



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Qualimetrics, Inc.

File: B-262057

Date: November 16, 1995

Cyrus E. Phillips IV, Esq., Kilcullen, Wilson and Kilcullen, for the protester.
David L. Frecker, Esq., General Services Administration, 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

Where an agency fails to effectively solicit an incumbent contractor because the solicitation was sent to the former address of the contractor, and where the agency had been advised, under Federal Acquisition Regulation subpart 42.12, prior to the issuance of the solicitation, that the contractor had executed a novation agreement approved by another agency and of the correct address of the successor contractor, the agency has not satisfied its obligation under the Competition in Contracting Act of 1984 to obtain full and open competition.

DECISION

Qualimetrics, Inc. protests the failure of the General Services Administration (GSA) to solicit it under request for proposals (RFP) No. FCGR-95-0002-B, for non-mandatory, multiple award federal supply schedule (FSS) contracts encompassing various instruments and laboratory equipment.

We sustain the protest.

On February 16 and March 17, 1995, GSA published in the Commerce Business Daily (CBD) notices of the RFP. The RFP was issued on April 5 requesting proposals for non-mandatory, multiple award schedule contracts covering Federal Supply Classification (FSC) group 66, part II, section Q, "Instruments and Laboratory Equipment: Environmental Sampling and Analysis Equipment (Geophysical, Oceanographic and Meteorology (Weather) Instruments); and Surveying Instruments and Systems," for a contract period commencing on

December 1, 1995, or date of award, whichever is later, through November 30, 2000.¹ Based upon its mailing list and requests pursuant to the CBD announcement, GSA sent the RFP to 230 firms.² GSA mailed a copy of the RFP to Qualimetrics,³ an incumbent contractor under the current FSS contract for this FSC group, to an address in Baldwin, Maryland, where Qualimetrics formerly maintained a sales office.⁴

At the time the FSS contract was executed in January 1992, Qualimetrics was a wholly owned subsidiary of Dynatech Corporation of Massachusetts. Dynatech, Qualimetrics, and the Federal Aviation Administration (FAA), the responsible agency for which Qualimetrics performed the most work, executed a novation agreement,⁵ effective September 30, 1994, whereunder all the assets and rights of

¹Non-mandatory, multiple award FSS contracts are indefinite delivery contracts for commercial firms to provide government agencies with a variety of commonly used goods and services at stated prices for given periods of time. Government ordering activities can order goods or services under simplified procedures from the contracts to meet their requirements. In this case, the RFP, which encompasses a wide variety of equipment, contemplates multiple awards to responsible offerors whose offers are found most advantageous to the government considering, among other things, the "multiplicity and complexity" of the equipment offered, and price. The RFP further advises prospective contractors that "by providing a selection of comparable supplies or services, ordering activities will be afforded the opportunity of fulfilling their requirements with the lowest cost item having the features which specifically meet their needs." The RFP also provides that only one contract will be awarded for each specific product, and that where multiple suppliers (regular dealers) offer the "identical" product, only the lowest-priced supplier will receive a contract for that product.

²In addition, GSA publicly posted the RFP.

³Qualimetrics manufactures microprocessor-based weather instrumentation, in particular, a "type-approved automated weather observing systems."

⁴This was the address used by Qualimetrics as a subsidiary of Dynatech when it first entered into the FSS contract in 1992. Qualimetrics's primary office with regard to weather instrumentation was and is located in Sacramento, California. The price lists provided to GSA by Qualimetrics during the FSS contract showed the firm's address in Sacramento.

⁵A novation agreement is a "legal instrument executed by (a) the contractor (transferor), (b) the successor in interest (transferee), and (c) the government by which, among other things, the transferor guarantees performance of the contract,
(continued...)

that firm were transferred from Dynatech to QSJJ, Inc., which continues to do business as Qualimetrics at the Sacramento address. The novation agreement specifically recognized Qualimetrics as the successor in interest for various contracts, including an FAA contract and Qualimetrics's FSS contract.

Pursuant to FAR §§ 42.1202 and 42.1203, the FAA was responsible for processing and executing Qualimetrics's novation agreement, which included informing GSA of the proposed agreement and obtaining that agency's consent to the terms and conditions of the novation. By letter dated December 21, the FAA sent GSA notice of Qualimetrics's novation agreement, asking for GSA's comments within 30 days and stating that no response would be taken as consent; this letter identified Qualimetrics as being located in Sacramento. Enclosed with this letter were the executed novation agreement as well as a proposed implementing modification to the primary FAA contract, which identified Qualimetrics as the successor contractor at the Sacramento address.⁶

Numerous firms submitted proposals by the May 16 closing date. Qualimetrics did not receive a copy of the solicitation that was sent to the closed Maryland office address, and first learned of the RFP when it contacted GSA in June regarding the resolicitation of its FSS contract that was scheduled to expire on November 30, 1995. GSA has declined to reopen the RFP to allow Qualimetrics to submit a proposal, arguing that the protester should have notified GSA that its address had changed. No awards have been made under this RFP.

The Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(a)(1)(A), requires contracting agencies to obtain full and open competition through the use of competitive procedures. "Full and open competition" is obtained where all responsible sources are permitted to submit sealed bids or competitive proposals. 41 U.S.C. § 403(6). GSA's solicitations for multiple award schedule FSS contracts

⁵(...continued)

the transferee assumes all obligations under the contract, and the government recognizes the transfer of the contract and related assets." Federal Acquisition Regulation (FAR) § 42.1201.

⁶Although in February 1995 GSA requested the FAA to provide the executed modification recognizing the novation, the executed modification to the FAA contract dated February 17 was not provided to GSA until June 22. On July 19 (after this protest was filed), GSA executed a modification to the FSS contract recognizing the novation and changing Qualimetrics's official address to that in Sacramento.

are required to be conducted under "full and open competition" and to assure that "participation has been open to all responsible sources." See 41 U.S.C. § 259(b)(3).

In seeking to achieve full and open competition, it is a contracting agency's affirmative obligation to use reasonable methods for the dissemination of solicitation documents to prospective contractors. Professional Ambulance Inc., B-248474, Sept. 1, 1992, 92-2 CPD ¶ 145. Solicitation mailing lists are required to be maintained by contracting activities, and are to include those firms considered capable of filling agency requirements; normally solicitations are to be sent to those firms on the lists. FAR §§ 14.203-1, 14.205-1, and 15.403. Although the FAR permits agencies to rotate names on a list so that not all those on an excessively lengthy list need be solicited for every procurement (except small business concerns), the regulation specifically provides that where agencies rotate names they must solicit the "previously successful bidder." FAR § 14.205-4(b). Thus, agencies are generally required to solicit their incumbent contractors in order to satisfy the CICA mandate for full and open competition. Davis Enter., B-249514, Dec. 4, 1992, 92-2 CPD ¶ 389; Pratt & Lambert, Inc., B-245537; B-245538, Jan. 9, 1991, 92-1 CPD ¶ 48; United States v. Thorson Co., 806 F.2d 1061 (Fed. Cir. 1986); Abel Converting, Inc. v. United States, 679 F. Supp. 1133 (D.D.C. 1988). An agency does not satisfy this mandate where it fails to effectively solicit an incumbent contractor because it misaddressed the solicitation, even if this was done inadvertently. Professional Ambulance Inc., supra; Lewis Jamison Inc. Assocs., B-252198, June 4, 1993, 93-1 CPD ¶ 433.

The record here shows that the agency reasonably should have been aware that Qualimetrics's Maryland address may no longer be valid and that its address was that in Sacramento. Months before the solicitation was issued, the same GSA contracting officer as was responsible for the mailing list for this RFP was apprised of the completed novation and was provided documents, i.e., the proposed contract modification, designating Qualimetrics's Sacramento address as that of the successor contractor.⁷ Under the circumstances, GSA should have verified its

⁷While the FAA did not advise GSA that this represented a change of address with regard to the FSS contract (because the predecessor Qualimetrics contractor for FAA had the same Sacramento address), the letter stated that Qualimetrics was located in Sacramento and the draft modification showed an address of the successor Qualimetrics that was different than the Maryland address identified on GSA's mailing list. Even though GSA was unable to promptly obtain the executed modification to the FAA contract recognizing the novation, GSA only modified the contract to recognize the novation after this protest was filed, notwithstanding that GSA had been advised that the novation was effective more than 9 months earlier.

mailing list to assure that the address of Qualimetrics's successor was on it.⁸ See Holiday Inn-Laurel, B-249673.2, Dec. 22, 1992, 92-2 CPD ¶ 428.

GSA asserts that Qualimetrics was on constructive notice of this RFP by virtue of the CBD announcements, and that the paramount reason that Qualimetrics was not solicited was because it did not make an early request for a copy of the solicitation, and did not notify GSA that its address had changed. While prospective contractors should avail themselves of every reasonable opportunity to obtain solicitation documents, see NRC Data Sys., 65 Comp. Gen. 735 (1986), 86-2 CPD ¶ 84; Sentinel Sec. & Patrol Servs., B-261018, Aug. 9, 1995, 95-2 CPD ¶ 67, under the circumstances, Qualimetrics reasonably assumed that no action on its part was necessary. First, 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 Davis Enters., *supra*; Professional Ambulance Inc., *supra*. Second, as noted above, we think the agency reasonably should have been aware of Qualimetrics's new address for purposes of mailing the solicitation. In this regard, FAR subpart 42.12 places the responsibility for advising affected agencies of a novation on the "responsible contracting officer," and this subpart places no responsibility on the contractor for advising affected agencies. Qualimetrics could reasonably assume that these procedures had been followed; indeed, the FAA's responsible contracting officer did in fact advise GSA of the novation and identified the successor contractor with its address. Further, as also noted above, Qualimetrics itself had made GSA aware of its new address by means of price lists furnished under its current FSS contract. We conclude that it was GSA's failure to incorporate Qualimetrics's new address in its bidders' list, not some failure by Qualimetrics, which most directly led to Qualimetrics's exclusion from the competition. This failure violated FAR § 14.205(b) and the CICA mandate to obtain full and open competition. See *id.*

GSA also asserts that any failure to properly solicit an incumbent contractor does not require corrective action because numerous proposals were received in response to the RFP, so as to assure fair and reasonable prices. This argument fails to consider the nature of this multiple award FSS solicitation, which requested prices for a multiplicity of items. GSA does not argue, nor does the record indicate, that any other offeror proposed to supply the identical equipment that Qualimetrics manufactures and is providing under its current FSS contract. Moreover, there is no reason to believe that Qualimetrics would not receive a contract to supply the

⁸While GSA contends that Qualimetrics did not return certain telephone calls it made to Qualimetrics's Sacramento office in late March 1995, the record indicates that these calls were in response to earlier calls initiated by Qualimetrics concerning possibly adding items to its current FSS contract. There is no evidence that the calls concerned the novation.

items it manufactures, if its proposal were considered and its prices were reasonable. Therefore, the receipt of numerous proposals under this RFP is neither relevant in determining whether the agency received the most advantageous price for the equipment that Qualimetrics manufactures, nor provides any basis for not allowing that firm an opportunity to compete. Moreover, we fail to perceive any prejudice to the other offerors, which do not supply Qualimetrics's equipment, in allowing Qualimetrics to now submit a proposal.

We recommend that GSA allow Qualimetrics to submit an offer. Qualimetrics also is entitled to recover the cost of filing and pursuing the protest. 4 C.F.R. § 21.6(d)(1) (1995). Qualimetrics should submit its certified claim for costs directly at the agency within 60 days of receiving this decision. 4 C.F.R. § 21.6(f)(1) .

The protest is sustained.

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