DECISION

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

FILE: B-220436 DATE: February 4, 1986

MATTER OF: N.B. Kenney Company, Inc.

DIGEST:

1. Bidder's failure formally to acknowledge a material amendment that, among other things, changes bid opening to an earlier date, may not be waived as a minor informality when the only evidence that the bidder received the amendment is the fact that its bid and bid bond include the earlier date. Bidders may be expected to prepare their bids before the actual due date, and thus an earlier-dated bid does not clearly show that the bidder is aware of and bound to the other changes required by the amendment.

2. Constructive acknowledgment exception to the general rule requiring bidders formally to acknowledge solicitation amendments may not be invoked when there is substantial doubt that the bidder is aware of the entire amendment and the changes required by it.

N.B. Kenney Company, Inc., protests the proposed award of a contract to MacDonald Plumbing and Heating, Inc., under invitation for bids (IFB) No. OARM-85-014-JC, issued September 12, 1985 by the Department of Labor. The IFB called for the replacement of the central heating plant at the Grafton, Massachusetts, Job Corps Center. Kenney contends that the agency should reject MacDonald's bid for failure to acknowledge receipt of amendment No. 1 and failure to include required representations and certifications.

We sustain the protest on the first basis.

The amendment in question changed both the bid opening date and the scope of work at the Job Corps Center. Bid opening was moved up 2 days, from October 19, 1985 to October 17, 1985. In addition, the amendment required removal of additional asbestos and replacement of fan coil heaters. It also changed previously-announced Davis-Bacon wage rates.

[redacted] Kenney's agency-level protest, Labor st[redacted]cDonald's failure formally to acknowledge rec[redacted]mendment No. 1 might be waived as a minor informality because Kenney's bid and bid bond both reflected the amended bid opening date. The agency states that in granting the waiver, it relied upon our decisions in Pioneer Fluid Power Co., B-214779, Sept. 4, 1984, 84-2 CPD ¶ 246, and Protimex Corp., B-204821, Mar. 16, 1982, 82-1 CPD ¶ 247. In Pioneer, we held that the bidder's inclusion in its bid of the amended opening date clearly established that the bidder had received the amendment and constituted an implied acknowledgment, binding the bidder to the terms of the amendment at its bid price.1/ In Protimex, we held that the inclusion of an amended bid opening date in a bid bond similarly constituted an implied acknowledgment. Labor argues that MacDonald also has impliedly acknowledged the amendment. We disagree because in MacDonald's case, the amended bid opening date was earlier, rather than later, than the original opening date.

Our constructive acknowledgment decisions are based on an exception to the general rule that a bidder's failure to acknowledge a material amendment requires the agency to reject the bid as nonresponsive. The general rule is based on the fact that acceptance of a bid when an amendment has not been acknowledged would afford the bidder the opportunity to decide, after bid opening, whether to furnish extraneous evidence showing that it had considered the amendment in formulating its price or to avoid award by remaining silent. 51 Comp. Gen. 500 (1972). Moreover, if such a bid were accepted, the bidder would not legally be bound to perform in accord with the terms of the amendment, and the government would bear the risk that performance would not meet its needs. See Doyon Construction Co., Inc., 63 Comp. Gen. 214 (1984), 84-1 CPD ¶ 194; 42 Comp. Gen. 490 (1963).

1/ We reversed this decision, however, in Pioneer Fluid Power Co.--Reconsideration, B-214779.2, Mar. 22, 1985, 85-1 CPD ¶ 332, holding that the revised bid opening date entered in Pioneer's unsigned Standard Form 19-B, Representations and Certifications, was contradicted by the date used on the cover of the bid, which was signed. It therefore appeared that the bidder's single use of the new date might be explained by circumstances other than the actual receipt of the amendment and did not clearly indicate the bidder's intent to be bound by all of the material changes in the amendment.

The constructive acknowledgment exception applies when the bid itself includes one of the essential items appearing only in the amendment. Thus, we have found that a bidder's failure to acknowledge an amendment could be waived when, for example, the bid included a price for an item that was added by amendment, 34 Comp. Gen. 581 (1955), or for quantities reduced by an amendment. Nuclear Research Corp. et al., B-200793 et al., June 2, 1981, 81-1 CPD ¶ 437. We also have found constructive acknowledgment when the bidder agreed to use materials other than those required by the original solicitation, W. A. Apple Mfg., Inc., B-183791, Sept. 23, 1975, 75-2 CPD ¶ 170, aff'd on reconsideration, Mar. 2, 1976, 76-1 CPD ¶ 143, or when the bid included an acceptance period that was different from that imposed by the original solicitation. Shelby-Skipwith, Inc., B-193676, May 11, 1979, 79-1 CPD ¶ 336.

These decisions, in our opinion, are consistent with the regulatory provision that permits a bidder's failure to return an amendment to be waived as a minor informality or irregularity if the bid "clearly indicates that the bidder received the amendment." Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.405(d)(1) (1984). In permitting constructive acknowledgment, only the bidder's failure to acknowledge the amendment is waived, not the bidder's compliance with the amended solicitation. Shelby-Skipwith, Inc., supra.

As the Department of Labor points out, we have applied the constructive acknowledgment exception in numerous cases where bid opening was extended by amendment, holding that submission of a bid either between the original opening date and the extended opening date or on the extended opening date itself is sufficient to charge the bidder with knowledge of the amendment in its entirety. These decisions are based on the theory that no bidder would deliberately submit a late bid. See, for example, Inscom Electronics Corp., 53 Comp. Gen. 569 (1974), 74-1 CPD ¶ 56; Lear Siegler, Inc., B-212465, Oct. 19, 1983, 83-2 CPD ¶ 465; B-176462, Oct. 20, 1972.

On the other hand, we have recognized that a bidder's use of the new opening date may not, in itself, be sufficient to indicate clearly that the bidder is aware of other aspects of the amendment or committed to performing in accord with its material terms. In Kinross Manufacturing Corp., B-219937, Dec. 26, 1985, 65 Comp. Gen. ____, 85-2 CPD ¶ ____, we held that the bidder's handwritten insertion of

the new bid opening date, along with a notation that it had been advised of this date by an agency official, in the space on the bid form where it should have acknowledged the amendment indicated that the bidder's knowledge was limited to the new bid opening date. We therefore found that the agency had acted properly in rejecting the bid as nonresponsive. As noted in the footnote on page 2, we also found upon reconsideration of Pioneer Fluid Power Co., supra, that despite inclusion of the new opening date in one section of the bid, the use of the original date on the cover sheet of the bid created doubt as to the bidder's intent to be bound by all the material changes in the unacknowledged amendment.

Similarly, we think this case falls under the general rule requiring the agency to reject the bid as nonresponsive, rather than under the constructive acknowledgment exception. The constructive acknowledgment decisions, as indicated above, all involve submission of bids after the original opening date. In this case, however, in amendment No. 1, Labor announced a bid opening date that was 2 days earlier than the original opening date (October 17, 1985, instead of October 19, 1985). In our opinion, the October 17 date on MacDonald's bid and bid bond may be explained by circumstances other than the actual receipt of the amendment, since bidders may be expected to date and prepare their bids before the final date for submitting them. They may, for example, allow for time in transit, either in the mail or between the agency's point of receipt and the place designated for bid opening. Therefore, MacDonald's inclusion of the earlier opening date on the bid and bid bond does not, of itself, clearly indicate that MacDonald received the amendment. The additional work, required by the amendment, removal of asbestos and replacement of fan coil heaters, and the change in Davis-Bacon wage rates, in our opinion clearly are material, since they will affect the contract price and the quality and quantity of performance. In the absence of any evidence of MacDonald's actual receipt of the amendment, we do not believe that the firm could be legally required to provide these changes at its original bid price.

Accordingly, by separate letter to the Secretary of Labor, we are recommending that the agency reject MacDonald's bid as nonresponsive and make award to Kenney if it is the next low responsive, responsible bidder. In view of this recommendation, we need not reach Kenney's second basis of protest.

We sustain the protest.

for Comptroller General
of the United States