

DOCUMENT RESUME

02688 - [A1792807]

[Failure of Bidder to Acknowledge Solicitation Amendment and Preaward Notice of Award]. B-188672. June 15, 1977. 4 pp.

Decision re: Mills Mfg. Corp.; by Robert P. Keller, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).

Organization Concerned: Pioneer Recovery Systems, Inc.; Forest Service.

Authority: F.P.R. 1-2.405. F.P.R. 1-2.408(a) (1). 41 Comp. Gen. 62. 55 Comp. Gen. 599. B-180999 (1974). B-181751 (1974).

A bidder on parachute contract was rejected as nonresponsive for failure to acknowledge receipt of solicitation amendment which imposed additional obligation, and was therefore nonwaivable. The agency had no obligation to inform protester of intention to award to higher bidder prior to award. Notice requirement of regulations was met 3 days after award, as well as orally prior to award. Protest was denied. (DJM)

P. S. Kelly
Protest II

DECISION



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

FILE: E-158672

DATE: June 15, 1977

MATTER OF: Mills Manufacturing Corporation

DIGEST:

1. Low bidder's failure to formally acknowledge receipt of IFB amendment which reduced quantity of product sought is waivable as minor informality. However, bidder's failure to acknowledge receipt of another amendment which had effect of imposing additional obligation on bidder may not be waived as minor informality and bidder was properly determined nonresponsive.
2. Fact that low bidder was not furnished presaward notice of agency's intention to award to higher bidder provides no basis for protest since there is no requirement that such notice be given.
3. Agency met notice requirements of FPR § 1-2.408(a)(1) where protester was advised of rejection of its low bid and award to higher bidder three days after award. Moreover record shows that protester was orally advised by contracting officer prior to award that its bid could not be considered for award.

Mills Manufacturing Company (Mills) protests the rejection of its bid and the award of a contract to Pioneer Recovery Systems, Inc. (Pioneer) under invitation for bids (IFB) No. R1-77-12 issued December 22, 1976, by the United States Department of Agriculture, Forest Service, Missoula, Montana (Forest Service). Mills contends that its failure to acknowledge receipt of two IFB amendments should not have caused the rejection of its bid as nonresponsive.

The IFB as issued called for bids on 104 parachute canopies. Thereafter, two amendments were issued by the Forest Service. Amendment No. 1, in addition to extending the bid opening date to January 31, 1977, modified the specification by requiring that the length of the suspension lines of each parachute canopy:

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"shall not vary more than 3 inches between the longest and shortest line. Measurement must be made when line is under 5 pounds tension."

Amendment No. 2 decreased the quantity of the product sought from 104 to 94 and extended the bid opening time to February 4, 1977.

On February 4, 1977, four bids, including that of Mills were opened. The Mills bid, dated January 13, 1977, contained the lowest unit price (\$222.10) and a total price (based upon supplying 104 units) of \$23,098.40. Pioneer submitted the second lowest unit price (\$240.88), and the lowest total price (based on supplying 94 units) of \$22,642.72. The contracting officer advised Mills on February 7, 1977, that its bid was considered nonresponsive due to Mills' failure to acknowledge the amendments. On February 11, 1977, Mills contended to the Forest Service that its failure to acknowledge Amendments No. 1 and No. 2 could be considered as a minor informality therefore making Mills bid responsive. On March 18, 1977, following a determination of urgency award was made to Pioneer. Mills then protested to our Office.

The protester takes the position that in view of the amount of savings that would have resulted from an award to Mills neither of the amendments should be considered substantial. The protester asserts that the suspension line requirement of Amendment No. 1 has been observed or exceeded by Mills since December 1975 under its own internal quality control procedures. In view thereof the protester contends that failure to acknowledge this amendment should have been waived as an informality. With respect to Amendment No. 2 Mills contends that the effect of this Amendment was minor.

The general rule as to the effect of a bidder's failure to acknowledge an amendment to an invitation for bids is that unless the amendment concerns a minor informality, that is, one which involves only a matter of form or has either no effect or merely a "trivial or negligible" effect on price, quantity, quality, or delivery of the item, the bidder's failure to acknowledge the amendment cannot be waived. FPR § 1-2.405 (1964 ed., circ.1). The basis for this rule is the principle that the acceptance of a bid which disregards a material provision of an invitation, as amended, would be prejudicial to other bidders. Clarification of the bid after opening may not be permitted because the bidder in such circumstances would have the option to decide to become eligible by furnishing extraneous evidence that the amendment

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had been considered, or to avoid award by remaining silent.
41 Comp. Gen. 550 (1962).

At the outset we note that Amendment No. 2 imposed on the protestor no additional obligations from those already included in the original solicitation. That amendment, in addition to extending the bid opening date, operated merely to decrease the number of units sought from 104 to 94. In view of the fact that the solicitation as originally issued authorized an award for less than the quantity offered at the unit prices offered the legal relationship between the parties was not materially affected by issuance of that amendment. Consequently, Mills' failure to acknowledge Amendment No. 2 could be waived as a minor informality or irregularity pursuant to FPR § 1-2.405 (1964 ed., Circ. 1). See Genest Baking, Inc., B-180999, July 12, 1974, 74-2 CPD 25.

However, it is our view that the protestor's failure to acknowledge Amendment No. 1 could not be waived. In this connection we note that our decision of B-156714, May 19, 1965, cited by the protestor for the holding that a bidder's failure to acknowledge an amendment could be waived, was bottomed on the fact that the amendment referenced information that was already contained in and required by the invitation. Amendment No. 1, unlike the situation in B-156714 and unlike Amendment No. 2, imposed an additional obligation, which was not contained under the original solicitation. Specifically, Amendment No. 1 required bidders to include as part of their product an additional requirement with respect to "suspension lines" which had the effect of establishing a stricter specification standard.

Although Mills may have intended to comply with the terms of Amendment No. 1, and formulated its bid price accordingly, such an intention was not apparent from the face of its bid. Any resultant contract with the protestor would not bind it to provide a product meeting the requirements of Amendment No. 1 and acceptance of Mills' bid would therefore be prejudicial to other bidders. Ira Gerber Food Services, Incorporated, 55 Comp. Gen. 599, 75-2 CPD 415. Accordingly, Mills' failure to acknowledge the receipt of Amendment No. 1 was fatal to the responsiveness of its bid.

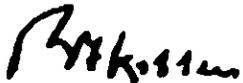
Additionally, Mills has asserted that the Forest Service failed to give the protestor notice prior to award, that someone other than Mills was going to receive award. However, the

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record indicates that on at least two occasions prior to March 18, 1977, the date of award to Pioneer, the protester was advised that it could not be considered for award. Accordingly, while Mills was not notified in writing prior to award of the rejection of its bid the record indicates that the protester had been informed prior to March 18th that it was considered nonresponsive. Moreover, the Forest Service formally advised Mills by letter dated March 21, 1977, that its bid had been rejected as nonresponsive and that award had been made to Pioneer. In these circumstances the Forest Service met the requirement of FPR § 1-2.408 (a)(1) (1964 ed. Circ. 1). See Gary Construction Company, Inc., B-181751, December 17, 1974. 74-2 CPD 357.

Finally, Mills has questioned the necessity of an administrative determination of urgency by the Forest Service in the circumstances of the instant case. In view of our conclusion on the merits of the protest, however, we see no need to decide this question.

Accordingly, the protest is denied.


Acting Comptroller General
of the United States