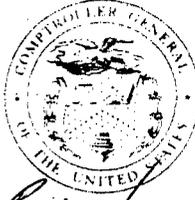


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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

Protest of Bid Rejection as Nonresponsive

FILE: B-200849

DATE: February 12, 1981

MATTER OF: Jose Lopez & Sons Wholesale
Fumigators, Inc.

DIGEST:

1. A bid which fails to acknowledge amendment having possible significant effect on price is nonresponsive and is properly rejected.
2. Bidder's failure to acknowledge IFB amendment may not be waived on basis that bidder did not receive amendment from agency before bid opening where evidence does not indicate deliberate attempt by agency to exclude bidder from competition.
3. Possibility that Government might realize monetary savings in particular procurement if material deficiency is corrected or waived is outweighed by importance of maintaining integrity of competitive bidding system.

Jose Lopez & Sons Wholesale Fumigators, Inc. (Lopez) protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. DAHC77-80-B-0348, issued by the Department of the Army. The IFB was for ground treatment against subterranean termites around family housing units at Wheeler Air Force Base, Hawaii. The Army rejected Lopez' bid because the protester failed to acknowledge a material amendment to the IFB. We believe the rejection was proper.

The bases of the protest are (1) that Lopez never received the amendment and (2) its bid was predicated on the terms of the amendment in any event.

One change made by the amendment restricted the use of insecticides to Chlorodane only; the original solicitation

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permitted the use of proprietary chemicals if they contained Chlorodane. The other, more significant change revised the warranty clause. As originally written, the warranty provided that "Structural repairs of damages resulting from subterranean termite inspection within * * * (1) year from the date of acceptance * * * will be made at the contractor's expense up to a total cost of \$2,000." The amendment revised the warranty to provide for a maximum contractor liability for these damages of \$2,000 per unit. Thus, as originally issued, the IFB fairly could be read to limit a contractor's potential liability to \$2,000 for the entire project, which included 492 units. In fact, at a pre-bid site visit, some of the prospective bidders questioned whether their liability was so limited. Lopez was not present at this site investigation.

With respect to Lopez' assertion that it understood its liability to be \$2,000 per unit and bid accordingly and that it always intended to use Chlorodane, we point out that the question of responsiveness deals with the bidder's legal obligation under the bid as submitted and not whether he intended to be bound by the requirements of the solicitation, as amended. See J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD 322. Thus, a bid which fails to acknowledge a material amendment to an IFB does not obligate the bidder to the terms of the amendment and the bid therefore is nonresponsive and cannot be accepted. Alaskan Office Equipment, Inc., B-196065, April 9, 1980, 80-1 CPD 266. An amendment is material if it has more than trivial or negligible effect on price, quantity, quality or delivery of the item bid upon. Defense Acquisition Regulation 2-405(iv)(B) (1976 ed.). We think the changes here are clearly material.

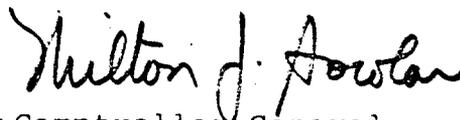
For example, under the original solicitation the liability of the contractor for structural damages "up to a total cost of \$2,000" can reasonably be viewed as limiting the contractor's obligation for the entire project to that amount. The amendment clearly increased that potential liability by \$982,000, an amount which is obviously significant and could substantially impact on the bid prices. Likewise, the restriction to a specific insecticide could have more than a trivial effect on price.

Lopez also believes that its failure to acknowledge the amendment should not render its bid nonresponsive since it never

received the amendment. However, the risk of non-receipt is on the bidder. Accordingly, if a bidder does not receive and acknowledge a material amendment to an IFB, and this failure is not the result of a conscious or deliberate effort to exclude a bidder from competition the bid must normally be rejected as nonresponsive. Porter Contracting Company, 55 Comp. Gen. 615 (1976), 76-1 CPD 2; Commercial Lawn Maintenance, Inc., B-193626, February 1, 1979, 79-1 CPD 78. Here, the contracting activity reports that it mailed a copy of the amendments to all the firms on the bidders list (which included Lopez). In addition, the agency states that it attempted to contact all of the potential bidders by telephone to apprise them of the issuance of the amendment but that it could not contact Lopez during normal business hours since it received no answer. On this record, therefore, we have no reason to believe that the failure of Lopez to receive the amendment was the result of a deliberate attempt by the contracting activity to exclude Lopez from competition.

Lopez points out that its bid would result in a \$94,000 monetary savings to the Government. However, the importance of maintaining the integrity of the competitive bidding system outweighs the possibility that the Government might realize a monetary savings in a particular procurement if a material deficiency is corrected or waived. Scott-Griffin, Incorporated, B-193053, February 9, 1979, 79-1 CPD 93.

The protest is denied.



For the Comptroller General
of the United States