



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Irwin-Jurkewicz Corporation

File: B-249037

Date: October 20, 1992

Katherine A. Irwin for the protester.
James L. Weiner, Esq., Department of the Interior, for the agency.
John Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's nonreceipt of a material amendment containing a Department of Labor wage rate determination does not warrant a cancellation and recompetition where the record does not indicate that the agency violated applicable regulations governing the distribution of amendments or deliberately attempted to exclude the bidder from the competition.

DECISION

Irwin-Jurkewicz Corporation protests the rejection of its bid as nonresponsive and the award of a contract to Jerry Lewis Construction Company under invitation for bids (IFB) No. FWS-92-IFB-05, issued by the Fish and Wildlife Service, Department of the Interior. Irwin-Jurkewicz argues that its bid was improperly rejected as nonresponsive for failing to acknowledge an amendment to the IFB because the modifications contained in the amendment did not materially affect its bid, and because it failed to receive a copy of any IFB amendments.

We deny the protest.

The IFB was issued on February 25, 1992, for the removal of an existing steel storage tank and water treatment building and for the construction of a new water reservoir and water treatment building at the Mingo Job Corps Conservation Center, Puxico, Missouri. Copies of the IFB were mailed to 81 firms, including the protester.

Three amendments to the IFB were issued. Amendment No. 1, issued on March 11, made various changes to sections K and L of the solicitation, and extended the bid opening date from March 25, 1992, to May 12. Amendment No. 2, issued on

March 12, changed the bid opening date to April 21. Amendment No. 3, issued on April 15, included a modified wage rate determination under the Davis-Bacon Act, 40 U.S.C. § 276(a) (1988), which increased the wage rate for several labor categories. This amendment also extended the bid opening date from April 21 to May 5.

Six bids were received in response to the solicitation, with Irwin-Jurkewicz submitting the apparent low bid of \$198,200. The agency reviewed Irwin-Jurkewicz's bid and determined it nonresponsive for failing to acknowledge any of the three amendments to the IFB. As a result, the contract was awarded to the second low bidder, Jerry Lewis, for \$211,770.

Irwin-Jurkewicz protests that it did not acknowledge the amendments because it never received the amendments, and contends that its failure to acknowledge the amendments should be waived as a minor informality since they do not materially affect its bid. The protester explains with regard to the wage rate determination contained in amendment No. 3 that the increased wage rates contained therein would not have affected its bid price because it "had recently performed a contract in Missouri . . . and have on file the current wage rate."¹

Generally, a bid which does not include an acknowledgment of a material amendment must be rejected because absent such acknowledgment, the bidder is not obligated to comply with the terms of the amendment, and its bid is thus nonresponsive. LaCorte ECM, Inc., B-231448.2, Aug. 31, 1988, 88-2 CPD ¶ 195. Irwin-Jurkewicz's claim, after bid opening, that it was aware of the current wage rates reflected in amendment No. 3, and suggestion that it had intended to comply with them, rather than the wage rates contained in the IFB as issued on February 25, are not relevant in determining Irwin-Jurkewicz's legal obligations and responsiveness. The failure to acknowledge an amendment increasing wage rates cannot be cured after bid opening unless the bidder's employees are already covered by a collective bargaining agreement binding the firm to pay wages not less than those prescribed by the Secretary of Labor and reflected in the new wage rate determination. ABC Paving Co., 66 Comp. Gen. 47 (1986), 86-2 CPD ¶ 436. Prescribed wage rates are mandated by statute, so that if an agency were to give the bidder an opportunity to acknowledge the wage rate amendment after bid opening, the bidder could

¹The copy of the "current" or wage rate" determination the protester has on file is not, in fact, current, as it was superseded by the wage rate determination included in amendment No. 3, which contains higher rates.

decide to render itself ineligible for award by choosing not to cure the defect. Thus, the bid must be rejected as nonresponsive where the bidder is not already bound to pay wage rates not less than those prescribed. LaCorte ECM, Inc., supra. Here, since there is nothing in the record to show that Irwin-Jurkewicz's employees are covered by an appropriately binding collective bargaining agreement, or that the protester is otherwise bound to pay its employees wages not less than those contained in the new wage rate determination, Irwin-Jurkewicz's failure to acknowledge the wage rate amendment cannot be waived as immaterial, or a minor informality, and its bid was properly rejected as nonresponsive. Id.; Tri-Tech Int'l, Inc., B-246701, Mar. 23, 1992, 92-1 CPD ¶ 304.

Irwin-Jurkewicz argues that it was improper for the agency to reject its bid as nonresponsive for failure to acknowledge the amendments as it never received any of the amendments to the solicitation.

The Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(a)(1)(A) (1988), requires contracting agencies to obtain full and open competition through the use of competitive procedures, the dual purpose of which is to ensure that a procurement is open to all responsible sources and to provide the government with fair and reasonable prices. Western Roofing Serv., 70 Comp. Gen. 323 (1991), 91-1 CPD ¶ 242. In pursuit of these goals, it is a contracting agency's affirmative obligation to use reasonable methods as required by the Federal Acquisition Regulations (FAR) for the dissemination of solicitation documents, including amendments, to prospective competitors. Ktech Corp., B-240578, Dec. 3, 1990, 90-2 CPD ¶ 447; FAR §§ 14.203-1, 14.205, 14.208. Concurrent with the agency's obligations in this regard, prospective contractors have the duty to avail themselves of every reasonable opportunity to obtain solicitation documents. Fort Meyer Constr. Corp., B-239611, Sept. 12, 1990, 90-2 CPD ¶ 200. As a general rule, the risk of nonreceipt of an amendment rests with the bidder or offeror. Data Express, B-234468, May 25, 1989, 89-1 CPD ¶ 507. Consequently, a prospective contractor's nonreceipt or late receipt of a solicitation amendment, and subsequent elimination as a source from the competition, will not justify overturning a contract award, or if an award has not yet been made, justify the disruption of the procurement, absent evidence that the agency failed to comply with the applicable regulations governing the distribution of amendments. See Western Roofing Serv., supra.

The agency explains that the bidders lists used to disseminate solicitations and amendments thereto are maintained on a computer, with a separate list being maintained for each solicitation. The mailing labels for a particular

solicitation are generated directly from the bidders list maintained for that specific solicitation. In response to this protest, the agency generated mailing labels as if it were generating the mailing labels for the dissemination of another amendment to this IFB. A copy of these labels has been provided by the agency with its report on the protest, and it includes Irwin-Jurkewicz, with its correct mailing address. The agency notes that as part of its standard procedure it saves all envelopes returned by the United States Postal Service as "undeliverable," and that the file maintained for this particular procurement does not show that any amendments were returned. We find no evidence that the agency's dissemination process here was deficient or that it was contrary to regulation, and we presume that the agency in fact sent the amendment to the protester. See Western Roofing Serv., supra; Shemya Constructors, 68 Comp. Gen. 213 (1989), 89-1 CPD ¶ 108; Cascade Gen., Inc., B-244395, Oct. 17, 1991, 91-2 CPD ¶ 343. While the protester has persuasively asserted that it did not actually receive the amendments, the risk of nonreceipt, in such circumstances, rests with the bidder. Id.

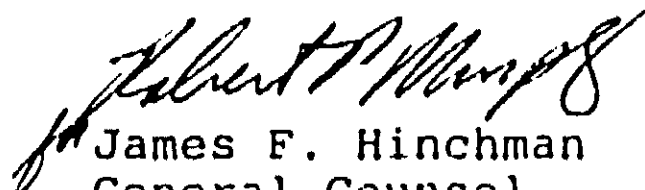
Irwin-Jurkewicz contends that it contacted the agency by telephone on March 23 to inquire as to whether any amendments to the IFB had been issued. Irwin-Jurkewicz alleges that it was told by the contracting officer during that telephone conversation that the agency had not issued any amendments to the solicitation. The protester points out that it submitted its bid on March 23 by overnight courier, and that the agency received Irwin-Jurkewicz's bid package on March 24--the day before the date set for bid opening in the solicitation as initially issued, prior to any of the amendments. The protester has submitted an affidavit of its employee who made the telephone call, in support of its allegation that it was told by the contracting officer on March 23--after amendment Nos. 1 and 2 had been issued--that no amendments to the solicitation had been issued, and a copy of a telephone bill indicating that the protester had made a 42 second telephone call on March 23 to the agency contracting division responsible for this procurement.

The agency has submitted an affidavit of the contracting officer, in which the contracting officer states that he cannot recall the March 23 telephone conversation referred to by the protester. The contracting officer explains that it is common for the agency contracting division, through which this procurement was conducted, to receive 200 telephone calls per day during the period of time involved here. The contracting officer explains that all calls are received at a central point, and that once a call is received, the caller is placed on hold, the individual to whom the call is being made is located, and the calling party announced to that individual. The contracting officer notes that, after

a call is routed to him, in order to answer a question as to the issuance of any amendments to a particular solicitation, he would have to go across the hallway to the bid file location, locate and research the appropriate bid file, return to the telephone, and advise the caller as to the status of the solicitation. The contracting officer concludes here that it would be "almost impossible" to complete the entire process of receiving a telephone call and responding to a question as to whether any amendments had been issued to a particular solicitation within 42 seconds.

While it is clear that the protester contacted the agency on March 23, and that a 42-second telephone call was made, we cannot conclude from the two conflicting affidavits in this record that the protester was misinformed regarding the agency's issuance of amendments to the IFB and extension of the bid opening date. Nor is there any corroborating evidence that would suggest that the contracting officer deliberately misled Irwin-Jurkewicz so as to exclude it from the competition.² Moreover, while the early receipt of the protester's bid could have led the agency to inquire whether the protester had received any of the amendments, there is no law or regulation which requires this to be done. See Western Roofing Serv., supra.

The protest is denied.


James F. Hinchman
General Counsel

²In response to the agency's position regarding the amount of time required under its standard procedures to answer a question as to whether any amendments to a particular solicitation have been issued, the protester comments that "[i]t does not take many seconds when the person answering the phone simply states, 'NO, there are no amendments.'" To the extent that the protester is contending that the agency deliberately misled it with regard to the issuance of amendments, we note that according to the record the agency has not had any prior experience with Irwin-Jurkewicz and thus would seem to have no motive for attempting to deliberately exclude the protester from the competition. It would appear equally unlikely that the agency would attempt to mislead the protester in order to enhance the chances of another firm for award, given the fact that 81 firms were solicited here, and the agency could not have known which firms or how many firms would be submitting bids, as bid opening was nearly 1 month away at the time of the March 23 telephone call.