



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gateway Cable Company
File: B-223157, B-223161, B-223162
Date: September 22, 1986

DIGEST

1. Protest concerning agency's failure to solicit protester filed more than 10 working days after bid opening is untimely since the protest was not filed within 10 working days after the basis for protest was known or should have been known, whichever was earlier, as required by Bid Protest Regulations.
2. Protest concerning agency's failure to furnish request for quotations to protester under two procurements conducted under simplified small purchase procedures is sustained where, despite agency contention that it was not aware that protester was a potential supplier, record contains clear evidence that agency should have been aware of protester's interest in competing. Agency's actions are not consistent with Competition in Contracting Act requirement that competition for small purchases be obtained to the maximum extent practicable.

DECISION

Gateway Cable Company (Gateway) protests the awards of contracts under invitation for bids (IFB) No. 102PI-86060, and request for quotations (RFQ) Nos. 102PI-86074 and 102PI-86077 issued by the Federal Prison Industries, Inc. (FPI), Department of Justice, for connectors, band markers and terminal lugs, respectively. Gateway contends that FPI acted arbitrarily in not providing Gateway with copies of the IFB and RFQ's despite repeated telephonic requests. In addition, Gateway contends FPI had in its possession price quotations from Gateway for these items which were lower than the awarded contract prices, and that FPI should have considered Gateway in its award decision.

The protest under IFB No. 102PI-86060 is denied in part and dismissed in part. The protests related to the RFQ's are sustained.

BACKGROUND

FPI is a wholly-owned government corporation engaged in the manufacture of goods, and responds to solicitations issued by other agencies. In response to a U.S. Army Tank-Automotive Command (TACOM) request for proposals for cable kits, FPI's Electronics Division in Washington, D.C. solicited suppliers' quotations on component parts in order to arrive at a unit cost estimate for submission to TACOM. Between January 2 and January 8, 1986, telephonic quotations were obtained from 10 companies and these price quotes were used by FPI to arrive at a unit cost estimate. Gateway was not solicited by FPI, but on January 20, 1986, Gateway hand-delivered to FPI's Washington location a letter containing price quotations for all components of the cable kits including band markers, terminals and cables. Gateway also indicated that it had been the "main supplier" of these cable kits in recent years.

On March 14, 1986, TACOM issued an order for cable kits directly to the FPI factory in Englewood, Colorado. Thereafter, FPI's Electronics Division in Washington, D.C. forwarded the telephonic quotations it had received to the FPI factory. Gateway's January 20 letter quotation apparently was not sent to the factory, although the telephonic quotation records were forwarded.

The contracting officer at the FPI factory divided the total requirement into four separate solicitations. IFB Nos. 102PI-86060 and 102PI-86061, for connectors and cables, respectively, were synopsized in the Commerce Business Daily (CBD) on March 4, 1986, and FPI states that it mailed copies of the solicitations to prospective bidders, including Gateway, on that date. Bid opening for both IFB's was scheduled for April 4, 1986. RFQ Nos. 102PI-86074 and 102PI-86077, for band markers and terminal lugs, respectively, were issued as small business set-asides under small purchase procedures as required by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 13.106(b) (1985). Both RFQ's involved amounts of less than \$10,000. The record shows that RFQ No. 102PI-86074 was issued on March 31, while RFQ No. 102PI-86077 was issued on April 10.

Gateway received a copy of IFB No. 102PI-86061 and submitted a bid. Its bid of \$296,983.50 was found to be low and Gateway was awarded the contract for cables on April 15, 1986. Gateway did not submit a bid under IFB No. 102PI-86060 nor a quotation under the RFQ's, and FPI awarded all three contracts to other firms.

Gateway complains that FPI ignored its repeated requests for copies of IFB No. 102PI-86060 and RFQ Nos. 102PI-86074 and 102PI-86077. As evidence, Gateway has submitted copies of its telephone bill, which shows 19 telephone calls to the agency from March 4 through April 21. Gateway states that in these conversations it requested that it be sent the appropriate forms. Further, Gateway contends that FPI was otherwise aware of its interest in the RFQ's from its January 20 quotation letter, which contained prices for all the items solicited and which was attached to the contract it was awarded on April 15.

In addition, Gateway contends that its January 20 letter constituted a valid offer to provide the items solicited by FPI. Consequently, although Gateway did not submit a bid or IFB No. 102PI-86060 or quotations for RFQ Nos. 102PI-86074 and 102PI-86077, Gateway argues that the prices contained in its January 20 letter should have been considered by FPI in its award determinations.

IFB No. 102PI-86060

Gateway's protest of the nonreceipt of the IFB is untimely. Our Bid Protest Regulations require that a protest be filed (either initially with the contracting agency or with this Office) not later than 10 working days after the basis for protest was known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a) (1986). The synopsis of the IFB included the scheduled April 4 bid opening date. Gateway therefore had constructive knowledge of the bid opening date and knew it had not received a copy of the IFB by that date. See G&L Oxygen & Medical Supply Serv., B-220368, Jan. 23, 1986, 86-1 CPD ¶ 78. Gateway, however, did not file its protest with FPI until April 22, 1986, which was more than 10 working days after bid opening. The protest as it pertains to the failure to solicit Gateway under the IFB, therefore, is dismissed as untimely.

With respect to Gateway's contention that its January 20 price quotation letter constituted a valid bid and should have been considered under IFB No. 102PI-86060, we note that it is a basic principle of contract formation that an offer must be sufficiently definite to show the offeror's intent to form a binding agreement upon acceptance. See George Rosen Son, Inc., VACAB No. 429, reprinted in 65-2 BCA ¶ 4936 (1965). A price quotation, standing alone, is not a firm offer that can be accepted. See Best Western Quantico Inn/Conference Center et al., B-209500 et al., Feb. 17, 1983, 83-1 CPD ¶ 164; see also Ordnance Parts & Eng'g Co., ASBCA No. 2820, reprinted in 68-1 BCA ¶ 6870 (1968). Further, the

quotation letter was not sufficient to indicate compliance with all the terms of the subsequently-issued IFB. Accordingly, Gateway's January 20 letter, submitted to FPI approximately 3 months before the issuance of the IFB, did not constitute a valid offer that could be accepted under the IFB. Best Western Quantico Inn/Conference Center, et al., supra.

RFQ NOS. 102PI-86074 and 102PI-86077

FPI states that the RFQ's were only issued to the suppliers whose telephonic quotations were forwarded to the contracting officer. Gateway's written quotation was not included with the telephonic quotations and the contracting officer asserts that he was not aware that Gateway was a supplier at the time the RFQ's were issued. The contracting officer states that he was unaware of Gateway's January 20 letter. In addition, FPI maintains that it diligently searches out new sources of supply, that adequate competition was obtained under the RFQ's, and that orders were issued to suppliers at reasonable prices.

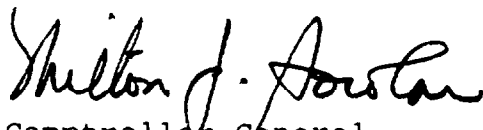
Under the small purchase procedures, agencies must promote competition to the "maximum extent practicable." 41 U.S.C. § 253(g)(4). Generally, the solicitation of three suppliers may be considered to promote competition to the maximum extent practicable. FAR, 48 C.F.R. § 13.106(b)(5); see also S.C. Svcs. Inc., B-221012, Mar. 18, 1986, 86-1 CPD ¶ 266.

The solicitation of three or more suppliers, however, does not automatically mean that the maximum practicable competition standard has been met. In procurements expected to exceed \$10,000, an agency is required to publish notice of the intended procurement in the Commerce Business Daily and make available to any business concern requesting it a complete solicitation package. 41 U.S.C. § 416. This provision obviously requires an agency to do more than simply solicit a minimum number of suppliers. Further, the Small Business Act, as amended, 15 U.S.C. § 637b (1982), expressly requires that procuring agencies provide a copy of a solicitation to any small business concern upon request, and the record indicates that Gateway is a small business. While the publication requirement itself is not applicable to the protested small purchases since they involve amounts under \$10,000, the point is that the procurement statutes and the Small Business Act obviously contemplate that, regardless of whether three suppliers are solicited, responsible sources requesting a copy of the solicitation and the opportunity to compete should be afforded a reasonable opportunity to do so.

In short, we view the requirement for maximum practicable competition to mean that an agency must make reasonable efforts, consistent with efficiency and economy, to give a responsible source the opportunity to compete, and cannot therefore unreasonably exclude a vendor from competing for an award. Cf. Instruments & Controls Serv. Co., B-222122, June 30, 1986, 65 Comp. Gen. _____, 86-2 CPD ¶ 16 (agency should consider a small purchase quotation received prior to award where the RFQ did not prohibit late quotations).

In light of the above, we must sustain this portion of the protest. The agency's only reason for failing to provide the RFQ's to the protester was that the agency allegedly was unaware of the protester's interest in competing. The record shows, however, that Gateway called the FPI contracting officer 19 times prior to the issuance of the two orders under the RFQ's. The contracting officer has denied that Gateway requested a copy of IFB No. 1021PI-86060 after March 10, 1986, but has not similarly denied Gateway's allegation that it subsequently requested that it be sent copies of the RFQ's. Under these circumstances, the contracting officer should have been aware of Gateway's express interest in competing under the particular procurements, and we therefore find that the failure to send Gateway copies of the RFQ's lacked any reasonable basis. In this respect, we note that FPI is not arguing that, in defining the scope of competition, it relied on a mailing list from which it inadvertently had omitted a previous supplier or a firm that previously had asked to be included on the list. Rather, what seems clear is that FPI disregarded Gateway's repeated expressions of interest in competing under the particular procurements. Cf. S.C. Servs. Inc., supra.

Accordingly, Gateway's protests concerning the RFQ orders are sustained. However, since the ordered items have already been delivered and paid for, no other corrective action is appropriate. We therefore find that Gateway is entitled to recover its cost of filing and pursuing the protest insofar as it relates to the RFQ's. See 4 C.F.R. § 21.6(e).

for 
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