

Spiegel



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Fort Myer Construction Corporation

File: B-239611

Date: September 12, 1990

Christopher M. Kerns, Esq., for the protester.
Charles H. Riddle for Chas. Riddle Associates Inc., an interested party.
Kathleen McCartney, Esq., General Services Administration, for the agency.
Robert A. Spiegel, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Even though the agency failed to place the protester, who has been issued an invitation for bids (IFB), on the solicitation mailing list and this failure precluded the protester from submitting a bid because it was unaware of the revised bid opening date set forth in an IFB amendment, the protest is denied because the protester did not avail itself of every reasonable opportunity to obtain the amendments.

DECISION

Fort Myer Construction Company protests the award of a contract to Chas. Riddle Associates Inc., under invitation for bids (IFB) No. GS-11P90MKC0182"U", issued by the General Services Administration (GSA), for landscaping and sidewalk improvements at the Old Executive Office Building in Washington, D.C. Fort Myer complains that GSA prevented it from submitting a bid on the IFB by failing to furnish it with an amendment giving notice of a new bid opening date.

We deny the protest.

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This procurement was authorized as noncompetitive based on a finding of unusual and compelling urgency; thus, the procurement was not publicly advertised and had a shortened bidding period. Federal Acquisition Regulation (FAR) § 6.302-2(a)(2) (FAC 84-52). GSA orally solicited seven prospective contractors (including Fort Myer) on April 11, 1990, and invited them to attend a pre-bid conference on April 13. Representatives of five firms attended that meeting, where they received copies of the IFB and were placed on the bidders list. Fort Myer states that it obtained the IFB from the GSA bid activity room on April 16; GSA denies this claim.

The IFB was thrice amended and copies of all three amendments were mailed to the five firms which had registered at the pre-bid conference, and to one additional firm that had formally requested a copy. The second of these amendments postponed the bid opening date from April 20 to April 30, 1990. Fort Myer did not receive any of the amendments, although it was aware that the original bid opening had been postponed. On April 30, three bids were received; Chas. Riddle was low bidder. Fort Myer only learned of the bid opening through a telephone conversation with the contract specialist on May 1. On May 8, Fort Myer filed this protest with our Office. On July 5, GSA awarded the contract to Chas. Riddle, notwithstanding the protest, after making a determination of urgent and compelling circumstances.

Fort Myer's protest centers on its failure to receive a copy of the second amendment which announced the new bid opening date. Fort Myer claims that it obtained a solicitation from the GSA bid activity office prior to bid opening, but had received no amendments. Fort Myer asserts that although a GSA employee advised it that the bid opening was postponed, it did not receive the IFB amendments, nor was it informed of the revised bid opening date, despite repeated inquiries of cognizant GSA officials. Fort Myer claims that since this was a limited competition, GSA was required to take more care to assure adequate competition, and that the GSA's failure to reasonably solicit Fort Myer should require a recompetition.

GSA claims that its procurement office was unaware of Fort Myer's interest in this procurement. GSA concedes that it is unable to account for one copy of the IFB, but asserts that Fort Myer failed to apprise the cognizant contracting officials of the firm's interest in the procurement to assure its inclusion on the bidders list. GSA's contracting officer and contract specialist deny receiving any inquiries

from Fort Myer regarding this procurement prior to bid opening.

Although the Competition in Contracting Act of 1984 (CICA) generally requires contracting agencies to obtain full and open competition through the use of competitive procedures, see 41 U.S.C. § 253(a)(1)(A) (1988), an agency may use other than competitive procedures where properly justified on the basis of unusual and compelling urgency. 41 U.S.C. § 253(c)(2); Data Based Decisions, Inc., B-232663; B-232663.2, Jan. 26, 1989, 89-1 CPD ¶ 87. However, under such circumstances an agency is obliged to "request offers from as many potential sources as is practicable under the circumstances." 41 U.S.C. § 253(e); Charles Snyder, 68 Comp. Gen. 659 (1989), 89-2 CPD ¶ 208. Just as the duty to obtain full and open competition may not be satisfied where bidders or offerors are precluded from submitting bids or offers because they are not sent amendments, see Essex Electro Eng'rs, Inc., B-234089.2, Mar. 6, 1990, 90-1 CPD ¶ 253; Catamount Constr., Inc., B-225498, Apr. 3, 1987, 87-1 CPD ¶ 374, the government's duty to obtain limited competition also may not be satisfied when it fails to furnish solicitation amendments.

In this regard, the government is required by regulation to place all prospective contractors, who have been provided solicitations, on the solicitation mailing list to assure that they timely receive solicitation amendments. FAR §§ 14.205-1(c), 14.208(a) (FAC 84-53); Essex Electro Eng'rs, Inc., B-234089.2, supra; Catamount Constr., Inc., B-225498, supra. On the other hand, the government is not the guarantor that all prospective contractors in fact receive solicitation amendments. Shemya Constructors, 68 Comp. Gen. 213 (1989), 89-1 CPD ¶ 108; Viktorija F.I.T., GmbH, B-233125 et al., Jan. 24, 1989, 89-1 CPD ¶ 70. Thus, while an agency may not deliberately exclude a potential contractor from the competition by not sending it amendments, its inadvertent failure to do so does not necessarily justify overturning a contract award. We will not sustain a protest of an agency's inadvertent failure on a sealed bid procurement^{1/} to provide a prospective contractor with an amendment where the firm did not avail itself of every reasonable opportunity to obtain bid documents or amendments

^{1/} On a competitive negotiated procurement, where no award was made and prices were not exposed, there may be a lesser duty on the part of a prospective contractor to avail itself of every reasonable opportunity to obtain bid documents. See Essex Electro Eng'rs, Inc., B-234089.2, supra; EMSA Ltd. Partnership, B-237846, Mar. 23, 1990, 90-1 CPD ¶ 326.

and competition was otherwise obtained. Catamount Constr., Inc., B-225498, supra.

In this case, GSA concedes that Fort Myer was not placed on the solicitation mailing list. Fort Myer asserts that it was given a solicitation by the GSA contracting office and reasonably presumed it was on the list.

In the two affidavits submitted in support of the protest, Fort Myer's job superintendent admits that he arrived too late for the April 13 pre-bid conference where the IFBs were provided to attending prospective contractors.^{2/} The superintendent also states that he personally obtained the IFB on April 16 in the bid activity room from a GSA employee who he has been unable to identify.^{3/} The superintendent asserts that he provided a business card to the GSA employee, at that employee's request, to attach to the official solicitation request form.

The agency has no record of the IFB's issuance to Fort Myer.^{4/} In this regard, none of the cognizant contracting office personnel contacted by GSA's counsel to prepare its response to the protest recalls or admits providing Fort Myer with the IFB.

The record shows that Fort Myer's superintendent signed the entry log on April 16 at the GSA building where the bid activity room is located. Moreover, the contract specialist admits that she cannot account for one copy of the IFB.

^{2/} GSA officials have no recollection of any Fort Myer personnel attending, or arriving late for the conference.

^{3/} The job superintendent's first affidavit states that he obtained the IFB on April 9, before the IFB was issued. When reminded in the agency report that the date of the pre-bid conference was on April 13, he persuasively states, in a supplementary affidavit, that when he executed the first affidavit he was unsure of the exact week in April, but that he was now sure that he obtained the IFB on April 16 (the first Monday following the Friday, April 13 pre-bid conference).

^{4/} GSA's standard operating procedures require that every contractor file an official request form when requesting any bid documents and that the appropriate contracting specialist be notified of all such applications at the end of each business day. This routine is followed in order that such applicants may be placed on a list of contractors which are to receive future amendments.

Thus, it is reasonable to infer that Fort Myer may well have obtained the IFB from GSA on April 16, but was not placed on the IFB mailing list. On the other hand, the record does not demonstrate that Fort Myer availed itself of all reasonable opportunities to obtain the IFB amendments, so as to justify sustaining the protest.^{5/}

The only substantiated contacts between Fort Myer and GSA personnel, from the bid issuance date to the bid opening date, were a series of phone calls exchanged between Fort Myer personnel and a GSA architect. From this unofficial source, Fort Myer learned that the bid opening had been postponed from April 20 to some future unspecified date. The architect also advised Fort Myer to contact the contract specialist to ascertain the new date.

Here, the recollection of the respective parties diverge. The affidavit of Fort Myer's vice president states that Fort Myer's bid coordinator made at least one telephone inquiry to the GSA contract specialist concerning the postponement of the bid opening date; Fort Myer alleges it was told that the new bid opening date had not been set, and that Fort Myer would be sent the amendment setting a new bid opening date. The GSA contract specialist's affidavit expressly denies any phone call or message from any Fort Myer representative during the period from the pre-bid conference to bid opening. The contract specialist also states that she was never apprised of any Fort Myer interest in this procurement. Given that Fort Myer chose not to submit the affidavit of its bid coordinator attesting to Fort Myer's version of these contacts (despite being invited to do so), we are not persuaded that any timely contacts were made with the contracting office after Fort Myer obtained the IFB up until bid opening.^{6/} Fort Myer's contacts with the GSA architect do not constitute reasonable attempts to obtain the bid documents, particularly since

5/ We note that if Fort Myer's representative had not been late for the pre-bid conference on this urgent procurement, its name would have been placed on the bid solicitation list. Thus, the burden was clearly on Fort Myer to assure that its name was included on the list.

6/ In any event, it is not clear that a single contact to the cognizant contract office in connection with such an urgent procurement would be sufficient to meet a prospective contractor's burden to make all reasonable attempts to obtain the IFB amendments.

Fort Myer was expressly told to obtain procurement information from the contract office. See Simmler, Inc., B-233503, Feb. 22, 1989, 89-1 CPD ¶ 192; Cleveland Pneumatic Co., B-230316, July 6, 1988, 88-2 CPD ¶ 11.

Therefore, we find that Fort Myer did not make all reasonable attempts to obtain the IFB amendments or to assure inclusion on the mailing list, even assuming that GSA improperly failed to place Fort Myer on the list and this failure caused that firm not to submit a timely bid. Furthermore, GSA obtained three bids on the IFB, which we consider adequate competition to assure a reasonable price. See Abel Converting Co., 67 Comp. Gen. 201 (1988), 88-1 CPD ¶ 40. Under these circumstances, we deny the protest.

for 
James F. Hinchman
General Counsel