

13598 *Pl-1 Request*

DECISION



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

FILE: B-197081

DATE: April 30, 1980

MATTER OF: Telex Computer Products, Inc.

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C 1533
A 20*

DIGEST:

1. Although there was no intention to preclude competition and order price was reasonable, late publication in Commerce Business Daily, under regulation requiring publication to obtain competition prior to ordering ADPE requirements in excess of \$35,000 from Federal Supply Schedule contract, did not generate competition and there was no other independent attempt to obtain competition; therefore, resolicitation of procurement is recommended.
2. Suggestion that it would not be in Government's interest to take corrective procurement action because contract price is \$78,642 and contract termination costs are likely to be thousands of dollars is dismissed, since it is conjectural that the contractor will not be successful on resolicitation and, if it is not successful, termination costs will be reduced by resulting savings.

Telex Computer Products, Inc. (Telex), protests the issuance to Storage Technology Corporation (STC) by the Army of delivery order No. DAKF40-80-F-0009 under the Federal Supply Schedule (FSS) for the rental and maintenance of tape drives and control units for 2 years commencing January 1, 1980.

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[Protest Against DELIVERY ORDER]

Telex points out that Temporary Regulation 46 (43 Fed. Reg. 40015-40018, September 8, 1978, as extended in 44 Fed. Reg. 52208, September 7, 1979) requires that a public notice be published in the Commerce Business Daily (CBD) prior to ordering against an FSS contract for ADPE requirements in excess of \$35,000 in order to permit other sources to compete for the equipment to be procured. In this regard, the notice for the immediate procurement appeared in the CBD on November 7, 1979, only 2 days before a request for a solicitation was to be received by the contracting agency. Defense Acquisition Regulation § 1-1003.2 (1976 ed.) provides that contracting agencies should synopsise proposed procurements no later than 10 days before the issuance of solicitations. In publishing the notice, the CBD omitted from the synopsis prepared by the contracting agency the statement that requests for the solicitation had to be received by the contracting agency by November 9, 1979. Telex's request for a solicitation was received on November 15, 1979, 2 days after an award was made to STC under the FSS because no requests had been received for a solicitation by that time.

The contracting agency concedes that the publication in the CBD "did not promote competition." However, the contracting agency states that it acted in good faith in that the procurement synopsis was mailed to CBD on October 31, 1979, the response time provided in the synopsis was consistent with past experience which caused no difficulty, and it was not aware of the omission of the response date in the CBD notice because it does not subscribe to the publication. To preclude a repetition of the situation, the contracting agency has initiated action to obtain a subscription to the CBD and in the future will allow 7 days for the CBD to receive the notices and 10 days more to make requests for solicitations.

Three factors for consideration in deciding whether to provide corrective action are: (1) whether adequate competition was obtained, (2) whether the failure to obtain competition was inadvertent, and (3)

whether the order was at a reasonable price. Coastal Services, Inc., B-182858, April 22, 1975, 75-1 CPD 250. Although there was no intention to preclude Telex from competing and the order price was reasonable, the late publication in the CBD did not generate competition and there was no other independent competition attempted or received. Cf. Reliable Elevator Corp., B-191061, April 27, 1978, 78-1 CPD 330; Culligan, Incorporated, Cincinnati, Ohio, 56 Comp. Gen. 1011 (1977), 77-2 CPD 242. The intent of Temporary Regulation 46 clearly was frustrated in its entirety. Therefore, the situation is the kind that would ordinarily call for corrective action.

The Army and STC have suggested that it would not be in the Government's interest to take corrective action because the contract price is \$78,642 and the cost of termination arising from added shipping costs and the rental differential provided in the FSS contract in the event the order is terminated in less than 2 years are likely to amount to thousands of dollars. Nevertheless, it is our recommendation that the remaining term of the requirement be resolicited before any termination action is taken. If the contractor is successful, no termination action will have to be taken. Moreover, if anyone other than the contractor is successful upon resolicitation, the termination costs will be reduced by the amount of the resulting savings.

Accordingly, we believe that corrective action should be taken.

Since this decision contains a recommendation for corrective action to be taken by the contracting agency, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970). Section 236 requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.


Comptroller General
of the United States