Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bosco Contracting, Inc.

File: B-270366

Date: March 4, 1996

Daniel A. Bellman, Esq., Porter, Wright, Morris & Arthur, for the protester.
Clifton M. Hasegawa, Esq., Department of Defense, for the agency.
Marie Penny Ahearn, Esq., and John M. 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 to perform interim services contract between the completion of its contract and the commencement of the services by the National Industries for the Severely Handicapped is sustained where the decision not to solicit incumbent was based on alleged poor past performance, which was unsupported by the record.

DECISION

Bosco Contracting Inc. protests the issuance of a purchase order to Specialized Services, Inc. (SSI) under a request for quotations (RFQ) issued by the Defense Information Systems Agency, Defense Information Technology Contracting Office (DITCO), Department of Defense, for janitorial, recycling, and snow removal services at DITCO buildings at Scott Air Force Base (AFB), Illinois, for a 2-month period. Bosco, the incumbent contractor, alleges that the agency improperly failed to solicit the firm.

We sustain the protest.

The RFQ, issued on October 23, 1995, contemplated award for a 2-month interim period (November 1 to December 31, 1995) between the expiration of Bosco's incumbent 5-year contract and the expected inclusion of the services on a procurement list developed under the provisions of the Javits-Wagner-O'Day Act, 41 U.S.C. §§ 46-48c (1994) (commodities or services placed on the list by the Committee for Purchase from the Blind and Other Severely Handicapped must be procured only from non-profit agencies employing persons who are blind or have other severe disabilities). At the time of issuance of the RFQ, DITCO was in the process of negotiating a 1-year contract for the services with the National Industries for the Severely Handicapped (NISH). SSI, the awardee here, was the NISH workshop contemplated to perform the services.

Under the RFQ for the interim services, DITCO requested quotes from SSI and two other vendors. Although Bosco had expressed interest to the agency in competing for any follow-on procurement, DITCO decided not to solicit the firm because it believed "there was doubt on its ability to perform considering its prior record." SSI was the only vendor which submitted a quote, and after determining SSI's price was fair and reasonable, DITCO issued a purchase order to the firm on October 30. On the same day, Bosco filed this protest with our Office. On the following day, the agency determined that continuing performance during the pendency of the protest was in the best interests of the United States. See 31 U.S.C. § 3553(d)(3)(C)(i)(I) (1994).

Bosco argues that DITCO lacked reasonable justification for excluding the firm from the competition. According to the protester, it had no indication of deficient past performance other than a single incident where two Bosco employees did not show up for work.

Simplified acquisition procedures are excepted under the Federal Acquisition Streamlining Act of 1994 (FASA) from the general requirement that agencies obtain full and open competition through the use of competitive procedures when conducting procurements. 10 U.S.C. §§ 2304(a)(1)(A), (g)(1), and (g)(3) (1994).[1] 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, FASA only requires that agencies obtain competition to the maximum extent practicable when they utilize simplified acquisition procedures. Id.; 41 U.S.C. § 427; see Omni Elevator, B-233450.2, Mar. 7, 1989, 89-1 CPD ¶ 248. In implementing the statutory requirement, the Federal Acquisition Regulation (FAR) requires contracting officers, when using simplified acquisition procedures, 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, based, as appropriate, on either price alone or price and other factors. FAR § 13.106-1(a)(1) (FAC 90-29); see S.C. Servs. Inc., B-221012, Mar. 18, 1986, 86-1 CPD ¶ 266.[2] Generally, for purchases

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[1]Prior to FASA, the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. §§ 2304(a)(1), (g)(1) (1988), similarly excepted procurements conducted under small purchase procedures from the full and open competition requirements.

[2]This FAR implementation with regard to obtaining competition under non-Federal Acquisition Ccomputer Network procurements under simplified acquisition procedures is essentially identical to the prior FAR implementation of the CICA requirements for the conduct of procurements under small purchase procedures. FAR § 13.106(b)(1), (5).

under $25,000, as here, a solicitation of three suppliers is sufficient. FAR § 13.106-1(a)(3) (FAC 90-29); Omni Elevator, supra. However, an agency does not satisfy its requirement to obtain competition to the maximum extent practicable where it fails to solicit other responsible sources who request the opportunity to compete--in those circumstances, those sources 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 Bosco, the incumbent contractor, is not in itself a violation of the requirement to promote competition in small purchases. J. Sledge Janitorial Serv., 70 Comp. Gen. 307 (1991), 91-1 CPD ¶ 225. Rather, the determinative question where an agency has deliberately excluded a firm which expressed interest in competing is whether the agency acted reasonably such that it has satisfied the requirement to obtain competition to the maximum extent practicable. Id.

While poor past performance may support a decision not to solicit the incumbent contractor, the record here contains insufficient evidence to reasonably establish that Bosco's past performance was anything but acceptable. As indicated, DITCO's justification for not soliciting Bosco was "performance problems" encountered with the firm "early in 1995," which the agency contends are evidenced in the February 1995 correspondence from the protester and its counsel (to DITCO). However, the cited correspondence does not reference any performance problems in early 1995. Rather, it refers to DITCO's decision to terminate Bosco's contract for the convenience of the government in February 1995, based on its erroneous belief that, due to the addition of recycling services to the requirement, SSI (through NISH), which was already the maintenance contractor at Scott AFB (except for the DITCO buildings), was the mandatory source for new recycling services. The record indicates that Bosco's contract was reinstated in March 1995, once the agency realized that these services were not required to be placed with NISH and that it could properly modify Bosco's existing contract to include the new services.

DITCO contends that Bosco's alleged poor performance is "also documented in the price negotiation memorandum" for the contemplated 1-year contract (with NISH and SSI, not at issue here). However, while that memorandum does state that "[t]he current contractor's performance is poor," it provides no explanation or documentation of any performance deficiencies. The protest record also contains a December 18, 1995, DITCO letter to the Committee (it was submitted in connection with the Committee's determination whether to add the services to the "handicapped set-aside" procurement list), which includes declarations by agency personnel citing "observed" instances of poor performance by Bosco. Our Office asked the agency to furnish documentation showing that the deficiencies in these declarations (or any other deficiencies) actually occurred during the performance of

Bosco's contract, since the cited instances are general in nature, undated, and the declarations are unsworn. However, the agency has furnished no affidavits or other supporting documentation of the cited deficiencies and, significantly, has never even cited any of these alleged deficiencies in support of its decision not to solicit Bosco.[3] Under these circumstances, the declarations are not entitled to significant weight in our analysis.

The record does include one instance of deficient past performance--the required services were not performed on 1 day in October 1995. This is the deficiency to which Bosco itself referred in defending its performance where two employees did not show up for work. However, this incident was not mentioned by the agency in deciding not to solicit Bosco. Moreover, Bosco maintains that this was only a minor incident, and did not justify excluding Bosco from the competition here, since it involved only 1 day of performance out of a 5-year contract, the contract payment was reduced accordingly, and Bosco took corrective action to prevent a recurrence (the agency does not argue that the corrective action was inadequate). We agree that, on its face, it is not apparent how this single deficiency during performance of a 5-year contract could support the agency's decision not to solicit Bosco, and the agency has not asserted or shown otherwise.

Given the absence of any documented deficiencies in Bosco's performance as the incumbent, other than the sole corrected instance discussed above, and the agency's failure to otherwise establish that Bosco experienced material performance problems, we conclude that the agency improperly excluded Bosco from the competition for the interim services.

Because performance under the RFQ has been completed, corrective action is not available. We recommend that the protester be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, § 21.8(d)(1), 60 Fed. Reg. 40,737, 40,743 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.8(d)(1)). Bosco should submit its detailed and certified claim for costs directly to the agency within 90 days after receipt of this decision. Bid Protest Regulations, § 21.8(f)(1) supra (to be codified at 4 C.F.R. § 21.8(f)(1)).

The protest is sustained.

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[3]Indeed, we note that DITCO included Bosco in the competition for a second 2-month interim contract for January and February 1996.