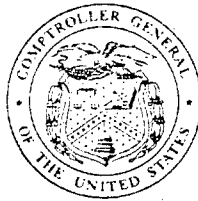


DECISION



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

12480

Bashin
Proc II

FILE: B-195481

DATE: January 11, 1980

MATTER OF: Native Plants, Inc. *DL 90 35 87*

DIGEST:

1. Low bidder's failure to acknowledge amend-ment that substantially reduced quantity of product sought may not be waived as minor informality where it appears prejudice might result to other bidders.
2. Bidder's failure to acknowledge IFB amendment may not be waived on basis that bidder did not receive amendment from agency prior to bid opening where there is no evidence that agency deliberately attempted to exclude bidder from competition or that adequate competition and unreasonable prices were not received.
3. Possibility that Government might realize monetary savings in particular procurement if bid deficiency is waived is outweighed by importance of maintaining integrity of competitive bidding system.

Native Plants, Inc. protests the rejection of its low bid and the subsequent award of a contract for containerized seedlings under invitation for bids (IFB) R2-79-179, issued by the Forest Service. Native Plants' bid was rejected for failure to acknowledge receipt of an amendment that decreased the quantities of item 4 of the solicitation from 1,100,000 trees to 408,000, or by approximately 62 percent.

Protest Involving Bid REJECTION

AGC 000634

The Forest Service rejected the protester's bid because it believes Native Plants would have had an unfair advantage over other bidders. According to the Forest Service:

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"Growing seedlings to specific seed lots and species involve substantial fixed start-up and production costs. It can be assumed that the unit prices offered by the other bidders for the reduced quantities of Item 4 would have been lower had they bid on the basis of the substantially larger quantities. This is indicated by the lower unit prices offered by Colo-Hydro on their alternate all-or-none bid.

"An award to Native Plants on the basis of their unit prices for the original quantities for Item 4 would be detrimental to other bidders who based their prices on different quantity requirements.

* * * * *

"We are not familiar with the Native Plants operation. However, it is * * * our position that it is unreasonable to believe that the unit cost would not change from producing 1,100,000 to 408,000 trees, a reduction of about 62%."

Native Plants admits that fixed start-up and production costs for growing seedlings from specific seed lots are substantial. It states, however, that in its experience, such costs would not differ significantly for 408,000 trees as opposed to 1,100,000 trees.

Failure to acknowledge receipt of an amendment may be waived as a minor informality if the bid clearly indicates that the bidder received the amendment or the amendment only involves a matter of form or has either no effect or a trivial effect on price, quantity, quality or delivery of the bid items. Federal Procurement Regulations (FPR) § 1-2.405(d) (1964 ed.). The agency here believes that the amendment, by significantly decreasing the specified quantity of trees, had more than a trivial effect on price.

As the Forest Service points out, an examination of the bids submitted for the correct quantities of item 4 supports its position. Those unit prices were:

<u>Hydro-Gardens</u>	<u>Colo-Hydro</u>
\$ 318.50*	\$ 356.00
	335.00*

*all or none bid for items 1-4

These bid prices were submitted on the basis of the awarded reduced quantities; however, the unit prices for guaranteed larger quantities--the all or none bids--are lower than the bid for only item 4. Moreover, the lower unit price offered by Colo-Hydro on its alternate all or none bid demonstrates that the prices would be lower if the risk of a reduced quantity is removed.

Under the circumstances, and since Native Plants offers no evidence to support its statement that its unit costs would have remained the same if it had timely received the amendment, we believe the Forest Service could reasonably determine that the 62 percent reduction in quantity could affect unit costs and that Native Plants, by not bidding in response to the amendment, could have had a bidding advantage over the other bidders.

The solicitation instructions advised bidders in paragraph 10(c) that the Government reserved the right to make an award on any item for a quantity less than the quantity offered at the unit prices offered unless the bidder specified otherwise. We have held that under this provision a bidder may be required to furnish at its bid price a quantity which was greatly reduced from the initial quantity solicited, see B-162967, February 24, 1968. Moreover, we have stated that a bidder that failed to acknowledge an amendment reducing the quantity of parachute canopies from 104 to 94 was not nonresponsive to the solicitation because as a result of paragraph 10(c), the legal relationship between the parties was not materially affected by the amendment. Mills Manufacturing Corporation, B-188672, June 15, 1977, 77-1 CPD 430.

While here the amendment also may not have changed the legal relationship between the bidder and the Government, the Mills case is otherwise distinguishable. In

Mills, the amendment reduced the quantity by a small amount that could have had only a trivial effect on price; here, of course, the reduction was far greater. It is likely that bidders take into consideration in computing their bids the risk that the Government, under paragraph 10(c), will award a lesser quantity. In our opinion, however, bidders would be more likely to assume that there would be greater opportunity to achieve economies of scale when the government advertises for 1,100,000 items as opposed to 408,000 items and bidders reasonably could assume the presence of less risk in the former situation. Presumably, this reduced risk would affect the computation of the unit price for item 4.

Here, we think Native Plants did not prepare its bid on an equal basis with the other bidders, to its benefit and to the disadvantage of the other bidders. This situation, however, does not compel us to require the solicitation to be canceled, because only Native Plants' bid was affected. Unintentional actions of an agency that result in a potential supplier of services being precluded from competing in a procurement do not constitute a compelling reason to resolicit, as long as adequate competition was generated, reasonable prices were obtained, and no deliberate attempt was made to preclude the supplier from competing. See U.S. Air Tool Co., Inc., B-192401, October 30, 1978, 78-2 CPD 307.

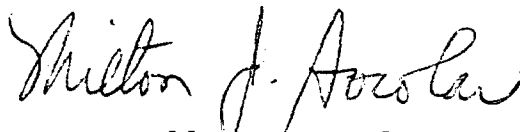
Concerning the failure to receive the amendment, Native Plants states that upon receipt of the solicitation announcement, it requested and subsequently received a copy of the IFB from the issuing office. The protester contends that the Forest Service was negligent in not sending it the amendment. Inexplicably, the Forest Service did not include Native Plants on its mailing list for firms that had obtained a copy of the solicitation and therefore did not send the protester a copy of the amendment.

As stated above, the propriety of a particular procurement rests upon whether adequate competition and reasonable prices were obtained, not upon whether each potential bidder was given an opportunity to bid. The procurement activity is not an insurer of delivery of amendments to each prospective bidder. The bidder bears the risk of nonreceipt of invitations and amendments in

the absence of substantive proof that the agency deliberately attempted to exclude a bidder from participating in the procurement. A. Brindis Company, Inc., B-187041, December 9, 1976, 76-2 CPD 477. Nothing in the record indicates that Native Plants' failure to receive the amendment was due to any deliberate attempt by the Forest Service to exclude the firm from competition, or that adequate competition and reasonable prices were not obtained.

Native Plants has offered to perform at the original unit price bid, and has pointed out that this would result in a substantial monetary savings to the Government. Nevertheless, 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 waiver of the deviation would prejudice other bidders. Chemical Technology, Inc., B-192893, December 27, 1978, 78-2 CPD 438.

Since we find a reasonable basis for the agency's action, the protest is denied.



For The Comptroller General
of the United States