

DECISION



12968 PL-11 Mr. Soroff
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-196630

DATE: February 28, 1980

MATTER OF: Fifth Generation Systems, Inc.

3983

DIGEST:

1. Agency's rejection of protester's bid on ground that it was nonresponsive for failing to acknowledge receipt of material amendment to solicitation was proper where there was no conscious or deliberate attempt by agency to preclude protester from competing. Bidder did not receive amendment to solicitation because solicitation was neither requested nor received from agency.
2. Even though agency may have received protester's bid prior to date originally established for bid opening and prior to issuance of amendment, agency was not on notice of need to include protester on distribution list for amendments of the solicitation. Burden is on protester to ascertain whether there are amendments to solicitation.

Fifth Generation Systems, Inc. of Clayton, Missouri (FGS) protests the decision of the Department of Justice's Immigration and Naturalization Service (INS) to reject its bid under IFB No. CO-31-79. 86

INS determined that the FGS bid was nonresponsive to the solicitation for failing to acknowledge receipt of an amendment containing revisions material to the solicitation. FGS concedes that it failed to acknowledge receipt of the amendment but maintains that it should not be penalized for this omission because it never received a copy of the amendment. For the reasons stated below, the protest is denied.

[Protest Against Bid REJECTION]
~~008789~~ 111669

The synopsis of this procurement appeared in the Commerce Business Daily on August 29, 1979 and stated that copies of the IFB were to be issued only to those firms who submitted written requests for copies of the solicitation. The Director of FGS who is also Director of a related firm, Fifth Generation Systems, Inc. of Maywood, Illinois, visited the INS purchasing office in early September and requested a copy of the IFB. He was advised that the solicitation was not then ready for distribution and was further advised that copies of the IFB would only be sent to those firms who submitted written requests to be placed on the bidders list. On September 12, 1979, INS received a letter from Fifth Generation Systems, Inc. of Maywood, Illinois, signed by its Director requesting that his company be furnished the IFB. INS received no request for the solicitation from the protester.

3984- The Director of Fifth Generation Systems, Inc. of Maywood, Illinois, subsequently furnished a copy of the solicitation to the protester, an affiliate, which prepared and submitted a bid prior to the October 17, 1979 date set for bid opening. However, at about that time, INS issued amendment number 2 to the solicitation which contained major changes to the IFB and extended bid opening to October 24, 1979. INS furnished a copy of the amendment to all firms which had initially requested a copy of the solicitation; but it did not furnish a copy of the amendment to the protester. When bids were opened, the contracting officer determined that the protester's bid was nonresponsive to the IFB for failure to acknowledge receipt of the amendment and to include a price for one of the required items.

The general rule is that the bidder bears the risk of not receiving an amendment to the solicitation. This is true even where the bidder has requested a copy of the solicitation and the agency complies with all regulations regarding timely mailing of the amendments but the amendment is not received because the agency inadvertently misaddresses the envelope containing the

amendment. CompuServe, B-192905, January 30, 1979, 79-1 CPD 63. If a bidder does not receive and acknowledge a material amendment to an IFB and such failure is not the result of a conscious and deliberate effort by the agency to exclude the bidder from participating in the competition, the bid must be rejected as non-responsive. Commercial Lawn Maintenance, Inc. B-193626, February 1, 1979, 79-1 CPD 78.

In this case, the agency abided by all applicable regulations by furnishing copies of the amendment to all firms that requested the solicitation in accordance with instructions in the synopsis. The protester did not submit a written request for a copy of the solicitation, nor did it request, orally or in writing, that a copy of the amendment be sent to it; however, the agency did send a copy of the amendment to Fifth Generation Systems, Inc. of Maywood, Illinois, which previously had, without the agency's knowledge, furnished a copy of the solicitation to the protester. Accordingly, INS was unaware of the protester's interest in this procurement.

However, the protester maintains that INS was on notice of its interest in this procurement once INS received its bid in time for the original opening date; and, therefore, the agency was obliged to furnish it a copy of the amendment. We disagree. We are aware of no regulation which requires a procuring agency to review each sealed bid or bid envelope received prior to bid opening to determine whether the bidder has been furnished all amendments to the solicitation. While FPR 1-2.401(a) provides that, "[p]rior to bid opening, information concerning the identity and number of bids received shall be made available only to Government employees who have a proper need for such information," we do not read this provision to require identification and recording of all bids received for the purposes argued by the protester. Rather, the burden is on the bidder to ascertain whether there are any amendments to the solicitation. Scott-Griffin, Incorporated, B-193053, February 9, 1979, 79-1 CPD 93.

In these circumstances, we cannot say that the agency acted improperly by not identifying and recording the names of firms which had submitted sealed bids for the purposes of determining if all potential bidders had received all amendments to the solicitation. This is especially the case here as it is undisputed that the agency had advised the protester's Director about the proper procedures for placing his firm on the bidders list for the procurement and the director nevertheless disregarded that advice.

The protest is denied.

A handwritten signature in cursive script, reading "Milton J. Fowler".

For The Comptroller General
of the United States