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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20546

FILE: B-211479

DATE: August 2, 1983

MATTER OF: Lavelle Aircraft Company

DIGEST:

1. Where the protester files a protest against failure to receive a bid package with the contracting agency prior to bid opening, subsequent GAO protest within 10 days of bid opening is timely filed.
2. Resolicitation is not required by section 223(a) of Pub. L. No. 95-507 due to failure of small business to receive copy of bid set prior to bid opening where the supply of bid sets was exhausted, the agency's mailing of the bid set just prior to opening was not due to any deliberate attempt to exclude the protester, and there was adequate competition.

Lavelle Aircraft Company (Lavelle) protests any award by the United States Army Materiel Development and Readiness Command (Army), under total small business set-aside invitation for bids (IFB) No. DAAA09-83-B-4629, for can assemblies. The protester contends that the solicitation should be canceled and the requirement resolicited because it failed to receive a copy of the solicitation prior to bid opening.

The protest is denied.

The IFB was issued on March 3, 1983, with an April 4 bid opening, following an announcement in the Commerce Business Daily of February 24. The Army received Lavelle's request for a bid package on March 4. By March 17, the Army reports that it had exhausted the available supply of bid sets by issuing 84 bid sets on a first-come, first-served basis to fill requests received by March 3.

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Lavelle states that on April 1, it was informed that no bid packages were available. Lavelle protested this to the Army by telegram of that date. Also on April 1, the Army mailed a bid package to Lavelle which was received on April 5, the day after opening. Lavelle then protested to our Office on April 14.

The Army contends that Lavelle's protest should be dismissed as untimely since Lavelle knew that its bid set request was in jeopardy prior to bid opening, but the protest to GAO was not filed until after bid opening.

We disagree. Our Bid Protest Procedures require a protest, initially timely filed with an agency, to be filed with this Office within 10 days of knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a) (1983). The record demonstrates that Lavelle timely protested to the Army on April 1, prior to bid opening, because the Army does not deny receiving the protest telegram or dispute that Lavelle sent the telegram. The Army only acknowledges an inability to locate the telegram, and the subsequent mailing of the bid set was obviously the result of a complaint by Lavelle. Therefore, the subsequent protest to our Office within 10 working days from bid opening was timely.

Lavelle contends that the Army is in violation of section 223(a), Pub. L. No. 95-507, 92 Stat. 1757, and the implementing Defense Acquisition Regulation § 1-1002.1 (Defense Acquisition Circular No. 76-24, August 28, 1980), which provide that a small business upon its request shall be provided with a copy of bid sets and specifications concerning a particular contract.

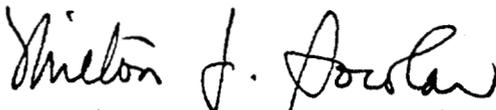
We have held that the statute only becomes operative when a small business concern requests information and the agency refuses. National Association of Aircraft and Communication Suppliers, Inc., B-208614, February 28, 1983, 83-1 CPD 196; Alpha Carpet Upholstery Cleaners, Inc., B-200944, February 5, 1981, 81-1 CPD 69. Further, the legislative history of the statute reveals that it was "not intended to allow small businesses routinely to request copies of every single procurement solicitation an agency makes." S. Rep. No. 95-1140, 95th Cong., 2d Sess. (Aug. 16, 1978). In Alpha, supra, we did not find a refusal as

contemplated by the statute where the agency inadvertently failed to solicit the incumbent contractor.

Lavelle distinguishes Alpha, supra, because Lavelle specifically requested a bid set and the agency failed to act in a timely and reasonable manner. According to Lavelle, a refusal is intended as a failure of compliance, not simply an outright rejection of the request.

Where there is no evidence of a conscious or deliberate effort to exclude a bidder from participating in the competition, as opposed to an inadvertent failure to solicit, we will not require a resolicitation where adequate competition resulted in reasonable prices. See Scripto, Inc., B-209450, November 9, 1982, 82-2 CPD 431. Here, the record shows no evidence of a deliberate or conscious attempt by the Army to exclude Lavelle from bidding. Rather, the Army eventually made a good-faith, although unsuccessful, effort to send timely a copy of the bid package to Lavelle, following an apparent exhaustion of bid sets due to 84 requests received prior to Lavelle's. We view what occurred here as reasonable agency conduct under the circumstances. Moreover, Lavelle contributed to its inability to compete by waiting until the Friday before a Monday bid opening to contact the agency. Finally, of the 84 bid packages issued, the Army received eight bids; therefore, we cannot conclude that the competition was inadequate.

Protest denied.

for 
Comptroller General
of the United States