acknowledgement. In support of this position, the Navy cites our decision in 33 Comp. Gen. 508 (1954).

With respect to the cost impact of the amendment, the Navy states that amendment No. 1 clarifies the plans, extends the bid opening and makes a minor modification to the exterior plan, by changing the exterior for one of the 82 units covered by bid item 1. Specifically, the exterior covering for Lookout Green Unit 2 and 3 was changed from scheme 3 to scheme 10. The cost increase of \$820 is considered by the Navy to have only a trivial effect on price and no effect on the relative standing of the bidders. Accordingly, the Navy argues that failure to acknowledge receipt of the amendment may be waived as a minor informality in accordance with Armed Services Procurement Regulation (ASPR) § 2-405(iv)(B) (1976 ed.).

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Universal argues that the responsiveness of Mid-South's bid must be determined from the face of the bid itself. Specifically, Universal contends that the failure to formally acknowledge an amendment is properly waived as a minor informality only where the bid as submitted reflects knowledge of an essential element in the amendment (emphasis of Universal). Therefore, Universal asserts that the failure of Mid-South to acknowledge receipt of the amendment on the face of its bid renders the bid nonresponsive. Universal states that extraneous evidence, such as the January 10, 1977, statement of the Mid-South representative, may not be considered in determining whether Mid-South acknowledged the amendment.

Universal argues that the "whiting out" of the bid prices is not evidence that Mid-South considered amendment No. 1 because the bid itself does not indicate when the "whiting out" occurred. Citing 33 Comp. Gen. 508 (1954), Universal also asserts that for an oral acknowledgement of an amendment to be effective, an authorized representative must acknowledge the same.

In response to the Navy's estimate of the cost impact of the amendment, Universal states that the amendment results in a \$6,784 increase in costs. This occurs because Universal believes that the value of deleted and added work must be added rather than subtracted to arrive at the cost impact. Furthermore, Universal argues that two units and not one unit are involved in the modification.

In view of our disposition of the issue involving the cost impact of the amendment, we will not consider the other arguments involved in this protest.

Essentially, the Navy states that whether or not failure to acknowledge receipt of this amendment renders the bid nonresponsive depends on whether "the amendment clearly would have no effect or merely a trivial or negligible effect on price, quality, delivery, or the relative standing of bidders." ASPR § 2-405(iv)(3) (1976 ed.). The Navy reviewed the amendment and prepared an estimate of its value. The exterior covering for Lookout Green Unit 2 and 3 was changed from scheme 3 to scheme 10. The cost estimate of \$820 is arrived at by subtracting from \$2,106, the Government estimate for covering one unit under scheme 10, the amount of \$1,286, the estimate for covering one unit under scheme 3. This is 0.375 percent of the Mid-South \$218,808 bid for the work and 1.369 percent of the \$59,903 difference between the Mid-South and Universal base bids.

Although Universal suggests that the Navy estimate is in error partially because it is based on one unit and not two, we believe the Navy report indicates that "Lookout Green Unit 2 and 3" (note use of "Unit," not "Units") constitutes "one unit" for the change from scheme 3 to scheme 10. Further, it is apparent that what the Navy has done is to figure the cost of scheme 10 and scheme 3 separately and to deduct the latter cost (\$1,286) from the former cost (\$2,106) to arrive at the additional cost (\$820) which results from the use of scheme 10 in lieu of scheme 3. Adding the costs together would result in an amount for performing both schemes, instead of the additional cost of performing scheme 10 rather than 3. Therefore, we find no basis to disagree with the Navy's calculations.

In 52 Comp. Gen. 544 (1973) 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 that decision, we agreed with the procuring activity that the failure to acknowledge receipt of an amendment may be waived as a minor informality since the value of the amendment was \$966, or 0.138 percent of the overall \$702,000 bid for the work (as compared with the value of the amendment in the present case of \$820 or 0.375 percent of the overall \$218,808 bid for the work), and 5.682 percent of the \$117,000 difference between the two lowest bids (as compared with the 1.369 percent of the \$59,903 difference between the Universal and Mid-South bids).

In discussing the standard for determining "trivial or negligible effect on price" under ASPR § 2-405(4)(B) (1976 ed.), we stated in 52 Comp. Gen., supra:


"* * * Indeed, we do not believe that any specific figure may be determinative without reference to the particular facts. In that connection, it is our view that whether the change effected by the amendment is trivial or negligible in terms of price must be determined in relation to the overall scope of the work and the difference between the low bids."

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In the instant case, the value of the amendment as computed by the Navy amounts to a total of \$820 or only 0.375 percent of the overall base bid offered by Mid-South and 1.369 percent of the \$59,903 difference between the Mid-South and Universal base bids. In addition, it is clear that Mid-South's failure to acknowledge the amendment did not affect the competitive standing of the bidders. In view thereof, we believe that it is reasonable to conclude under the circumstances that Mid-South's failure to acknowledge receipt of the amendment was properly waived as a minor informality. Algernon Blair, Inc., B-192626, February 4, 1975, 75-1 CPD 76.

Universal has presented no evidence to substantiate its claim that amendment 1 has a substantial effect on price. Further although Universal states that a bidder not bound by amendment 1 who is forced to adhere to the clarifications in the amendment would have a basis for a compensable change under the Changes clause. the record discloses that in its January 10, 1977, letter Mid-South agreed to be bound to the amendment at the bid price. In this connection, see ASPR § 2-405 (1976 ed.) permitting the curing of any deficiency resulting from a minor informality or irregularity in a bid.

For the reasons stated above, the protest is denied.


Deputy Comptroller General
of the United States