



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Air Masters Corporation

File: B-262213

Date: September 12, 1995

Steven M. Cockriel, Esq., Cockriel, Horas & Radice, for the protester.
Michael R. Freeman for Commercial Facilities Management, Inc., an interested party.

Joel D. Malkin, Esq., General Services Administration, for the agency.
Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest by incumbent contractor that the agency deprived it of an opportunity to compete because the firm allegedly did not receive a mailed copy of the solicitation is denied where the record shows that the agency followed established procedures for disseminating solicitation documents, there is no indication of any deficiencies in the contracting agency's solicitation process and no evidence that the agency deliberately attempted to exclude the protester.

DECISION

Air Masters Corporation protests any award under request for proposals (RFP) No. GS-05P-95-GAC-0056, issued by the General Services Administration (GSA) for mechanical operation and maintenance services for two federal buildings in East St. Louis, Illinois. Air Masters, the incumbent contractor, contends that GSA improperly failed to provide the firm a copy of the RFP, that this failure precluded it from submitting an offer, and that the requirement should be canceled and resolicited to give Air Masters an opportunity to compete.

We deny the protest.

In a letter dated May 11, 1995, the contracting officer notified Air Masters that it intended to issue a solicitation on or about June 16, for the services currently being provided by the firm to cover the period January 1, 1996 to December 31, 1998. The contracting officer requested Air Masters to provide a copy of the collective bargaining agreement (CBA) covering the proposed follow-on contract period by close of business May 30, 1995.

The May 17 Commerce Business Daily (CBD) contained a notice of the requirement which indicated that performance would begin on January 1, 1996, for a 3-year term and that the agency anticipated a July 20 closing date. Interested firms were directed to contact the contract specialist to obtain copies of the solicitation and the notice contained the names and telephone numbers of two agency employees (the contract specialist and the contracting officer). The RFP was issued on June 16, and copies were mailed to 170 firms, including the protester, on the solicitation mailing list. Amendment 01 was also issued that day and mailed to the same firms, including Air Masters. The RFP advised offerors that the current CBA would expire on June 30, and offerors could obtain a copy of the CBA from either the contracting officer or the union at the address listed in the RFP.¹ Two offerors (not including the protester) submitted proposals by the July 20 deadline for receipt of proposals.

On July 21, the contract specialist contacted Air Masters regarding its failure to submit a proposal and learned that the firm was unaware that an RFP had been issued. After checking with its staff, the protester sent a facsimile letter to the contracting officer later that same day which stated that a search within the organization revealed that the firm had not received the solicitation package.

Thereafter, on July 26, the contract specialist telephoned Air Masters and informed its contract manager of the address to which the solicitation package and the amendment had been mailed on June 16, and that neither had been returned by the Postal Service as undeliverable. In addition, the contract specialist advised him of the May 11 letter which had been mailed, prior to release of the RFP, to the same address as that used for mailing the solicitation and amendment packages; that letter also had not been returned by the Postal Service as undeliverable. Since the solicitation had closed on July 20, the contract specialist indicated that no further action could be taken. This protest followed.

Air Masters maintains that it did not receive either the solicitation package or the May 11 letter and was not "aware" of the CBD announcement for the follow-on services. The protester asserts that as the incumbent contractor for the past 11 years, it is unaware of any reason why GSA would not consider the firm a potential offeror and that the agency's failure to furnish the firm a copy of the solicitation had the effect of improperly excluding it from the competition in contravention of the applicable statutory and regulatory requirements.

¹As a follow-up to the May 11 request for the new CBA, the record shows that the contract specialist telephoned Air Masters on June 27, and was told that the new CBA would be issued in mid-July.

Under the Competition in Contracting Act of 1984 (CICA), agencies are required to obtain full and open competition through the use of competitive procedures when procuring property or services. 41 U.S.C. § 253(a)(1)(A) (1988). "Full and open competition" is obtained when "all responsible sources are permitted to submit sealed bids or competitive proposals." 41 U.S.C. § 259(c). Accordingly, we carefully scrutinize allegations that a firm has not been provided an opportunity to compete for a particular contract and take into account all of the circumstances surrounding the firm's nonreceipt of the solicitation materials, as well as the agency's explanations. Sutton Designs, Inc.,-Recon., B-235382.2, Aug. 11, 1989, 89-2 CPD ¶ 131. Thus, we will conclude that the agency has met its obligation if it has made a diligent, good faith effort to comply with the statutory and regulatory requirements regarding notice and distribution of solicitation materials and it obtains competition and reasonable prices. Metropolitan Int'l Resources, Inc., B-258011; B-258012, Nov. 17, 1994, 94-2 CPD ¶ 196.²

Here, we find GSA satisfied the statutory and regulatory requirements governing notice and distribution of solicitation materials and have no basis in the record to attribute the protester's nonreceipt of the solicitation to any deficiencies in the agency's dissemination process or to a deliberate attempt to exclude the protester from the competition.

Air Masters does not dispute that the solicitation mailing list, which was provided in the agency's report on the protest, contains the firm's correct mailing address. Nor does it dispute that GSA had the correct address for mailing the May 11 letter which sought a copy of the CBA by May 30, and which also advised Air Masters of the anticipated June 16 issuance of the instant RFP. In this regard, Air Masters's apparent failure to receive either of these packages in no way shows purposeful or deliberate action on the part of the agency to exclude the incumbent from competing. As a general rule, the risk of nonreceipt of solicitation documents rests with the offeror as the contracting agency is not a guarantor that these

²In its comments on the agency report, the protester alleges that since the lowest-priced offer GSA received is unreasonably low, this precludes a finding that adequate competition was achieved. This contention has no merit. As the agency points out, both timely offers are significantly below the government estimate (as is also the late offer submitted by the protester). The fact that a firm's offer for a fixed-priced contract may be below-cost does not, by itself, provide a basis to reject the offer. This is so because below-cost pricing is not prohibited and the government cannot withhold an award from a responsible offeror merely because its low offer is below cost. Norden Sys., Inc., B-227106.9, Aug. 11, 1988, 88-2 CPD ¶ 131. Further, the agency reports that this is a negotiated procurement, and if the agency has reason to question the prices, it can do so by conducting discussions.

documents will be received in every instance. Lewis Jamison Inc. & Assocs., B-252198, June 4, 1993, 93-1 CPD ¶ 433. Since there is no showing here that GSA did not mail the solicitation package to Air Masters at its correct address, there is no basis to sustain the protest.

The protest is denied.³

/s/ Ronald Berger
for Robert P. Murphy
General Counsel

³Air Masters questions why during a July 13 meeting with three GSA employees regarding a different contract, none of these employees (who allegedly are involved with this maintenance services contract) mentioned the RFP. However, the protester has not shown, nor is there any evidence in the record before us, that the individuals who met with the protester knew that a solicitation for the follow-on services had been issued or that Air Masters had not received the solicitation package.