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DECISION



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

FILE: B-201839

DATE: December 31, 1981

MATTER OF: Security Assistance Forces & Equipment OIG

DIGEST:

1. Where solicitations are not published in the Commerce Business Daily because they are for foreign procurements, but solicitations are displayed in the contracting office, there is public notice of their existence and protest filed after award is untimely; however, protest will be considered, since deficiencies in procurements warrant consideration of the protest on the merits.
2. Where protester was current contractor, contracting officer was aware of protester's existence, and protester made repeated requests to receive solicitations, contracting office should not have ignored protester merely because protester had not submitted a formal application to be placed on the bidders mailing list.
3. Although it was inappropriate for the contracting office to decline to issue solicitations to the protester because the protester refused to submit a formal application to be placed on the bidders mailing list, the awards were not improper since the Government received the benefit of competition and there is nothing in the record which suggests that reasonable prices were not obtained or that the failure to solicit the protester was the result of any deliberate effort to exclude the protester from competition.
4. Although the sole-source award was of questionable validity because the

justification was based on an outdated restriction and there is no indication that a search was made among installers of equipment to ascertain that there was no one other than the selected offeror that was capable of performing, corrective action on contract is not recommended since contract was completed and contractor paid several months before the protester learned of the procurement and protested.

Security Assistance Forces & Equipment OHG (SAFE) protests the award by the Department of the Army of contracts numbered DAJA10-80-C-0198, DAJA10-80-C-0259, DAJA10-80-C-0323 and DAJA10-80-C-0340.

The first contract was let on a sole-source basis and the remaining contracts on a competitive basis. SAFE contends that the first contract should have been competitive and that it should have been solicited to submit an offer on the remaining competitive contracts. The protest of the first contract is sustained and the protests against the remaining contracts are denied.

The Army alleges that SAFE's protest against the failure to receive the latter three solicitations made after SAFE learned of the award of the contracts from the contracting office is untimely under section 21.1(b)(1) of the Bid Protest Procedures, 4 C.F.R. § 21.1(b)(1) (1981). The basis for that contention is that the solicitations were publicly displayed in the contracting office so that SAFE could have ascertained their existence prior to the closing dates for receipt of proposals and protested the failure to receive the solicitations prior to the closing dates. SAFE indicates that visiting the contracting office to ascertain whether there were any solicitations it should be protesting was impractical since its office is 200 miles from the contracting office.

We have held that publication of a solicitation in the Commerce Business Daily (CBD) constitutes notice of the solicitation and that a protest that the protester should have been solicited filed after the closing date for the receipt of proposals is untimely. Micro-Mil, Inc., B-202703, May 1, 1981, 81-1 CPD 335. Foreign procurements are not required to be published in the CBD. Since the protested procurements were foreign procurements, the solicitations were not published in the CBD. Display of

the solicitations at the contracting office provides public notice of their existence. See Defense Acquisition Regulation § 1-1002.4 (1976 ed.). Thus, the protest filed by SAFE after the award was made under the three solicitations is untimely. However, we believe the deficiencies in these procurements warrant consideration of the protest on the merits. Federal Contracting Corporation, B-183342, June 30, 1975, 75-1 CPD 398.

The disagreement between SAFE and the contracting agency over whether SAFE should have been solicited for the competitive solicitations turns on whether SAFE should have been solicited where it failed to file a "Bidders Mailing List Application" (Standard Form 129) with the contracting office.

The contracting office sent a letter to SAFE requesting it to complete standard form 129. However, SAFE was suspicious of the contracting office's motives in requesting the application, since sometime ago SAFE had furnished a completed form to the contracting office that had previously conducted procurements of the type involved here. SAFE resisted all efforts to submit a new application despite admonitions from the contracting office that SAFE would not be solicited for procurements from that office until it received a completed application. Despite the warnings, during the entire controversy, SAFE repeatedly indicated its interest in receiving solicitations even though the contracting office did not have the standard form on file. SAFE took steps to have the office with which it originally filed the application send a copy of the application to the contracting office conducting these procurements. After much delay, the contracting office received a copy of the application from the office with which it was filed. Commencing with the receipt of that application, SAFE was placed on the mailing list for the subsequent solicitations.

Essentially, it is the position of the contracting office that, until it received the formal application from SAFE to be placed on the mailing list, it was under no obligation to send SAFE any procurement solicitations. However, the contracting office knew of the existence of SAFE since it invited SAFE to submit standard form 129. Further, the contracting officer has admitted that he knew of the existence of SAFE when the solicitations were issued because he was administering a similar contract with SAFE at the time. In refusing to send SAFE any solicitations until standard form 129 was on file,

the contracting office relies on Defense Acquisition Regulation § 2-205.1(b) (1976 ed.). That section states that all eligible and qualified suppliers who have submitted bidders mailing list applications or whom the purchasing activity considers capable of filling the requirements of a particular procurement shall be placed on the appropriate bidders mailing list. We have interpreted the language in the latter section to include a requirement that a current contractor who has not filed a standard form 129 be placed on the bidders mailing list. B-160975, March 28, 1967. Thus, since SAFE was a current contractor and repeatedly requested that it be furnished solicitations, it should not have been ignored merely because it had not submitted a formal application. Requiring a formal application when a prospective offeror indicates in other respects a desire to receive solicitations is giving undue weight to form over substance.

Although we conclude that it was inappropriate for the contracting office to decline to issue the solicitations to SAFE, we deny these protests because the circumstances are not such that the contracting office would have been required to resolicit the procurements. The propriety of the awards is determined upon the basis of whether adequate competition and reasonable prices were obtained and whether there was any deliberate attempt to exclude the protester from the competition, not whether every prospective offeror was afforded an opportunity to make an offer. McQuiston Associates, B-199013, September 1, 1981, 81-2 CPD 192; Dash Metal Products Co., Inc., B-190973, April 20, 1978, 78-1 CPD 309; Reliable Elevator Corp., B-191061, April 27, 1978, 78-1 CPD 330. In this case, on two of the procurements, 14 firms were solicited and four offers were received on each and on another 11 firms were solicited and three offers were received. Thus, the Government received the benefit of competition and there is nothing in the record which suggests that reasonable prices were not obtained. Moreover, we do not find that the failure of the contracting office to solicit SAFE was the result of any specific effort on its part to exclude SAFE from the competition. The contracting office was ready to place SAFE on the bidders mailing list upon the receipt of standard form 129 and did so, in fact, when a copy of the form was received.

As indicated above, SAFE also protests the sole-source award of contract DAJA10-80-C-0198 for the installation of an alarm system in a security area. We agree with SAFE that the award is of questionable validity. First, as SAFE indicates, the sole-source justification is based in part upon the proposition that Defense

Intelligence Agency Manual (DIAM) 50-3 provides that no foreign alarm company/contractor, such as SAFE, will be employed in the installation of a security alarm system for the security area involved. However, the DIAM relied upon had been superceded and the DIAM 50-3 in effect at the time of award provided that a foreign alarm system company/contractor could be employed. Second, the justification states that a manufacturer's designated representative is required to insure that the installation of the equipment complies with the specifications of the manufacturer and the Government; however, there is no indication in the justification that a search was made among installers to ascertain that there was no one other than the selected offeror that was capable of performing in accordance with the specifications of the manufacturer and the Government. In that regard, the usual method to determine whether there are any companies capable of performing in accordance with the specifications is to issue a solicitation stating the requirements and examining the responsibility of companies that submit offers. Consolidated Elevator Company, 56 Comp. Gen. 434 (1977), 77-1 CPD 210. See also Las Vegas Communications, Inc., B-195966, July 22, 1980, 80-2 CPD 57.

Notwithstanding the foregoing, we are unable to recommend any corrective action on the sole-source contract, since the contract was completed and the contractor paid several months before SAFE learned of the procurement and timely protested. However, by separate letter to the Department of the Army, we are recommending that appropriate action be taken to preclude a recurrence of the situation in the future.

Harry R. Van Clave
For Comptroller General
of the United States