



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of:           Packaging Corporation of America  
File:                 B-225823  
Date:                 July 20, 1987

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### DIGEST

1. Where agency's and protester's version of facts conflict, General Accounting Office (GAO) generally resolves disputes over whether the protest was timely filed in accordance with GAO's Bid Protest Regulations in the protester's favor if there is at least a reasonable degree of evidence to support the protester's version showing that the protest was timely.

2. Where contracting agency did not provide protester/incumbent contractor with a copy of the solicitation, despite being aware that the protester was one of only three firms that have supplied the agency with the precise product called by the solicitation, and where record suggests the agency should have known that the protester would want to compete, the protester was improperly excluded from the competition in violation of the Competition in Contracting Act of 1984, which requires full and open competition.

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### DECISION

Packaging Corporation of America (PCA) protests that it was improperly deprived by the General Services Administration (GSA) of the opportunity to submit an offer under request for proposals (RFP) No. 7PRT-53034/N4/7FX to meet GSA's Federal Supply Schedule requirements of Grade "A" paper plates and compartmented paper trays. PCA asserts that it did not receive a copy of the solicitation, despite being one of a limited number of suppliers of such items.

We sustain the protest.

The procurement was synopsisized in the Commerce Business Daily (CBD) on August 21, 1986. The synopsis specified that the solicitation would be issued on approximately October 20, 1986, with an opening date for bids of November 21. The RFP was not issued until December 18,

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however, and the closing date for receipt of proposals was January 20, 1987.

PCA alleges that it contacted GSA's contracting office at the end of October and was informed that a solicitation had not been issued, but that, as a current supplier of paper plates for GSA, PCA automatically would receive a copy when it was issued. PCA further alleges that it called the contracting office in mid-December and again in February of 1987, and was told that the date for issuing the solicitation was not set. The company has submitted affidavits in support of these allegations.

According to PCA, it was first informed by GSA on March 11 that the RFP had been issued after PCA again called the contracting office to clarify the status of the procurement. PCA filed the instant protest with our Office on March 13.

#### TIMELINESS

GSA contends that PCA's protest should be dismissed as untimely under our Bid Protest Regulations because it was filed 142 days after the announced October 20 date of issuance in the CBD. In this respect, section 21.2(a)(2) of our Regulations, 4 C.F.R. part 21 (1986), requires that a protest of other than an apparent solicitation impropriety be filed within 10 working days after the basis for the protest is known or should have been known, whichever is earlier. GSA argues that the CBD synopsis gave PCA constructive notice of the announced date of the RFP's issuance, so that if PCA wished to protest its not receiving a copy of the solicitation, it had to do so within 10 working days of the CBD's announced closing date of November 21. GSA also denies that it received a request for the RFP from PCA before March 11, and has submitted affidavits from the contract specialist listed in the CBD notice as the agency contact point to that effect.

We think it illogical to conclude that PCA's protest had to be filed within 10 days of November 21, the CBD's announced closing date, in order to be timely since the RFP in fact was not issued until after that date and the actual closing date was January 20, 1987. Further, with regard to whether PCA should be charged with knowledge that the RFP actually was issued in December of 1986, the facts conflict on whether PCA did call GSA's contracting office in mid-December 1986 and in February 1987 concerning the status of the procurement. GSA's contract specialist avers, in an affidavit, that he has no "recollection" of being called by

PCA in mid-December 1986 or early February 1987, and focuses on what he would and would not have told PCA if he had been called. PCA's employees, however, have executed affidavits to support the company's assertion that the contract specialist was contacted in December 1986 and February 1987.

We generally resolve disputes over timeliness in the protester's favor if there is at least a reasonable degree of evidence to support the protester's version of the facts. Howard Management Group, B-221889, July 3, 1986, 86-2 C.P.D. ¶ 28. Here, we think PCA has provided sufficient evidence to support its version that it did not know or have reason to know prior to March 11, 1987, that a solicitation for Grade "A" paper plates already had been issued. PCA filed its protest with our Office within 10 working days after March 11, and its protest is, therefore, timely.

#### MERITS

This procurement is subject to the Competition in Contracting Act of 1984 (CICA), which requires the use of full and open competitive procedures. 41 U.S.C. § 253(a)(1)(A) (Supp. III 1985). Congress established "full and open" competition as the required standard for awarding contracts because of its strong belief "that the procurement process should be open to all capable contractors who want to do business with the government." House Conference Rep. No. 98-861, 98th Cong., 2d Sess. 1422 (June 23, 1984). In light of this clear expression favoring full and open competition, we give careful scrutiny to an allegation that a particular contractor has not been provided an opportunity to compete for a particular contract, taking into account all of the circumstances surrounding the contractor's nonreceipt of the solicitation, as well as the agency's explanation for the nonreceipt. Dan's Moving & Storage, Inc., B-222431, May 28, 1986, 86-1 C.P.D. ¶ 496.

We think PCA improperly was denied a copy of the solicitation in violation of CICA's requirement for full and open competition. The record shows that PCA was an incumbent Federal Supply Schedule contractor providing Grade A, molded pulp paper plates for GSA, and there is nothing in the record to suggest that PCA is other than a responsible

source.<sup>1/</sup> Further, the record is clear that GSA's contracting office was aware that PCA was one of only three companies which have supplied or could supply to the government the type of paper plate specified by the RFP. In these circumstances, PCA normally would have a right to expect to be solicited for any follow-on contract for Grade "A" paper plates. See Trans World Maintenance, Inc., 65 Comp. Gen. 401 (1986), 86-1 C.P.D. ¶ 239 (incumbent contractor has the right to expect to be solicited for a follow-on contract).

GSA explains that PCA was not automatically provided a copy of the solicitation because PCA failed to respond to a pre-invitation notice (PIN) regarding the issuance of the RFP that GSA sent on September 12, 1986, to all 287 firms that were on its computerized mailing list for the entire Federal Supply Schedule class of paper plates and trays. GSA states that the PIN indicated that in order to obtain a copy of the RFP, the prospective offeror had to provide its name and address on the form attached to the PIN and mail the form to GSA's contracting office no later than September 23, 1986. GSA points out that the Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.205-4(c) (1986), specifically allows the use of PIN's to determine which firms are interested in receiving a solicitation where the agency's bidders mailing list is lengthy. According to GSA, PCA never responded to the PIN it was sent and, consequently, was considered by GSA not to be interested in the RFP; GSA states that 26 firms requested the RFP on the PIN notice form, with another 6 firms making separate written requests for the solicitation. In response, PCA categorically denies that it ever received a PIN from GSA and, as stated above in our discussion of the protest's timeliness, has furnished affidavits purporting to establish PCA made GSA aware of its interest in continuing to contract with the agency.

Ordinarily, we would not question the propriety of an agency's relying on sending PIN's to the firms on its

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<sup>1/</sup> GSA argues that PCA was not an "incumbent" because PCA's schedule contract for paper plates ended on May 31, 1986, and thus PCA's right to accept orders under the contract also expired on that date. Nevertheless, the record reveals that GSA extended PCA's contract until December 7, 1986, so that it could complete performance on orders placed prior to May 31. As stated above, the RFP was issued on December 18, only a short period after the performance under PCA's contract ceased. Accordingly, we think that PCA should be considered as an incumbent. See Dan's Moving & Storage, Inc., B-222431, supra.

mailing list to establish the field of competition for a procurement. Such reliance, however, does not in every instance necessarily establish that the agency has met the CICA mandate for full and open competition. Here, for example, the number of PIN's mailed out is somewhat misleading in terms of generating competition for the items in issue, since GSA used the mailing list for the entire Federal Supply Schedule class of paper plates and trays whereas there are only three firms that have supplied or can supply Grade "A" paper plates. See Scott Graphics, Inc., et al., 54 Comp. Gen. 973 (1975), 75-1 C.P.D. ¶ 302 (involving a pre-CICA procurement to furnish film, where the failure to solicit the incumbent, a film manufacturer, warranted cancellation even though 176 firms were solicited, since only a limited number of the 176 were manufacturers).

Moreover, the record is clear that GSA was aware that PCA, whose contract with the agency had expired just 1 week earlier, was one of those three firms and, we think, should have expected PCA to be interested in the procurement, especially given the magnitude of the contract to be awarded. In these circumstances, we think it was inappropriate for the agency to have relied exclusively on whether PCA responded to the PIN in deciding whether to send PCA a copy of the solicitation; GSA simply should have mailed the firm a copy of the RFP upon issuance in December. GSA's failure to solicit PCA prevented a responsible source from competing, and therefore did not satisfy the CICA competition mandate.

The adverse effect on competition of PCA's not receiving a copy of the RFP is borne out by the fact that only one firm submitted a proposal under the RFP. In this respect, our records show that while another of the three firms that supplies Grade "A" paper plates, The Fonda Group, Inc., did submit a proposal, the offer was received by GSA 2 days after the closing date and was rejected as late. We dismissed the company's protest of GSA's rejection because the offer was sent by regular mail and there was no government mishandling involved. The Fonda Group, Inc., B-225823.2, Apr. 28, 1987, 87-1 C.P.D. ¶ 443. It should be noted, however, that Fonda alleged that it first learned of the RFP 1 week before the closing date when a customer furnished the company an incomplete copy of the solicitation.

PCA states that it desired to submit an offer on line items 8 through 22 and 26 through 31 of the RFP. Therefore, by separate letter to the Administrator, we are recommending that GSA cancel and resolicit for those line items. In addition, PCA should be reimbursed the costs of filing and pursuing this protest, since our sustaining the protest

further the purpose of the statutory requirement for full and open competition. See Catamount Construction, Inc., B-225498, Apr. 3, 1987, 87-1 C.P.D. ¶ 374. PCA should submit its claim for such costs directly to the contracting agency. 4 C.F.R. § 21.6(f).

The protest is sustained.

*for* *Harry R. Van Cleave*  
Comptroller General  
of the United States