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DECISION

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

[Protest of Nonresponsive Bid Determination]

FILE: B-201364

DATE: April 6, 1981

MATTER OF: Moltzen Electric, Inc.

DIGEST:

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1. Failure of bidder to acknowledge amendment containing revised wage rates renders bid nonresponsive. Bidder may not make non-responsive bid responsive after bid opening by agreeing to be bound by revised wage rates.
2. Failure of bidder to acknowledge amendment may not be waived on basis that bidder was not sent amendment by agency where evidence does not indicate deliberate effort by agency to exclude bidder from competing on procurement.

Moltzen Electric, Inc. (Moltzen), protests the rejection of its low bid as nonresponsive and the November 20, 1980, award of a contract to another company under United States Army Corps of Engineers (Sacramento District) invitation for bids No. DACA05-80-B-0148. The Corps rejected Moltzen's bid because the bid did not acknowledge an invitation amendment containing revised wage rates. Moltzen states that the contracting agency never sent it the amendment and that to reject its bid for the stated reason unjustifiably denies Moltzen the contract for the work. Moltzen also contends that the contract was improperly awarded prior to resolution of a protest which it made in a November 6, 1980, letter addressed to the contracting officer concerning the rejection of its bid; thus, Moltzen believes that the contract should be canceled and the procurement should be recompeted. Based on our review of the record, we deny the protest.

Where a bidder fails to acknowledge an amendment which modifies or adds a wage rate determination, the failure may not be waived. This result is required because the Government's acceptance of a bid which

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does not contain an agreement to pay the appropriate wage rates does not bind the contractor to pay wages to which its employees are entitled. The Government may not waive the right of the employees to the wages set forth in the wage rate determination. Corner Construction Company, B-193107, November 7, 1978, 78-2 CPD 330. A bidder whose bid has been found nonresponsive for the failure to acknowledge an amendment containing a wage rate determination may not agree to abide by that determination after bid opening. To permit a bidder to make its nonresponsive bid responsive after bid opening would be tantamount to permitting it to submit a new bid and may not be permitted. Jack Young Associates, Inc., B-195531, September 20, 1979, 79-2 CPD 207.

The Corps informs us that it failed to send the amendment in question to Moltzen; specifically, the contracting officer advises that the failure occurred because Moltzen was not on the original bidder's list and its name was not added to that list after the company requested a copy of the bid. Since the amendment was issued only to bidders on the list, Moltzen was inadvertently overlooked when the amendment was sent out. This failure was investigated, and it was found to have been caused solely by this clerical error rather than by any deliberate attempt to exclude Moltzen from competing on the procurement.

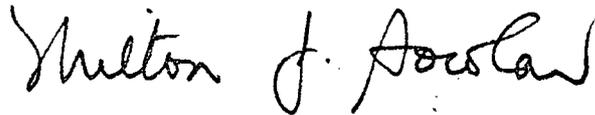
Generally, if a bidder does not receive and acknowledge a material amendment to an invitation because the contracting agency has neglected to send the bidder the amendment, the bid must be rejected as nonresponsive unless it is shown that the failure to provide the bidder with the amendment resulted from a conscious and deliberate effort to exclude the bidder from participating in the competition. Porter Contracting Company, 55 Comp. Gen. 615 (1976), 76-1 CPD 2; Mike Cooke Reforestation, B-183549, July 2, 1975, 75-2 CPD 8. No such conscious and deliberate effort is apparent in the present case. Moreover, all other bidders (eight in all) acknowledged the amendment.

Finally, Moltzen argues that the agency's award of the contract without first resolving the November 6 Moltzen protest should affect the validity of the award. In this connection, the agency states that

argument

Moltzen's November 6 letter to the contracting officer was not considered to be a protest but rather a notice of intention to file a protest with GAO. In any event, since the Moltzen bid was properly rejected as nonresponsive, the failure to consider the Moltzen protest prior to making the award did not result in any prejudice to Moltzen. Commercial Law Maintenance, Inc., B-193626, February 1, 1979, 79-1 CPD 78.

Accordingly, the protest is denied.

A handwritten signature in cursive script that reads "Milton J. Aoulan".

Acting Comptroller General
of the United States