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DECISION

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

FILE: B-212871 **DATE:** November 30, 1983

MATTER OF: Eugene Ricciardelli, Inc.

DIGEST:

1. Where bid failed to acknowledge a material amendment, agency was under no obligation to extend bid opening date and was required to reject the bid as nonresponsive even though agency knew that bidder had not received the amendment in time to consider it in preparation of the bid. Once an agency has dispatched an amendment in sufficient time to permit all prospective bidders to consider the information, prospective bidders bear the risk of untimely receipt unless they can show that untimely receipt resulted from a conscious and deliberate effort to exclude them.

2. The propriety of a particular procurement generally depends on whether the government obtained adequate competition and reasonable prices. GAO has no reason to question agency's determination that it did obtain a reasonable price through adequate competition where four responsive bids were received, the lower of which was in line with agency's cost estimate.

Eugene Ricciardelli, Inc., protests rejection of its bid as nonresponsive and the subsequent award of a contract to another bidder under invitation for bids No. DAHA19-83-B-0011, issued by the United States Property and Fiscal Officer, Massachusetts, for the repair of high temperature hot water lines and breeching at Otis Air National Guard Base, Falmouth, Massachusetts. The agency found Ricciardelli's bid to be nonresponsive for failure to acknowledge receipt of an amendment to the solicitation. We deny the protest.

By amendment No. 2, dated July 29, 1983, 11 days before the bid opening date of August 9, the agency amended

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the IFB to increase the thickness of the required insulation from 2" to 4" and to require that all protective coatings be free of asbestos. Agency memoranda indicate that copies of the amendment were delivered to a United States Postal Service (USPS) station on the afternoon of July 29, at which time agency officials received assurances from postal officials that the copies would be dispatched that evening.

However, for reasons unknown, an undue delay occurred before at least some of the bidders received their copies of the amendment. Ricciardelli learned of the amendment 25 minutes before bid opening when it received a telephone call from contracting officials who were concerned that not all the bidders might have received their copies; Ricciardelli did not receive its copy of the amendment, postmarked August 9, until August 10, 1 day after bid opening. Ricciardelli informs us that two of the firms on the prospective bidders list of over 40 firms did not receive their copies until the day before bid opening. One of the bidders did not receive its copy until the very day of bid opening.

Nevertheless, the agency informs us that a poll of six firms selected from the bidders list indicated that most had received their copies of the amendment between August 1 and August 5, primarily on August 3 and August 4. Although Ricciardelli alleges that none of the five actual bidders received his copy during the period of August 1 to August 5, all but Ricciardelli acknowledged receipt of the amendment. The agency accordingly found Ricciardelli's apparent low bid nonresponsive and made award to the next low bidder.

Ricciardelli claims that it did not learn of amendment No. 2 until it was too late to review and acknowledge it, and contends that since the agency was aware prior to bid opening of the late delivery of some copies of the amendment it should have extended the bid opening date. Ricciardelli also argues that the amendment was of such importance that it should have been sent by special delivery or by some other method ensuring verification of receipt by bidders.

A bidder's failure to acknowledge receipt of a material amendment to an IFB generally renders the bid nonresponsive and requires its rejection since acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amended solicitation. See Aerial Service Corporation, B-209761.2, May 24, 1983, 83-1 CPD 559. An amendment having more than a trivial effect on price, quality, quantity or delivery relative to the cost and scope of the services being procured is material. Id. Ricciardelli has not only failed to dispute the agency's determination that doubling the required insulation resulted in a significant increase in the cost of meeting the specifications, but has in fact itself characterized the amendment as important. Accordingly, we will consider the amendment as effecting a material change in the solicitation.

The contracting agency is not an insurer of the prompt delivery of amendments to each prospective bidder. The agency discharges its responsibility when it issues and dispatches an amendment in sufficient time to permit all the prospective bidders to consider the information in preparing their bids. Therefore, unless the failure to receive the amendment in a timely manner results from a conscious and deliberate effort by the contracting agency to exclude a prospective bidder from participating in competition, the prospective bidder bears the risk of untimely receipt or nonreceipt. See CMP Incorporated, B-209179, October 29, 1982, 82-2 CPD 390; Rockford Acromatic Products Company, B-208437, August 17, 1982, 82-2 CPD 143; 52 Comp. Gen. 281 (1972).

A protester generally bears the burden of affirmatively proving its case and its protest will be denied in the absence of such proof. See Alchemy, Inc., B-207954, January 10, 1983, 83-1 CPD 18. As indicated above, the copy of amendment No. 2 which Ricciardelli received was postmarked August 9, suggesting the possibility that it and perhaps other copies were in fact not mailed until well after July 29 and not in time to permit a prospective bidder to consider it in preparing a bid. However, the record also includes a statement from an agency official claiming to have delivered copies of the amendment to the

USPS on July 29 and an unrebutted agency claim that most of a group of six widely-dispersed firms selected from the bidder's list and polled by the agency after bid opening received their copies between August 1 and August 5, thus giving rise to the inference that at least some of the copies were mailed well before August 9, probably on July 29. Given the conflicting inferences that can be drawn from the above evidence, given that an August 9 postmark on one copy of the amendment does not preclude the possibility that while the amendment was actually delivered to the USPS on July 29 some of the copies were subsequently delayed in postmarking and dispatch by postal officials, we conclude that Ricciardelli has failed to show that the agency did not mail amendment No. 2 in sufficient time to permit bidders to consider the information in preparing their bids.

That contracting officials were aware before bid opening that some copies of the amendment had not been received in a timely manner did not in itself require the contracting officer to extend the bid opening date, since, as indicated above, in the absence of a conscious and deliberate exclusion of a bidder, it is irrelevant that a particular prospective bidder's copy of an amendment is fortuitously lost or delayed after timely issuance and dispatch of an amendment by the agency. See Electro-Mechanical Industries, Inc., supra. Nothing in the record indicates a conscious and deliberate attempt to exclude Ricciardelli from competition. Further, we are unaware of any requirement that copies of amendments be sent by special delivery or other means beside first class mail. See Morris Plains Contracting, Inc., B-209352, October 21, 1982, 82-2 CPD 360; Marino Construction Company, Inc., 61 Comp. Gen. 269 (1982), 82-1 CPD 167.

Rather, the propriety of a particular procurement generally depends on whether the government obtained adequate competition and reasonable prices. See Space Services International Corporation, B-207888.4 et al., December 13, 1982, 82-2 CPD 525; Electro-Mechanical Industries, Inc., supra. Given the receipt of four responsive bids, we find insufficient reason to question the agency's determination that it obtained adequate competition. Nor do we find sufficient reason to doubt the agency's determination that award to the second low bidder for $92,438 was for

a reasonable price. Although Ricciardelli bid only $56,348, the difference between Ricciardelli's bid and those of the four responsive bidders, whose bids ranged from $92,438 to $114,000, apparently reflects Ricciardelli's failure to consider the material changes made by amendment No. 2. Further, although the government initially estimated the cost of the project to be only $61,700, it later found that it had overlooked important labor and material costs. Its subsequent determination that $92,438 was a reasonable price is supported by a comparison of the contract price to the prices offered in the other responsive bids.

The protest is denied.

Milton J. Socolar
for Comptroller General
of the United States