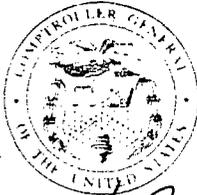


Robert

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DECISION



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

*[Protest of Bid Rejection for Failure to Acknowledge
Amendment]*

FILE: B-200481

DATE: February 11, 1981

MATTER OF: United States Cartridge Company

DIGEST:

1. Where agency does not receive acknowledgment of material amendment to solicitation, fact that bidder mailed acknowledgment is not sufficient to constitute express acknowledgment; bidder has responsibility to assure that acknowledgment arrives at agency.
2. Records of telegraph company which show that two messages, one of which announced that amendment would be issued and another which constituted additional amendment, were received by protester do not constitute implied acknowledgment of amendments as telegraph company is not agency's agent for receipt of amendment acknowledgments, agency was not required to check company records prior to bid opening, and first message only announced that amendment would be issued and contained none of the specification changes included in actual amendment.
3. Evidence of oral acknowledgment of amendments, both of which, among other things, extended bid opening, is inconclusive where affidavit of contract specialist indicates that only general conversations regarding extended bid opening were held with protester prior to bid opening.
4. Fact that telegraphic amendment does not expressly state it must be acknowledged does not eliminate bidder's obligation to acknowledge all material amendments.

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The United States Cartridge Company (USCC) protests the rejection of its bid and the subsequent award of a contract under solicitation No. DAAA09-80-B-0093 issued on April 7, 1980, by the U.S. Army Armament Materiel Readiness Command (ARMCOM), at Rock Island, Illinois. For reasons set forth below, we deny the protest.

The solicitation invited bids for 23,094,000 .38 caliber high velocity cartridges and outlined the requirements for packing the items in containers and packaging the containers in pallets. On May 28, ARMCOM issued amendment 0001 to the solicitation, which among other changes, extended the bid opening date to June 20. By telegram dated June 15, the protester was informed that amendment 0002 would be issued modifying the specifications for packing and packaging the ammunition. This amendment, which was issued on July 14, also extended the bid opening date to July 29 and made a number of changes in the areas specified in the advance telegram and indicated that bidders were to acknowledge receipt of the amendment or risk rejection of their bids.

On August 11 ARMCOM issued amendment 0003, which further extended the bid opening date to August 20 and made additional changes to the packing and packaging requirements set out in amendment 0002. This amendment was transmitted by telegram which stated that it was to be considered the amendment and that "no formal copy will be sent." The telegram made no mention of acknowledgment. At bid opening, ARMCOM determined that the protester had submitted the low bid but had not acknowledged receipt of amendments 0002 and 0003. The protester's bid, which had been submitted prior to the issuance of amendments 0002 and 0003, was therefore rejected as non-responsive and the contract was awarded to the second low bidder, the Olin Corporation.

The protester argues that the rejection of its bid was improper as receipt of amendments 0002 and 0003 was actually and constructively acknowledged prior to bid opening. USCC states that a signed acknowledgment of amendment 0002 was sent to ARMCOM by first-class mail on July 21, and that no such formal acknowledgment was required of amendment 0003. In any event, the protester contends that these amendments were constructively

acknowledged because the records of the telegraph company which delivered the messages regarding amendments 0002 and 0003 indicate that these messages were in fact received and acknowledged by USCC and these records were available to ARMCOM. Further, the protester contends that it orally confirmed its intention to be bound by these amendments during telephone conversations with an ARMCOM contract specialist prior to bid opening.

ARMCOM states that because the protester's bid failed to indicate acknowledgment of amendments 0002 and 0003, the bid was properly rejected as nonresponsive. Although the protester contends that it mailed an acknowledgment of amendment 0002, the agency indicates that it was never received. Further, ARMCOM's contract specialist denies that USCC's representative specifically acknowledged receipt of these amendments in conversations before bid opening.

The failure of a bidder to acknowledge, prior to bid opening, receipt of an amendment which contains a material requirement renders the bid nonresponsive. Imperial Fashions, Inc., B-182252, January 24, 1975, 75-1 CPD 45. However, a bidder's failure to acknowledge receipt of an amendment may be waived if the bid submitted clearly indicates that the bidder received the amendment. Defense Acquisition Regulation (DAR) § 2-405(iv)(A) (DAC 76-17, September 1, 1978). In this regard, we have held that a bidder's failure to explicitly acknowledge receipt of an amendment can be waived if there is any implied acknowledgment through submission of a bid which reflects some change made by the amendment, such as an extended bid opening date. Inscom Electronics Corporation, 53 Comp. Gen. 569 (1974), 74-1 CPD 56; Algernon Blair, Inc., B-182626, February 4, 1975, 75-1 CPD 76, and American Monorail, Inc., B-181226, July 31, 1974, 74-2 CPD 69.

USCC argues that it expressly acknowledged amendment 0002 in a timely manner by mail. The bidder, however, has the responsibility to assure that the acknowledgment arrives on time at the agency. Since there is no indication that the agency received the acknowledgment, we cannot find that the amendment was expressly acknowledged. See generally Enrico Roman, Inc., B-196350, January 21, 1980, 80-1 CPD 61.

We do not agree with the protester that the telegraph company records which show that USCC received messages regarding the two amendments constitute implied acknowledgment of those amendments. First, the protester does not argue, and we do not believe, either that the telegraph company employees were agents of ARMCOM for the purpose of receiving acknowledgment of these amendments or that the agency was under any duty to check these company records before bid opening to determine whether the messages were received. Further, the message concerning amendment 0002 was merely an announcement that an amendment would be issued in the future and contained none of its terms other than the extended bid opening date. Acknowledgment of such a message could hardly be held to constitute acceptance of the many specification changes actually included in the amendment issued later.

USCC maintains that conversations between its employee and an ARMCOM contract specialist before bid opening constituted an implied acknowledgment of these amendments. In this regard, the protester insists that its representative discussed the two amendments, the extended bid opening dates and USCC's decision not to amend its bid price in light of the specification changes in the amendments. The contract specialist, however, in an affidavit submitted to this Office in connection with the protest, maintains that she had only general conversations with the USCC representative before bid opening regarding the fact that the bid opening had been extended and that "[n]o reference was made to any specific amendment."

Oral acknowledgment of a material amendment prior to bid opening can be sufficient to permit acceptance of a bid which contains no other indication of acknowledgment. 33 Comp. Gen. 508 (1954); Nautical Manufacturing Company, B-185198, February 24, 1976, 76-1 CPD 129. However, in order to maintain the integrity of the bidding process, evidence used to show awareness of or concurrence with an amendment must, at the very least, be independently verifiable evidence over which the bidder does not have exclusive control as to whether to submit it. Nautical Manufacturing Company, supra.

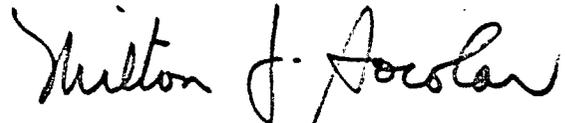
Here, the only evidence meeting this requirement is the affidavit of the contract specialist. It is our view that this evidence is inconclusive as to whether the amendments were orally acknowledged as it indicates that only very general conversations occurred concerning bid opening date

extension without specific reference to either amendment or to the specific changes contained in those amendments.

Finally, USCC argues that as amendment 0003 contained no provision requiring formal acknowledgment and since amendment 0003 referenced amendment 0002 there was no need to formally acknowledge amendment 0002. The fact that amendment 0003, which was transmitted by telegraph message, did not provide a space for acknowledgment did not, of course, relieve USCC of its obligation to acknowledge receipt of that amendment. In fact, paragraph 4 of Standard Form 33A, incorporated in the solicitation by reference, provides that "receipt of an amendment to a solicitation by an offeror must be acknowledged (a) by signing and returning the amendment, (b) on page three of Standard Form 33, or (c) by letter or telegram. Such acknowledgment must be received prior to the hour and date specified for receipt of offers."

It is our view that USCC's bid was properly rejected for failure to acknowledge amendments 0002 and 0003.

The protest is denied.



For the Comptroller General
of the United States