Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: EMSA Limited Partnership

File: B-237846

Date: March 23, 1990

Charles M. Allen, Esq., Wright, Robinson, McCammon, Osthimer & Tatum, for the protester.
William R. Sheehan, Esq., Department of the Navy, for the agency.
Christina Sklarew, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where contracting agency did not provide protester with the solicitation until one day before the closing date for receipt of initial proposals, notwithstanding protester's requests and agency's assurance that it would do so, and where agency advised protester that closing date was being extended but did not disclose revised closing date until one day prior to closing, protester was improperly excluded from the competition in violation of the Competition in Contracting Act of 1984, which requires "full and open" competition.

DECISION

EMSA Limited Partnership protests that it was excluded from competing under request for proposals (RFP) No. N00140-89-R-3317, issued by the Naval Regional Contracting Center (NRCC), Philadelphia, for family practice medical services to be performed at the Naval Hospital in Millington, Tennessee. The protester asserts that the requirement should be recompeted because the agency did not provide the firm with a complete copy of the solicitation prior to the closing date for receipt of proposals.

We sustain the protest.

EMSA has been an active bidder for medical services and is currently performing seven contracts for medical care at various clinics within Navy hospitals, including a contract for emergency medical care services at the Naval Hospital in Millington.1/ In April 1989, EMSA filed the appropriate form with NRCC to request that it be placed on the agency's Bidders Mailing List (BML) for solicitations pertaining to medical care service contracts. On July 13, 1989, this acquisition was synopsized in the Commerce Business Daily (CBD), and on July 31, EMSA submitted a written request to receive a copy of the RFP. When the Navy contract negotiator submitted his source list to the bid room on August 25 to prepare the solicitation's BML, EMSA appeared on the list. It also appears on the final BML that was used for mailing the RFPs on September 8.

On October 4, the Navy issued amendment No. 0001, which extended the original closing date for receipt of initial proposals from October 10 to October 23. On October 16, amendment No. 0002 was issued, extending the closing date to October 31. On October 25, amendment No. 0003 was issued, extending the closing date to November 7.

On October 30, EMSA received a copy of amendment No. 0002 (which extended the closing to the following day, October 31); it had never received the original RFP or the first amendment. EMSA states that it phoned NRCC several times that day but was unable to reach the designated contract negotiator and received no return call in response to the messages it left. When EMSA did get through the next day, October 31, the contract negotiator referred EMSA to NRCC's mailroom clerk. The clerk advised EMSA that an additional amendment further extending the closing date was "in the works," but that she could not say when the new date would be.2/ The protester thereupon requested that the clerk send EMSA the RFP and its amendments by Federal Express, using EMSA's account number, and the clerk agreed.

1/ There is much argument in the record about whether or not EMSA should be regarded as a bona fide incumbent for purposes of this procurement, since its current contract at Millington is for emergency medical care services, and the RFP at issue here is for family practice medical services, including some emergency family practice physician services. While we find that the protester's status is analogous to that of an incumbent, our decision does not rest on the firm's incumbency.

2/ In fact, amendment No.0003 had already been issued, extending the closing date until November 7.

On November 6, the protester received the RFP, without amendment No. 0003, by regular mail. EMSA phoned the Navy to find out when the new closing date would be, and was told it was scheduled for the following day. The protester asked the agency to send it a copy of the final amendment.

The agency did close the procurement on November 7, receiving three timely proposals. EMSA received its copy of amendment No. 0003 on November 9. The protester phoned the agency again on November 20 to request a further extension of the closing date, and was told that the closing had already occurred. This protest followed.

EMSA asserts that it was an eligible and responsible source of the services requested in the RFP. It argues that it had requested the RFP informally and formally and had been placed on the BML, and that as an incumbent contractor, it should have received the solicitation. The protester contends that the agency improperly failed to provide for full and open competition, as required under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(1)(A) (1988), by failing to provide a copy of the solicitation to EMSA in time for the firm to prepare its offer.

The Navy argues that the protester has not shown any deliberate attempt on the agency's part to exclude EMSA from the competition; that the protester did not avail itself of every reasonable opportunity to obtain the solicitation; that adequate competition was obtained; and concludes that, in these circumstances, it is the contractor which must bear the risk of nonreceipt.3/

3/ The Navy also challenges the timeliness of EMSA's protest and contends that the filing period for EMSA's protest commenced on October 30, 1989, when EMSA was first notified of the apparent mismailing by its receipt of only amendment No. 0002. We disagree. Under our Bid Protest Regulations, a protest must be filed within 10 days after the basis for the protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1989). Here, upon receipt of the amendment, the protester called NRCC and was told that the closing date was in the process of being extended and that a copy of the RFP would be sent by Federal Express. It was not until November 6, when EMSA finally received the RFP and was told that closing would be held the next day, that the firm actually had a basis for protest. Since the protest was filed in our Office within 10 working days (excluding a federal holiday) of that date, we find that it is timely.

Under CICA, agencies are required to follow the procurement policy of using "full and open competitive procedures," which is enunciated in several provisions of the act. See 10 U.S.C. §§ 2301(a)(1), 2302(2), 2304(a)(1)(A), and 2305(a)(1)(A)(i). "Full and open competition" is defined as meaning that "all responsible sources" are permitted to submit sealed bids or competitive proposals on the procurement. 41 U.S.C. § 403(7) (Supp. IV 1986). In view of CICA's clear statement of the government's policy and the clear expression of Congress's intent that a new procurement standard--"full and open" competition--govern, our Office will give careful scrutiny to the 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 therefor. See Trans World Maintenance, Inc., 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239.

While a contractor bears the risk of not receiving a solicitation when the failure to receive it is the result of mere inadvertence on the part of the contracting agency, see Viktoria F.I.T., GmbH, B-233125 et al., Jan. 24, 1989, 89-1 CPD ¶ 70, the contractor does not bear that risk if the contracting agency makes a deliberate effort to exclude the bidder from competing or if the contracting agency inadvertently fails to furnish the solicitation and the offeror has availed itself of every reasonable opportunity to obtain it. Catamount Constr., Inc., B-225498, Apr. 3, 1987, 87-1 CPD ¶ 374.

We are persuaded that the Navy's failure to deliver the solicitation and all of its amendments to the protester when EMSA first reported its exclusion, and when the Navy had the last clear opportunity to do so, unreasonably precluded the protester from competing. While the Navy argues that its records indicate that the RFP was properly mailed to EMSA when the solicitation was first sent out and that the agency had no reason to suspect that EMSA had not received it until the protester's contact on October 31, the Navy has not refuted the protester's account of what transpired after that contact, nor has it offered any meaningful explanation for its failure to send a copy of the RFP and its amendments by Federal Express, as it promised. Indeed, the agency has confirmed that where a contractor requests this type of expedited shipment at its own expense, it is the agency's established practice to comply with the request. According to EMSA, the firm had submitted a standing order to have its procurement-related materials sent this way, and had received a number of shipments this way in the past.

While the record contains some conflicting statements regarding whether EMSA requested only that the RFP be sent or whether it requested the RFP together with any or all subsequent amendments, we do not believe that an offeror in this circumstance should have to specifically request that an amendment that had been issued the previous week be included. Although, the agency argues that EMSA could have acted more promptly or more forcefully in protecting its interests, the agency agreed to send the materials by Federal Express, and EMSA states that it knew from past experience that it might take a day or two for the agency to actually do so. Therefore, it did not have immediate reason to follow up with the Navy or with Federal Express when it did not arrive. At the same time, the agency's assurance that an extension was "in the works," without disclosing that the amendment had, in fact, already been issued or revealing the new closing date, led the protester to believe that the matter was not necessarily urgent. Since this was the third such extension, we do not believe that the protester should have suspected or anticipated that the closing date was imminent.

Furthermore, and more importantly, we do not agree with the agency's contention that adequate competition was obtained in this case. Although the agency received three timely proposals, only two of them were technically acceptable. Where so few contractors participate in a solicitation, the absence of even one responsible firm significantly diminishes the level of competition, requiring resolicitation. See Abel Converting, Inc. v. United States, 679 F. Supp. 1133 (D.D.C. 1988). We therefore conclude that the agency's actions here prevented a fully responsible source from competing and that, therefore, the CICA mandate for full and open competition was not met.

We find that the appropriate course of action to remedy this situation is for the Navy to resolicit, giving all responsible sources a fair opportunity to compete on the resolicitation. We also find that EMSA is entitled to be reimbursed its protest costs, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1).

The protest is sustained.

Milton J. Socolar

Acting Comptroller General
of the United States