DECISION

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

FILE: B-220436.2 **DATE:** May 5, 1986

MATTER OF: MacDonald Plumbing & Heating, Inc.--Request for Reconsideration

DIGEST:

1. Low bidder's failure to acknowledge a solicitation amendment which, among other things, required the removal of asbestos, renders the bid nonresponsive, even if state law governs the method for removal of asbestos, since such law cannot obligate a contractor to perform any particular work without its consent.

2. Failure to acknowledge a material amendment may not be waived as a minor informality, even though impact on bid price of the work added by the amendment is de minimus, when the amendment also has an impact on the quality of performance.

MacDonald Plumbing and Heating, Inc., requests reconsideration of our decision, N.B. Kenney Company, Inc., B-220436, Feb. 4, 1986, 65 Comp. Gen. ___, 86-1 CPD ¶ 124, in which we sustained Kenney's protest against the proposed award of a contract to MacDonald under invitation for bids (IFB) No. OARM-85-014-JC, issued by the Department of Labor. We affirm our prior decision.

The IFB called for the replacement of the central heating plant at the Grafton, Massachusetts, Job Corps Center. We concluded that the agency should have rejected MacDonald's low bid as nonresponsive because the firm failed to acknowledge an amendment which changed bid opening to an earlier date and increased the scope of the work by requiring the removal of asbestos insulation and the replacement of fan coil heaters with new ones meeting certain specifications. The amendment also changed previously-announced Davis Bacon wage rates.

In its request for reconsideration, MacDonald argues that in Massachusetts (where the work was to be performed), removal of asbestos is governed by state law, which requires contractors to follow federal guidelines. MacDonald therefore argues that its failure to acknowledge the amendment was not grounds for rejection of its bid. Further, MacDonald states, the value of the addenda was no more than $1,000, or less than 2/10 of 1 percent of MacDonald's bid price. Since the difference between its own and the next-low bid was $31,000, MacDonald contends that its failure to acknowledge the amendment should be waived.

A bidder's failure to acknowledge a material amendment generally renders the bid nonresponsive and thus unacceptable since, absent acknowledgment, the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. See Jose Lopez & Sons Wholesale Fumigators, Inc., B-200849, Feb. 12, 1981, 81-1 CPD ¶ 97. Under the Federal Acquisition Regulation (FAR), however, a contracting officer may correct or waive a minor informality, an immaterial defect, or a variation of a bid from the exact requirements of the invitation, so long as the correction or waiver is not prejudicial to other bidders. Failure to acknowledge an amendment falls under the regulation when the amendment is only a matter of form and has no effect on price, quantity, quality, or delivery of the item bid upon. See FAR, 48 C.F.R. § 14.405 (1984).

With regard to MacDonald's first contention, in the absence of an acknowledgment of the amendment, we do not believe that the firm would be legally obligated to perform the additional work required by the amendment, i.e., removal of asbestos and replacement of fan coil heaters. Although the method for removing asbestos may be governed by state law, which requires contractors to follow federal guidelines, such law cannot obligate a firm to perform any particular work at any particular time without its consent. Since the solicitation, as originally issued, did not specifically require removal of asbestos insulation, and since there are other possible methods for dealing with this hazard (for example, containment), the existence of state law does not obviate the need for MacDonald to acknowledge the amendment.

As for MacDonald's second argument, the FAR provision permitting correction or waiver of a bidder's failure to acknowledge an amendment goes beyond consideration of the impact on price and the relative standing of bidders. It also includes impact on quality, quantity, and delivery.

See 52 Comp. Gen. 886 (1973); Federal Aviation Admin., B-193238, Feb. 27, 1979, 79-1 CPD ¶ 136, aff'd on reconsideration, Apr. 3, 1979, 79-1 CPD ¶ 231. Even if we assume that MacDonald correctly characterizes the impact of the additional work on its own bid price as de minimus, we believe it is clear that if the successful contractor were not legally obligated to remove the additional asbestos and to perform the other work covered by the amendment, the quality of performance would be affected. Accordingly, MacDonald's failure to acknowledge the amendment may not be waived as a minor informality. Doyan Construction Co., Inc., 63 Comp. Gen. 214 (1984), 84-1 CPD ¶ 194; McKenzie Road Service, Inc., B-192327, Oct. 31, 1978, 78-2 CPD ¶ 310.

Our prior decision is affirmed.

Milton J. Socolar

Comptroller General
of the United States