

11/27/86

**DECISION**



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

**FILE:** B-222045.2

**DATE:** July 1, 1986

**MATTER OF:** W.H. Smith Hardware Co.--  
Reconsideration

**DIGEST:**

Where solicitation understates agency's needs, but low offeror's proposal will meet those needs, award to that offeror rather than a resolicitation is appropriate where record further indicates that agency is not likely to obtain greater competition if it resolicits, so that award on original solicitation will satisfy the "full and open competition" standard of the Competition in Contracting Act.

The Defense Logistics Agency (DLA) requests reconsideration of our decision in W.H. Smith Hardware Co., B-222045, May 13, 1986, 65 Comp. Gen. \_\_\_\_, 86-1 CPD # \_\_\_\_, sustaining Smith's protest. We affirm our prior decision.

Our original decision responded to W.H. Smith's complaint that its offer for lavatory faucets should not have been rejected and that award should be made to it. DLA itself determined that Smith's offer in fact was acceptable and terminated the contract awarded to a higher-priced offeror. DLA further determined, however, that the solicitation had been defective, and that it therefore had to resolicit. We held that the solicitation defects did not warrant resolicitation and that award should be made to Smith. DLA, in requesting reconsideration, asserts that our holding is inconsistent with the Competition in Contracting Act of 1984 (CICA), Pub. L. 98-369, Tit. VII.

At the outset, we point out that DLA's reconsideration request technically is untimely. Our Bid Protest Regulations provide that a request for reconsideration must be received by this Office not later than 10 working days after the basis for reconsideration is known or should

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have been known. 4 C.F.R. § 21.12(b) (1986). Since the basis for this reconsideration is the agency's dissatisfaction with our decision, the request should have been filed within 10 working days of the agency's receipt of the decision. The agency indicates that it received the decision on May 19, 1986. The request for reconsideration is untimely because, although the request is dated and postmarked on May 30, we did not receive it until June 4, 11 working days after May 19. In light of the agency's concern about the lack of consistency between the recent CICA legislation and our decision, however, we think it is appropriate to consider the agency's reconsideration request.

The defects in the solicitation that concerned DLA revolve around the need for a male adapter. First, the agency's need was for faucets with male adapters, but the solicitation item description contained no reference to that requirement. Second, two of the three approved manufacturers' part numbers listed in the solicitation as acceptable in fact were not acceptable because they did not include male adapters. We held that these defects did not preclude award to Smith under the solicitation because (1) the solicitation understated the agency's needs; (2) Smith in fact offered faucets with a male adapter, thus meeting the agency's needs; and (3) Smith, although offering more than the specifications required, submitted the low acceptable offer, so that award to Smith could not be said to be prejudicial to higher-priced offerors who competed under the solicitation.

DLA now counters that our decision is contrary to the CICA provisions that require the use of specifications which permit full and open competition. See 10 U.S.C. § 2305(a)(1), as added by CICA. DLA argues that because two of three part numbers listed were incorrect, potential offerors were misled as to the government's actual needs so that full and open competition was not obtained. DLA also states that "the buying center has now determined that there are five manufacturers' part numbers which are acceptable." Finally, DLA states that it is unknown whether "Smith's current offer would be the low offer on a solicitation which accurately reflects the Agency's needs."

We do not believe our decision is contrary to CICA's full and open competition standard. Although the solicitation did not accurately set forth DLA's actual needs, the circumstances indicate that full and open competition was obtained. As DLA points out, "full and open competition" means that "all responsible sources are permitted to submit . . . proposals on the procurement." 41 U.S.C. § 403(7) (Supp. II 1984). Our record indicates that eight different companies, offering the faucets of five different manufacturers, submitted proposals. Thus, it appears that the original solicitation, identifying only three different manufacturers' models as acceptable but including a "Products Offered" clause which permits submission of offers on alternate products, did not preclude offers of models made by other manufacturers and in fact such offers were obtained. Second, while the need for male adapters was not specified and two models listed were incorrect because they did not include the adapters, the low acceptable offeror did offer a model with male adapters; we do not find it likely that if the other vendors, in response to a more accurate item description or acceptable model numbers, had offered a faucet with male adapters, a more costly item, they would have done so at prices lower than they submitted for less costly faucet models. Accordingly, we remain of the view that award is appropriate under the original solicitation, that there is little reason to anticipate an increase in the number of offerors on a resolicitation, and that therefore DLA, despite the deficiencies in its original solicitation, has obtained full and open competition for this procurement which has resulted in a low-cost proposal that will meet its needs.

With respect to DLA's concern that Smith's offer might not be low on a resolicitation, we point out that the appropriate test is whether a fair and reasonable low price is obtained on the original solicitation, not whether vendors, particularly vendors other than the low acceptable offeror on the initial competition, might decide to lower their prices on a second competition. See Reves Industries, Inc., B-219348.3, Apr. 3, 1986, 86-1 CPD ¶ 316.

The prior decision is affirmed.

*Milton J. Arosian*  
for Comptroller General  
of the United States