

DECISION



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

[Protest Alleging Solicitation Specification Was Restrictive of Competition] ^{10,353}

FILE: B-194216

DATE: June 4, 1979

MATTER OF ABC Refuse Collection, Inc.

DL601704

DIGEST:

1. Contention that specifications give advantage to incumbent contractor does not render specifications unduly restrictive of competition unless incumbent's advantage was gained through unfair action on part of Government. →
2. There is no legal requirement that Government must discount inherent advantages of some bidders arising by virtue of prior Government contracts or other neutral circumstances.
3. There is no legal requirement that Government must provide equipment in order to enhance competition.

ABC 00378

ABC Refuse Collection, Inc. (ABC), protests specification 3-08 concerning contractor-furnished equipment in IFB DLA710-79-B-0007, issued by the Defense Logistics Agency (DLA) in Columbus, Ohio. ABC asserts that the requirement that the successful bidder provide 30 specially designed dumpster-type containers for use in performance of the contract is restrictive of competition insofar as it provides an unfair advantage to the incumbent contractor. ABC's protest is based on the alleged defect in the solicitation and was timely filed before the bid opening.

ABC has protested twice before on preceding solicitations for refuse collection at the same DLA installation. ABC Cleaning Service, Inc., B-187569, February 4, 1977, 77-1 CPD 91; ABC Cleaning Service, Inc., B-190406, February 27, 1978, 78-1 CPD 158. (Since the prior decisions the company has changed its name to ABC Refuse Collection, Inc.)

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The requirement for contractor-furnished containers was first used in a solicitation for these services in 1977. In that year ABC (then the incumbent), Trash Collection Company (TCC) (now the incumbent) and other bidders were asked to submit separate bids for trash collection services using both Government-furnished and contractor-furnished equipment. ABC's low bid was for Government-furnished containers only. TCC bid on both types of service. DLA awarded the contract to TCC using contractor-furnished containers, stating that this would result in the lowest overall cost to the Government. We sustained ABC's protest on that award because the IFB had advised that the lowest bid, not the lowest overall cost, would be selected. Consistent with our decision, TCC's contract was terminated for the convenience of the Government and the procurement was resolicited.

On resolicitation, however, it was necessary to specify contractor-furnished containers, because one-third of the Government-owned containers had been disposed of during the first few months of TCC's performance of the terminated contract.

ABC protested the resolicitation on two grounds: restrictive specifications and insufficient time to prepare bids. We found, in ABC Cleaning Service, Inc., B-190406, supra, that the protest was untimely filed, precluding consideration on the merits. However, we noted that the protester's objection to the requirement in the solicitation for front-loading packer trucks had been mooted by an amendment permitting either front or rear-loading trucks. We further stated that the contention of insufficient time to prepare bids was negated by the fact that ABC was a timely bidder.

In the instant protest, ABC objects to the requirement for contractor-furnished containers. Clause 3-08 of the IFB describes in detail the special design of the containers. The required containers are not the standard commercial "Dempster Dumpster" which ABC uses. To meet the specifications ABC would have to purchase new containers or modify

existing ones. ABC contends that this constitutes a restrictive specification.

ABC does not allege that the special design (hinges, doors, retaining loops, etc.) exceeds DLA's minimum requirements. Neither has it asserted that the specification was so restrictive that no other Columbus, Ohio, trash service could have bid on the procurement. Instead, it asserts that the specification puts the incumbent, TCC, at a competitive advantage because it has had the opportunity to build up an inventory of the required containers over the course of performance.

We have frequently addressed the question of incumbent contractor advantage. We have consistently held that:

"* * * certain firms may enjoy a competitive advantage by virtue of their incumbency or their own particular circumstances * * * As we said in B-175496, [November 10, 1972]:

"* * * We know of no requirement for equalizing competition by taking into consideration these types of advantages, nor do we know of any possible way in which such equalization could be effected."

Rather, the test to be applied is whether the competitive advantage enjoyed by particular firms would be the result of a preference or of unfair action by the Government.* * *"

ENSEC Service Corp., B-184803, B-184804, B-184805, January 19, 1976, 76-1 CPD 34, and cases cited therein.

To compete on the procurement ABC would have to make a substantial investment in new equipment. We have held, in nearly identical circumstances, that:

"* * * a new bidder competing with an incumbent, may be forced to assume

the risk of spreading the recovery of its initial investment over a * * * period [longer than the initial term of the contract] in order to offer the Government a competitive price.* * *"

IMBA, Incorporated, B-188364, B-187404, November 9, 1977, 77-2 CPD 356. ABC's opportunity to compete is not diminished because it must take such a risk. Any other new bidder would be in exactly the same situation and:

"* * * the Government is not required to equalize competition on a particular procurement by discounting competitive advantages accruing to firms by reason of their own particular circumstances.* * *"

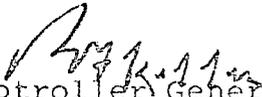
Field Maintenance Services Corporation, B-185339, May 28, 1976, 76-1 CPD 350.

Similarly, we have held that there is no requirement for the Government to provide equipment solely for the purpose of enabling more firms to compete. Southwest Marine, Inc.; Triple "A" South, B-192251, November 7, 1978, 78-2 CPD 329.

In response to the agency report, ABC implies that the contractor-furnished equipment specification was included for the purpose of eliminating ABC from the competition. ABC points to a 1976 letter from the facilities engineer to the contracting officer as probative of the issue of prejudice. No copy of the letter was furnished to GAO. In any event, in ABC Cleaning Service, Inc., B-187569, supra, we examined evidence relating to the cost of maintaining and replacing existing Government-owned containers. The fact that the solicitation which was the subject of that protest requested bids on both service options is evidence of the Government's desire to secure the most economical service. Judgments on economy were based on data received through the competitive procurement process. That TCC (which had itself made a large initial investment

in containers) was the low bidder on the resolicitation is further proof that the decision to select TCC and use contractor-furnished equipment was sound from a management point of view. Furthermore, over the course of performance with contractor-furnished equipment, the Government has disposed of its equipment. Thus, the present specification is but a result of a decision by the agency to fulfill its needs in a particular manner.

X The protester has not proven that the inevitable advantage accruing to the incumbent contractor was unfairly gained. Neither has it demonstrated any other reason why the specification was unduly restrictive of competition. Accordingly, the protest ~~is~~ denied.


Deputy Comptroller General
of the United States