

148142
M Dec 04



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

Decision

Matter of: Davis Enterprises
File: B-249514
Date: December 4, 1992

Charles E. Davis for the protester.
Craig R. Schmauder, Esq., Department of the Army, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest by small business incumbent contractor that the contracting agency failed to provide it a copy of the solicitation is sustained where record shows that the procuring agency improperly failed to include the incumbent contractor on the solicitation's mailing list and the protester had a reasonable expectation that it would receive a copy of the solicitation.

DECISION

Davis Enterprises protests the failure of the United States Army Corps of Engineers, Fort Worth District, to solicit Davis, the incumbent contractor, under invitation for bids (IFB) No. DACW63-92-B-0107, for facility and park cleaning services at Somerville Lake, Texas.

We sustain the protest.

On April 22, 1992, the Corps published notice of the IFB in the Commerce Business Daily (CBD). On April 23, the Corps sent presolicitation notices of the IFB to 17 companies; these companies were solicited because their names were listed in the Corps's Standard Army Automated Contracting System (SAACONS) data base. The SAACONS is the Corps's mailing list of contractors that previously have expressed interest in a particular requirement. Since Davis was not listed in the SAACONS data base, it did not receive a presolicitation notice of the IFB, even though it is the incumbent contractor. On June 16, the Corps issued the IFB as a total small business set-aside to the 29 firms that had expressed an interest. On July 16, the Corps received six bids in response to the IFB.

According to Davis, it learned of the solicitation shortly after bid opening when one of the bidders contacted Davis for information regarding the current contract. Davis contacted the Corps on this same day to determine why the Corps failed to notify Davis of the solicitation. After checking the SAACONS data base, the Corps determined that there was no evidence that Davis had requested to be considered for cleaning services in the Somerville Lake area, so it was not included on the bidders mailing list. On July 27, after initially filing an agency-level protest, Davis filed this protest.

The Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(1)(A) (1988), requires contracting agencies to obtain full and open competition through the use of competitive procedures, the dual purpose of which is to ensure that a procurement is open to all responsible sources and to provide the government with fair and reasonable prices. See Western Roofing Serv., 70 Comp. Gen. 323 (1991), 91-1 CPD ¶ 242. "Full and open competition" is obtained where all responsible sources are permitted to submit sealed bids or competitive proposals. See 10 U.S.C. § 2302(3); 41 U.S.C. § 403(6) (1988). In pursuit of these goals, it is a contracting agency's affirmative obligation to use reasonable methods as required by the Federal Acquisition Regulations (FAR) for the dissemination of solicitation documents to prospective contractors. See Irwin-Jurkewicz Corp., B-249037, Oct. 20, 1992, 92-2 CPD ¶ ____.

The FAR provides that solicitation mailing lists are to be maintained by contracting activities, that lists are to include those considered capable of filling agency requirements, and that solicitations normally are to be sent to those on the lists. FAR §§ 14.203-1, 14.205-1, 15.403. Although the FAR permits agencies to rotate names on lists so that not all those on an excessively lengthy list need be solicited for every procurement, the regulation expressly provides that agencies must solicit the "previously successful bidder." FAR § 14.205-4(b). Under these regulations, contracting agencies are generally required to solicit their incumbent contractors. Kimber Guard & Patrol, Inc., B-248920, Oct. 1, 1992, 92-2 CPD ¶ ____; Professional Ambulance, Inc., B-248474, Sept. 1, 1992, 92-2 CPD ¶ ____; Abel Converting Co., 67 Comp. Gen. 201 (1988), 88-1 CPD ¶ 40; Abel Converting, Inc. v. United States, 679 F. Supp. 1133 (D.D.C. 1988); United States v. The Thorson Co., 806 F.2d 1061 (Fed. Cir. 1986). In addition, an agency is required to include all established and potential small business sources, such as Davis, on its mailing list and to send solicitations to these firms. FAR §§ 19.202-2(a), 19.202-4(c). Here, the record establishes that the agency failed to satisfy the foregoing requirements since it did not solicit the incumbent small business contractor.

The Corps does not dispute that it failed to provide Davis a copy of the solicitation; instead, the Corps maintains that it did not deliberately exclude Davis, that it made a good faith effort to comply with the applicable statutory and regulatory requirements regarding notice and distribution of solicitation materials, and it obtained adequate competition and reasonable prices. As discussed below, these arguments do not justify the Corps's failure to solicit Davis.

The Corps states that Davis was not solicited because it failed to request inclusion in the SAACONS data base for these services. However, Davis has provided a copy of a November 27, 1989, request to be included in the SAACONS data base and states that it received previous solicitations without making an additional request. In addition, while Davis regularly visited the Somerville project office, no one mentioned this solicitation. The Corps states that "it is not the policy of the personnel at Somerville to . . . discuss advertised solicitations with incumbent contractors or anyone else." Not only does the record contain evidence that Davis had previously submitted the requisite request to be included on the bidders list, but the Corps's policy of not soliciting incumbents unless specifically asked to do so is clearly inconsistent with the FAR requirements outlined above.

The Corps also asserts that Davis was on constructive notice of the solicitation, since it was synopsisized in the CBD. However, publication in the CBD is not sufficient notification to an incumbent that reasonably expects to be considered for the new contract and to receive the solicitation. See United States v. Thorson Co., 806 F.2d 1061; Abel Converting Inc. v. United States, 679 F. Supp. 1133; Kimber Guard & Patrol, Inc., supra; Professional Ambulance Inc., supra. Indeed, Davis states that it did not think to inquire about the solicitation because the agency solicited these services earlier than would be expected for a October 1 contract commencement date.

Finally, the Corps argues that its receipt of six bids in response to the IFB constituted enough competition that its failure to solicit Davis should not require resolicitation of the requirement. A similar argument was addressed by the court in Abel Converting Inc. v. United States, 679 F. Supp. at 1141, another case in which the procuring agency did not solicit an incumbent. In reversing our finding that two offerors constituted adequate competition so that resolicitation was not required, the court stated that:

"Where so few bidders participate in a solicitation, the absence of even one responsible bidder significantly diminishes the level of competition. This is particularly so when the absent bidder is

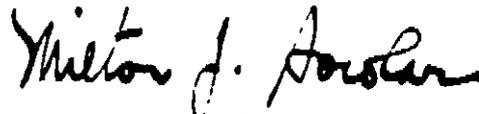
the incumbent contractor since that contractor previously submitted the lowest bids. Because [the agency's] action 'prevented a responsible source from competing . . . the CICA mandate for full and open competition was not met.'" [Citations omitted.]

The court in Abel also supported its view that receiving a few bids does not constitute full and open competition by pointing out that the "participation of Abel will also further CICA's goal of assuring that the government receives the lowest possible price." Id.

In this case, the agency received two bids at prices that the protester contends are unreasonably low. From this assertion, we conclude that the protester would not have submitted a lower bid. However, the agency has not determined that the two lowest bids are not, in fact unreasonably low or that the two bidders are otherwise responsible. Based on the record in this case, where six bids were received, we cannot say that the protester was not prejudiced by losing an opportunity to submit a bid or that the agency obtained the most advantageous contract for the government. Moreover, the Corps's position that it does not solicit incumbent contractors unless they submit requests evidently applies irrespective of the number of bidders, and clearly violates the applicable regulation.

As a result of the Corps's failure to properly maintain mailing lists to ensure that incumbents are solicited, or to otherwise solicit Davis, we find the CICA mandate for full and open competition was not achieved. We recommend that the Corps resolicit this requirement, giving the protester the opportunity to compete. Davis is entitled to recover its costs of filing and pursuing the protest. 4 C.F.R. § 21.6(d)(1) (1992).

The protest is sustained.


for Comptroller General
of the United States