

DECISION



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

FILE: 8-220947

DATE: March 11, 1986

MATTER OF: Trans World Maintenance, Inc.

DIGEST:

1. Where contracting agency did not provide protester/incumbent contractor with the solicitation, in spite of incumbent contractor's numerous requests that agency procurement officials do so, incumbent contractor was improperly excluded from the competition in violation of the Competition in Contracting Act of 1984, which requires "full and open competitive procedures."
2. Claim for costs of filing and pursuing protest is denied where remedy afforded protester is an opportunity to compete for award under resolicitation.

Trans World Maintenance, Inc. (TWM) protests the proposed award of a contract under invitation for bids (IFB) No. N62766-85-R-2159, issued by the Department of the Navy, Naval Facilities Engineering Command, for the maintenance of family quarters in Guam, M.I. TWM, the incumbent contractor for the solicited services, contends that the agency consciously and deliberately prevented it from competing under the subject solicitation by refusing to provide it with a copy of the solicitation.

The protest is sustained.

According to the protester, during the first week of May 1985, the company's president and the company's contract specialist became aware through a copy of a solicitation posted in the Guam Navy Public Works Office that the Navy intended to issue a new solicitation for the follow-on contract for the maintenance services it then was performing under contract. However, the posted solicitation contained no bid opening date. At that time and on at least three subsequent occasions between May and August 1985, TWM officials requested a copy of the bid documents. They also requested on at least two occasions that TWM's name be placed on the bidders mailing list. The protester states that in response to their requests, Navy contract officials

034783

repeatedly told TWM officials that the bid documents were not available, but that TWM would be provided a copy of the bid documents when the solicitation was approved by the San Bruno regional office. Navy contract officials also assured the protester that its name had been added to the bidders mailing list. TWM further states that although it received information from the agency that a synopsis of the solicitation and subsequently a correction notice were published in the Commerce Business Daily (CBD), TWM failed to find the synopsis there, and the Navy refused to advise the protester of the relevant publication dates.^{1/} The solicitation was issued on September 13, and the Navy mailed copies of the solicitation documents to 31 other contractors, but a copy was never provided to TWM.

TWM maintains that the agency deliberately prevented it from competing for the new contract, even though TWM, as the incumbent contractor, was an interested, prospective bidder. TWM contends that it was prejudiced by the Navy's actions in this regard in that, through its inquiries and visits to the Navy Public Works Office, TWM became aware that the solicitation would be issued, but was prevented from submitting a bid as a consequence of its reliance on the Navy's assurances that a copy of the solicitation would be provided to TWM when the documents became available. Accordingly, the protester requests that the procurement be resolicited so that it may be afforded an opportunity to submit a bid. The protester also requests reimbursement of the costs for filing and pursuing the protest.

In response to TWM's contentions, the Navy states that the procurement was properly synopsized in the CBD on April 24, 1985, and that a correction to that synopsis was published in the CBD on August 8, 1985. The Navy takes the position that since "Publication of a proposed procurement constitutes notice," TWM's protest is untimely and should be dismissed, because "any alleged impropriety should have [been] raised by [TWM] prior to bid opening." The Navy also

^{1/} Both the synopsis and the correction notice appeared in the CBD under Category Z, "Construction (i.e.) New Construction and major additions to existing buildings and facilities," not under Category Y, "Maintenance, Repair and Alteration of Real Property," as the protester might have expected. We question whether it was appropriate to synopsize this procurement under Category Z although we recognize that the line between "construction" and "maintenance, repair and alteration" is not always easily drawn.

states that it does not "stand as a guarantor that copies of the solicitation will be sent to all bidders." Citing our decision Preventive Health Programs, Inc., B-195877, Jan. 22, 1980, 80-1 C.P.D. ¶ 63, the Navy maintains that its failure to include the name of a prospective bidder, "even an incumbent contractor," on the bidders mailing list does not warrant cancellation of the solicitation and resolicitation where the omission is not shown to be deliberate, where a significant effort is made to obtain competition, and where award is made at a reasonable price. In this regard, the Navy states that TWM never filed a Standard Form (SF) 129, Solicitation Mailing List Application, in accordance with the Federal Acquisition Regulation (FAR), § 14.205-1(d)(1) (Federal Acquisition Circular No. 84-5, April 1, 1985). The agency contends that it did not deliberately fail to provide a copy of the solicitation to TWM, that it mailed copies of the solicitation to 31 other contractors in an effort to obtain competition, that it received four bids, and that the protester has not alleged that award will not be made at a reasonable price.

We first address the timeliness issue raised by the Navy. The agency contends that the filing period for TWM's protest commenced on April 23, 1985, at the earliest, or August 8, 1985, at the latest, since the synopsis and its correction were published--and thus all prospective bidders, including TWM, had notice of the procurement--on those respective dates. Thus, the Navy argues that, under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), TWM should have protested any alleged improprieties prior to bid opening.

We do not agree. TWM has not alleged any apparent improprieties in the solicitation which would require its protest to be filed before bid opening. Rather, TWM protests the Navy's action in denying it an opportunity to compete by refusing to provide it with a copy of the subject solicitation, even though on at least four occasions TWM had requested a copy of the solicitation documents well in advance of the Navy's distribution of the solicitation to potential bidders and had received assurances from Navy contracting officials that its request would be honored whenever the documents became available.

Under our Bid Protest Regulations, a protest must be filed within 10 days after the basis for the protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). The record shows that TWM first became

aware that the agency had actually issued the solicitation on October 16, 1985, the day following bid opening. Since neither the published synopsis of the procurement nor the posted copy of the solicitation specified the date on which the bid documents would be available or the bid opening date, the protester was not unjustified in relying on the Navy's assurances that its name had been added to the bidders mailing list, pursuant to its request, and that it would be provided a copy of the solicitation documents when they became available. TWM filed its protest with our Office within 10 working days after October 16, and its protest is, therefore, timely. 4 C.F.R. § 21.2(a)(2); see also Culligan, Inc., Cincinnati, Ohio, 56 Comp. Gen. 1011, 1012 (1977), 77-2 C.P.D. ¶ 242 at 2.

The Navy issued this solicitation after March 31, 1985, the effective date of the Competition in Contracting Act of 1984 (CICA), and, therefore, the Navy was bound to follow the procurement policy of using "full and open competitive procedures," which is enunciated in several provisions of the act. See 10 U.S.C.A. §§ 2301(a)(1), 2302(2), 2304(a)(1)(A), and 2305(a)(1)(A)(i) (West Supp. 1985). "Full and open competition" is defined as meaning that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement." 10 U.S.C.A. § 2302(3) (West Supp. 1985). The legislative history of CICA reveals that Congress established "full and open" competition as the new required standard for awarding contracts because of its "strong belie[f] that the procurement process should be open to all capable contractors who want to do business with the Government." See House Conference Rep. No. 98-861, 98th Cong., 2d Sess. 1422 (June 23, 1984). In view of this clear statement of the government's policy and the clear expression of Congress' intent that a new procurement standard--"full and open" competition--govern, our Office must give careful scrutiny to the allegation that a particular contractor has not been provided an opportunity to compete for a particular contract, taking into account all of the circumstances surrounding the contractor's nonreceipt of the solicitation, as well as the agency's explanation therefor.

Such scrutiny leads us to conclude that TWM was improperly denied a copy of the solicitation here in violation of CICA's requirement for "full and open" competition. TWM was the incumbent contractor performing the very same services for which this procurement was conducted and there is nothing in the record to suggest that

TWM is other than a responsible source. As the incumbent contractor, TWM had a right to expect to be solicited for the follow-on contract. In addition, TWM specifically requested a copy of the solicitation on at least four occasions before the solicitation was issued. TWM also specifically requested that it be placed on the bidders mailing list on two occasions. The Navy has neither refuted these facts nor offered any meaningful explanation for its failure to provide a copy of the solicitation to TWM. While the Navy points to TWM's failure to file an SF129, in view of TWM's repeated oral requests we do not believe that a written request in the form of an SF129 was a prerequisite to obtaining the solicitation. See Metro Medical Downtown, B-220399, Dec. 5, 1985, 85-2 C.P.D. ¶ 631 at 2. Furthermore, FAR, § 14.205-1(b) (Federal Acquisition Circular No. 84-5, April 1, 1985), specifically directs that all firms which the contracting office knows are capable of filling the particular requirement shall be placed on the bidders mailing list regardless of whether they have filed an SF129.

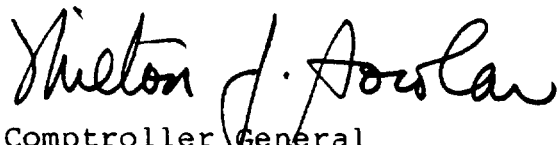
Furthermore, the record shows that the CBD synopsis and its subsequent correction did not indicate either the date the solicitation was to be issued or the bid opening date; accordingly, the protester was not on notice of when bid opening would take place so that it could again attempt to obtain the solicitation and submit a bid or take other appropriate action to prevent bid opening before it could bid. We also do not consider the result in Preventive Health Programs, Inc., B-195877, supra, cited by the Navy in support of its position, to be dispositive of the propriety of the agency's failure to provide the protester a copy of the solicitation, particularly since that decision predated the enactment of CICA and the application of its standard for full and open competition, and also because the protester here, unlike the protester in Preventive Health Programs, Inc., specifically requested on at least four occasions that it be provided the solicitation.

Accordingly, we conclude that the Navy's actions here prevented a responsible source from competing and that therefore the CICA mandate for full and open competition was not met.

Having so concluded, we further find that the appropriate course of action here to remedy this procurement defect is for the Navy to resolicit. We recognize that rejecting all bids after they have been publicly opened tends to discourage competition, because it results in making all bids public without award, which is contrary to the interests of the low bidder, and because rejection of all bids means that bidders have expended effort and money to prepare their bids without the possibility of acceptance. See GAF Corp.; Minnesota Mining and Mfg. Co., 53 Comp. Gen. 586, 591 (1974), 74-1 C.P.D. ¶ 68. However, in view of the congressional mandate for "full and open" competition, we believe that the government's interests are best served in the present case by canceling the solicitation and giving all responsible sources a fair opportunity to compete on the resolicitation. We therefore are recommending that the Navy cancel the invitation and resolicit bids using full and open competitive procedures.

The protester's claim for reimbursement of the costs of filing and pursuing this protest is denied, because the protester will have the opportunity to compete for the award under a resolicitation. See Galveston Houston Co., B-219988.4, Nov. 4, 1985, 85-2 C.P.D. ¶ 519; The Hamilton Tool Co., B-218260.4, Aug. 6, 1985, 85-2 C.P.D. ¶ 132.

The protest is sustained.



Acting Comptroller General
of the United States