

Benjamin



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: J. Sledge Janitorial Service

File: B-241843; B-241845

Date: February 27, 1991

Martin J. Heffernan, Esq., Wyatt and Martell, for the protester.

Lee Shea, Department of Agriculture, for the agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging contracting agency's failure to solicit incumbent contractor in a small purchase, small business set-aside procurement is sustained where contracting officer deliberately decided not to send copy of solicitation to incumbent based solely on remarks purportedly made by incumbent to another contracting official during conversation concerning incumbent's performance under then-current contract.

DECISION

J. Sledge Janitorial Service protests the issuance of any purchase orders under request for quotations (RFQ) Nos. RFQ-004-82HW-91 (004) and RFQ-005-82HW-91 (005), by the Department of Agriculture for janitorial services at two Agricultural Research Service (ARS) facilities on the campus of the Colorado State University, Fort Collins, Colorado.^{1/} J. Sledge, the incumbent contractor at both facilities, argues that the purchase orders should be canceled because it was improperly denied an opportunity to submit quotes responding to the solicitations due to the agency's failure to provide it with copies of the RFQs.

We sustain the protests.

The RFQs were issued on September 19, 1990, as small business set-asides for janitorial services at NSSL and CRL for the period October 15, 1990, through September 30, 1991. Due to

^{1/} RFQ No. 004 called for services at the National Seed Storage Laboratory (NSSL); RFQ No. 005 covered services at the Crops Research Laboratory (CRL).

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its expectation that the aggregate amount of each procurement would not exceed \$25,000, the agency used small purchase procedures. See Federal Acquisition Regulation (FAR) § 13.000. The agency states it mailed the RFQs to 15 firms that had either expressed an interest in performing the required services, or had performed the services in the past. J. Sledge was not provided copies of the RFQs.

Two firms submitted quotes in response to RFQ No. 004, J.T. Enterprises (\$32,940) and Handy Jacks (\$12,178). Three firms submitted quotes in response to RFQ No. 005, J.T. Enterprises (\$28,037), Handy Jacks (\$9,795) and Knotty Pines (\$9,343). The agency issued a purchase order to Handy Jacks on October 3 for the services at NSSL, and to Knotty Pines on October 15 for services at CRL.^{2/} On October 16, during a telephone conversation concerning the protester's performance under its existing contract at NSSL, the contracting officer informed Mr. Fred Miranda, owner of J. Sledge, that the purchase orders under RFQ Nos. 004 and 005 had been issued. This protest followed.

In response to the protest, the contracting officer provided our Office with her affidavit stating that J. Sledge was not furnished copies of the RFQs because during a telephone conversation on September 10, 1990, Mr. Miranda allegedly told James E. Hindley, ARS' Area Administrative Officer for the Northern Plains Area, that he just wanted to complete the then-current contracts at NSSL and CRL, adding that he "wanted nothing more to do with ARS." The contracting officer states that in deciding not to solicit J. Sledge, she relied on Mr. Miranda's statement to Mr. Hindley and on the fact that 15 other potential sources were to be solicited. According to the contracting officer, since J. Sledge did not specifically request the RFQs, they were not provided to the firm.

With regard to the September 10 conversation between Mr. Hindley and Mr. Miranda, Mr. Hindley states in his affidavit that he telephoned the protester that day in response to an earlier call from Mr. Miranda to the agency, during which, apparently upset about a list of discrepancies that had been posted at NSSL and CRL concerning J. Sledge's performance at the facilities, Mr. Miranda had asked to speak to "whoever was in charge of the [janitorial services]

^{2/} The original purchase orders were subsequently amended to reduce the 1-year period announced in the RFQ pending availability of funds for the full term contemplated by the RFQs. On November 20, 1990, the agency determined that proceeding with performance of the services was in the best interest of the government in accordance with FAR § 33.104(c), notwithstanding the protest filed at our Office.

procurement for the agency." According to Mr. Hindley, Mr. Miranda sounded very upset; stated that he did not understand why he had received the discrepancy notices; said he had been dissatisfied with the contracts ever since they were awarded; and expressed dissatisfaction with the manner the agency generally handled the janitorial contracts at NSSL and CRL.

According to Mr. Hindley, during their conversation, Mr. Miranda suggested how the solicitations for janitorial services at the facilities should be written and handled, specifically discussing how the floors at CRL should be polished in view of their suspected asbestos content.^{3/} Mr. Miranda "blamed Mr. Standridge [the Procurement Assistance Officer] for the delay in the contract and [the agency] for asking Mr. Miranda to cease the buffing of the tiles in the CRL." According to Mr. Hindley, Mr. Miranda "demanded that [Mr. Hindley] keep Standridge off his back," and stated that after J. Sledge's contracts expired, "he did not want anything more to do with the agency," maintaining that "he would not bid on any more [ARS] contracts, ever." On September 10, Mr. Hindley informed Mr. Standridge of the conversation, who in turn informed the contracting officer of the Hindley-Miranda exchange on September 11.^{4/}

The protester's account of the facts is different from the agency's in several material respects. Mr. Miranda states in his affidavit, for example, that he specifically requested the RFQs from the contracting officer at least twice in September and twice in early October 1990. According to the protester, in response to his requests, the contracting officer stated

^{3/} Mr. Hindley states in his affidavit that because of concern for the safety of employees at CRL, he had instructed the Safety Office and the Procurement Office to stop J. Sledge's janitorial work at CRL until the agency could conduct a test of the effect of buffing and polishing the floor tiles on the asbestos content of the air at the facility.

^{4/} The agency report also contains copies of memoranda to the contracting officer from the contracting officer's representative at NSSL and from two other individuals who allegedly directly or indirectly heard Mr. Miranda state that he was not interested in future ARS contracts. The memoranda are dated on or after October 25, 1990, well after the RFQs were issued and purchase orders awarded. There is no indication that these individuals conveyed Mr. Miranda's statements to the contracting officer prior to issuance of the RFQs on September 19, and the contracting officer states that she did not rely on these statements in determining not to solicit J. Sledge.

that the solicitations would be provided as soon as they became available, and indicated that funds would be available for the new contracts around October 15, apparently leading Mr. Miranda to conclude that the RFQs would be issued around that time. Mr. Miranda also asserts that he never stated that he would not bid on future contracts.

In the comments on the agency report, Mr. Miranda states that his "frustration" with ARS began in January or February of 1990, over a "confrontation" with Mr. Standridge concerning the proper method of cleaning the floor tiles at the facilities. According to the protester, it refused to use a method suggested by Mr. Standridge because the floor tile contained asbestos and the method suggested would cause the release of asbestos fibers into the air, placing at risk the health and safety of the protester's employees and other users of the facility. Although the protester states it "prevailed" on the appropriate method of cleaning the floors, the agency subsequently began conducting what J. Sledge characterizes as "surprise inspections" of its work at the facilities.

With regard to the discrepancy notices, the protester states that during a telephone conversation on September 7, it explained to the contracting officer and Mr. Standridge that the deficiencies were due to the fact that cleaning of the facilities was completed at the end of a work-week, and the inspections were conducted at the beginning of the following week, after the facilities were used over the weekend. The protester states that disputes of that nature, which had arisen since the earlier "confrontation" with Mr. Standridge concerning polishing the floor tiles, were examples of the cause of its frustrations in dealing with the agency.

Mr. Miranda admits that in discussing the discrepancy notices with Mr. Hindley on September 10, he told Mr. Hindley that he was not happy with the way Mr. Standridge was treating him. Although Mr. Miranda admits that he expressed dissatisfaction with ARS, he vehemently denies ever stating to Mr. Hindley or anyone else at the agency that he was no longer interested in bidding on ARS contracts.

On January 14, 1991, a telephone conference was held between the parties at our Office's request during which they essentially confirmed their previous statements. Mr. Standridge was unavailable and did not participate in the conference. Although Mr. Miranda and Mr. Hindley disagreed as to the exact words said during their September 10 conversation, they both reaffirmed during the telephone conference that Mr. Miranda was very upset during their conversation.

Small purchase procedures are excepted from the requirement in the Competition in Contracting Act of 1984 (CICA) that agencies obtain full and open competition through the use of competitive procedures when conducting procurements. 41 U.S.C. § 253 (1988). These simplified procedures are designed to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors. To facilitate these stated objectives, CICA only requires that agencies obtain competition to the maximum extent practicable when they utilize small purchase procedures. 41 U.S.C. §§ 253(a)(1)(A), 259(c); Omni Elevator, B-233450.2, Mar. 7, 1989, 89-1 CPD ¶ 248. In implementing the statutory requirement, the FAR requires contracting officers, when using small purchase procedures for purchases of more than \$2,500, to solicit quotations from a reasonable number of qualified sources to promote competition to the maximum extent practicable and ensure that the purchase is advantageous to the government, price and other factors considered. FAR § 13.106(b)(1); S.C. Servs. Inc., B-221012, Mar. 18, 1986, 86-1 CPD ¶ 266. Generally, a solicitation of three suppliers is sufficient. FAR § 13.106(b)(5); Omni Elevator, B-233450.2, supra. It is not sufficient, however, where other responsible sources request the opportunity to compete--in those circumstances, they should be afforded a reasonable opportunity to do so. See Gateway Cable Co., 65 Comp. Gen. 854 (1986), 86-2 CPD ¶ 333.

The agency's failure to solicit J. Sledge, the incumbent contractor, is not in itself a violation of the requirement to promote competition in small purchases. S.C. Servs. Inc., B-221012, supra. What is determinative is whether the agency made a deliberate or conscious attempt to preclude the protester from competing, see Omni Elevator, B-233450.2, supra, and, if so, whether the agency's action was reasonably based. Since there is no question that the agency deliberately excluded the protester from the competition, the question presented is whether the agency acted reasonably in so doing. We find that it did not.

The protester asserts, and the agency does not dispute, that J. Sledge received RFQs for janitorial services at both NSSL and CRL for the past 5 consecutive years; that J. Sledge submitted quotes responding to each of the solicitations; and that the agency issued purchase orders to J. Sledge for janitorial services at NSSL and CRL on two previous occasions, including the incumbent contracts, indicating the government was satisfied with J. Sledge's services. It is also undisputed that the contracting officer was aware prior to September 11 that the protester had expressed interest in the RFQs; and that in response to the protester's requests, she had indicated that work was scheduled to begin around

October 15, leading the protester reasonably to conclude that the RFQs would be issued on or prior to that time.

The contracting officer's justification for not soliciting the incumbent contractor is that the contractor had expressed its desire not to participate in future procurements. We do not agree, however, that Mr. Miranda's alleged statements to Mr. Hindley, made in the context of what apparently was a heated discussion precipitated by the performance deficiency notices posted at NSSL and CRL, alone warranted excluding the protester from the competition. In this regard, in her comments on the telephone conference, the contracting officer acknowledged that she was aware that there was "frustration on the part of Mr. Miranda pertaining to his janitorial contracts" with ARS. Under these circumstances, we think the contracting officer had a duty to verify that the protester was not interested in competing before excluding J. Sledge.

The contracting officer states that although she confirmed Mr. Miranda's conversation with Mr. Hindley on September 11, she did not verify with Mr. Miranda Mr. Hindley's understanding of the conversation. Rather, except for discussing with Mr. Standridge on September 19 whether the agency was required to solicit J. Sledge, the contracting officer relied only on Mr. Hindley's interpretation of his September 10 conversation to exclude the protester from the competition. We do not suggest that agencies are required to verify and document each and every statement made by a contractor to agency personnel; however, in light of the agency's responsibility to give responsible sources requesting a copy of the solicitation the opportunity to compete, see Gateway Cable Co., 65 Comp. Gen. 333, supra, we think it is simply unreasonable for a contracting officer to rely exclusively on a third party's interpretation of a conversation to exclude an incumbent contractor from the competition, rather than to confirm the parties' understanding of the conversation. Accordingly, given the contracting officer's awareness that J. Sledge had expressed interest in the procurement, we think she should have mailed the RFQs to the protester notwithstanding what she had been told or, at a minimum, contacted the protester to verify whether it remained interested in competing for the services or was no longer interested in the procurement. In short, we find that the agency's decision not to furnish J. Sledge with copies of the RFQs without seeking that verification was improper.

Finally, regarding the degree of competition achieved and the reasonableness of the prices quoted under RFQ No. 004, FAR § 13.106(c) (1) states:

"The determination that a proposed price is reasonable should be based on competitive

quotations. If only one response is received, or the price variance between multiple responses reflects lack of adequate competition, a statement shall be included in the contract file giving the basis of the determination of fair and reasonable price. The determination may be based on a comparison of the proposed price with prices found reasonable on previous purchases . . . or any other reasonable basis."

The agency received only two quotes responding to RFQ No. 004, one from J.T. Enterprises for \$32,940, and one from Handy Jacks for \$12,178. On October 3, prior to issuing the purchase order to Handy Jacks, the contracting officer's representative requested that \$5,578.50 be authorized for the procurement in addition to that already authorized pursuant to the government's estimate of \$6,600, based on the predecessor contract. The agency has not explained its rationale for awarding a purchase order to Handy Jacks for nearly twice the government estimate; has not explained the vast difference between the two quotes; and there is no evidence in the record of the basis for the agency's determination that the awardee's price was fair and reasonable in accordance with FAR § 13.106(c). The price variance between the only two quotes obtained under RFQ No. 004 (\$20,762), and the fact that the awardee's quotation exceeded the government's estimate by 85 percent, reflect a lack of adequate competition further supporting our recommendation below for cancellation of the purchase order and resoliciting the procurement. Compare Omni Elevator, B-233450.2, supra, and S.C. Servs. Inc., B-221012, supra (where in each case the agency obtained three quotations for the work and there was no evidence that the awardee's price was unreasonable).

We recommend that ARS reissue the RFQs and provide J. Sledge an opportunity to compete. If, as a result of the resolicitation, Handy Jacks and Knotty Pines are no longer in line for award, ARS should terminate their contracts for convenience and issue purchase orders to the firms in line for award. We also find the protester to be entitled to the costs of filing and pursuing its protests, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990). J. Sledge should submit its claim for costs directly to the agency. 4 C.F.R. § 21.6(e).

The protests are sustained.

Milton J. Avocar
for Comptroller General
of the United States