



Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Phillip Sitz Construction  
**File:** B-245941  
**Date:** January 22, 1992

Gordon Mallon, Esq., Cramer & Mallon, for the protester, Allen W. Smith and Marle Brandt, Forest Service, United States Department of Agriculture, for the agency. Kathleen A. Gilhooly, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Agency improperly rejected protester's bid as nonresponsive for failure to acknowledge material solicitation amendment where agency violated Federal Acquisition Regulation by failing to mail protester a copy of the amendment. Agency's violation contributed to the protester's exclusion from the competition and resulted in the receipt of only one responsive bid, contrary to the full and open competition requirement of the Competition in Contracting Act of 1984.

## DECISION

Phillip Sitz Construction protests the rejection of its bid as nonresponsive and the award of a contract to Shannon Voigt Construction under invitation for bids (IFB) No. R6-4-91-90, issued by the Forest Service, Department of Agriculture, for the construction of a communications facility. The Forest Service rejected the bid because Sitz failed to acknowledge an amendment to the IFB. Sitz contends that the agency's failure to send it a copy of the amendment prevented Sitz from acknowledging the amendment and caused it to be eliminated unfairly from the competition.

We sustain the protest.

The Forest Service synopsised the requirement in the Commerce Business Daily, and issued an IFB on August 9, 1991, with a bid opening date of September 9, 1991. Sitz states that the Forest Service mailed it a copy of the IFB. According to the Forest Service, however, it has no record of mailing the IFB to Sitz and does not know how Sitz got the IFB. The Forest Service states that ten firms, other than Sitz, requested and were sent a copy of the IFB.

Amendment No. 1, issued on August 26, 1991, included a modified wage rate determination under the Davis-Bacon Act, 40 U.S.C. § 276a (1988), which increased the wage rate for several labor categories. The amendment, which did not change the scheduled bid opening date, was mailed to all firms on the "planholder's list," a mailing list maintained by the agency of firms interested in the IFB. The Forest Service states that Sitz was not on the planholder's list and, therefore, was not sent a copy of the amendment.

Two bids were received by bid opening, and Sitz was the apparent low bidder at \$90,000. The contracting officer reviewed Sitz's bid and determined it nonresponsive for failing to acknowledge Amendment No. 1, a material amendment.<sup>1</sup> As a result, the contract was awarded to the only other bidder, Shannon Voigt Construction, for \$109,175.

Sitz protests that it was improper for the agency to reject its bid as nonresponsive since the agency's failure to send it Amendment No. 1 prevented Sitz from acknowledging the amendment. Sitz contends that the agency sent it the solicitation package on August 13, and has furnished a copy of an envelope postmarked August 13, 1991, addressed to Sitz from the agency in support of its contention. Sitz adds that it called the agency on August 23 and September 5 to ask about the bid specifications, and argues that the agency thus was aware that Sitz was interested and should have been placed on the planholder's list for the IFB.

The agency maintains that a bidder bears the risk of not receiving IFB amendments unless it is shown that the contracting agency made a deliberate effort to exclude the bidder from competing. The agency notes that Sitz has successfully completed work for it in the past, and that it did not attempt to prevent Sitz from competing.

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 the opportunity to receive fair and reasonable prices. In pursuit of these

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<sup>1</sup>An IFB amendment increasing wage rates pursuant to the Davis-Bacon Act is material, and therefore must be acknowledged, except where employees are covered by a collective bargaining agreement binding the firm to pay wages not less than those prescribed by the Secretary of Labor. See North Santiam Paving Co., B-241062, Jan. 8, 1991, 91-1 CPD ¶ 18. Sitz does not allege that this exception applied to it.

goals, it is a contracting agency's affirmative obligation to use reasonable methods, as required by the Federal Acquisition Regulation (FAR), for the dissemination of solicitation documents, including amendments, to prospective competitors. Custom Environmental Service, Inc., 70 Comp. Gen. 563 (1991), 91-1 CPD ¶ 578; North Santiam Paving Co., B-241062, Jan. 8, 1991, 91-1 CPD ¶ 18.

In this regard, FAR § 14.205-1(c) specifically requires that the names of prospective bidders who are furnished invitations in response to their requests be added to the list of those initially mailed copies of a particular solicitation, so that they will be furnished copies of solicitation amendments. Likewise, FAR § 14.208(a) specifically requires that amendments be sent to everyone to whom the invitation was furnished.

A prospective contractor normally bears the risk of not receiving a solicitation amendment. However, this is not the case where there is evidence (beyond mere non-receipt by the protester) establishing that the agency failed to comply with the FAR requirements for notice and distribution of amendments, and where the prospective contractor has not failed to avail itself of reasonable opportunities to obtain the documents. Republic Floors, Inc., 70 Comp. Gen. 567 (1991), 91-1 CPD ¶ 579; Custom Environmental Service, Inc., supra.

Here the evidence indicates that the agency failed to comply with the FAR requirements. While agency officials have no recollection of mailing the IFB to Sitz, the protester states that it requested and received the IFB and the copy of the envelope postmarked August 13 addressed to Sitz from the Forest Service supports Sitz's version of the facts. Therefore, we find that the agency did send the IFB to Sitz, and, as a result, was required by the FAR to place Sitz on the mailing list and to send it solicitation amendments. The agency concedes that Sitz was not included on the mailing list and that the amendment was not sent to it.

Further, there is no indication that Sitz failed to avail itself of a reasonable opportunity to obtain the amendment. Compare Fort Myer Construction Corporation, B-239611, Sept. 12, 1990, 90-2 CPD ¶ 200. In particular, we do not believe that Sitz was obligated to affirmatively inquire as to the existence of amendments or to confirm that no amendment had been issued. See Republic Floors, Inc., supra.


For these reasons, we sustain Sitz's protest.

As a result of the agency's actions, only one responsive bid was received. Where so few firms participate in a

competition, the absence of even one responsible firm due to the agency's regulatory violation so diminishes the level of competition and undermines the CICA mandate for full and open competition that a compelling reason to resolicit the requirement is established. See Republic Floors, Inc., supra; Custom Environmental Service, Inc., supra; EMSA Limited Partnership, B-237846, Mar. 23, 1990, 90-1 CPD ¶ 326; see also, Abel Converting, Inc. v. United States, 679 F.Supp. 1133 (D.D.C. 1988). In these circumstances, we believe that the appropriate remedy is for the agency to terminate Shannon Voigt Construction's contract and resolicit the requirement, giving all responsible sources a fair opportunity to compete on the resolicitation.

We also find that Sitz is entitled to be reimbursed its protest costs, including reasonable attorneys' fees.  
4 C.F.R. § 21.6(d)(1) (1991).

The protest is sustained.



Acting Comptroller General  
of the United States