

DECISION



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

[Protest Alleging Improper Exclusion From Competition]

FILE: B-199773

DATE: December 18, 1980

DLG 88

MATTER OF: Freedom Elevator Corporation

DIGEST:

1. Where agency intentionally did not solicit incumbent elevator service contractor for new elevator service requirements, incumbent contractor was improperly precluded from competing.
2. Where agency decides not to exercise option to extend contract on basis (among others) of contractor's alleged poor performance, reasonable inference can be drawn that agency dissatisfaction was at least a contributing factor to conscious decision not to furnish incumbent contractor with solicitation for new requirements and was improper premature responsibility determination.

Freedom Elevator Corporation protests the Department of the Navy's award of a contract under invitation for bids (IFB) No. N62472-80-C-3575 for maintenance and repair of elevators at the Naval Support Activity, Brooklyn, New York, on the ground that Navy failed to solicit Freedom's bid for that requirement. Freedom, the incumbent elevator maintenance and repair contractor, contends that it was deliberately and improperly excluded from the competition and therefore requests that the contract awarded under the IFB be terminated and the requirement resolicited to afford Freedom an opportunity to compete.

Based on the following, the protest is sustained.

The facts indicate that Freedom had performed the Navy's Brooklyn shipyard elevator maintenance and repair

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services under several contracts from July 1975 until the presently disputed contract award in July 1980. Freedom's most recent contract with the Navy included an option provision by which the Navy had the right to extend the term of Freedom's contract for two additional years. The Navy decided not to extend Freedom's contract term, and therefore the contract between Freedom and the Navy expired by its terms on June 30, 1980. On May 28, 1980, Navy formally advertised its requirements for future Brooklyn shipyard elevator maintenance and repairs. While the Navy provided several companies with copies of the IFB, none was sent to Freedom.

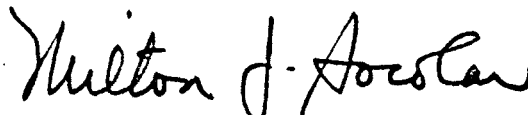
According to the Navy:

"A decision not to renew was made not only because of dissatisfaction with the performance of the protester but also because the specifications for the work were deemed to be vaguely written and not representative of the quality of work desired. A copy of the IFB was not mailed to the protester since it was reasonably assumed that Freedom Elevator Corporation was no longer interested in performing the work at the shipyard. While the IFB should have been forwarded to the protester routinely, nevertheless the personnel concerned concluded otherwise on the basis that since the 60 day advance notice of renewal had not been given and no notification or negotiation of price adjustment triggered by a new prevailing wage determination by the Department of Labor were held, the protester must have realized that its contract would conclude on 30 June 1980."

The Navy also asserts that Freedom "was advised on many occasions of dissatisfaction with its performance." Although the Navy denies that its dissatisfaction with Freedom's contract performance was a factor in its decision not to solicit Freedom for the new requirements, we believe that in these circumstances a reasonable inference can be drawn that Navy's dissatisfaction was at least a contributing element in the agency's decision not to provide Freedom with an IFB, and thus constituted a premature responsibility determination. Such determinations may not be made in advance of the receipt of a bid. PRB Uniforms, Inc., 56 Comp. Gen. 976 (1977), 77-2 CPD 213.

We have held in numerous decisions concerning an agency's failure to solicit an incumbent contractor that where adequate competition resulted in reasonable prices and where there was no deliberate or conscious intent on the part of the procuring agency to preclude a bidder from competing, bids need not be rejected solely because a bidder (even the incumbent contractor) did not receive a copy of the IFB. Wichita Beverage, Inc., d/b/a/ Pepsi-Cola and Seven-Up Bottling Company, B-191205, July 6, 1978, 78-2 CPD 11. However, in the instant case, where it is clear that the Navy intentionally did not provide Freedom with an IFB, we believe that Freedom was improperly precluded from competing. Scott Graphics, Incorporated; Photomedia Corporation, B-183274, May 19, 1975, 75-1 CPD 302; Plattsburgh Laundry and Dry Cleaning Corp.; NuArt Cleaners Laundry, 54 Comp. Gen. 29 (1974), 74-2 CPD 27.

The contract awarded to Elco Elevator Corporation on June 26, 1980, was for a one year performance period commencing July 1, 1980 with an option for one additional year. Inasmuch as more than 50 percent of the performance period will have elapsed before any new competition and resultant contract award can be accomplished, we do not believe it to be practical to recommend termination of the existing Elco contract. Nonetheless, because of the erroneous exclusion of Freedom from the competition for these requirements, we are recommending to the Secretary of the Navy that the option to extend the contract not be exercised.



For The Comptroller General
of the United States



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

B-199773

December 18, 1980

The Honorable Edward Hidalgo
The Secretary of the Navy

Dear Mr. Secretary:

Enclosed is a copy of our decision of today in the matter of Freedom Elevator Corporation, wherein we sustained the protest on the basis that Freedom was improperly precluded from competing for elevator maintenance and repair service requirements at the Naval Support Activity, Brooklyn, New York. We recommend that the option to extend the existing contract with Elco Elevator Corporation not be exercised.

We would appreciate advice of the action taken on this recommendation.

Sincerely yours,

A handwritten signature in dark ink, reading "Milton J. Arosen". The signature is written in a cursive style with a large, stylized "M" and "A".

For The Comptroller General
of the United States

Enclosure