

DECISION



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

40338

09984

28A
4

FILE: B-184309

DATE: December 30, 1975

MATTER OF: Shrink-O-Matic, Inc.

DIGEST:

Protester's bid was properly rejected as nonresponsive where IFB was amended (Amendment No. 1) to correct objections concerning restrictive specifications raised by bidder's protest and protester's bid as submitted contained two copies of Amendment No. 1 but failed to acknowledge Amendment No. 2 which had made substantive changes to requirements of Amendment No. 1, since deficiency could not be regarded as a minor informality or irregularity in bid subject to correction or waiver after bid opening under FPR § 1-2.405.

Shrink-O-Matic, Inc. (Shrink-O-Matic) protests the rejection of its bid and the subsequent award of a contract to E. C. Campbell, Inc. (Campbell) under invitation for bids (IFB) 5672 (as amended) issued by the United States Geological Survey (Geological Survey), Reston, Virginia.

The invitation issued on April 14, 1975, solicited bids for the procurement of a canopy type "heat shrink machine" including oven pedestal and bag dispenser in accordance with the specifications. By letter dated April 28, 1975, Shrink-O-Matic protested that the specifications were restrictive and requested that they be changed. Amendment No. 1, issued by the Geological Survey on May 12, 1975, established the new time for bid opening as May 28, 1975, and eliminated the items which Shrink-O-Matic alleged to be restrictive. Before the Amendment was released, Shrink-O-Matic indicated that the proposed changes were acceptable and its protest would be withdrawn.

On May 14, 1975, the Contract Assistant received a memorandum from the Geological Survey's Technical Officer requesting that the language of Amendment No. 1 be changed to eliminate an ambiguity in the contents of "Part I, D, B Safety." It was determined the amendment as issued did not adequately state the required essential safety features for the product. Amendment No. 2, incorporating the proposed changes was issued and sent to all prospective bidders on May 16, 1975.

Two bids were submitted by the time set for bid opening on May 28, 1975. Shrink-O-Matic's bid had been received by mail, and Campbell's was hand delivered. After the opening, Campbell's representative reviewed Shrink-O-Matic's bid and noted that it included two (2) copies of Amendment No. 1 but failed to acknowledge receipt of Amendment No. 2. The Contract Assistant subsequently discovered that the bid also contained additional prices which were not requested by the solicitation, which gave the appearance of being a breakdown of prices not included as a part of the original bid. In response to his telephone request (an hour after bid opening), Shrink-O-Matic sent written confirmation of its intended bid which was received on May 30, 1975.

During the evaluation of bids it was also noticed that Shrink-O-Matic's initial protest had never been formally withdrawn. By letter dated May 29, 1975, the Contract Assistant advised Shrink-O-Matic that its protest was considered closed due to their prior conversations (May 9, and 12, 1975), and the receipt of its bid and Amendment No. 1. In acknowledging receipt of this letter, Shrink-O-Matic submitted written withdrawal of its protest by letter dated May 30, 1975.

After a complete evaluation of the bids, the Geological Survey concluded that Shrink-O-Matic's failure to acknowledge receipt of Amendment No. 2 could not be corrected or waived as a minor informality since it was an error which affected price and, therefore its low bid was rejected. Accordingly, it was not necessary for them to consider the effect of the ambiguities in Shrink-O-Matic's bid price. Award was made to E. C. Campbell, Inc. at its total bid price of \$9,742.82.

Shrink-O-Matic maintains that Amendment No. 2 was acknowledged and included with the bid when it was filed. It also contends that there was implied acknowledgment (by telephone) prior to bid opening since Shrink-O-Matic's approval of the language in Amendment No. 1 was sought prior to its release, and the sole reason for the issuance of both amendments was to remove the objections by Shrink-O-Matic's initial protest against the IFB. In addition, Shrink-O-Matic's counsel argues that:

"Even if Amendment No. 2 had not been specifically acknowledged in writing, but that two copies of Amendment No. 1 were submitted, it seems clear and obvious that a minor informal error was committed in the assembly and forwarding of the bid. Since there was no requirement for two

copies of Amendment No. 1 to be submitted, it seems obvious that it was intended that a copy of Amendment No. 2 be included."

Therefore, it states the failure to acknowledge the amendment could not have had any effect on its bid price or the quality of the machine offered since Shrink-O-Matic asserts that the contents of the amendments were obviously taken into consideration prior to the submission of its low bid.

Under these circumstances Shrink-O-Matic questions the motives and actions after bid opening of the contracting personnel who requested Shrink-O-Matic's bid confirmation and protest withdrawal (in order to make an award) while intentionally failing to reveal any problem related to Amendment No. 2.

The established rule applicable under these circumstances is that the failure of a bidder to acknowledge receipt (in a manner required by the solicitation) of an amendment which could affect the price of the procurement renders the bid nonresponsive. The rationale for this rule is that generally such a bidder would have an option to decide after bid opening whether to become eligible for award by furnishing extraneous evidence that a material amendment had been considered or to avoid award by remaining silent. See Torotron Corporation, B-182418, January 30, 1975, 75-1 CPD 69 and decision cited therein. However, section 1-2.405 of the Federal Procurement Regulations (1964 ed. circ. 1), provides that the failure of a bidder to acknowledge receipt of an IFB amendment may be regarded as a minor informality or irregularity in the bid and that the contracting officer shall either give the bidder an opportunity to cure the deficiency, or waive such deficiency where (1) the bid received clearly indicates that the bidder received the amendment, and (2) the amendment involves only a matter of form or is one which has either no effect or merely a trivial or negligible effect on price, quantity, quality or delivery of the item bid upon.

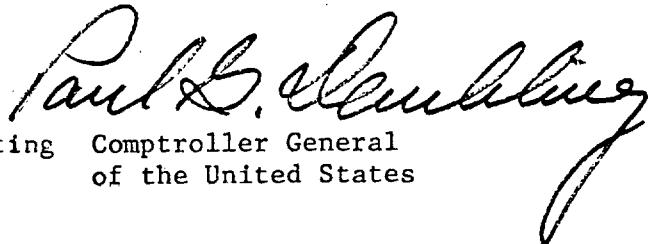
From the record, it is clear that Shrink-O-Matic's protest prompted the drafting of Amendment No. 1, and its concurrence was sought before the amendment was issued. However, we find nothing in the record to indicate that its subsequent concurrence was sought, or that it had prior knowledge of the detailed changes made to Amendment No. 1 which were incorporated into the IFB by Amendment No. 2. The contention that Shrink-O-Matic received and returned both Amendment No. 1 and No. 2 by its act of returning two copies of Amendment No. 1 with its bid is unpersuasive. Moreover, the

record does not clearly indicate its receipt of either amendment since Shrink-O-Matic's Standard Form 33 (submitted with the bid package) did not indicate (as required) their receipt.

After bid opening there was no requirement for contracting personnel to advise Shrink-O-Matic of the irregularity in its bid or allow it to correct the deficiency until it had been determined what effect the amendment had upon the bid. The record reveals that prior to award the Geological Survey reviewed the substance of Amendment No. 2 to determine whether the failure to acknowledge its receipt could be considered to be a minor informality or irregularity in bid subject to correction after the opening of bids. In this regard, the contracting officer's report states that:

"The wording of amendment Number 2 clearly defines two (2) required safety devices which we considered essential; 1) A safety device to stop the downward path of the oven if obstructed and; 2) A safety device to permit an individual to escape from the oven once it reaches the down position. Whereby amendment No. 1 would lead a bidder to provide only one safety device, amendment No. 2 clearly calls for two (2) separate safety devices. This was felt to be significant and could quite possibly affect the price and quality of the items being offered. The decision to require these two separate safety devices was given considerable consideration and was not made to place undue restriction upon prospective bidders but rather provide safety features considered essential to protect the safety and well being of the Government Employees and property."

We agree with the conclusion reached by the Geological Survey that Amendment No. 2 made substantive changes to the IFB, and that Shrink-O-Matic's acknowledgement after bid opening would have been contrary to the principles of the competitive bidding system.


Paul G. Stauffling
Acting Comptroller General
of the United States