



The Comptroller General
of the United States

Washington, D.C. 20548

Shenka

Decision

Matter of: Ace Amusements, Inc.

File: B-222479

Date: July 14, 1986

DIGEST

Protest that agency acted deliberately to exclude protester from the competition and failed to obtain reasonable prices is denied, since protester fails to prove allegations.

DECISION

Ace Amusements, Inc. (Ace) protests the award of a contract under request for proposals (RFP) No. DAKF48-86-R-NAF-0023 issued by the Department of the Army, Ft. Hood, Texas, requiring the contractor to furnish, install, and maintain coin operated amusement vending machines (such as jukeboxes and video and pinball games) at various Ft. Hood recreation facilities.^{1/} Ace contends that the Army acted deliberately to prevent it from competing for the contract. The protest is denied.

The RFP, issued on June 20, 1985, initially solicited offers to cover a contract period from September 1, 1985, through August 31, 1986, with options for renewal through August 31, 1990,^{2/} and established the closing date for receipt of proposals as July 9, 1985. When the RFP was issued, however, Ace was performing the solicited services under a contract awarded to it in February 1982 by the Ft. Hood Army and Air Force Exchange Service (AAFES), which contract provided for renewal options through February 1987. The base contract period of the solicitation under protest, therefore, overlapped the final option year of Ace's AAFES contract.

^{1/} We have jurisdiction over this protest, even though the procurement is for a nonappropriated fund activity, because the procurement is conducted by the Department of the Army, a federal agency. See Artisan Builders, B-220804, Jan. 24, 1986, 65 Comp. Gen. ____, 86-1 C.P.D. ¶ 85.

^{2/} The contract period was subsequently amended to run from February 6, 1986, or date of award (whichever is later) to February 5, 1987, with options to renew through February 5, 1991.

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It appears from the record that the protester's 1982 contract with AAFES was for the provision of amusement vending machine services not only at AAFES facilities (which are not at issue in this protest) but also on behalf of Morale, Welfare and Recreation (MWR) facilities, and clubs, at Ft. Hood. It is the service for these latter users, to which we will refer as the nonappropriated fund, which is the subject of RFP -0023. It does not appear that the nonappropriated fund itself directly contracts for these services but that other entities--such as AAFES--contract on its behalf. According to a memorandum in the file, the nonappropriated fund, dissatisfied with the maintenance of machines and the contractor's unwillingness to place machines in requested locations under the existing AAFES contract, sought to independently contract for these services through the Ft. Hood Contracting Division, Directorate of Contracting and Commercial Activities, which issued RFP -0023. The nonappropriated fund subsequently invoked an agreement it had with AAFES for the termination of these services, and AAFES has directed the protester to remove the machines it had provided the nonappropriated fund under the AAFES contract.

Although it is not entirely clear whether Ace received a copy of the solicitation at the time of its issuance on June 20, 1985, the record does indicate that on July 11, Ace was given a copy of the solicitation and of amendment 0001, issued on that same day, by which the time for receipt of offers was "temporarily postponed." At that time, Ace inquired of the Ft. Hood Contracting Division concerning its issuance of RFP -0023 for services which Ace was then under contract with AAFES to perform for a period that would overlap the period covered by the subject RFP. According to the Army, it informed the protester that it did not "handle" or get involved in AAFES contracts.

The protester then inquired at the AAFES contracting office concerning the Army's issuance of an RFP for services Ace was under contract with AAFES to provide. The record indicates that the AAFES officials advised Ace to the effect that the Army was not authorized to contract for the services Ace was then performing under the AAFES contract. According to Ace, AAFES said it had no knowledge of RFP -0023 and referred the protester to the Army; the Army contracting officials disclaimed any knowledge of the AAFES contract with Ace; and the nonappropriated fund office, on behalf of which the Army conducted the procurement, claimed it could not discuss the matter.

By amendment 0002, dated October 15, 1985, the closing date for receipt of offers was reestablished as November 4, and by amendment 0003, the closing date was changed to December 20. Award was made on February 21, 1986, to Central Music Co., the sole offeror.

When, on March 17, 1986, apparently after receiving notice of the award of RFP -0023, Ace inquired of the Army why it was not given an opportunity to compete for the contract, the Army stated that it had

mailed to Ace amendments 0002 and 0003 in October and November, respectively. Ace maintains that it never received either of those amendments.

Ace contends that the Army and the AAFES failed to provide it with information necessary for Ace to bid on the solicitation, and directly and intentionally misled Ace when it attempted to obtain clarification concerning the procurement. Ace further alleges that the Army failed to establish that it delivered to Ace, or that Ace received, a copy of the amendments which reestablished the date for receipt of proposals, and that the Army failed to obtain adequate competition and reasonable prices.

The Army denies that it acted deliberately to preclude Ace from competing for the contract. Ace was listed among the nine firms on the bidders mailing list, and the record indicates that amendment 0003, the final change to the date for submission of offers, was sent to all bidders on that list. The agency emphasizes that the solicitation package provided to ACE listed the Ft. Hood Contracting Division as the point of contact regarding the solicitation (including the names and telephone numbers of two employees at that office), but that Ace consulted with and accepted the advice of AAFES with respect to the procurement. We note that during the 8 month period between July 16, 1985, and March 17, 1986, there is no record of any inquiry made by Ace of Army contracting officials concerning the status of RFP -0023. Ace states that it was "led to believe" that the solicitation issued in July 1985 was postponed "due to confusion and problems" surrounding the procurement and, for that reason it took no further action following its receipt of the amendment 0001 notice of postponement of receipt of offers.

Certainly some confusion resulted from the fact that one organization (Ft. Hood Contracting Division) had issued a solicitation for services whose period for performance overlapped that of an existing contract which the protester had with another organization (AAFES), and where both the proposed contract and part of the existing contract actually were for the benefit of a third organization (the nonappropriated fund). It does not appear that the relationship of these three organizations, as it related to this contract, was ever comprehensively explained by anyone to the protester, to whom the parties involved simply represented "the Army."

Based on the record in this case, it appears that this situation may have reflected some misunderstanding, particularly on the part of AAFES, concerning the Army's authority to contract for the subject services on behalf of the nonappropriated fund. The question of the Army's authority to contract for the services in spite of Ace's existing contract with AAFES was finally resolved by the contracting offices

involved in favor of the Army's action. Nevertheless, Ace was aware in July 1985, at the latest, of the issuance of RFP -0023 for the services it was then performing, but it apparently assumed, based principally on advice received from AAFES, that its contractual interests were protected and, therefore, took no further initiative with respect to the solicitation.

It is well-established that the bidder bears the risk of nonreceipt of a solicitation amendment. Marino Construction Co., Inc., 61 Comp. Gen. 269, 272 (1982), 82-1 C.P.D. ¶ 167. From the government's point of view, the propriety of a procurement is determined on the basis of whether full and open competition was achieved and reasonable prices were obtained, and whether the agency made a conscious and deliberate effort to exclude a bidder from competing. International Association of Fire Fighters, B-220757, Jan. 13, 1986, 86-1 C.P.D. ¶ 31. The requirement that agencies obtain full and open competition through the use of competitive procurement procedures is the standard set forth in the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 153 (Supp. II 1984), and is defined as permitting "all responsible sources . . . to submit competitive proposals" in negotiated procurements. Id., §§ 259(c), 403(7).

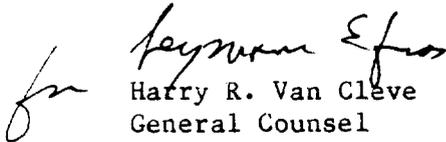
The central question presented by this protest is whether the Army consciously and deliberately acted to preclude Ace from competing for this contract. While Ace alleges that this is what occurred, it has presented no evidence in support of that allegation. Rather, the record indicates that Ace may have been provided with a copy of RFP -0023 when it was issued in June 1985 and without question was provided with a copy, together with amendment 0001, in July 1985. The fact that the amendment only "temporarily postponed" the time for receipt of offers, and did not cancel the solicitation, indicates that the procurement was still in process and had not come to an end. Ace apparently concluded that it need "not worry" about RFP -0023, however, based on information which came from AAFES and not from the Ft. Hood Contracting Division which had issued the RFP. Although employees of the Contracting Division did not attempt to comment on the terms of Ace's AAFES contract or to explain the relationship of that contract to this procurement, it does not appear that they refused any request by Ace for solicitation documents or to answer any inquiry concerning the status of RFP -0023. In fact, as we indicated above, Ace did not contact the Ft. Hood Contracting Division between mid-July 1985 and mid-March 1986, some 8 months later, when it learned of the award of the contract.

In addition, the protester does appear on the bidders mailing list which two employees of the Ft. Hood Contracting Division state was used in disseminating amendments 0002 and 0003 by first class mail. The protester does not claim that its address, as it appears on the list, is inaccurate. Although the protester maintains that it failed to receive copies of those amendments, we have no basis to conclude that they were

not sent to it in an attempt to preclude it from competing. Under the circumstances in this case, we do not conclude that the agency deliberately, or otherwise, denied Ace the opportunity to compete. Denver X-Ray Instruments, Inc., B-220963, Nov. 15, 1985, 85-1 C.P.D. ¶ 562.

Further, we do not consider it legally necessary or appropriate to disturb the Army's award based on Ace's objections to the competition and prices obtained by the Army, in view of the agency's solicitation of nine firms and its award of the contract on more favorable terms than that of the last option year of Ace's contract with AAFES. See International Association of Fire Fighters, B-220757, supra.

The protest is denied.


Harry R. Van Cleve
General Counsel