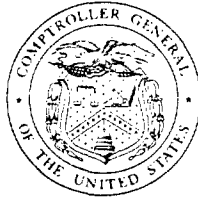


P. L. I
E. FATZMAURICE

DECISION



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

9107
GAO 00045

FILE: B-193053

DATE: February 9, 1979

MATTER OF: Scott-Griffin, Incorporated

DIGEST:

[Bid Failing to Acknowledge IFB Amendment is Nonresponsive]

1. Failure to acknowledge material amendment to IFB which was received and acknowledged by only other bidder justifies rejection of bid even though protester claims it was never received since procuring activity is not insurer of delivery of bidding documents to prospective bidders so long as agency has complied with applicable regulations.
2. Bid which failed to acknowledge IFB amendment, which increased cost of performance by estimated \$24,340, is nonresponsive since failure to acknowledge amendment was material deviation and there is no indication that there was deliberate or conscious effort on part of 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.

DLG 00850
Scott-Griffin, Incorporated (Scott-Griffin),
protests any award to Mt. Lebanon Enterprises, Inc. DLG
(Mt. Lebanon), under invitation for bid (IFB) 00849
No. N62470-76-B-6585 issued by the Naval Facilities
Engineering Command (Navy), Atlantic Division,
Norfolk, Virginia.

The IFB was issued on August 29, 1978, requesting vinyl siding and storm windows to be installed on family housing units at the Marine Corps Air Station, Cherry Point, North Carolina. Simultaneous bid openings were scheduled for September 26, 1978, at both Norfolk and Cherry Point; however, only two bids were submitted and both were received at Cherry Point.

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Prior to bid opening, Scott-Griffin made several inquiries to the procurement officials at Cherry Point asking whether there were any amendments to the solicitation. The personnel at Cherry Point consistently stated that to their knowledge there were none. However, the Cherry Point officials claim that, despite these assurances, they also told the Scott-Griffin representative that since Norfolk issued the IFB he should check with Norfolk to make certain that in fact there were no amendments. Scott-Griffin, on the other hand, vigorously denies ever being told to check with Norfolk and never did.

When bids were opened at Cherry Point, Mt. Lebanon's was opened first. It offered a bid price of \$884,475 and acknowledged receipt of an amendment. Scott-Griffin's bid offered a lower price of \$824,350, but failed to acknowledge receipt of any amendment. Scott-Griffin's representative was "astonished" by the news that there was an amendment to the IFB and, at first, the Cherry Point officials present believed that Mt. Lebanon was acknowledging a nonexistent amendment. The Mt. Lebanon representative, however, produced a copy of the amendment as proof of its existence.

It was later learned that amendment No. 1, which the Government estimated would increase the cost of the work by \$24,340, had been mailed on September 15, 1978, to all the parties which had initially responded to the bid advertisement. This included both Scott-Griffin and Mt. Lebanon; however, for reasons unknown, Scott-Griffin never received its copy. When informed that its low bid would probably be rejected for failure to acknowledge receipt of the amendment, Scott-Griffin filed a protest with our Office arguing that it had done its best to learn of any amendments and that it is the Government which is actually responsible for its failure to receive and, therefore, acknowledge the amendment. In addition, Scott-Griffin has also offered to perform the contract at its original bid price regardless of any increase in cost due to the amendment.

The Navy argues, however, that the bidder bears the risk of not receiving an amendment where the agency has complied with all regulations regarding the timely mailing of amendments. Moreover, while conceding that Cherry Point personnel informed Scott-Griffin that there were no amendments to the IFB, the Navy denies that it misinformed the protester and maintains that Scott-Griffin was told to check with Norfolk to make sure that no amendments had been issued. Finally, the Navy contends that it cannot waive Scott-Griffin's failure to acknowledge the amendment as a minor informality under the provisions of Armed Services Procurement Regulation/ Defense Acquisition Regulation (ASPR/DAR) § 2-405(iv)(B) (1976 ed.) since the amendment did not have merely a trivial or negligible effect on the solicitation.

The general rule is that the procuring activity is not an insurer of delivery of bidder documents to prospective bidders. 52 Comp. Gen. 281 (1972). Thus, the bidder bears the risk of not receiving an amendment to the solicitation where the agency has complied with all regulations regarding timely mailing of the amendments. Empire Painting Company, Inc., B-190294, January 11, 1978, 78-1 CPD 23; General Aero Products Corporation, B-191870, July 25, 1978, 78-2 CPD 70.

The applicable regulation, ASPR/DAR § 2-208(a), provides that if it becomes necessary prior to bid opening to make changes in a solicitation, the changes will be accomplished by the issuance of an amendment which "shall be sent to everyone to whom invitations have been furnished." Here, the record indicates that Norfolk mailed copies of the amendment to all parties on its bidders list which had originally received a copy of the IFB. Thus, since the Navy has complied with the appropriate regulations, Scott-Griffin must bear the risk of not receiving the amendment. Empire Painting Company, Inc., supra; General Aero Products Corporation, supra.

As a general rule, if a bidder fails to receive and acknowledge an amendment, the bid must be rejected as nonresponsive. Porter Contracting Company, 55 Comp. Gen. 615 (1976), 76-1 CPD 2. However, ASPR/DAR § 2-405(iv) allows some amendments to be waived if the deviation is considered a minor informality. The failure of a bidder to acknowledge an amendment may only be waived if "the amendment clearly would have no effect or merely a trivial or negligible effect on price, quality, quantity, delivery, or the relative standing of bidders." ASPR/DAR § 2-405(iv)(B).

The Navy contends that the increase in costs (\$24,340) which the Government estimated will result because of the amendment, as well as the significant difference between the bid which acknowledged the amendment (\$884,475) and the one which did not, (\$824,350) indicates that Scott-Griffin's failure to acknowledge the amendment may not be deemed a minor informality within the meaning of ASPR/DAR § 2-405(iv)(B).

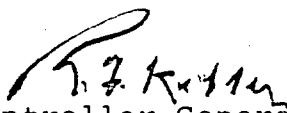
As mentioned above, amendment No. 1 changed the IFB's specifications to the extent that the Government estimated that the cost to perform the contract would increase by \$24,340. This is an alteration of the contract terms and materially changes the legal rights of the parties. The amendment, therefore, is material, and Scott-Griffin's failure to acknowledge it cannot be waived as a minor informality under the provisions of ASPR/DAR § 2-405(iv)(B). Porter Contracting Company, supra; Aqua-Trol Corporation, B-191648, July 14, 1978, 78-2 CPD 41. This conclusion is based on the fact that if Scott-Griffin's failure to acknowledge the amendment were waived, upon acceptance of its bid, Scott-Griffin would not be legally bound to perform all the work specified in the solicitation. See, e.g., G & H Aircraft, B-189264, October 28, 1977, 77-2 CPD 329.

Scott-Griffin has offered to perform at its original bid price despite the changes resulting from amendment No. 1. It points out that this

would result in a substantial monetary savings to the Government. However, as our decisions indicate, 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. A. D. Roe Company, 54 Comp. Gen. 271 (1974), 74-2 CPD 194; Chemical Technology, Inc., B-192893, December 27, 1978, 78-2 CPD 438.

Therefore, since Scott-Griffin failed to acknowledge a material amendment and nothing in the record indicates that such failure was the result of a conscious and deliberate effort on the part of the Navy to exclude Scott-Griffin from participating in the competition, the bid must be rejected as nonresponsive. Porter Contracting Company, supra; G & H Aircraft, supra. In this connection, with regard to the advice by Cherry Point personnel that they knew of no amendments, there is no evidence that they knowingly misled Scott-Griffin. Further, there is an irreconcilable dispute as to whether Scott-Griffin was advised to check with Norfolk as to the issuance of any amendments. In these circumstances, Scott-Griffin has not carried the burden of establishing the validity of its contention that the Government was responsible for its failure to be aware of the amendment. The University of New Hampshire, Center for Industrial and Institutional Development, B-191956, September 5, 1978, 78-2 CPD 169.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States