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DECISION

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

[Protest of Bid Rejection as Nonresponsive] ¹⁵²⁰⁹

FILE: B-199142

DATE: October 17, 1980

MATTER OF: C. B. Goad Construction Co.

DLC 05360

DIGEST:

1. Bidder need not protest within 10 days of agency advice that bid "probably" would be rejected as nonresponsive for failure to acknowledge amendment. Protest filed within 10 working days of date bidder knew of basis of protest is timely filed and for consideration.
2. Amendment increasing cost of contract work in more than trivial amount and binding bidder to supply items under contract is material, and bidder's failure to acknowledge amendment prior to bid opening made bid nonresponsive. Fact that contracting agency failed to send amendment to bidder does not alter nonresponsiveness since record does not show failure to have been result of conscious and deliberate effort to exclude bidder from participating in competition, and bidder contributed to failure to acknowledge amendment.
3. Contracting officer may exercise discretion afforded by regulation and consider oral protest without requesting protester to confirm protest in writing within specific time period and withhold award. After contracting officer has denied protest, award may be made where he has no knowledge that protest has been filed with GAO.

The C. B. Goad Construction Co. (Goad) protests the rejection of its bid by the Federal Aviation Administration (FAA) under invitation for bids No. DTFA06-80-B-50074 for an approach light system and the manner in which an award was made notwithstanding the protest.

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The invitation was issued March 28, 1980. Amendment No. 0001 to the invitation, dated April 16, changed certain towers to contractor-supplied, brand name or equal items from Government-furnished items. Amendment No. 0002, dated April 23, changed the wage rates applicable to the work and extended the bid opening date to May 5, 1980. On April 24, Goad requested from the FAA a copy of the invitation and received it on April 27. According to Goad, on April 29 the contracting officer confirmed to Goad that the towers were to be contractor supplied. The contracting officer states that the April 29 conversation concerned only the historical installation cost for the towers on similar past projects. Although the April 29 conversation involved the subject matter of amendment No. 0001, the existence of the amendment was apparently not discussed. Goad contends that it spoke with the brand name manufacturer of the towers on April 30.

Bids were opened on May 5. Goad was the low bidder at \$35,938.66; the second low bid was \$41,600. Goad's bid contained no acknowledgement of amendment No. 0001; amendment No. 0002 received by Goad on May 2, was acknowledged. Goad told the contracting officer at the bid opening that it had never received the amendment and that it had assumed the change had been incorporated into the specifications since it had been furnished the bid package after the issuance of the amendment. Goad showed the contracting officer its cost estimation which included \$4,200 (the FAA cost estimation for this change was \$3,200) for the towers. At this time, Goad was told that its bid was "probably" nonresponsive due to the failure to acknowledge the amendment.

By letter of May 22, the contracting officer advised Goad that its bid "is hereby" rejected as non-responsive for the above reason. Apparently, also on May 22 during a conversation between Goad and the contracting officer the bid protest procedures of our Office were discussed, although Goad maintains that it did not know that its bid had been rejected as non-responsive until May 31. On June 2 Goad orally and in writing protested the rejection of its bid to the contracting officer, followed by a June 3 protest to our Office. By letter of June 5 the contracting officer

informed Goad that an award would be made pending any protest Goad might file with our Office. Award was made on June 6. Our Office received the protest on June 6. Our notification to the FAA of the protest apparently occurred after the award had been made.

The FAA maintains that the Goad protest was untimely filed with our Office and should not be considered on the merits. It is argued that the May 5 and 22 conversations apprised Goad that its bid was rejected as nonresponsive and that the filing of the protest with our Office on June 6 was more than 10 days after the basis for protest was or should have been known. The FAA also believes that the rejection of the Goad bid was proper since bidders were advised in the invitation that amendments had to be acknowledged prior to bid opening, Goad did not so acknowledge, and the amendment was material inasmuch as the change affected bid prices by an estimated \$3,200. That the FAA neglected to send Goad a copy of the amendment does not affect the validity of the non-responsiveness determination, it is contended, because the failure was not the result of a conscious and deliberate effort to exclude Goad from competing.

Goad maintains that the failure to acknowledge the amendment should have no effect on the responsiveness of its bid because it was never furnished the amendment. Further, the April 29 conversation made Goad aware that it was to furnish the towers, and it reasonably believed the content of the amendment to have been incorporated into the specifications. Goad notes that its cost estimation included the cost effects of the amendment in the bid price. Goad also protests the award made on June 6 without resolution of its protest to the contracting officer.

While we find the protest timely filed, we deny it as having no merit.

On May 5, the Goad bid was not rejected; Goad was merely informed that the bid would "probably" be rejected. The bid was not rejected until May 22, at the earliest. Since Goad's protests to the agency and our Office were received within 10 working days from

May 22, the protest is timely under our Bid Protest Procedures. See 4 C.F.R. § 20.2(a) and (b)(2) (1980).

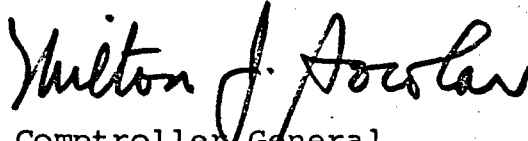
We believe that the Goad bid was properly rejected. The amendment increased the cost of contract performance by approximately \$3,200 (clearly a more than trivial amount) and bound the bidder to furnish the towers under any resultant contract. Accordingly, the amendment was material, and the failure of Goad to acknowledge it could not be waived. Navaho Corporation, B-192620, January 16, 1979, 79-1 CPD 24. While Goad signed the amendment after bid opening, to be effective, an acknowledgement must be submitted prior to bid opening. Ira Gelber Food Services, Inc., 55 Comp. Gen. 599 (1975), 75-2 CPD 415. Further, where a bidder fails to acknowledge a material amendment due to the failure to receive the amendment, the bid must be rejected as nonresponsive unless, unlike here, the failure is the result of a conscious and deliberate effort by the agency to exclude the bidder from participating in the competition. Western Microfilm Systems/Lithographics, B-196649, January 9, 1980, 80-1 CPD 27. Finally, we believe that Goad significantly contributed to its failure to acknowledge the amendment since Goad did not request a copy of amendment No. 0001 when amendment No. 0002 was received before bid opening.

Goad also protests the failure of the contracting officer to withhold the award until the Goad protest was resolved. Goad contends that section 1-2.407-8(b) of the Federal Procurement Regulations (FPR) (1964 ed. amend. 68) was violated because the contracting officer did not request Goad to confirm its oral agency protest in writing within a specific time period and withhold award until that specified time period had expired.

We believe the actions taken by the contracting officer were proper. The above FPR section cited by Goad is discretionary and not mandatory. By letter of June 5, the contracting officer advised Goad that an award would be made and that there was no evidence that Goad had filed a protest with our Office as a result of the May 22 conversation. This letter, in essence, advised Goad that the contracting officer determined that the agency protest had no merit and

that any further consideration would have to be by our Office. [At the time the award was made, the contracting officer, therefore, had resolved the agency protest, and apparently he had no knowledge either of a protest having been filed with our Office or knowledge that Goad would file with our Office. Even if the contracting officer had been aware that Goad would protest to our Office, there is no FPR requirement that award be withheld when the contracting officer has no knowledge that a protest has actually been filed with our Office.] Wheeler Industries, Inc., B-193883, July 20, 1979, 79-2 CPD 41.

Accordingly, the protest is denied.



For the Comptroller General
of the United States