



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Essex Electro Engineers, Inc.

File: B-234089.2

Date: March 6, 1990

Charles E. Raley, Esq., Israel and Raley, for the protester. James M. Murphy, for UMC Electric Company and Timothy F. Hannon, for Hannon Electric Company, interested parties. Diane-Marie Carrero, Esq., Office of the General Counsel, Department of the Navy, for the agency. John Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where agency failed to comply with regulatory requirement concerning inclusion of those furnished solicitations on the solicitation mailing list.
2. Where protester was improperly excluded from competition and there was no need for an immediate award, in view of the mandate of the Competition in Contracting Act of 1984 for full and open competition, when the exclusion came to agency's attention, the government's interests would have been best served by canceling solicitation and giving all responsible sources a fair opportunity to compete on resolicitation.

DECISION

Essex Electro Engineers, Inc., protests that it was improperly excluded from competing under request for proposals (RFP) No. N00140-88-R-1712 issued by the Navy for mobile load bank electrical power plant test sets.

We sustain the protest.

The acquisition was synopsisized in the Commerce Business Daily (CBD) on June 10, 1988, and the solicitation was issued on June 29, to the firms on the agency's source list. The Navy reports that the source list included firms that responded to the CBD notice and other vendors suggested by

the using activity. Essex, which had not responded to the CBD notice, was not on the source list and initially was not sent a copy of the solicitation.

Although the solicitation was originally scheduled to close in July 1988, the Navy issued 12 amendments and extended the closing date for proposals to June 27, 1989. Prior to the closing date, on June 7, Essex requested the solicitation from the Navy's contract negotiator who sent Essex a copy of the solicitation and the 12 previously issued amendments.

According to a statement prepared by the contract negotiator, when Essex requested the solicitation, she failed to add Essex to the source list maintained by the agency for the testers. The negotiator explains that the solicitation had been open for a year with 12 amendments already issued and she believed the solicitation was complete. As a result, the negotiator explains that she thought it was not necessary to add Essex to the source list since she anticipated no further amendments would be issued.

Nonetheless, on June 12 the contract negotiator prepared amendment No. 0013 at the request of the using activity. The agency issued the amendment, which did not extend the closing date, to the vendors on the source list, which of course did not include Essex.

On June 19, the contract negotiator received a letter from Essex which asked for the government's price for road testing required by the solicitation and if a required fungus test could be waived. Essex also requested that the RFP closing date be extended. Shortly thereafter--according to Essex, on June 23--in a phone call to the contract negotiator, an Essex representative inquired as to the status of the information it requested in the June 19 letter. According to the Navy's contract negotiator, she told Essex that its questions would be answered by an amendment and that sufficient time would be allowed for offerors to respond.

On June 26, the agency issued amendment No. 0014 which contained the cost of the testing and, on or about July 10, it issued amendment No. 0015, which added a required certification provision and extended the closing date to July 25. The Navy reports that it issued these amendments, which were prepared by the contract negotiator, to the firms on the source list, again not including Essex. Consequently, Essex did not receive, and was not aware of, amendment Nos. 0013, 0014, and 0015, nor was it aware of the July 25 closing

date. Several firms, not including Essex, submitted offers on or before the July 25 closing date.

On August 9, Essex called the contract negotiator to inquire about the status of the acquisition. The contract negotiator advised Essex that the solicitation had closed on July 25 and proposals were being evaluated. The contract negotiator's statement indicates that upon checking the source list in the bid room and discovering that Essex was not on the list, she realized that she had neglected to put Essex on the list after giving Essex the solicitation.

After August 9, the contracting officer advised Essex that the agency was investigating the firm's failure to receive the last three amendments and that award would not be made until the investigation was completed. After the agency told Essex by letter of October 24 that the requirement would not be resolicited, Essex protested to this Office on October 30. The Navy has not yet made award under the solicitation.

Essex argues that it was improperly excluded from competing under the RFP as a result of the contract negotiator's conscious decision not to include the firm on the source list. Essex maintains that the Navy's conduct, which prevented a responsible source from competing, failed to comply with the mandate of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(1)(A) (1988), that agencies obtain full and open competition. As a result of its improper exclusion and since it brought the matter to the agency's attention before award was made, Essex argues that the Navy should have canceled the solicitation and resolicited the requirement.

Under CICA, agencies are required, when procuring property or services, to obtain full and open competition through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A). "Full and open competition" is obtained where all responsible sources are permitted to submit sealed bids or competitive proposals. 10 U.S.C. § 2302(3). The term has been further explained in the legislative history of CICA as meaning "all qualified vendors are allowed and encouraged to submit offers . . . and a sufficient number of offers is received to ensure that the government's requirements are filled at the lowest possible cost." H.R. Rep. No. 1157, 98th Cong., 2d Sess. 17 (1984).

Although an agency generally meets CICA's full and open competition requirement when it makes a diligent good faith effort to comply with the statutory and regulatory

requirements regarding notice of the procurement and distribution of solicitation materials and obtains a reasonable price, Kahr Bearing, B-228550.2 et al., Feb. 25, 1988, 88-1 CPD ¶ 192, we think the circumstances of this case warrant sustaining the protest. The agency failed to comply with the regulatory requirements concerning the inclusion of those furnished solicitations on the solicitation mailing list. The regulations require that the name of a prospective offeror furnished a solicitation in response to its request be added to the mailing list "so that they will be furnished copies of any solicitation amendments, etc." See Federal Acquisition Regulation §§ 14.205-1(c) and 15.403. The contract negotiator failed to put Essex on the list because she believed that no further amendments would be issued after Essex's request. While she appears to have acted in good faith, her actions were contrary to the regulation. Also, she in fact was wrong since several subsequent amendments were issued. Because of her failure to follow the clear mandate of the regulation, Essex was denied the opportunity to submit a proposal. See Abel Converting Co., 67 Comp. Gen. 201 (1988), 88-1 CPD ¶ 40; Catamount Constr., Inc., B-225489, Apr. 3, 1987, 87-1 CPD ¶ 374.

While the agency argues that Essex could have acted more promptly in protecting its interests--it waited from June 23 until August 9 to inquire as to the status of the promised amendment--we do not believe that the protester's delay was unreasonable in the context of a solicitation which had been amended 12 times and had remained open for an entire year. Moreover, in a negotiated procurement contracting officials need only a reasonable basis for cancellation after receipt of proposals, and the potential for increased competition provides a reasonable basis for the cancellation of a negotiated procurement. See Bell Indus., Inc., B-233029, Jan. 25, 1989, 89-1 CPD ¶ 81.

Further, the exclusion of Essex came to the agency's attention only 2 weeks after proposals were submitted and there is no indication in the record that an immediate award was necessary at that time.^{1/} Finally, it is also significant that the agency was clearly aware that Essex was interested in participating in the procurement. In fact one

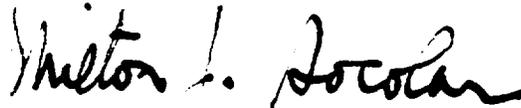
^{1/} In fact, the contracting officer told Essex that the contract would not be awarded until the matter was investigated and that investigation took until October 24. Moreover, at this time, award has still not been made.

of the amendments which Essex was not provided was issued in order to incorporate information in response to an inquiry made by Essex.

Under these circumstances, and in view of the CICA mandate for full and open competition, we believe that when the agency discovered how Essex had been excluded from the competition, the government's interests would have been best served by canceling the solicitation and giving all responsible sources a fair opportunity to compete on the resolicitation.^{2/}

We therefore recommend that the agency include Essex on its source list, cancel the solicitation and resolicit the requirement. We also find that Essex is entitled to be reimbursed its protest costs, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1989).

The protest is sustained.

for 
Comptroller General
of the United States

^{2/} The Navy argues that Essex's protest should be dismissed as untimely because the firm, by waiting more than 6 weeks before it called the Navy after being told that an amendment would be issued, failed to diligently pursue information to form its protest. Also, the Navy maintains that Essex should have protested within 10 working days of August 9 when it was told by the Navy that the closing date had occurred on July 25. The record indicates that in both instances, Essex was told by the Navy that its concerns were being taken care of and in both cases it reasonably relied on these assurances to its detriment. Under these circumstances, and considering the clear regulatory violation evident in this case, we consider this protest to be timely filed. See Loral EOS/STS, Inc., B-230013, May 18, 1988, 88-1 CPD ¶ 467.