The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Alcon, Inc.

File: B-228409

Date: February 5, 1988

DIGEST

1. Oral acknowledgment of material amendment after the contracting officer states that the time for receiving bids has passed may not be considered, and subject bid therefore is nonresponsive.

2. Bidder's failure formally to acknowledge an amendment that clarifies agency's intention to assess liquidated damages for late performance of delivery orders rather than merely for late performance of whole contract, may not be waived as a minor informality since the amendment eliminates a reasonable, more lenient interpretation, and therefore is material.

3. Acknowledgment of a later amendment to a solicitation does not constitute acknowledgment of prior amendments; a bidder's failure to acknowledge each material amendment renders the bid nonresponsive.

DECISION

Alcon, Inc. protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. DADA15-87-B-0007, issued by the Walter Reed Army Medical Center, Washington, D.C. Alcon's bid was rejected because it failed to acknowledge in writing amendment No. 0004. Alcon contends that the rejection of its bid was improper because it did acknowledge the amendment and, alternatively, because the amendment in question is immaterial.

We deny the protest.

The subject IFB contemplated award of a requirements contract for painting the interiors of buildings 2 and 4 at Walter Reed Army Medical Center. Five amendments were issued and bid opening, as amended, was set for September 27. Alcon's apparent low bid was submitted without formal acknowledgment of amendments 0003, 0004, and 0005. The contracting officer determined that failure to

acknowledge amendments 0003 and 0005 could be waived (as amendment 0003 was deemed not material, and Alcon submitted its bid on the revised bidding schedule from amendment 0005), showing the bidder had received the amendment and thus would be bound to its terms. The contracting officer also determined, however, that Alcon's failure to acknowledge amendment No. 0004, actually or constructively, could not be waived as a minor informality. This amendment, among other changes, revised the liquidated damages clause of the solicitation in accordance with the language in Federal Acquisition Regulation (FAR) § 52.212-5 (Alternate I), to provide specifically for assessment of liquidated damages for untimely completion of any delivery order issued against the requirements contract. The agency was of the opinion that the basic language of FAR § 52.212-5, already in the solicitation, could have been read more leniently, as providing for liquidated damages only in the event of late completion of the entire 1-year contract.

Alcon contends that by virtue of its attendance at the bid opening and its oral acknowledgment of all the amendments, it was bound by amendment 0004; Alcon orally acknowledged the amendments prior to the actual opening of any bids, but after the time established for the opening of bids, the passing of which was announced by the contracting officer.

This argument fails for two reasons. First, the failure of a bidder to acknowledge, prior to bid opening, receipt of an amendment that contains a material requirement renders the bid nonresponsive. Imperial Fashions, Inc., B-182252, Jan. 24, 1975, 75-1 CPD ¶ 45. Here, Alcon did not acknowledge the amendment in writing, and did not orally acknowledge it until the time for bid opening had passed. We note that the declaration of the time of bid opening by the bid opening officer generally serves as the basis for determining lateness. See Blount Brothers Corp., B-212788, Oct. 31, 1983, 83-2 CPD ¶ 521. Moreover, oral, rather than written, acknowledgment of a material amendment is unacceptable. Construction Catering, Inc., B-207987, July 13, 1982, 82-2 CPD ¶ 49.

Alcon also argues that by using the bid schedule accompanying amendment 0005, the bid itself reflected an awareness on the part of the bidder that there were four prior amendments. Alcon states that although this fact standing alone may not be sufficient to permit waiver of the deficiency, it should be considered as a factor in this case where the amendments were acknowledged orally before any bids were actually opened. Although we agree with the contracting officer that Alcon constructively acknowledged amendment No. 0005, this fact cannot be viewed as a constructive acknowledgment of amendment No. 0004 since

there was no evidence that the bidder was aware of amendment 0004 and intended to be bound by it. The acknowledgment of a later amendment does not constitute acknowledgment of prior amendments. M. C. Hodom Construction Co., Inc., B-209241, Apr. 22, 1983, 83-1 CPD ¶ 440.

Alcon argues in the alternative that amendment 0004 was not material, and that failure to acknowledge it thus was no more than a minor, correctable informality. In this regard, Alcon maintains that the original liquidated damages clause provided with sufficient clarity for assessment of damages for late performance of delivery orders, and that the clause as amended did not materially change the contract. The original clause provided, in pertinent part:

> "(a) If the Contractor fails to complete the work within the time specified in the contract, or any extension, the Contractor shall pay to the Government as liquidated damages, the sum of $228.60 for each day of delay."

Alcon maintains that the only "time specified in the contract" is found in clause 11 on the IFB cover page, which establishes as mandatory the delivery order performance periods specified in clause 67a (45, 120, or 200 days, depending on the type of painting). Alcon concludes that since these were the mandatory performance periods, they clearly were the basis for determining late performance and the assessment of liquidated damages.

An amendment is material when it imposes legal obligations on the contractor that were not contained in the original solicitation. See Reliable Building Maintenance, Inc., B-211598, Sept. 19, 1983, 83-2 CPD ¶ 344. While we agree with Alcon that the IFB can be read as assessing liquidated damages for late performance of individual delivery orders under the IFB, the determinative question here is whether the contracting officer's interpretation--that liquidated damages could be assessed only for work uncompleted at the expiration of the 365 calendar day contract period--also is reasonable, rendering the IFB at least ambiguous and in need of clarification. See, e.g., The Owl Corp., B-224174, Dec. 23, 1986, 86-2 CPD ¶ 706.

In our view, the contracting officer's interpretation was reasonable. Our view in this regard is based on the absence of any express statement in the IFB that liquidated damages would be assessed based on late performance of individual delivery orders. Without such language, the reference in

the original liquidated damages clause to work not performed "within the time specified in the contract" could, we believe, reasonably refer either to the delivery order performance times in clause 67a, or to the 365 day contract term specified on the IFB cover page. This latter interpretation would impose a more lenient standard on the contractor than the intended standard, so the IFB was amended to read as follows:

> "(a) If the contractor fails to complete the work within the time specified in each delivery order, or any extension, the Contractor shall pay the Government as liquidated damages, the sum of $228.60, for each day of delay." (Emphasis added.)

This change, again, was based on the instruction in FAR § 52.212-5, Alternate I, that where different completion dates are specified in the contract for separate parts or stages of the work, the clause should be modified to specify the amount of liquidated damages that will be assessed for late performance of the separate parts. As the delivery orders to be placed under the contract here represent separate parts of the total contract work, we believe the Army correctly determined that the Alternate I instruction was applicable.

Under these circumstances, we consider amendment 0004 a material amendment that had to be acknowledged before bid opening for a bid to be responsive. Since Alcon did not acknowledge the amendment prior to bid opening, its bid properly was rejected as nonresponsive.

The protest is denied.

James F. Hinchman
General Counsel