

DOCUMENT RESUME

03310 - [A2353475]

[Protest Based on Late Receipt of Solicitation Amendment].
B-189220. August 19, 1977. 5 pp.

Decision re: Kennedy Van and Storage Co., Inc.; by Robert I.
Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government
(806).

Organization Concerned: Department of Commerce; Small Business
Administration: Size Appeals Board.

Authority: F.P.R. 1-2.207(a). F.P.R. 1-2.407-8(a); (1). F.P.R.
1-1.703-2. 52 Comp. Gen. 281.

A company protested contract award, contending that it was denied the opportunity to bid because it did not find out about bid opening date until after bids had been opened, and that it lost its right to protest the small business size classification. Since the agency had complied with regulations regarding notice of new bid opening date but inadvertently misaddressed the bidder's copy, the bidder must bear the risk of not receiving the amendment. The argument that protester was denied the opportunity to present its views on size classification was found to be without merit. (HTW)

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-189220

DATE: August 19, 1977

MATTER OF: Kennedy Van and Storage Company, Inc.

DIGEST:

1. Bidder bears risk of not receiving an amendment to the solicitation where agency has complied with all regulations regarding notice of new bid opening date but inadvertently misaddresses bidder's copy of amendment.
2. Protester's argument that it was denied the opportunity to present its views as to the solicitation's small business size classification because of agency's failure to notify it of SBA's size determination is without merit where final decision is made and notice is given by Small Business Size Appeals Board, not by contracting officer. Moreover, record shows that protester had actual knowledge of all proceedings and exercised its rights under the regulations.

Kennedy Van and Storage Company, Inc. (Kennedy) protests the award of a contract under Solicitation No. 7-35520 issued by the Department of Commerce (Commerce) inviting bids for performing moving services for Commerce in the Washington, D.C. commercial zone. Kennedy's protest has two bases arising out of the fact that it did not receive Amendment No. 4 to the solicitation which established a new bid opening date and reflected a new small business size standard. The first ground of protest is that Kennedy was denied the opportunity to bid because (1) it did not find out about the bid opening date until after bids had been opened, and (2) the contracting officer refused to cancel the procurement and resolicit. Second, Kennedy states that it lost its right to protest the Small Business Size Appeals Board's determination of the appropriate size standard for the solicitation. For the reasons that follow, we deny Kennedy's protest.

The solicitation was issued on March 18, 1977, and on March 21, 1977 Kennedy protested to the contracting officer that the solicitation contained the wrong size standard of \$7 million annual receipts

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and argued that the proper standard was \$2 million average annual receipts for the 3 preceding fiscal years. Commerce agreed, and on March 23, 1977 mailed Amendment No. 2 to all prospective bidders informing them that the new size standard was \$2 million. That change generated a protest from Moving Services, Ltd., which argued that the size standard should be changed back to \$7 million. The contracting officer decided that the matter should be referred to the Small Business Size Appeals Board and informed all prospective bidders of that fact and of the suspension of the bid opening date by Amendment No. 3 mailed April 14, 1977.

On May 12, 1977 the Small Business Size Appeals Board overruled the contracting officer's classification of the work to be performed. The Size Appeals Board notified Commerce by telegram on May 15, 1977, and sent a telegram to Kennedy which was received on May 20, 1977. The day after Commerce received the Size Appeals Board's decision, May 17, 1977, Commerce issued Amendment No. 4 which returned the size standard to \$7 million and established a bid opening date of May 27, 1977.

At bid opening 12 bids were received and announced publicly. That day, Kennedy, having heard that bids had been opened, inquired as to why it had not received notice of the bid opening date. Commerce responded that its records indicated that Kennedy had been mailed a copy of Amendment No. 4. Four days later, on May 31, 1977, Commerce received the letter sent to Kennedy containing Amendment No. 4 which had been marked, "Return to Sender From Washington, D.C." and "Not for Box Main Off, Washington, D.C." This envelope had apparently been misaddressed at Commerce, because Kennedy's correct address was P.O. Box 17191, Washington, D.C. 20041, whereas the address on the envelope read P.O. Box 1719, Washington, D.C. 20041.

Regarding Kennedy's failure to receive notice of the new bid opening date, Federal Procurement Regulations (FPR) § 1-2.207(a) states as follows:

"If after issuance of invitations for bids but before the time set for opening of bids it becomes necessary to make changes in quantities, specifications, delivery schedules, opening dates, etc., or to correct a defective or ambiguous

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invitation, such changes shall be accomplished by issuance of an amendment to the invitation for bids. The amendment shall be sent to each concern to whom the invitation for bids has been furnished and shall be displayed in the bid room."

In 52 Comp. Gen. 281 (1972) we considered a case where a prospective bidder's address was erroneously listed on the bidders list. The incorrect address caused the bidder not to receive timely notice of the new bid opening date. The bidder called the procuring activity and requested that the bid opening date be extended. The request was denied. We sustained the agency's refusal to extend the bid opening date on the following basis:

"* * * we have held that * * * [FPR 1-2.207(a)] * * * [does] * * * not make the procurement activity an insurer of the prompt delivery of amendments to each prospective bidder. The procurement activity discharges its responsibility when it issues and dispatches an amendment in sufficient time to permit all the prospective bidders time to consider such information in submitting their bids, notwithstanding the fortuitous loss or delay of a particular individual's copy of the amendment. The risk of nonreceipt of invitations and amendments thereto is upon the bidders. While the Government should make reasonable efforts to see that interested bidders receive timely copies of the invitation for bids and amendments thereto, the fact that there was a delay in a particular case, where the provisions of ASPR 2-208 [language identical to FPR § 1-2.207] have been complied with, does not warrant the acceptance of a bid or a modification thereof after the time fixed for opening, nor does it require the resolicitation of the procurement. 40 Comp. Gen. 126, 128 (1960); B-175409, April 14, 1972; B-174259, January 5, 1972; B-174230, November 17, 1971; B-167921, December 1, 1969.

"We have also held that the propriety of a particular procurement must be determined from the Government's point of view upon the basis of whether adequate competition and reasonable prices were obtained, not

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upon whether every possible prospective bidder was afforded an opportunity to bid. B-147515, January 12, 1962. While it is unfortunate that your address was not correctly recorded on the bidders list, we do not find anything in the record to indicate that the error was other than an inadvertent mistake, or that it was occasioned by any deliberate attempt on the part of the procuring personnel to exclude you from participating in the procurement. In such circumstances, although we recognize the resulting hardship which may be experienced by your firm, it has been our consistent position that the nonreceipt or delay in receiving bidding documents by a prospective bidder does not require cancellation or amendment of the invitation. 34 Comp. Gen. 684 (1955)." Id. at 283-284.

We see nothing in the record to indicate that there was a deliberate attempt by Commerce to exclude Kennedy from the competition.

Kennedy also argues that, even if it must bear the risk of not receiving a bid amendment, it was still entitled to a formal notification from Commerce regarding the final decision as to the small business size standard.

FPR § 1-2.407-8(a)(1) states that protesters shall receive written notice of the final decision on a written protest. The section also refers to FPR § 1-1.703-2 where the matter under protest involves "small business status." FPR § 1-1.703-2(g) states that the contracting officer's classification of a service (the matter at issue here) establishing the small business definition is final unless "appealed" under FPR § 1-1.703-2(h). That section states that such appeals are to be directed to the Chairman, Size Appeals Board, Small Business Administration--not to the agency--and that the Board will render a decision in accordance with FPR § 1-1.703-2(f). Subsection (f) states that the Board notifies all known interested parties of the appeal. In that regard, we note that Kennedy forwarded its views on the matter to the Board by its letter of May 9, 1977. After considering the matter, the Board is required to render a decision stating the reasons therefor and to notify the interested parties of the decision and the reasons. As stated above, Kennedy was advised of the Board's decision in the matter. However, there is no provision in the regulation requiring the contracting agency to notify the interested parties of the Board's decision.

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Two things are evident from the above discussion. First, Kennedy was afforded the opportunity to present its views to the Small Business Size Appeals Board. Second, Commerce had no obligation to inform Kennedy as to the status of the Size Appeals Board's consideration of the appeal. As the record shows, Kennedy had actual knowledge of the proceedings before the Board and exercised its right to comment on the merits.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States