



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: DSS, Inc.
File: B-255143
Date: February 8, 1994

Mitchell H. Segal, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protester.
Emily Martinez Stein, for The L&E Service Company, an interested party.
Col. Riggs L. Wilks, Jr., and Maj. Wendy A. Polk, Department of the Army, for the agency.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester bears the risk of nonreceipt of an amendment, which accelerated the bid opening date by a week, where the agency has provided evidence that it properly distributed the amendment to the protester.

DECISION

DSS, Inc. protests any award under invitation for bids (IFB) No. DAKF03-93-B-0013, issued by the Department of the Army, Fort Ord, California, for full food service at various dining facilities located on three Army installations.¹ DSS contends that the agency improperly failed to timely furnish DSS, an incumbent contractor, with amendment No. 0003 to the IFB--announcing an accelerated bid opening date--which thereby precluded that firm from submitting a bid.

We deny the protest.

The Army issued the IFB on July 12, 1993, mailing copies of the IFB to 53 firms, including the protester. Three amendments followed. Amendment No. 0001, issued on August 2, extended the bid opening date from August 12 to

¹The installations are the Presidio of Monterey, Fort Hunter Liggett and Fort Ord. DSS is the incumbent contractor at Fort Hunter Liggett and at Fort Ord.

September 2. Amendment No. 0002, issued on August 16, changed the bid opening date to September 27, and stated:

"The Department of Labor has advised this office that a wage determination will be released by 20 September 1993. Upon receipt of the wage determination, this office will issue an amendment to incorporate the wage determination."

DSS admits receiving all solicitation materials issued by the Army up until amendment No. 0003, issued on September 2, which included the promised wage determination as well as notice that the bid opening was accelerated to September 20. DSS states that it never received amendment No. 0003. DSS advises that it first learned on Sunday, September 19, that amendment No. 0003 may have been issued when DSS' dining facility manager "heard a rumor" that the bid opening would take place the next day, Monday, September 20. The dining facility manager confirmed the rumor on Monday morning at 8:15 a.m. when he called the contract specialist and learned that bid opening would occur in 45 minutes at 9:00 a.m. The Army reports that DSS' dining facility manager "did not request a copy of amendment No. 0003 nor did he inquire about its contents," nor did he "request that the bid opening be delayed based on DSS' nonreceipt of the amendment." The Army proceeded with the scheduled bid opening and received 15 bids in response to the IFB.

DSS contends that the Army failed to use reasonable methods in disseminating amendment No. 0003 to potential bidders. DSS claims that because of this lapse DSS and three other prospective bidders never received amendment No. 0003. DSS also alleges that the problem of improper dissemination of solicitation materials at Fort Ord is not limited to this procurement, citing a recent Fort Ord procurement where an incumbent did not receive an amendment.

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. Western Roofing Serv., 70 Comp. Gen. 323 (1991), 91-1 CPD ¶ 242. To meet its obligation under CICA to obtain full and open competition, an agency must use reasonable methods as required by the Federal Acquisition Regulation (FAR) to disseminate solicitation materials (solicitations and amendments thereto) to prospective competitors.

DSS does not deny the Army's version of this conversation.

See North Santiam Paving Co., B-241062, Jan. 8, 1991, 91-1 CPD ¶ 18; Ktech Corp., B-240578, Dec. 3, 1990, 90-2 CPD ¶ 447; FAR §§ 14.203-1, 14.205, 14.208.³ Generally, absent evidence that the agency failed to comply with the applicable regulations governing the distribution of amendments--i.e., evidence beyond a prospective competitor's mere nonreceipt--the risk of nonreceipt of an amendment rests with the prospective competitor. See Western Roofing Serv., supra.

Here, the Army followed established procedures in generating mailing lists and distributing the solicitation materials. Specifically, the Army maintains the names of prospective competitors and their business addresses on a computer data base that generates the mailing lists used to disseminate solicitation materials. The Army makes two identical print-outs of the mailing list when it issues solicitation materials: (1) a mailing label print-out (providing the actual labels that are placed on the envelopes) and (2) a checklist print-out. After contracting personnel affix the mailing label from the mailing label print-out, and insert and seal the solicitation materials in their respective envelopes, they cross-check each envelope's address against the corresponding address on the checklist print-out. As each address is verified as a correct address, it is checked off.⁴

The Army has furnished an annotated (i.e., complete with checks) copy of amendment No. 0003's 5-page mailing list/checklist print-out dated "09/02/93," as evidence that these procedures were followed in the mailing of amendment No. 0003. The print-out lists DSS as bidder No. 1, shows DSS' correct mailing address, and has a check mark next to DSS' bidder number. The agency reports that after verifying the addresses, the contract specialist bound the sealed

³FAR 14.208(a) provides, in part, that, "[a]mendments shall be sent, before the time for bid opening, to everyone to whom invitations have been furnished."

⁴Contracting personnel also review the checklist print-out of the mailing list to ensure that solicitation materials are not sent to any vendors named on the List of Parties Excluded from Federal Procurement or Non-Procurement Programs. This effectively requires a double audit of the mailing list--(1) the above described verification that the mailing label the envelope corresponds to a vendor on the checklist print-out, and (2) an attempt to locate each particular vendor's name and address in the List of Parties Excluded from Federal Procurement or Non-Procurement Programs before certifying on the bottom of the checklist print-out that the review has been completed.

envelopes together with rubber bands for delivery to the Directorate of Contracting mail room. At this point, direct evidence of the transit of DSS' copy of amendment No. 0003 ends; the record shows only that when such bundles arrive in the Directorate of Contracting mail room they are placed in a mail distribution bin, pending their dispatch to "AG [Adjutant General] distribution"⁵ and finally to the Post Office, where the mail enters the postal system for ultimate delivery to the addressees.

DSS initially alleged that four firms (DSS and three other firms) did not receive the amendment. The record shows, however, that only DSS and another firm state they did not receive the amendment; a third firm states that it received the amendment after the accelerated bid opening date and the fourth firm's situation is at best unclear.⁶ After the protest was filed with the Army surveyed the 53 firms on the mailing list to ascertain how many firms had received amendment No. 0003. Of the 53 firms, 31 firms received amendment No. 0003, 12 could not say whether they had received it, and 2 firms (the protester and one other firm) reported not receiving it.⁷ Thus, of the 53 firms solicited only 2 are certain that they did not receive amendment No. 0003.

DSS nevertheless views the aforescribed failures to receive amendment No. 0003, as well as an earlier instance of nonreceipt of solicitation materials by potential competitors on another procurement conducted by Fort Ord, as establishing a "pattern of failures reflecting serious deficiencies." DSS cites our decisions Southeastern Enters. Inc., B-245491.2, Jan. 17, 1992, 92-1 CPD ¶ 88, and Hospitality Inn--Downtown, B-248750.3, Oct. 28, 1992, 92-2 CPD ¶ 291, as reflecting examples of reasonable agency procedures "designed to check to ensure mailing." DSS finds

⁵At the AG distribution center, mail destined for on-base addresses is separated from mail directed to off-base locations which is forwarded to the Post Office.

⁶When the agency contacted the fourth firm in early October the firm's president advised that "he remembers receiving the main package and a couple of the amendments. However, he is not really sure just how many amendments he did receive." Later, in early November, the same official swore that his firm "never received Amendment 0003 from Fort Ord and was otherwise wholly unaware that the bid opening date had been moved up one week to September 20, 1993."

⁷The Army was unable to obtain information from eight firms for a variety of reasons ranging from disconnected telephones to failures to return the Army's call.

the procedures described in these decisions to be reasonable because the agency's standard procedure was "to mail a copy of every amendment to each prospective bidder on the mailing list and to then note the date that the amendment was mailed next to the prospective bidder's name." [DSS' emphasis.]

First, we find that the agency reasonably investigated its mail handling procedures and found no systemic problem. Absent some other evidence of a systemic problem at Fort Ord in distributing amendments, the failure of two sources on one prior procurement to receive amendments provides no basis to disturb this IFB, given the agency's production of adequate evidence indicating that the amendment No. 0003 was mailed.

In addition, DSS apparently misunderstands the manner in which we used the term "mail" in the cited decisions. It is apparent from the decisions that we meant "mail" to include a contracting specialist's placing mail in the out-box for dispatch to an installation post office, and did not require that the items mailed actually be placed by the contracting specialist in the custody of the postal service (i.e., in a mail box or post office). In this light, we see no distinction between the Fort Ord mail procedures and the procedures in the cited cases. The Fort Ord contract specialist used the checklist print-out to verify the address on each envelope and "mailed" all 53 envelopes as a bundle on the same day by placing the envelopes in the installation internal mail distribution system. When we remarked, in the cited cases, that a notation was made of "the date that the amendment was mailed next to the prospective bidder's name," this did not mean that the date so entered necessarily corresponded to the date that the postal service took custody of the articles mailed (as would be the situation if the envelopes were hand-carried to the post office and individually hand canceled with a bulls-eye stamp bearing the date of mailing, with that date entered in the agency's procurement file); rather, it meant that the agency recorded the fact that on a certain day the amendments were placed in distribution for delivery to the postal service.⁸ Consequently, there is no basis for

⁸The kind of procedure DSS appears to envision would require either hand carrying all solicitation materials to the installation post office or the institution of an on-base registered mail system (i.e., logging in and logging out each article at each point of its transit to the postal service) so there would be chain of custody documentation up to each individual article's actual arrival at the post office. We doubt that such procedures are warranted, or justifiable for the distribution of solicitation materials.

shifting the risk of nonreceipt of the amendments to the agency as the protester urges.

Therefore, on this record we have no basis to conclude that the agency did not send amendment No. 0003 to the protester since there is no evidence that the agency's dissemination process was deficient or contrary to regulation. See Western Roofing Serv., supra; Shemya Constructors, 68 Comp. Gen. 213 (1989), 89-1 CPD ¶ 108; Cascade Gen., Inc., B-244395, Oct. 17, 1991, 91-2 CPD ¶ 343. While the protester asserts that it did not actually receive the amendments, the risk of nonreceipt, in such circumstances, rests with the bidder. Id.

The protest is denied.⁹

Ronald Berger
 for Robert P. Murphy
 Acting General Counsel

⁹To the extent that the protester contends that the agency should have suspended the bid opening to allow the incumbent contractor time to prepare its bid, we note that while an agency may extend a closing date for receipt of proposals in order to enhance competition, see Fort Biscuit Co., 71 Comp. Gen. 392 (1992), 92-1 CPD ¶ 440, the Army was not, in our opinion, required to do so here since the record shows that the Army complied with the FAR requirements regarding the timely dissemination of solicitation documents. See U.S. Pollution Control, Inc., B-248910, Oct. 8, 1992, 92-2 CPD ¶ 231. In any case, DSS did not request an extension of the bid opening before it occurred.