



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: C Construction Company, Inc.

File: B-228038

Date: December 2, 1987

DIGEST

Responsiveness must be determined from the face of the bid. Therefore, bidder's failure to acknowledge a material amendment to a solicitation which also extended the bid opening date may not be waived where the bid contains only the previous bid opening date. The mere submission of the bid on the amended bid opening date is not sufficient to show that the bidder intended to be bound by the terms of the amendment. Previous cases inconsistent herewith will no longer be followed.

DECISION

C Construction Company, Inc. protests the award of a contract to J.W. Cook, Inc. by the Naval Facilities Engineering Command (Navy) under invitation for bids (IFB) No. N62470-87-B-7107, issued for the construction of a high school for military dependents at Camp LeJeune, North Carolina. The protester argues that the Navy should have rejected Cook's bid on the ground that Cook failed to acknowledge a material amendment to the solicitation and thus submitted a nonresponsive bid.

We sustain the protest.

The solicitation as originally issued called for bid opening on June 25, 1987, and was subject to a total of four amendments. Amendment No. 0001 added specifications to the solicitation but left the bid opening date unchanged. Amendment No. 0002 changed the bid opening date from June 25 to July 2, and corrected a typographical error

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contained in the solicitation. Amendment No. 0003 added additional specifications and drawings to the solicitation but left the bid opening date unchanged. Finally, amendment No. 0004 called for additional work under the solicitation and extended the bid opening date from July 2, to July 7. Cook's failure to acknowledge amendment No. 0004 is the subject of this protest.

According to the agency, the additional work called for by amendment No. 0004 will result in increased costs of \$57,794. The protester states that amendment No. 0004 caused it to add some \$85,000 to its total bid. The difference between Cook's bid and C Construction's bid is \$43,000.

At bid opening on July 7, Cook submitted its bid which failed to acknowledge amendment No. 0004. Additionally, Cook's bid and bid bond bore the earlier bid opening date of July 2, and the envelope which contained its bid bore the original bid opening date of June 25. According to the protester, Cook's failure to acknowledge amendment No. 0004, coupled with the lack of any indication whatsoever on the face of Cook's bid that the firm in fact received the amendment renders the bid nonresponsive. The protester argues that Cook could have simply learned about the extended bid opening date from suppliers or subcontractors or other sources within the construction community.

The agency, on the other hand, while agreeing that the amendment was material, argues that the fact that Cook submitted its bid on the extended bid opening date is, by itself, sufficient to show that the firm constructively acknowledged amendment No. 0004 and, thus, that Cook submitted a responsive bid.

As a general rule, a bidder's failure to acknowledge a material amendment renders the bid nonresponsive, thus requiring that the agency reject the bid. This rule is premised upon two facts. First, that acceptance of a bid when an amendment has not been acknowledged affords 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. Second, if such a bid were accepted, the bidder would not be legally bound to perform in accordance with the terms of the amendment, and the government would bear the risk that performance would not meet its needs. See generally N.B. Kenney Co., Inc., 65 Comp. Gen. 265 (1986), 86-1 CPD ¶ 124, and cases cited therein.

However, an amendment may be constructively acknowledged where 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 a price 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 acknowledge 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) (1986). 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.

In this connection, a number of our previous decisions have allowed acceptance of a bid which did not acknowledge a material amendment where the bid itself reflected an extended bid opening date provided for in the amendment (or a date subsequent to the original bid opening date) and the bid was in fact submitted on the extended date. Inscom Electronics Corp., 53 Comp. Gen. 569 (1974), 74-1 CPD ¶ 56; American Monorail, Inc., B-181226, July 31, 1974, 74-2 CPD ¶ 69; S. Livingston & Son, Inc., B-183548, July 2, 1975, 75-2 CPD ¶ 7; Aetna Ambulance Service, Inc., G&L Ambulance Service, B-190187, Mar. 31, 1978, 78-1 CPD ¶ 258.

One of these cases, Aetna Ambulance Service, Inc., G&L Ambulance Service, supra, was later cited as authority to extend the above stated rule to hold that the mere submission of a bid on the extended bid opening date was itself sufficient to charge the bidder with constructive knowledge of the amendment. See Arrowhead Linen Service, B-194496, Jan. 17, 1980, 80-1 CPD ¶ 54 (no discussion of whether bid reflected extended bid opening date). Subsequently, the broad language contained in Arrowhead Linen Service, supra, was followed in two other cases (relied upon by the Navy in this case), which stated that the mere submission of a bid on an extended bid opening date

is sufficient, without more, to charge the bidder with constructive knowledge of an amendment. Lear Siegler, Inc., B-212465, Oct. 19, 1983, 83-2 CPD ¶ 465; Law Brothers Contracting Corp., B-208877, May 17, 1983, 83-1 CPD ¶ 521 (denied because time of submission could not be established).

In our opinion, it is axiomatic that the responsiveness of a bid must be determined from the face of the bid at bid opening. Consequently, where, as here, the bid itself does not establish its responsiveness, we think that submission of the bid on the extended bid opening date, without more, is not sufficient to show that the bidder agreed to comply with the terms of the amendment. While the bidder might have been aware of the existence of the amendment, this does not show that the bidder agreed to the terms of the amendment. FAR § 14.405(d)(1) (1985).

Indeed, we have endorsed this line of reasoning (that the bid must evidence on its face an intent to be bound by the terms of an amendment) in previous decisions. Thus, for example, in Pioneer Fluid Power Co.--Reconsideration, B-214779.2, Mar. 22, 1985, 85-1 CPD ¶ 332, we concluded that the bidder's notation of an extended bid opening date on an unsigned standard form 19-B submitted with its bid was insufficient evidence of the bidder's intent to be bound by the amendment in light of the fact that the signed cover sheet of its bid bore an earlier superseded bid opening date. Similarly, in Kinross Manufacturing Corp., 65 Comp. Gen. 160 (1985), 85-2 CPD ¶ 716, we held that the bidder's handwritten insertion of the new bid opening date, along with the notation that it had been advised of the extended bid opening date by an agency official, indicated that the bidder's knowledge of the amendment was limited to the new bid opening date. Simply stated, if a bidder's handwritten insertion of the extended bid opening date may not be sufficient to constructively acknowledge the amendment, we fail to see how a bid with no indication whatsoever of the extended bid opening date or of any other material terms of the amendment clearly indicates the bidder's intent to be bound by the amendment.

Accordingly, since Cook's bid does not establish either receipt of the amendment, or Cook's intent to be bound by its terms, we think the bid was nonresponsive. To the extent that the rule stated in our decisions in Arrowhead Linen Service, supra, Lear Siegler, Inc., supra, and Law Brothers Contracting Corp., supra, (that the mere submission of a bid on the bid opening date indicates the bidder's intent to be bound to the terms of the amendment) are inconsistent with this decision, the prior cases will no longer be followed.

Consequently, we think that the Navy improperly accepted Cook's bid and the protest is sustained. We recognize that the Navy relied upon the cases of Arrowhead Linen Service, supra, Lear Siegler, Inc., supra, and Law Brothers Contracting Corp., supra, in concluding that acceptance of Cook's bid was proper. Under circumstances such as these, we would ordinarily only apply a newly stated rule prospectively. We are informed however, that performance of the contract awarded to Cook has been suspended pending our decision in this case. Accordingly, by separate letter of today to the Secretary of the Navy, we are recommending that the contract awarded to Cook be terminated for the convenience of the government and award be made to C Construction, if otherwise proper.

The protest is sustained.

A handwritten signature in cursive script, reading "Milton J. Foster".

Acting Comptroller General
of the United States