

DOCUMENT RESUME

03880 - [A2773992]

[Protest of Proposed Award of Contract for Demineralizers].
B-189307. September 29, 1977. 4 pp.

Decision re: Culligan Inc., Cincinnati, OH; by Robert F. Keller,
Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense -
Procurement & Contracts (058).

Organization Concerned: Department of the Navy: Naval Sea
Systems Command.

Authority: 4 C.F.R. 20 et seq. B-186235 (1975). B-182636 (1975).
49 Comp. Gen. 707. 49 Comp. Gen. 409. 50 Comp. Gen. 565. 50
Comp. Gen. 571. 54 Comp. Gen. 973. A.S.P.E. 2-404.1.

Company protested that the bid advertisement for
demineralizers was misclassified and misleading, and that only
two small businesses responded. Omission of bidder from mailing
list did not require cancellation and reprocurement; protest was
denied. (SS)

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DECISION



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

R. F. Culligan
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FILE: B-189307

DATE: September 29, 1977

MATTER OF: Culligan Incorporated, Cincinnati, Ohio

DIGEST:

1. While protest concerning failure to solicit bid from previous supplier was filed after bid opening, protest is considered timely because procurement was not properly categorized in Commerce Business Daily (CBD) and it would not be fair to impose burden of discovering that fact within time constraints of GAO Bid Protest Procedures
2. In view of broad discretion permitted contracting officer in deciding whether to cancel invitation after opening, omission of bidder from bidder's mailing list does not require cancellation and resolicitation of procurement where there is no evidence of conscious or deliberate effort by procurement activity to preclude bidder from competing, significant effort to obtain competition was made and award will be made at reasonable price.
3. Contention of protester concerning fact that synopsis of procurement in CBD did not include bid opening date is academic because protester did not rely on CBD synopsis.

Culligan Incorporated, Cincinnati, Ohio (Culligan) protests the proposed award of demineralizers by the Naval Sea Systems Command (Navy) under Invitation for Bids (IFB) No. N00024-77-B-4285.

Only one bid was received in this procurement which the Navy considers reasonable and which it proposes to accept. The procurement was synopsisized in the Commerce Business Daily (CBD) on March 15, 1977, under CBD category 41 for "Refrigeration and Air Conditioning Equipment." The protester claims that category 46 "Water-Purification and Sewage Treatment Equipment" is a more appropriate category than refrigeration and air conditioning equipment. Culligan states that this misclassification prevented the

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firm from bidding in that it was unaware of the existence of this procurement. Culligan maintains that only two of the suppliers on the bidders list are small business and that the remaining four firms on the list are either large businesses or do not manufacture or supply demineralizer equipment. Culligan questions whether the eight other firms requesting solicitations represent the water treatment industry. Therefore Culligan contends that a representative cross section of the industry was not obtained, that the Navy failed to solicit a known supplier and that an up-to-date bidders list was not maintained. Culligan requests that the Navy cancel the IFI and readvertise the procurement.

Culligan was a previous supplier of this equipment. However, through an oversight the Navy did not include Culligan on the bidders list. Rather, Culligan, Inc. of Northbrook, Illinois was listed and solicited by the Navy. In this connection the Navy's report states that the Illinois firm is believed to be the franchisor of the protester. While the protester's attorney asserts that the protester is a "completely separate, independent and wholly distinct corporate entity," we note that the bidder's mailing list application submitted to Navy in August 1975 lists the Illinois firm as an affiliate of the applicant.

Initially the Navy argues that the protest is untimely, citing 4 C.F.R. § 20.2(b)(1) (1977 ed.) of our Bid Protest Procedures which provides that protests against "alleged improprieties in any type of solicitation which are apparent prior to bid opening * * * shall be filed prior to bid opening." The Navy states that notice of intent to procure in the CBD amounts to constructive notice to all parties who may be interested in the proposed procurement, even if the listing in CBD is incorrect. Apparently, the Navy believes that the misclassification is a defect of the solicitation which should have been raised prior to bid opening.

Publication of a proposed procurement in the CBD generally constitutes notice of such fact for the purpose of satisfying the timeliness requirements of section 20.2(a) of our Bid Protest Procedures, 4 C.F.R. § 20 et seq., Non-Linear Systems, Inc., B-182636, February 12, 1975, 75-1 CPD 91. However, the procurement was not properly categorized and we could not fairly impose the burden of discovering that fact within the time constraints of our protest procedures even though others may have discovered it.

The instant procurement was a 100 percent small business set-aside. The Navy admits that the procurement may have been mistakenly classified in CBD and that it inadvertently failed to

include Culligan on the bidders list or send Culligan an IFB. Copies of the solicitation were sent to the six companies on the bidders list. Contrary to the contention of Culligan, the Navy believes that all of the firms listed either manufacture or supply demineralizing equipment. In any event, the protester admits that at least two were potential suppliers. Furthermore, eight other potential suppliers requested copies of the solicitation. The Navy has advised us that three of these firms also have demineralizing equipment. The protester, however, contends that none is a regular industry supplier. Navy proposes to accept the only bid received rather than resolicit for additional bids because it believes the bid received is reasonably priced.

The authority vested in the contracting officer to decide whether or not to cancel an invitation and readvertise is extremely broad. Scott Graphics, Inc., et al., 54 Comp. Gen. 973 (1975) 75-1 CPD 302. However, in exercising such authority the impact upon the integrity of the competitive bidding system must be considered and cancellation is permitted only for compelling reasons. Armed Services Procurement Regulation 2-404.1 (1976 ed.). Generally, the propriety of a particular procurement must be determined from the Government's point of view on the basis of whether adequate competition and a reasonable price were obtained, not upon whether every prospective bidder was afforded an opportunity to bid. 50 Comp. Gen. 565, 571 (1971). In the absence of probative evidence of a conscious and deliberate intent to impede the participation of a prospective bidder, the failure to receive a copy of the solicitation must be viewed as an inadvertence which generally does not provide a basis to cancel an invitation. 49 Comp. Gen. 707, 709 (1970).

The requirement that there be adequate competition normally is satisfied if competitive bids are received. However, we are aware of no legal requirement that no less than two bids must be received to permit a contract award. In our opinion there may be sufficient justification for award to the only bidder if there is a significant effort to obtain competition (Cf. DeWitt Transfer and Storage Co., B-186235, March 26, 1975, 75-1 CPD 180), a reasonably priced bid is received and there is no deliberate attempt to exclude a particular firm. Although the receipt of only one bid and the failure to solicit the protester in this case could justify a resolicitation, we cannot conclude that a contrary conclusion is an abuse of discretion.

Here, the contracting officer determined that the only bid submitted was reasonable as to price. We understand that the price is in line with the prior contract price, allowing for inflation. Moreover, the record shows that the contracting officer had reason

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to anticipate that competitive bids would be received as a result of the fourteen solicitation packages furnished. Although the CBD synopsis was not properly categorized, it nevertheless generated inquiries from potential suppliers of the equipment. The public advertising together with the solicitation of all firms on the bidder's list was a significant effort to obtain competition and weighs heavily against any inference of an attempt to exclude the protester. Accordingly, we find no abuse of discretion in this case.

In its comments on the agency report, Culligan also argues that the synopsis appearing in the March 15, 1977 CBD was deficient because it failed to state the bid opening date. The synopsis indicated that the bid opening date was "not furnished." Inasmuch as Culligan did not rely on the CBD synopsis it was not prejudiced by this defect and its protest in this regard is academic.

Nevertheless, we believe that the misclassification of this procurement in CBD and the failure to provide all relevant information warrants attention. Therefore we recommend that the Navy improve its CBD listing procedures to insure that procurements are properly synopsisized in the future.

For the reasons stated, the protest is denied.


Acting Comptroller General
of the United States