



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Grieshaber Manufacturing Company, Inc.

File: B-224388

Date: September 29, 1986

DIGEST

1. Where a procuring agency fails to obtain adequate competition on a solicitation for a small purchase through error on the part of procuring officials by soliciting only one of several suppliers it has violated the procurement regulations.
2. Where protest is sustained, but contract has already been performed, protester is entitled to recovery of its costs of filing and pursuing the protest, including attorney's fees.

DECISION

Grieshaber Manufacturing Company, Inc. (Grieshaber), protests the award of a contract to Surgimed-MLB Inc. (Surgimed) under solicitation No. DLA-120-86M-EW13, issued by the Defense Personnel Support Center (DPSC) for 468 finger ring saws.

The protest is sustained.

Grieshaber states that it is an established supplier of the medical instrument and this was known to DPSC. Grieshaber states that DPSC conducted the procurement without soliciting Grieshaber in violation of section 6.302-2(c)(2) of the Federal Acquisition Regulation (FAR) and the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2301(b)(1) (Supp. III (1985)), which calls for "full and open competition."

DPSC states that the solicitation was initiated by DPSC's Medical Supply Operations Division on April 11, 1986, due to a supply shortage. The purchase request was then forwarded to the Medical Technical Operations Division (MTOD) for identification of known acceptable sources of the item. On April 17, that division listed Surgimed, the original supplier of the item, as the only known acceptable source. The

036872-131143

purchase request was then assigned to a new buyer who accepted the recommendation from the MTOD and solicited the single listed source, Surgimed, by telephone on May 1, 1986. The solicitation was not synopsised in the Commerce Business Daily. Written confirmation of Surgimed's quotation dated May 2, was received and award was made on May 7 with a June 15 delivery date.

DPSC has provided the procurement history card for the finger ring saw and this, as well as a review of DPSC's contract files, shows that Grieshaber and other suppliers had been solicited and awarded contracts for this item in the past. However, Surgimed was the only supplier solicited. DPSC states that the above described purchase procedure was not the normal practice and that an experienced buyer would have detected that MTOD had made an error and would have challenged the absence of Grieshaber as a previous supplier.

DPSC argues that failure to provide a potential supplier, even an incumbent contractor, with a copy of the solicitation does not invalidate an award unless the protester can show that the procuring agency deliberately precluded the protester from competing; that there was inadequate competition; or that the prices obtained were unreasonable, citing Parking Company of America, B-215241, Aug. 17, 1984, 84-2 C.P.D. ¶ 188, and Coast Canvas Products II Co., Inc., B-214272, July 23, 1984, 84-2 C.P.D. ¶ 84. DPSC argues that even though errors were made in this acquisition, these errors did not reflect a conscious or deliberate intent to exclude Grieshaber from participating in the procurement. DPSC also states that there is no apparent dispute concerning whether the price was fair and reasonable.

With respect to whether there was inadequate competition, DPSC states that since this was a small purchase, the "full and open competition" requirement of FAR, part 6, does not apply and it was allowed to solicit only one source if only one source is reasonably available, particularly in view of the urgency of the proposed purchase. Accordingly, DPSC states that the contracting officer, even though relying on erroneous information, reasonably concluded that in this emergency case only one source was reasonably available. In this connection, DPSC states that Grieshaber was notified in February 1986 of a specification noncompliance of an item previously supplied to DPSC and therefore the contracting officer could reasonably have concluded that Grieshaber was nonresponsible and only one source was reasonably available.

Grieshaber concedes that there was no conscious or deliberate intent to exclude it from the competition, but it disputes the assertion that there was adequate competition or that the price was reasonable. Moreover, it contends that DPSC's notice to Grieshaber of prior specification noncompliance is irrelevant.

We agree with Grieshaber that prior specification noncompliance has no bearing on the propriety of DPSC's actions in this procurement. DPSC only raised this matter after the fact and the record shows that Grieshaber's responsibility was never considered as an issue. DPSC does not allege that Grieshaber was found nonresponsible prior to award, as required by FAR § 9.103(b). The simple fact is that Grieshaber was not solicited, not because it was nonresponsible, but because Grieshaber was never considered as a possible offeror.

DPSC utilized small purchase procedures which are excepted from the requirement set forth in CICA that agencies obtain full and open competition through the use of competitive procedures when conducting procurements. S.C. Services Inc., B-221012, Mar. 18, 1986, 86-1 C.P.D. ¶ 266.^{1/} For purchases of less than \$25,000, such as here, these simplified procedures are designed to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors. To facilitate these stated objectives, CICA only requires that agencies obtain competition to the maximum extent practicable--rather than full and open competition, defined as permitting "all responsible sources . . . to submit sealed bids or competitive proposals," 10 U.S.C. § 2302(3) (Supp. III 1985)--when they utilize the small purchase procedures. 10 U.S.C. § 2304(g)(4) (Supp. III 1985). In implementing the statutory requirement, the FAR requires contracting officers, using small purchase procedures for purchases of more than \$1,000, to solicit quotations from a reasonable number of qualified sources to ensure that the purchase is advantageous to the government, price and other factors considered. FAR, § 13.106(b)(1) (FAC No. 84-5, Apr. 1, 1985). Generally solicitation of three

^{1/} For decisions involving the violation of the full and open competition requirement see Trans World Maintenance, Inc., B-220947, Mar. 11, 1986, 65 Comp. Gen. _____, 86-1 C.P.D. ¶ 239.

suppliers is sufficient. FAR, § 13.106(b)(5) and S.C. Services Inc., B-221012, Mar. 18, 1986, supra.

In this case, DPSC states that it was permissible to solicit only one source because of the urgency of the procurement. Whatever the urgency of the procurement may have been, however, it was not the reason other offerors were not solicited. The solicitation was made over the phone and DPSC had ample opportunity to similarly solicit Grieshaber and other offerors as award was not made until 6 days after the telephonic solicitation of Surgimed. The reason Grieshaber and other suppliers were not solicited was because DPSC erred in identifying sources, not because of the urgency of the solicitation.

It is plain that adequate competition was not obtained and there is no justification for this inadequacy (contrast S.C. Services Inc., B-221012, Mar. 18, 1986, supra, where the incumbent was not solicited, but three quotations were received.) The reason Grieshaber was not solicited was based on the error of contracting officials and, while not showing bad faith towards Grieshaber, does not excuse the violation of the procurement regulations. Accordingly, the protest is sustained. In view of this finding, we do not address Grieshaber's argument that the awarded contract was unreasonably priced.

Since delivery of the item has already been completed, it is impractical to provide Grieshaber with corrective action concerning the solicitation. However, since Grieshaber has lost any opportunity to compete for and be awarded a contract under this solicitation, we allow its request for recovery of its costs of filing and pursuing its protest, including attorney's fees. EHE National Health Services, Inc., 65 Comp. Gen. 1 (1985) 85-2 C.P.D. ¶ 362.

for 
Comptroller General
of the United States