

DECISION



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

FILE: B-220200 **DATE:** November 25, 1985
MATTER OF: Colleague, Incorporated

DIGEST:

A bid that fails to acknowledge an amendment which reduced the contract delivery period is nonresponsive, and the deficiency may not be waived on the basis that the bidder did not receive the amendment where the bidder fails to show that, as it contends, the agency deliberately failed to provide a copy of the amendment and otherwise consciously acted to exclude the bidder from competing.

Colleague, Incorporated, protests the rejection of its apparent low bid and the award of five items of a requirements contract to Ghent Manufacturing, Inc., under invitation for bids (IFB) No. FNP-F1-1732-A-7-10-85. The IFB was issued by the General Services Administration (GSA) for portable and wall mounted blackboards to be provided over a period of 1 year. Colleague's bid was rejected as nonresponsive for failure to acknowledge receipt of an amendment to the solicitation. The protest is denied.

The IFB, issued on June 10, 1985, initially set bid opening for July 10, 1985, at 2:30 p.m. On July 9, the agency issued an amendment to the solicitation which reduced the delivery period from 90 days to 70 days after receipt of orders and extended the bid opening date to July 22 at 2:30 p.m. The agency states that on the day the amendment was issued, a copy of the amendment was mailed to all bidders on the bidders mailing list, to which Colleague had been added 2 weeks after the original IFB was issued. In addition to mailing the amendment to the bidders, the agency states that the bid opening officer posted a notice of the changes to the solicitation and, on July 10, informed bidders who were present for the previously scheduled bid opening of the changes to the solicitation. Bids that had been submitted by July 10, including Colleague's, were not opened at that time. Instead, bidders were given the opportunity to change their bids, provided that revised bids were received prior to the newly established time for receipt of bids.

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Upon bid opening on July 22, eight bids were received in response to the amended solicitation. Of those bids, four acknowledged receipt of the amendment. Although Colleague was the apparent low bidder, its bid was rejected because it failed to acknowledge receipt of the amendment.

Colleague states that it never received a copy of the amendment and that it was not otherwise notified of the issuance of the amendment. Colleague also maintains that GSA, by failing to notify Colleague of the amendment, acted deliberately to exclude it from the competition.

It is well established that the bidder bears the risk of nonreceipt of a solicitation amendment. Marino Construction Co., Inc., 61 Comp. Gen. 269, 272 (1982), 82-1 C.P.D. ¶ 167. This rule is based on the principle that, from the government's point of view, the propriety of a procurement is determined on the basis of whether adequate competition and reasonable prices were obtained, not on whether every possible prospective bidder is afforded an opportunity to bid. Reliable Service Technology, B-217152, Feb. 25, 1985, 85-1 C.P.D. ¶ 234. Therefore, where a bidder does not receive and acknowledge a material amendment, generally its bid must be rejected as nonresponsive unless it is shown that there was a conscious or deliberate effort on the part of the agency to exclude the bidder from competing for the contract. See General Atronics Corp., B-217305, Jan. 4, 1985, 85-1 C.P.D. ¶ 20; see also Capital Engineering & Mfg. Co., B-213924, Apr. 2, 1984, 84-1 C.P.D. ¶ 374.

Under the Federal Acquisition Regulation, an amendment is material if it affects the bidder's price or the quantity, quality, or delivery times of the IFB in more than a trivial or negligible manner. 48 C.F.R. § 14.405 (1984); See Doyon Construction Co., Inc., 63 Comp. Gen. 214 (1984), 84-1 C.P.D. ¶ 194. The protester argues that the amendment did not affect the responsiveness of its bid because it was timely submitted and the firm could have complied with the reduced delivery period. However, acceptance of Colleague's bid would not have legally obligated it to meet the government's shorter delivery period required under the amended IFB and, thus, the bid was nonresponsive. See Doyon Construction Co., Inc., 63 Comp. Gen. at 217, 84-1 C.P.D. ¶ 194 at 4; see also TCA Reservations, Inc., B-218615, Aug. 13, 1985, 85-2 C.P.D. ¶ 163.

Further, we find that Colleague has failed to show that the agency manifested a deliberate effort to exclude Colleague from competing for the contract. The protester

expresses the view that the report submitted by the agency in response to its protest shows that at the time the solicitation was issued, the contracting officer was aware of instructions from the Director of Procurement, GSA Office of Federal Supply Services, to various agency regional Directors of Procurement directing the reduction of delivery periods on certain contracts. The protester assumes that the contracting officer delayed necessary actions to effectuate this change until 2 days before bid opening to thwart Colleague's efforts to compete for the contract. We find this argument unpersuasive, particularly since the extension under the amendment of the bid opening date by 12 days provided adequate time for bidders to receive the amendment and modify their bids if they chose to do so. Moreover, the documents in the record do not show that the contracting officer knew of these instructions or, if he did, that he deliberately failed to execute them under the original solicitation and delayed necessary procedures to effectuate the reduction by amendment.

The protester further states that the four bidders who acknowledged the amendment are listed on a series of three asterisked pages included among several bidders mailing lists. On the basis of this observation, Colleague concludes that only those bidders listed on the three asterisked pages were sent copies of the amendment and, since its name did not appear among the bidders listed on those three pages, the agency never mailed it a copy of the amendment. We note, however, that at least one bidder who acknowledged the amendment was not listed on the referenced pages. The agency report contains what appears to be several groups of mailing lists, some of which include bidders that do not appear on other lists. Thus, the protester's argument does not support the conclusion that the agency deliberately failed to provide Colleague a copy of the amendment. Moreover, the fact that four bidders acknowledged the amendment indicates that the agency, in fact, did transmit the amendment. See Richard Delene Contractors, Inc., B-212797, Sept. 13, 1983, 83-2 C.P.D. ¶ 321.

Colleague also contends that during a telephone conversation between the contracting officer and its vice president and general counsel prior to the date initially set for bid opening, the contracting officer failed to mention that issuance of an amendment was being considered, even though the contracting officer was then in the process of surveying certain other companies to determine the feasibility of reducing the delivery period. The fact that the agency was then in the process of assessing the

feasibility of reducing the delivery period would seem to indicate that a final decision had not yet been made to issue the amendment. Under those circumstances, the contracting officer properly advised Colleague that the bids were due on July 10, the bid opening date then established in the IFB. Further, the agency states that the feasibility survey was conducted upon previous bidders, including the then-incumbent contractor. Colleague has not contested the agency's statement in this regard, nor has it claimed that it was included in this group.

We conclude, therefore, that the protester has not shown that there was a deliberate effort on the part of the agency to exclude it from competing for the contract. The protest is denied.

for Seymour Efra
Harry R. Van Cleve
General Counsel