

DOCUMENT RESUME

03331 - [A2413552]

[Protest Regarding Procurement of Urinalysis Services].
B-188527. August 26, 1977. 6 pp. + enclosure (1 pp.).

Decision re: S & W Stat Lab., Inc.; Qual-Med Associates, Inc.;
by Milton Socolar (for Elmer B. Staats, Comptroller General).

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel; Procurement Law II.
Budget Function: General Government: Other General Government
(806).

Organization Concerned: District of Columbia: Dept. of Human
Resources.

Authority: B-183549 (1975), B-192626 (1975), 52 Comp. Gen. 240.
39 Comp. Gen. 655. 49 Comp. Gen. 139. 49 Comp. Gen. 144. 51
Comp. Gen. 588.

Second low bidder objected to the finding that its bid was nonresponsive for failing to acknowledge a solicitation addendum. Since the addendum had only a trivial effect on price and quality and since acceptance of the bid would not prejudice other bidders, the bidder's failure to acknowledge the addendum may be waived. The low bidder objected to a determination that it was nonresponsive based on a preaward evaluation. The solicitation did not preclude retesting, and the protester may be retested if justified in light of the time which had passed since the initial test and the protester's explanation for the test failure. If the low bidder is still found nonresponsive, the agency should consider award to the second low bidder whose failure to acknowledge the solicitation amendment was a minor irregularity in the circumstances. (Author/SC)

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DECISION



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

**Mrs. Egan
Proc. II**

FILE: B-188627

DATE: August 26, 1977

**MATTER OF: B&W Stat Laboratory, Inc.;
Qual-Med Associates, Inc.**

DIGEST:

1. Bidder's failure to acknowledge addendum to solicitation which has only trivial affect on price and quality may be waived where acceptance of the bid would not prejudice other bidders.
2. Where solicitation provided for testing in order to determine bidder capability, agency is advised that solicitation does not preclude retesting and that low bidder who failed initial test may be retested if justified in light of time which has passed since initial test and protester's explanation for test failure. In event low bidder is still found nonresponsible, agency should consider award to second low bidder whose failure to acknowledge solicitation amendment was minor irregularity in circumstances.

Two bid protests have been filed in connection with Invitation for Bids (IFB) No. 0117-AA-85-0-7-BM, involving the procurement of urinalysis services at the District of Columbia Superior Court for the Narcotics Treatment Agency of the D. C. Department of Human Resources. Two days after being advised that its bid had been found nonresponsive for failing to acknowledge a solicitation addendum, B&W Stat Laboratory, Inc. (B&W) filed a protest with our Office contending (1) that it never received the addendum and (2) that because the effect of the addendum on price was trivial and the difference between bids was great, the failure to acknowledge the addendum should be waived. In its report on the protest of B&W, the District of Columbia Department of General Services indicated that the low bidder, Qual-Med Associates, Inc. (Qual-Med), had been determined to be nonresponsible based on a pre-award evaluation. Upon receiving a copy of the report containing this information, Qual-Med protested this determination.

B&W'S PROTEST

Three timely bids were received as follows:

Qual-Med	\$145,460.00
B&W	146,005.00
Precision Analytical Laboratories, Inc.	344,944.00

After the D. C. Government found Qual-Med, the low bidder, non-responsible, but before Qual-Med was apprised of that determination, B&W was advised that its bid was nonresponsive for failing to acknowledge the second addendum. B&W contends that it never received the addendum. We have held that 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. Mike Cooke Reforestation, B-183549, July 2, 1975, 75-2 CPD 8. There is no basis for concluding that the agency deliberately excluded B&W from receiving addenda in this case.

Failure to acknowledge a solicitation addendum does not necessarily render a bid ineligible for award. The question is whether the unacknowledged amendment is material. Section 2820.14 of the District of Columbia Procurement Regulations states in pertinent part:

"2820.14 MINOR INFORMALITIES OR IRREGULARITIES

A. Definition

A contracting officer shall either give a bidder an opportunity to correct any minor informalities or irregularities in the bid or he may waive them if it is to the District's advantage to do so. * * *. However, the correction or waiver of such an informality or irregularity cannot be made if it will be prejudicial to other bidders.

B. Examples of Such Minor Matters Which Can Be Corrected or Waived Include:

* * * * *

4. Failure of a bidder to acknowledge receipt of an amendment to an Invitation for Bids, but only if:

* * * * *

- b. The amendment involved only a matter of form or is one which has either no effect or merely a trivial or negligible effect on price, quantity, quality, or delivery of the item bid upon."

The only substantive change made by addendum No. 2 was in requiring the use of "no-carbon-required" report forms instead of "an original and three carbon copies." In other words, the Government desired forms which would provide copies without the use of carbon paper.

B&W contends that the additional cost of complying with the addendum is \$150.00 and that, because this amount is trivial in comparison with the total contract price, the failure to acknowledge the addendum can and should be waived. We have independently solicited an estimate of the cost impact of the addendum from the U.S. Government Printing Office and have been advised that no-carbon-required type forms would cost approximately \$209 more than the same number of forms utilizing carbon copies.

Though specifically requested to introduce evidence as to the effect which addendum No. 2 would have on the cost of performance, the D. C. Department of General Services has made no proffer on this point. Furthermore, the District does not contend that the addendum affected the quality, quantity, or delivery of the bid and we find no basis in the record for concluding that the nature of the report form copies is material to the quality of contract performance under the instant service contract. The agency contends that the addendum affected the price and, therefore, required rejection of any bid which failed to acknowledge it. However, as we have indicated, infra, the applicable procurement regulations specifically contemplate waiver in appropriate circumstances.

The estimated cost increase attributable to the addendum (\$209) is .14 percent of B&W's \$146,005 bid price and .11 percent of the \$198,939 difference between B&W's bid and that of the next highest bidder. Under the circumstances, we conclude that the effect of the addendum on price was trivial and that waiver of B&W's failure to acknowledge the addendum would not prejudice other bidders. See *Algernon Blair, Inc.*, B-18266, February 4, 1975, 75-1 CPD 76. B&W's bid should not have been rejected for failing to acknowledge addendum No. 2 and its protest is sustained.

QUAL-MED'S PROTEST

Qual-Med states that it was not aware that it had been found nonresponsible until it received a copy of the agency's April 7, 1977 report concerning B&W's protest. Furthermore, Qual-Med contends that it was not aware of the reasons for the agency's finding until the D. C. Government responded to Qual-Med's protest in a report dated June 15, 1977. In that report the agency states that Qual-Med failed to accurately identify a sufficient number of the samples which were submitted to it on March 4, 1977 as part of a pre-award evaluation of Qual-Med's ability to perform in accordance with the specifications. Qual-Med now contends that the infirmities which caused it to fail the initial pre-award evaluation (viz, equipment malfunction, illness of key personnel) no longer exist and requests that a retest be conducted to ascertain its present capabilities.

As the protester points out, our Office has held that the purpose of a pre-award evaluation is to ascertain a prospective contractor's ability to perform at the time performance is to begin under the contract being awarded, 52 Comp. Gen. 240 (1972); 39 Comp. Gen. 655 (1960), based upon the most current information available. 49 Comp. Gen. 139, 144 (1969). Thus, we have recommended that a rejected offeror's responsibility should be re-evaluated based on the most current information available. 51 Comp. Gen. 588 (1972).

The District of Columbia Government contends that a re-evaluation of Qual-Med is barred by Special Condition No. 1 of the solicitation which states, in pertinent part:

"1. PRE-AWARD EVALUATION: The Contracting Officer reserves the right to require any bidder at no cost to the District, to demonstrate his capability to perform in accordance with the

specifications herein by testing the equivalent of one weekday's collection (Approx. 136 samples), in accordance with the specifications herein and within the required time periods. If a bidder * * * demonstrates satisfactory sensitivity and specificity for testing for eight (8) of the eleven (11) drugs, and otherwise demonstrates during the course of such pre-award evaluation that the methods he proposes to use should produce satisfactory results for all drugs required, the Contracting officer reserves the right to require that bidder to undergo another pre-award evaluation as described above. * * *."

The District States:

"Special Condition No. 1 of the Invitation to Bid further provides for another pre-award evaluation at the contracting officer's option if the tested laboratory demonstrates minimum capability. Failure to identify 8 of 11 drug groups in Category C disqualified the bidder [Qual-Med] from additional testing."

Thus, the District concluded that only a bidder who passed a pre-award evaluation may be retested and that, having failed to identify an acceptable number of drug groups, Qual-Med was disqualified from further testing. In fact, there is nothing in the solicitation to preclude the District from retesting Qual-Med and the District's refusal to grant a retest was based on a misreading of Special Condition No. 1.

While the solicitation does not preclude a second pre-award evaluation, neither does it require one if the initial evaluation continues to be a valid basis for finding Qual-Med nonresponsible. Consequently, we are recommending that the District determine whether a second pre-award evaluation is necessary to ascertain Qual-Med's ability to perform at the time performance is anticipated, taking into account both the time which has passed since the initial pre-award evaluation and the reasons advanced by Qual-Med for its initial failure. Should a re-evaluation be deemed appropriate and Qual-Med subsequently be found responsible, award may then be made to that firm. If Qual-Med

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is found nonresponsive, based either on a retest or on the initial pre-award evaluation, then award consideration should be given to B&W which, for the reasons explained herein, was improperly found nonresponsive.

Milton J. Boardman
for Comptroller General
of the United States



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

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Proc II

B-188627

August 26, 1977

The Honorable Walter E. Washington
Mayor of the District of Columbia

Dear Mayor Washington:

In our decision of today in B-188627, copy enclosed, we hold that it was improper to reject the bid of B&W Stat Laboratory, Inc. for failing to acknowledge Addendum No. 2 to Invitation for Bids No. 0117-AA-65-0-7-BM. We also hold that the solicitation did not preclude a re-evaluation of Qual-Med if necessary to determine Qual-Med's ability to perform at the time performance is anticipated under the contract.

We recommend that the current validity of the initial pre-award evaluation be appraised in light of both the time which has passed since the initial test was administered and the protester's claim that the factors which contributed to its initial failure have since been corrected. If, upon review, Qual-Med is found responsible, we would favor award to that firm. If Qual-Med is found to be ineligible for award, we recommend that award consideration be given to B&W Stat Laboratory, Inc.

Sincerely yours,

Comptroller General
of the United States

Enclosure

cc: Mr. Eugene L. Bennett
Assistant Director for
Materiel Management
Government of the District
of Columbia