

MS. COOPER



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Arrest-A-Pest

**File:** B-241506

**Date:** February 6, 1991

Philip W. Engle, Esq., for the protester.  
Gerald C. Baker, Esq., Baker, Miller & Bortner, for Angel Systems, an interested party.  
Paul M. Fisher, Esq., Department of the Navy, for the agency.  
Sabina K. Cooper, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Bid properly was rejected for failure to acknowledge a material amendment where the bidder demonstrated receipt of the amendment only by presenting one of many plausible explanations for prices changed or unchanged in comparison to its earlier bid submitted to the agency before the issuance of the amendment, since an amendment is not considered to have been constructively acknowledged where the bid as submitted at bid opening does not include any evidence that the bidder had knowledge of the essential items appearing only in the amendment.

### DECISION

Arrest-A-Pest protests the rejection of its bid as nonresponsive for failure to acknowledge a material amendment under invitation for bids (IFB) No. N62477-90-B-0167, issued by the Department of the Navy for pest control services at the Naval Air Station, Patuxent River, Maryland. Arrest-A-Pest argues that it constructively acknowledged the amendment at issue, and that formal acknowledgement should be waived as a minor informality.

We deny the protest.

The Navy issued four amendments to the July 5, 1990, IFB for pest control services. Amendment No. 3, issued on August 21, made certain work deletions, increased the size and location of areas to be serviced, supplied historical data and provided

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questions and answers concerning the acquisition. The Navy received five bids by the September 10 bid opening. Arrest-A-Pest submitted the apparent low bid at \$322,692. However, on September 28, the Navy notified Arrest-A-Pest that its bid had been rejected because of failure to acknowledge receipt of amendment No. 1; the Navy did not mention amendment No. 3. Award was subsequently made to Angel Systems, the second low bidder at \$484,151.45. Arrest-A-Pest filed a protest in our Office on October 4, asserting that the firm had constructively acknowledged amendment No. 1 and that its offer had been improperly rejected by the Navy.

Following Arrest-A-Pest's protest, the Navy acknowledged that the firm had constructively, if not formally, acknowledged amendment No. 1. However, during its review, the Navy concluded that Arrest-A-Pest had also failed to acknowledge, either formally or constructively, amendment No. 3, an amendment that made material changes to the solicitation, including correction of the location of bird control services from motels, cottages, and other buildings to aircraft hangers, and a change in the location of weed control services from single family housing to parking lots, roads, shoulders, and sidewalks. Arrest-A-Pest does not dispute the materiality of the amendment; rather, the firm asserts that it constructively acknowledged amendment No. 3 in that the price schedule it had prepared before receipt of the amendment and submitted on August 20, as compared to its bid opened on September 10, represents clear evidence that Arrest-A-Pest changed its prices as a result of receiving amendment No. 3.

A bid that does not include an acknowledgement of a material amendment must be rejected because, absent such an acknowledgement, the bidder is not obligated to comply with the terms of the amendment, and thus its bid is nonresponsive. Woodington Corp., B-235957, Oct. 11, 1989, 89-2 CPD ¶ 339. This 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. Professional Aviation Maint. & Mgmt. Servs., Inc., B-232078, Oct. 13, 1988, 88-2 CPD ¶ 350. 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. Id.

An amendment may be constructively acknowledged, however, where the bid itself includes one of the essential items appearing only in the amendment, thus evidencing the bidder's receipt of, and intent to be bound by, the amendment. C. Constr. Co., Inc., 67 Comp. Gen. 107 (1987), 87-2 CPD ¶ 534.

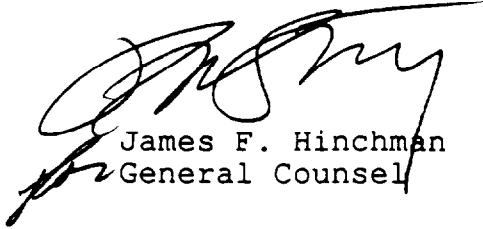
This principle is consistent with the regulatory provision that permits a bidder's failure to acknowledge an amendment to be waived as a minor informality or irregularity if the bid clearly indicates that the bidder received the amendment. Federal Acquisition Regulation (FAR) § 14.405(d)(1).

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.; Ridgeway Electronics, Inc., B-200793; B-200793.2, June 2, 1981, 81-1 CPD ¶ 437. We have also found constructive acknowledgement 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, or when the bid included an acceptance period that was different from that imposed by the original solicitation. Shelby-Skipworth, Inc., B-193676, May 11, 1979, 79-1 CPD ¶ 336. However, in cases where there may be more than one plausible explanation for changes to a bid, doubt exists as to the bidder's intent to be bound by the material changes in the unacknowledged amendment, see N.B. Kenney Co. Inc., 65 Comp. Gen. 265 (1986), 86-1 CPD ¶ 124, and, therefore, a bidder's failure to acknowledge an amendment cannot be waived as a minor informality or irregularity.

Here, Arrest-A-Pest has produced no evidence ascertainable from its bid as submitted that it has constructively acknowledged amendment No. 3. To justify its assertion that its bid price did take into account the essential items included in the amendment that changed the location of bird and weed control services, Arrest-A-Pest has produced only extraneous evidence, its original price schedule prepared before receipt of the amendment and submitted to the Navy on August 20, as compared with its bid as amended by its representative and submitted on September 10. Arrest-A-Pest presents a plausible explanation for each item price that changed or remained unchanged with reference to its earlier bid submitted before the issuance of amendment Nos. 3 and 4, but fails to eliminate the possibility that other equally plausible reasons or factors might have occasioned the changes. For example, no independent proof arising from the bid itself verifies Arrest-A-Pest's contention that it changed its price for ornamental pest control, fly control, and control of ticks, mites and chiggers, none of which were specifically changed by amendment No. 3, because of the historical data contained in amendment No. 3. Without that evidence, we might also speculate that Arrest-A-Pest had changed its prices as a result of a fluctuation in supplier prices, or in order to correct mistakes in its original bid, or for other business reasons.

Clearly, acceptance of Arrest-A-Pest's bid without an acknowledgement of amendment No. 3 would have allowed the firm an 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. Since it is not clear from the bid itself that Arrest-A-Pest constructively acknowledged amendment No. 3, the bid properly was rejected as nonresponsive for failure to acknowledge a material amendment.

The protest is denied.



James F. Hinchman  
General Counsel