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*J. J. Amato, Pl. 2*

**DECISION**



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

**FILE: B-191648**

**DATE: July 14, 1978**

**MATTER OF: Aqua-Trol Corporation**

**DIGEST:**

1. Oral discussion of an amendment to a bid is not a substitute for written acknowledgement.
2. Amendment which may have been received by agency in time for bid opening but which was not in office designated at proper time is late in absence of evidence establishing time and place of receipt.
3. Amendment changing economic adjustment clause may not be waived as a minor informality because it affects the legal relationship of the parties.
4. GAO has no authority to direct a contracting officer to withhold award pending a determination under the Walsh-Healey Act.
5. GAO will not require a procurement to be resolicited where significant effort to obtain competition was made, award will be made at a reasonable price and there is no evidence that the contracting officer made a conscious and deliberate effort to exclude a bidder.

Aqua-Trol protests the rejection of its bid by the Defense Construction Supply Center (DCSC) as non-responsive because it failed to acknowledge an amendment in time for bid opening.

DLA 700-78-B-0630 was an advertised solicitation issued on February 6, 1978 requesting bids to supply garden hose nozzles. On March 6, 1978 amendment 0001 was issued at the suggestion of Aqua-Trol to add an

economic price adjustment clause to the contract based upon the Department of Labor's Wholesale Price Index. A clause in the original solicitation allowing economic adjustment for transportation costs only was deleted. Additionally, the date for bid opening was extended to March 16, at 10:30 a.m. The DCSC telephoned Aqua-Trol on March 7 informing it that the amendment had been issued and that it was required to acknowledge the amendment before bid opening. Aqua-Trol did not receive the amendment until March 13, however, but returned it by certified mail to the DCSC in Columbus, Ohio on March 14.

The acknowledgement was received late in the bid room on March 16, 1978, at 2:30 p.m. The time of the letter's receipt at the Supply Center's central mailroom is unknown. Because the certified envelope did not identify the IFB number, the mailroom personnel did not stamp the time and date it was received but estimate that it arrived at the mailroom between noon and 2:30 p.m. It was stamped by the personnel in the office designated as bid opening room at 2:30.

Aqua-Trol's bid was the lowest of the five received but because it failed to return or acknowledge the amendment as required, its bid was not considered. Two of the other four bidders also failed to acknowledge the amendment, however, the second low bidder acknowledged the amendment on time.

Aqua-Trol believes that its bid should not have been rejected because it discussed the amendment on March 7 in the telephone conversation with DCSC. Aqua-Trol originally proposed the amendment and it believes this was a sufficient acknowledgement of its assent to the terms of the amendment to have its bid considered responsive. This office has held that oral discussion cannot cure the bidder's failure to acknowledge in writing its intention to be bound by the agreement. See Paragon Heating and Plumbing Co., B-170162, August 17, 1970. Therefore, we cannot conclude that Aqua-Trol's bid is responsive.

Aqua-Trol contends next that because it did not receive the amendment in time to respond through the mail at least five days before bid opening, it should not be penalized for submitting the amendment late. Our cases clearly establish, however, that the onus is upon the bidder to comply exactly with the bid opening time requirements in the solicitation. See, e.g., 52 Comp. Gen. 281 (1972); Oil Country Materials of Houston, Inc., B-189646 December 13, 1977, 77-2 CPD 459.

Aqua-Trol also argues that since the mailroom personnel at the DCSC are uncertain when the amendment arrived at the mailroom, it cannot be concluded that the amendment was late. ASPR § 2-302 provides that "bids must be received in the office designated in the invitation not later than the exact time set for opening of bids." Since Aqua-Trol's amendment did not arrive in the designated office by the time set for bid opening, it was late within the definition of the regulation. A late bid is not considered unless: (1) sent by registered or certified mail at least five days prior to bid opening, or (2) late receipt is due to Government mishandling. ASPR § 7-2002.2. In this case, exception (1) does not apply because the amendment was mailed two days prior to bid opening. Even assuming the amendment arrived at the mailroom prior to bid opening, there is no evidence that the Government delayed forwarding the amendment to its proper destination or mishandled the piece of mail in any way. In the absence of such evidence, it must be concluded that Aqua-Trol's amendment does not meet the requirements necessary to be considered under the exceptions. See Adrian L. Merton, Inc. B-190982, May 9, 1978, 78-1 CPD 351.

The failure to acknowledge an amendment usually renders the bid nonresponsive. 55 Comp. Gen. 615 (1976). Nevertheless, ASPR § 2-405(iv) allows some amendments to be waived if the deviation is considered a minor informality. The failure of a bidder to acknowledge an amendment may be waived if "the amendment clearly would have no effect or merely a trivial or negligible effect on price, quality, quantity or the relative standing of bidders \* \* \*." ASPR § 2-405(iv)(B).

The economic adjustment clause added to the contract in amendment 0001 provides that "the contract price for supplies shall be subject to adjustment upward or downward by the percent of difference between the base price index and the adjusting price index." The price increases, however, shall not exceed ten percent of the contract unit price on the date the contract was awarded.

The DCSC contends that if the amendment were waived, Aqua-Trol would not be bound by the price reduction provisions of the amendment. The amendment, therefore, has an effect on the price and method of payment under the contract and cannot be waived. See Mike Cooke Reforestation, B-183549, July 2, 1975, 75-2 CPD 8. Aqua-Trol suggested the inclusion of this provision in the contract because it believed the economic adjustment clause provided better protection for the contractor in an inflationary market than did the transportation clause included in the original solicitation. Thus, Aqua-Trol believes it is very unlikely that the price reduction clause will be invoked and, therefore, the effect of the amendment on the price the Government will pay is trivial. Although Aqua-Trol may be correct, the amendment cannot be waived even if it is assumed that the effect on price is minimal. This Office has stated that where an amendment changes the legal relationship between the parties, it is a material defect which cannot be waived even if the impact on price is trivial. 50 Comp. Gen. 11 (1970). In that case, it was held that because the amendment made certain contract provisions mandatory rather than discretionary it "imposed additional obligations not legally enforceable under the prior provisions." Id. at 14. In this case, the amendment replaced the economic adjustment clause requiring price adjustments for transportation costs only with a clause allowing price changes in the cost of supplies. It imposed the additional obligation upon the Government to increase the amount of payment the contractor receives if the cost of its supplies increases. Additionally, it requires the contractor to lower its price to the Government if the cost of

its supplies decreases. This is an alteration of the contract terms and materially changes the legal rights of the parties. It is, therefore, a material alteration which cannot be waived. The fact that it is unlikely that the price decrease clause will be invoked is not a sufficient reason to waive the amendment since the contract terms preclude the Government from reducing its contract payment in the event the price of supplies does decrease. See Porter Contracting Company, 55 Comp. Gen. 615 (1976) 76-1 CPD 2; Cibro Petroleum, B-189330, B-189619, September 23, 1977, 77-2 CPD 221; Electro-Coatings, Inc., B-191240, March 10, 1978, 78-1 CPD 196.

Aqua-Trol asserts that the second low bidder should not be awarded the contract because it is not in compliance with the Walsh-Healey Act. Questions of compliance with Walsh-Healey requirements are not reviewed by this Office and we have no authority to direct a contracting officer to withhold an award pending a determination under the Walsh-Healey Act. See M & S Products Corporation, B-191602, May 15, 1978, 78-1 CPD 372.

With regard to Aqua-Trol's request that the procurement be resolicited, we have held that unless there is evidence of a conscious and deliberate effort to exclude a bidder from participating in the competition, we will not require that a bid be resolicited provided a significant effort to obtain competition was made and award will be made at a reasonable price. See Culligan, Inc., Cincinnati, Ohio, B-189307, September 29, 1977, 77-2 CPD 244. In this case Aqua-Trol does not allege that it was consciously precluded from bidding or that award to the second low bidder would be made at an unreasonable price and there is no evidence that such is the case.

Accordingly the protest is denied.



Deputy Comptroller General  
of the United States