

P.L-1
Ayer

DECISION



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

18493

FILE: B-201585

DATE: June 16, 1981

MATTER OF: Hutto Appliance & Refrigeration
Service

DIGEST:

1. Material IFB amendment may not be orally acknowledged.
2. Where only possible effect of IFB amendment is to decrease cost of contract performance, failure of low bidder to timely acknowledge amendment should be waived as minor informality. Whether amendment which bidder failed to acknowledge has overall effect of reducing cost of performance is disputed. Nevertheless, one effect of amendment was to impose additional work requirements which procuring agency considers essential to quality of performance and which may increase performance cost. Therefore, failure of bidder to acknowledge amendment may not be waived.

Hutto Appliance & Refrigeration Service (Hutto) protests the rejection of its bid under invitation for bids (IFB) No. F38610-81-B-0003 issued by Charleston Air Force Base, South Carolina (Air Force). The Air Force rejected Hutto's low bid for installation and maintenance of washers and dryers because of the company's failure to acknowledge an amendment to the IFB prior to bid opening. Based on our review of the record, we deny the protest.

The unacknowledged amendment deleted the word "new" from the original item description for the washers and dryers during the option periods involved, imposed a 4-hour response time on emergency calls, and provided that the contractor would be required

[Protest of Bid Rejection as Nonresponsive]

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to deliver a service ticket to an Air Force employee no later than 4:30 p.m. on the day the service call is completed instead of 24 hours after the service call as originally provided. An emergency constituted any time, including nights, weekends, and Federal holidays, that any building did not contain at least one operable washer and one operable dryer. The majority (13 of 22) of the buildings contained only two washers and two dryers. The Air Force reports that the heaviest usage of washers and dryers occurs on weekends and for this reason believes that imposition of the 4-hour response time would materially affect a bidder's cost projections.

Hutto believes the Air Force should have waived the failure to acknowledge because prior to bid opening the Air Force discussed the amendment with Hutto and that this discussion constituted an oral acknowledgment of the amendment.

Generally, the failure to acknowledge an amendment renders a bid nonresponsive. Fil-Coil Company, Inc., B-197604, March 25, 1980, 80-1 CPD 221. As we said in the cited case:

"* * * Defense Acquisition Regulation § 2-405 allows acknowledgement of an amendment to be waived, if the amendment clearly would have no effect or only a trivial effect on price, quality, quantity or the relative standing of the bidders. * * * The basis for this rule is that acceptance of a bid which disregards a material provision of an invitation, as amended, would be prejudicial to the 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."

Moreover, we have specifically rejected the position that a material IFB amendment may be orally acknowledged. MET Electrical Testing, Inc., 60 Comp. Gen. (B-201146, March 17, 1981), 81-1 CPD 202. Therefore, we reject Hutto's argument that the amendment was properly acknowledged in oral discussions before bid opening.

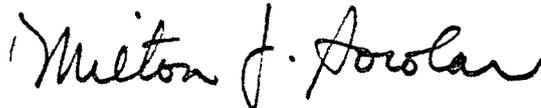
Hutto is also of the view that its failure to acknowledge the amendment should be waived because the amendment's overall cost impact allegedly would only be to reduce its bid. Hutto argues that deletion of the requirement for new equipment "would have reduced my bid by approximately \$15-20,000.00 each for the first and second option periods." Hutto contends that this reduction "would more than have off-set any dollar amount that would have figured in our pricing for the 'emergency call' addition," since the likelihood of such calls was, in Hutto's opinion, small.

We have held that, where the only possible effect of an IFB amendment is to decrease the cost of performance, the failure of the low bidder to acknowledge timely the amendment should be waived as a minor informality. See, for example, Signal, Inc., B-201339, March 10, 1981, 81-1 CPD 189. Nevertheless, we do not consider that precedent as allowing consideration of the Hutto bid.

As noted above, the "emergency call" requirement particularly affected 13 of the 22 buildings--each of which contained only two washers and two dryers. Thus, we question Hutto's view on the likelihood of emergency calls and the company's related view on the overall cost effect of the amendment. In any event, the fact remains that the amendment added one requirement (emergency call) and made another existing requirement ("service tickets") more demanding. Regardless, therefore, of the overall cost effect involved, one effect of the amendment was to impose additional work requirements which the Air Force considers as affecting the quality of performance

under the contract and which may increase the cost of performance. Nevertheless, Hutto's bid did not contain a commitment to these requirements. Consequently, the circumstances of this case are distinguishable from those in Signal, Inc., above, where the involved amendment merely made clear that bidders were not to perform (or price in their bids) unneeded work requirements which happened to be set forth in an IFB drawing. Thus, Hutto's failure to acknowledge the amendment may not be waived.

Accordingly, the protest is denied.



Acting Comptroller General
of the United States