

Weiskopf



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Catamount Construction, Inc.

File: B-225498

Date: April 3, 1987

DIGEST

Contracting agency's unexplained failure to send the protester amendments to invitation for bids where the protester twice requested them effectively prevented the protester from competing and violated the statutory mandate for full and open competition.

DECISION

Catamount Construction, Inc. protests the award of a contract to Gilbane Building Company, the low bidder, under invitation for bids (IFB) No. N62472-86-B-0097, issued by the Navy for the construction of a firefighting training facility at Newport, Rhode Island. Catamount's second low bid failed to acknowledge four amendments to the IFB. Catamount complains that despite its repeated requests for the amendments, the Navy failed to furnish them or to read the amendments over the phone prior to bid opening. Contending that its bid included substantial amounts to cover increased requirements that might have been included in the amendments, Catamount argues that the Navy should be required to terminate the current contract and reissue a complete solicitation under which Catamount has an opportunity to compete.

We sustain the protest because the Navy's unexplained failure to furnish the amendments in response to requests by Catamount in advance of bid opening effectively precluded Catamount from competing.

The IFB was issued on July 11, 1986, and specified a bid opening date of August 12. The first amendment--issued on August 1--merely extended the bid opening to August 19. The second amendment--issued 1 week after the first--extended the work schedule, increased the requirements regarding electric heating equipment, and further extended bid opening

038526

to September 4 at 2:00 p.m. The third amendment changed the address for submitting offers, while the fourth and final amendment--issued August 18--increased the requirements for roof insulation and added a requirement for vapor barriers between the roof and the insulation.

On August 22, according to Catamount it called the issuing activity and requested copies of the amendments which the Navy assured would be mailed immediately. This seems to be verified by the Navy's report, which contains a written memorandum of a telephone request by Catamount on that date. Catamount further states, and the Navy does not dispute, that it again called on August 28 because it had not yet received the amendments, and was advised that the amendments had been mailed the previous day.

Since the amendments had not arrived on the morning of September 3, the day preceding bid opening, Catamount called the contract specialist listed in the IFB. Catamount requested that the amendments be read over the phone but both the Navy's contract specialist and the contracting officer refused to relay them orally. Catamount's representative states that he was led to believe the Navy "would arrange for the amendments to be received by Catamount by September 4, 1986."

The Navy admits it refused to read the amendments over the telephone and explains that its policy prohibited doing so. The Navy procurement specialist who spoke to the Catamount representative states that delivery by Federal Express was discussed, but says that the Navy agreed to do so only if Catamount bore the cost, which Catamount refused to do. As an alternative, the specialist states, Catamount was told it could pick up a copy of the amendments from the Resident Officer in Charge of Construction in Newport, Rhode Island (approximately 150 miles from Catamount's location in Pittsfield, New Hampshire).

The Navy explains that when the amendments were sent to prospective bidders, Catamount was not included in the mailing. According to the agency, sometime after the solicitation was issued but prior to the August 1 amendment, there was a computer overload and the portion of the bidder's list which included Catamount was inadvertently deleted. The Navy stresses that there was no deliberate or intentional effort to withhold the amendments from Catamount, and argues that Catamount had a reasonable opportunity to obtain the amendments before bid opening. In this regard, the Navy

points out that a notation on the Navy's memorandum of Catamount's August 22 call indicates that the amendments were mailed on September 3.

While the Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.208(a) (1986), provides that amendments shall be sent before the time set for bid opening to everyone to whom invitations have been furnished, this provision does not make the government a guarantor that bidders in fact receive those amendments. See Marino Construction Company, Inc., 61 Comp. Gen. 269 (1982), 82-1 CPD ¶ 167; James L. Clark, Jr., Plumbing & Heating Co. Inc., B-220673, Oct. 29, 1985, 85-2 CPD ¶ 484. The propriety of a particular procurement depends on whether full and open competition was achieved and reasonable prices were obtained. International Association of Fire Fighters, B-220757, Jan. 13, 1986, 86-1 CPD ¶ 31. Full and open competition means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement. 10 U.S.C. § 2302(3); 41 U.S.C. § 403(7) (Supp. III 1985).

The standard of full and open competition requires an agency to take reasonable steps to ensure that solicitation materials are made available to all responsible sources, but is not so broad as to require the agency to resolicit whenever it contributes to a prospective bidder's failure to receive solicitation materials in a timely manner. NRC Data Systems, B-222912, July 18, 1986, 65 Comp. Gen. ____, 86-2 CPD ¶ 84. The fact that inadvertent mistakes occur in the process should not in all cases be grounds for disturbing the procurement. Keener Manufacturing Co., B-225435, Feb. 24, 1987, 87-1 CPD ¶ ____.

Under certain circumstances, however, where a prospective bidder requests solicitation documents on several occasions and the agency fails to furnish them, the agency may effectively deny the prospective bidder an opportunity to compete and thus violate the requirement for full and open competition. See Trans World Maintenance, Inc., 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239; Dan's Moving & Storage, Inc., B-222431, May 28, 1986, 86-1 CPD ¶ 496. Those circumstances must be such that the bidder availed itself of every reasonable opportunity to obtain the documents. See NRC Data Systems, B-222912, supra. We think this is such a case.

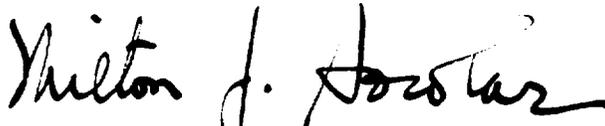
Although the Navy explains that the initial failure to mail Catamount the amendments was the result of inadvertently omitting the firm from the bidder's list, it has offered no explanation for its failure promptly to mail Catamount the

amendments in response to Catamount's requests for them on August 22 and 28. The written record of Catamount's August 22 call merely contains an annotation that all amendments "were mailed" on September 3, the day preceding bid opening. Moreover, even if as the Navy claims it subsequently offered to dispatch the amendments by Federal Express on September 3 if the protester bore the cost, we do not think that the amendments would have arrived in time for Catamount to consider them and to submit its bid by bid opening on 2:00 p.m. the following day.^{1/}

Under the circumstances of this case, we conclude that the Navy prevented Catamount from effectively competing and that therefore full and open competition was not obtained. Although a contract was awarded prior to the protest, we understand that performance was suspended for other reasons and that no construction has occurred. We therefore recommend that if feasible, the Navy terminate the contract with Gilbane and resolicit the requirement using full and open competition. See Dans Moving & Storage, Inc., B-222431, supra.

In addition, Catamount should be reimbursed the costs of filing and pursuing the protest, including attorney's fees, since our sustaining the protest furthers the purpose of the statutory requirement for full and open competition. See Tandem Computers, Inc., B-221333, Apr. 14, 1986, 65 Comp. Gen. _____, 86-1 CPD ¶ 362. The protester should submit its claim for such costs directly to the contracting agency. 4 C.F.R. § 21.6(f) (1986).

The protest is sustained.

for 
Comptroller General
of the United States

^{1/} The affidavit from the Navy contracting officer indicates that she spoke with Catamount's representative between 11:00 and 12:00 p.m. on September 3. The affidavit of the contract specialist does not indicate what time the September 3 conversation took place.