

DECISION



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

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FILE: B-222431 DATE: May 28, 1986
MATTER OF: Dan's Moving & Storage, Inc.

DIGEST:

Where contracting agency did not provide protester/incumbent contractor with the solicitation, in spite of several requests by the incumbent contractor 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."

Dan's Moving & Storage, Inc. (DMS) protests the award of a contract under invitation for bids (IFB) No. DAAC71-86-B-0014, issued by Tobyhanna Army Depot, Pennsylvania, for moving and storage of household goods at Seneca Army Depot. DMS, which had previously provided these services at Seneca Army Depot under an Air Force contract, complains that it was improperly deprived by the Army of the opportunity to bid because it did not receive a copy of the solicitation. Specifically, DMS, although not disputing that the agency received adequate competition and reasonable prices under the solicitation, argues that the requirement must be resolicited because its failure to receive a solicitation was caused by a deliberate attempt to exclude the firm from competing. While we do not find evidence of any deliberate attempt by the Army to exclude the firm from competing, we nevertheless sustain the protest.

The procurement was synopsisized in the Commerce Business Daily (CBD) on December 9, 1985. The synopsis specified an approximate bid opening date of January 23, 1986. DMS was unaware of the publication of this synopsis. However, DMS did make several inquiries to the Seneca Army Depot, where it was performing these services under the Air Force contract, during January and February concerning the proposed issuance of the solicitation. On these occasions, DMS states that Army officials assured the firm that the solicitation had not yet been issued and that the firm would be included in any solicitation mailing. In fact, bid opening was held on March 5, 1986, six weeks after the approximate date specified in the CBD, and the protester

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never received a copy of the solicitation prior to that date.^{1/} On March 10, 1986, 3 working days after bid opening, DMS learned for the first time from non-government sources that the solicitation had been issued; the firm thereupon made numerous unsuccessful telephone inquiries to the Tobyhanna procurement office to ascertain why it had not been solicited. DMS then filed this protest with our Office on March 24, 1986.

We first address the timeliness issue raised by the Army. The agency contends that the filing period for DMS' protest commenced on December 9, the date the synopsis was published. The agency's view is based on its belief that all prospective bidders, including DMS, are charged with constructive knowledge of the contents of CBD announcements.

We do not agree. DMS, the incumbent, is protesting the Army's action in denying it an opportunity to compete by failing to provide it with a copy of the solicitation, even though on several occasions DMS had made attempts to secure a copy of the solicitation well in advance of the actual bid opening and had received assurances from Army officials at Seneca Army Depot that its request would be honored.^{2/}

^{1/} The Army has not explained why bid opening was delayed significantly beyond the approximate date indicated in the synopsis or whether the delay was the result of formal extensions effected by solicitation amendments.

^{2/} The Army argues that DMS was not the "incumbent" because the previous household goods contract had been awarded to DMS by the Air Force and not by Tobyhanna Army Depot, and that the counties previously serviced by DMS under its prior contract were just recently added to Tobyhanna's solicitation. Nevertheless, the record shows that purchase orders, with Tobyhanna designated as the issuing office, were awarded to DMS for the period of January 1 to February 28, 1986, apparently as an interim measure until a permanent contract could be awarded. While the Army states that these purchase orders were issued by Seneca Army Depot and not Tobyhanna, we think this contention is immaterial. The Army was bound to follow the procurement policy of using "full and open competitive procedures," which requires that all responsible sources be permitted to submit bids. We think that this requirement imposes a duty on an agency to take all reasonable and necessary steps to identify capable contractors and provide them with the opportunity to compete. Here, Tobyhanna knew or should have known, through reasonable inquiry, of the existence and identity of the incumbent servicing Seneca Army Depot. Accordingly, we think DMS should be treated for purposes of our decision as a bona fide incumbent.

Under our Bid Protest Regulations, a protest must be filed within 10 working 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) (1985). The record shows that DMS first became aware that the agency had actually issued the solicitation on March 10, 3 working days following bid opening. Since the published synopsis only specified the approximate date on which bid opening would be held, the protester was not unjustified in relying on the Army's assurances that it would be included in any solicitation mailing. DMS filed its protest with our Office within 10 working days after March 10, and its protest is, therefore, timely. See Trans World Maintenance, Inc., B-220947, Mar. 11, 1986, 65 Comp. Gen. _____, 86-1 CPD ¶ ____.

The Army issued this solicitation after April 1, 1985, the effective date of the Competition in Contracting Act of 1984 (CICA), and, therefore, the Army 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. See Trans World Maintenance, Inc., supra.

Such scrutiny leads us to conclude that DMS was improperly denied a copy of the solicitation here in violation of CICA's requirement for "full and open" competition. Just as was the situation in Trans World Maintenance, Inc., supra, a case with a similar fact pattern, DMS 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 DMS is other than a responsible source. Further, as we stated in the prior case, DMS, as the incumbent contractor, had a right to expect to be solicited for the follow-on contract. In addition, DMS specifically requested a copy of the solicitation on several occasions before bid opening. While DMS made its inquiries to the Seneca Army Depot, where it was performing these services, rather than directing its inquiries to the procurement office at Tobyhanna, we think that the firm's attempts to obtain a copy of the solicitation were reasonable under the circumstances. This is so because, as stated above, DMS received at least two purchase orders, with Tobyhanna designated as the issuing office, from Seneca Army Depot. Moreover, we must conclude on this record that officials at Seneca Army Depot, even after assuring DMS that the solicitation had not yet been issued and that the firm would be included in any solicitation mailing, failed to communicate the existence and identity of the incumbent to Tobyhanna. Also, Tobyhanna, while aware that new counties previously serviced by an Air Force incumbent were added to its solicitation, failed to take the most obvious step to identify the incumbent, which was simply to contact Seneca Army Depot. The Army has neither refuted these facts nor offered an adequate explanation for its failure to provide a copy of the solicitation to DMS.

Accordingly, we conclude that the Army'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 Army 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 CPD ¶ 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 Army cancel the invitation and resolicit bids using full and open competitive procedures.

The protest is sustained.

A handwritten signature in cursive script, reading "Milton J. Jordan". The signature is written in dark ink and is positioned above the printed title.

Acting Comptroller General
of the United States