

DECISION



My...
29021
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-213974.2

DATE: August 7, 1984

MATTER OF: Conrad Industries, Inc.

DIGEST:

1. Generally, absent evidence that failure of bidder to receive amendment was result of conscious or deliberate effort by contracting personnel to exclude bidder from competition, where bidder fails to receive and to acknowledge a material amendment, its bid must be rejected as nonresponsive.
2. Where bid was submitted on basis of original invitation f.o.b. destination delivery requirement, fact that unacknowledged amendment changes delivery requirement to f.o.b. origin does not cause bid to be nonresponsive since failure to acknowledge amendment that merely effects a decrease in the cost of performance should be waived as minor informality.
3. As a general rule, where invitation amendment provides that bids will be evaluated for award purposes on basis of prices submitted for basic year and for option years that are exercised at time of award (none were exercised) and also on basis of prices submitted for basic year and for all option years, whether exercised or not at time of award, invitation would be defective since bid that did not include option year prices would be responsive under one evaluation method and nonresponsive under the other. However, since clear intent of invitation amendment was, notwithstanding slight ambiguity created by two evaluation provisions, that options would be evaluated, award was properly made.

029690

4. Invitation soliciting bids on f.o.b. origin delivery basis which did not include provision for evaluation of transportation costs is defective. However, since failure to provide for such evaluation did not affect relative standing of bidders, defect does not render award invalid.

Conrad Industries, Inc. (Conrad), protests the rejection of its bid as nonresponsive under National Park Service, Department of the Interior (Interior), invitation for bids No. WASO-84-01 due to Conrad's failure to acknowledge the receipt of amendment No. 1, which the contracting agency states was mailed to all bidders.

We deny the protest.

The amendment that Conrad failed to acknowledge made three pertinent changes to the invitation. First, the delivery terms for the items (which were now designated in the amendment as "Year No. 1" items) were changed from f.o.b. destination to f.o.b. origin. Second, two 1-year options, each for the same number of items as for "Year No. 1" and for f.o.b. origin delivery, were added. Third, the following provisions were added:

"Evaluation Options

"The Government will evaluate the total price for the basic requirements together with any option(s) exercised at the time of award.

"Evaluation of Options

"(1) The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. . . . The evaluation of options will not obligate the Government to exercise the option(s).

.

"Contract Award

"Only one (1) Contract will be awarded as a result of this solicitation. Bids which do not include prices for all three years will be considered nonresponsive and will be rejected."

Conrad states that it was never provided with a copy of the amendment and believes that since it was low on the originally solicited items, the amendment should not affect its receiving the award for that amount. Interior, citing our decision, B-169897, Aug. 26, 1970, contends that the Conrad bid was properly found to be nonresponsive since the amendment changed the delivery terms from f.o.b. destination to f.o.b. origin and, therefore, affected prices in other than a trivial manner. Also, the amendment added two option years. Interior also contends that the protest is untimely since it was not filed with our Office until December 29, 1983, more than 10 working days after Conrad learned on December 13 of the basis for its protest.

As regards the question of timeliness, our Office received the Conrad protest on December 20. The protest therefore was timely filed with our Office and is for our consideration. 4 C.F.R. § 21.2(a) (1984).

As to the reasons for finding the Conrad bid nonresponsive, we do not agree that the change in the delivery terms affected the responsiveness of the Conrad bid. The decision, B-169897, supra, cited by Interior, is distinguishable from the present facts inasmuch as it involved a change in the delivery terms from f.o.b. origin to f.o.b. destination. By bidding on the basis of the originally requested f.o.b. origin delivery, the bidder in that case failed to accept liability both for the loss of, or damage to, the goods between the shipping and the delivery points and for the transportation costs between those two points. Thus, the bid price was lower than it would have been had the bidder bid on the basis of the amendment, and the bid failed to offer what the government had requested of the bidders. Here, Conrad offered more than the government's requirements as regards delivery by agreeing to be liable for any possible loss of, or damage to, the goods and for the transportation costs for the goods between those two points. The failure of the low bidder to acknowledge an amendment which merely effects a decrease in the cost of performance should be waived as a minor informality. Imperial Fashions, Inc., B-182252, Jan. 24, 1975, 75-1 C.P.D. ¶ 45; MBAssociates, B-197566, June 4, 1980, 80-1 C.P.D. ¶ 383.

The contracting agency also believes that Conrad's bid was nonresponsive because the amendment added two 1-year options to the invitation requirements and advised that a failure to submit prices for these options would render the bid nonresponsive.

We have held that if a bidder does not receive and acknowledge a material amendment, and there is no evidence that this failure is the result of a conscious or deliberate effort on the part of the contracting personnel to exclude the bidder from the competition, the bid must normally be rejected as nonresponsive. Mario Construction Company, Inc., B-204970, Feb. 25, 1982, 82-1 C.P.D. ¶ 167. We believe this the case here.

We do, however, note that the two option evaluation clauses contained conflicting language. If the invitation amendment had informed bidders that the low bidder would be that bidder whose total price for the basic year and the option years was low and that a failure to submit prices for the option years would render the bid nonresponsive, we would agree with the agency. However, the amendment also provided that bids would be evaluated by considering the price for the basic year along with the prices of any option year(s) "exercised at the time of award." If the Conrad bid were to be evaluated by considering only the prices submitted for the basic year and for those option years exercised at the time of award (none), that bid would not only be low, but also responsive. See 51 Comp. Gen. 528 (1972). However, the clear intent of the invitation amendment was, notwithstanding the ambiguity created by the language of the two evaluation clauses, that options would be evaluated. This is so particularly because the agency could not properly have exercised at time of award any option for subsequent year requirements. 31 U.S.C. §§ 1341 and 1502 (1982). We therefore conclude that the award was properly made.

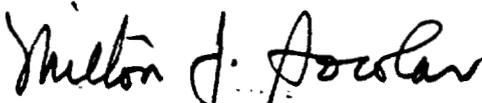
We also note that in the Federal Procurement Regulations, 41 C.F.R. § 1-2.202-3 (1983):

"(a) Invitations for bids solicited f.o.b. origin shall state that bids will be evaluated on the basis of bid price plus transportation cost to the Government from point of origin to one or more designated destinations."

Neither the invitation nor amendment made provision for the evaluation of transportation costs and was, therefore, defective in this regard. Without this evaluation, it is impossible to determine which bid would result in the lowest cost to the government. However, since the nonresponsiveness of the Conrad bid was not affected by this fact and since the prices of the other two bidders show clearly that any evaluation involving transportation costs would have had

no affect on which bidder received the award, we do not believe that this defect renders the award invalid. We point it out to prevent a recurrence in the future.

The protest is denied.

for 
Comptroller General
of the United States