

**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 2054840943  
95247

FILE: B-180380

DATE: July 15, 1974

MATTER OF: Plattsburgh Laundry and Dry Cleaning Corp.;  
Nu Art Cleaners Laundry

## DIGEST:

1. Where telefax message protesting solicitation's 90-mile geographic restriction is received at GAO at 8:20 a.m. and bids are opened at 2 p.m. same day, protest is timely filed since section 20.2(a) of GAO Bid Protest Procedures and Standards, which requires protests against apparent solicitation improprieties to be filed before bid opening, states protest is "filed" at time of receipt by GAO. Portion of protest objecting to denial of opportunity to submit bid is timely because filed within 5 working days of adverse agency action--rejection by agency of bidder's oral protests.
2. Reasonable expectation that potential contractors located beyond certain distance from installation will not satisfactorily perform laundry contract provides basis for including in solicitation restriction requiring bidders have facilities located within certain radius of miles, and where protester has not presented evidence to overcome contracting officer's finding of marginal historical performance by contractors located beyond 90 miles from Camp Drum, New York, GAO cannot conclude that 90 mile restriction was without reasonable basis.
3. Refusal to provide incumbent laundry contractor with copy of IFB and opportunity to bid on successor contract because of doubts as to

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incumbents' capacity to perform is tantamount to premature nonresponsibility determination.

4. Ninety - mile geographic restriction in IFB cannot justify exclusion of incumbent contractor, located at distance of 165 miles, since requirement pertains to responsibility which may be complied with after bid opening and before award.
5. Failure to furnish copy of IFB to incumbent contractor and solicitation of only three sources afford grounds to recommend that solicitation be canceled so as to provide wider opportunity to bid under new IFB.

Invitation for bids (IFB) No. DAKF36-74-B-0028 was issued December 18, 1973, by Camp Drum, Watertown, New York, for laundering services on a 100 percent small business set-aside basis. The protest arises by reason of section "D" of the IFB, "Evaluation and Award Factors," which provides that "Only those facilities located within a radius of ninety (90) miles of Camp Drum, New York will be considered for award." Two bids were opened at 2 p.m. on January 7, 1974. The \$87,763.40 bid of Nu Art Cleaners Laundry, Felts Mills, New York, was low followed by the \$91,524.90 bid of R. Gibson, Inc., of Watertown, New York.

In its telefax message dated January 5, 1974, and letters dated January 21 and March 14, Plattsburgh Laundry and Dry Cleaning Corp. (Plattsburgh) protested to our Office against the 90-mile geographic restriction and the fact that it was not given an opportunity to bid. Plattsburgh, which we understand, is located about 165 miles from Camp Drum, was the predecessor contractor for these services. In its letter of March 14, 1974, the protester states that on December 17 and 18, 1973, it telephoned the contracting officer to inquire when the solicitation for the successor contract would be distributed, and it was told that it would receive a copy of the IFB during the week of December 18. However, Plattsburgh states that on December 28, 1973, it was told by a procurement office official that the solicitation had been mailed only to those prospective bidders within a 90-mile radius of Camp Drum. Plattsburgh states that it protested

orally to Camp Drum officials on January 2 and 4, 1974, against the restrictiveness of the geographic limitation and what it terms the denial of its right to receive a copy of the bid package. Finding that it was unable to resolve the matter with the procuring agency officials, Plattsburgh then filed a written protest with our Office.

By letter of March 1, 1974, with enclosures, the Assistant Deputy for Materiel Acquisition, Office of the Assistant Secretary, submitted the Department of the Army report on the protest. It is the agency's position that the protest is untimely, since GAO's Bid Protest Procedures and Standards require that protests against alleged improprieties in solicitations which are apparent prior to bid opening be filed prior to bid opening. 4 CFR 20.2(a). In addition, the agency has pointed out that our Office has held that the need of a contracting agency for prompt service and plant accessibility may afford a reasonable basis for including in an invitation for bids a provision requiring bidders to have facilities located within a specified geographic area for performance of a contract. In this regard, the agency cites B-150703, February 15, 1963, where we upheld a 50-mile restriction in a solicitation for laundry services in Washington, D. C.

In addition, the contracting officer has offered the following explanation of why the 90-mile geographic restriction was adopted:

"The requesting activity requested that the area of performance be limited to a ninety (90) mile radius of Camp Drum in order to insure expeditious pickup and delivery of the services required.

"Historically, contractors located beyond a ninety mile radius have performed marginally and/or subcontracted the services to facilities located within the ninety mile radius.

"Camp Drum is serviced by unimproved two lane highways to the southeast and interstate highways to the south. Camp Drum and surrounding area is subjected to severe inclement weather during the period October through March.

"During the period April through September, approximately 70,000 troops conduct annual training at Camp

Drum, and timely pickup and delivery of laundry services is required in order for the installation to perform its mission in support thereof as this installation does not have sufficient stockage for issue when services are not received as scheduled under the contract.

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"\* \* \* the inclusion of an area limitation of ninety (90) miles \* \* \* will insure timely receipt of services required to support Annual Training which will reduce administration costs and will be in the best interest of the Government."

Initially, the record indicates that Plattsburgh's protest to our Office was timely filed. A protest is "filed" with our Office at the time of receipt. 4 CFR 20.2(a). In the present case, the notice of protest was sent by a telefax message dated January 5, 1974, and received at our Office at 8:20 a.m. on January 7, 1974. Since bid opening did not take place until 2 p.m. the same day, the protest against the alleged impropriety in the solicitation was timely. In addition, to the extent Plattsburgh's protest was directed at its exclusion from the competition and denial of an opportunity to submit a bid, the protest filed on January 7, 1974, was timely since it was filed with five working days of "adverse agency action"--that is, the rejection by Camp Drum officials of Plattsburgh's oral protests on January 2 and 4, 1974. See section 20.2(a), GAO Bid Protest Procedures and Standards.

Our Office has recognized that a geographic restriction may constitute a legitimate restriction on competition where the contracting agency has properly determined, after careful consideration of the relevant factors involved, that a particular restriction is required. We have stated that determination of the proper scope of a restriction is a matter of judgment and discretion, involving consideration of the services being procured, past experience, market conditions, and other factors. See 53 Comp. Gen. \_\_\_\_ (B-178956, B-179672, January 31, 1974), and decisions cited therein.

A reasonable expectation that potential contractors located beyond a certain distance will not satisfactorily perform can provide a basis for the establishment of a geographic restriction.

B-150703, supra. In the present case, the contracting officer has cited highway conditions, severe winter weather, and historical experience of marginal performance by contractors located beyond 90 miles as reasons why the 90-mile restriction was included in the solicitation. In its March 14, 1974, letter, Plattsburgh contests the contracting officer's implication that highways in the area are inadequate, contending that it has not experienced difficulties in this regard. As for the severe winter weather, the protester points out that the bulk of the work occurs during the summer months. However, the protester has not shown the contracting officer's finding that past performance by contractors beyond 90 miles was marginal is without reasonable basis. We therefore conclude that the 90-mile restriction is not objectionable. Cf. 53 Comp. Gen. 102, 103-104 (1973).

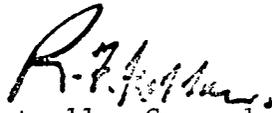
A more serious issue is raised by Plattsburgh's contention that it was denied a copy of the IFB and thus an opportunity to bid. The inadvertent failure to furnish a prospective bidder with a copy of a solicitation does not ordinarily require a resolicitation of bids where adequate competition and reasonable prices were obtained in the bidding. See 49 Comp. Gen. 707 (1970). However, where the omission appears to be conscious and deliberate rather than inadvertent, a different question is presented. In B-173029, September 1, 1971, we held that a deliberate failure to furnish a copy of the solicitation to an incumbent contractor on the basis that it lacked the capacity to perform was an improper and premature nonresponsibility determination. Where the incumbent is a small business concern--as here--we have held that such failure to solicit tends to undermine the purposes of 15 U.S.C. 637(b)(7), whereunder the Administrator of the Small Business Administration is empowered to conclusively certify to the capacity and credit of a small business concern to perform a particular Government contract. 45 Comp. Gen. 642 (1966).

We do not believe that the apparent refusal to provide the protester with an opportunity to bid could be supported on the basis of doubts as to Plattsburgh's capacity to perform. Moreover, the establishment of the 90-mile geographic restriction could not support such action. A geographic limitation requiring bidders' facilities to be located within a certain area relates to bidder responsibility, not to bid responsiveness, and a bidder may thus be properly allowed to demonstrate compliance with the requirement after bid opening and before award. 50 Comp. Gen. 769, 772 (1971); B-171586(2), April 29, 1971; B-170798, November 13, 1970.

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In addition to the failure to provide a copy of the solicitation to the incumbent contractor, we have been informally advised by the Department of the Army of other circumstances indicating that competition was unduly restricted. We are informed that the IFB was not synopsisized in the Commerce Business Daily as required by Armed Services Procurement Regulation (ASPR) 1-1003.1 (a), and that copies of the solicitation were provided to only three potential sources of supply.

In view of the foregoing, we are recommending to the Secretary of the Army by letter of today that IFB DAKF36-74-B-0028 be canceled and that the protester, and other firms similarly situated, be provided with an opportunity to bid in response to a resolicitation for the laundry services.

  
Deputy Comptroller General  
of the United States