



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: TLM Marine, Inc.

File: B-226968

Date: July 29, 1987

DIGEST

1. The jurisdiction of the General Accounting Office to decide protests by federal agencies does not turn on whether appropriated funds are involved.
2. Protest that solicitation for custodial services for vessels does not comply with the requirements of the Federal Acquisition Regulation (FAR) is without merit where the agency has statutory authority to conduct the procurement "notwithstanding any other provision of law" and is therefore exempt from strict compliance with the FAR.
3. Protester's complaint that it was unfairly precluded from the competition is without merit where the protester had an opportunity to participate in the agency's well-publicized prequalification process but declined to do so.

DECISION

TLM Marine, Inc., protests a solicitation issued by the Maritime Administration (Marad), Department of Transportation, for custodial services for mobile offshore drilling units (MODUs).^{1/} TLM complains that the solicitation does not comply with a number of provisions of the Federal Acquisition Regulation (FAR) and that it does not adequately describe either the agency's requirement or the evaluation factors. We deny the protest in part and dismiss it in part.

During April 1986, Marad published in 12 different publications, including the Commerce Business Daily (CBD), an announcement that the agency anticipated a potential need for custodians to care for a variety of vessels, including MODUs, that might come into the agency's possession in connection with its responsibilities under

^{1/} A MODU, commonly called a jack-up drilling rig, is a type of vessel that serves as a work platform for offshore exploration and other purposes.

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Title XI of the Merchant Marine Act, 1936, as amended, 46 U.S.C. §§ 1271-1280 (1982 and Supp. III 1985). Under Title XI, Marad guarantees repayment of the principal and interest on loans made by private lenders for constructing and reconditioning commercial vessels. Marad receives a security interest in the vessels and, in the event of default, may take possession after foreclosure proceedings.

The announcement stated that those interested in providing custodial services would be evaluated based on demonstrated ability to furnish an adequate facility, availability of trained personnel, and financial stability. According to the announcement, Marad intended to compile a source list by type of vessel and geographic location to be used to solicit for custodial care contracts in particular districts as the need arose. The agency received 200 responses to the announcement, nearly one-quarter of which indicated an interest in providing MODU custodial services. TLM did not respond to the announcement.

In accordance with the announcement, Marad visited the facilities of each prospective custodian to assess such factors as seabed conditions, firefighting capability, security, and available personnel. Following completion of this process, which the agency terms "sight approval," the agency on March 6, 1987, mailed to these firms a copy of a custodian agreement and invited the firms to submit bids consisting of a daily rate, hourly rates for skilled and unskilled labor, and a markup percentage for materials. The labor rates and markup percentages on materials would be used as the basis for paying the custodians for additional work required by the contracting officer and for emergency repairs. The agency received 38 bids in response to this solicitation. TLM obtained a copy of the solicitation and filed this protest prior to the closing date.

Preliminarily, Marad questions our jurisdiction to consider this protest on two grounds. First, the agency argues that because it enjoys broad powers under Title XI with respect to foreclosed vessels, as discussed in more detail below, it is not bound by the Federal Property and Administrative Services Act of 1949 and implementing regulations. Second, the agency says that we lack jurisdiction here because, it says, no appropriated funds will be used to obtain the custodial services.

We conclude that we have jurisdiction. The authority of this Office to decide protests is based on 31 U.S.C. § 3551 et seq. (Supp. III 1985) under which we are to decide protests filed by interested parties challenging

solicitations issued by federal agencies for proposed contracts for property or services or the awards or proposed awards of such contracts. Artisan Builders, 65 Comp. Gen. 240 (1986), 86-1 CPD ¶ 85. The solicitation in this case was issued by Marad, which no one contends is not a federal agency. Nor does anyone contend that the protested solicitation is not for a proposed contract for services. Further, for purposes of our protest jurisdiction, it does not matter the extent to which the procurement statutes and regulations may apply, see Gino Morena Enterprises, B-224235, Feb. 5, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 121, nor does our protest jurisdiction turn on whether appropriated funds are involved. T.V. Travel, Inc. et al.--Request for Reconsideration, 65 Comp. Gen. 109 (1985), 85-2 CPD ¶ 640.

TLM's protest consists in large part of a listing of numerous provisions and clauses in the FAR that it says are not reflected in the solicitation as well as arguments that the solicitation did not clearly set forth the agency's needs and that the agency failed to publish the CBD notifications required by the procurement statutes and FAR. Marad admits that it did not comply in this procurement with the provisions of FAR, but states that its method of procuring these services is reasonable in view of the nature of its requirement. We agree with the agency.

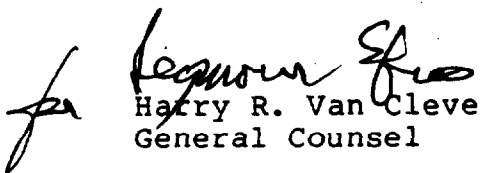
The procurements of most civilian federal agencies are governed by the FPASA, as amended by the Competition in Contracting Act of 1984 (CICA). The applicability of the FAR and CICA with respect to these agencies derives from the FPASA, and thus, FAR and CICA will apply generally only to the extent that the FPASA applies. With respect to Marad, FPASA provides that it does not apply to its procurements but that the agency must coordinate its operations with the Act and implementing regulations to the maximum extent the agency deems practicable. 40 U.S.C. § 474(16) (1982). TLM argues that this provision means that Marad was required to follow the FPASA, and therefore the FAR, in the absence of a specific determination not to do so. As the agency points out, however, this procurement was conducted under Title XI of the Merchant Marine Act, under which the agency may contract for custodial services "[n]otwithstanding any other provision of law relating to the acquisition, handling, or disposal of property by the United States." 46 U.S.C. § 1275(c) (1982). We agree with the agency that this broad grant of authority exempts Title XI procurements from strict compliance with the FPASA, CICA and the FAR. In this connection, we note that this provision was reenacted without change subsequent to enactment of the FPASA. Pub. L. No. 92-507, 86 Stat. 914 (1972).

Consequently, we do not agree with TLM that Marad's solicitation was defective because it failed to incorporate, for example, clauses on inspection and acceptance as required by FAR, 48 C.F.R. § 15.406-2 (1986), or to satisfy requirements for option clauses set forth in FAR, 48 C.F.R. §§ 17.201 and 17.204(b). In any event, although TLM argues that it was prevented from competing because of the solicitation's vague description of the agency's requirements and the agency's failure to publish a notice of its March 6 solicitation for prices, the protester has not shown that Marad's failure to conduct this procurement in strict conformance with FPASA, CICA and FAR has actually resulted in any competitive prejudice to that firm. Rather, it appears to us that if TLM is at any disadvantage compared to the 38 firms that were able to prepare bids, this circumstance is directly attributable to TLM's failure to respond in a timely manner to the agency's announcement inviting interested firms to undergo site approval. TLM does not contend that it was unaware of the notice or otherwise explain why it did not respond. Because TLM failed to demonstrate its ability to provide the required services when it had the opportunity to do so, we cannot find that the firm was unfairly excluded from the competition. See Engine & Generator Rebuilders, 65 Comp. Gen. 191 (1986), 86-1 CPD ¶ 27.

In the alternative, TLM argues for the first time in its response to Marad's administrative report that the agency's method of conducting the procurement, even if not governed by the FPASA and implementing regulations, is unreasonable and that therefore the procurement should be canceled and redone. The argument is both untimely and without merit. This issue, which is separate from those originally raised, should have been evident to TLM when it filed its initial protest on March 26. Our Bid Protest Regulations require that allegations such as this that concern the agency's procurement methodology be filed prior to the solicitation's closing date. See 4 C.F.R. § 21.2(a)(1) (1986). Moreover, our regulations are designed to give protesters and interested parties a fair opportunity to present their cases with the least disruption possible and do not contemplate a piecemeal presentation or development of protest issues. See Pennsylvania Blue Shield, B-203338, Mar. 23, 1982, 82-1 CPD ¶ 272. Consequently, we dismiss the issue.

In any event, we understand that Marad established the prequalification-type process^{2/} so that it would have on hand a list of firms whose facilities had been inspected, evaluated and accepted as adequate. Marad informs us that its inability to predict exactly when it will obtain custody of a foreclosed vessel, as well as the requirements of insurance underwriters, mandate that it only accept bids from firms with existing approved facilities. According to the agency, it would not be practicable to inspect and evaluate each prospective contractor's facility after a vessel needing custodial services had been acquired. Consequently, we do not think that Marad's establishment of a well-publicized prequalification procedure was unreasonable under the circumstances. Further, we see nothing improper here with grounding that procedure on the requirement that a prospective contractor have an established storage facility. In this regard, we understand that if the protester or any other firm wishes to be included on Marad's list of prospective bidders for these contracts, it may do so by making its facility available for inspection. In view of the fact that Marad has 38 bidders qualified to perform these services, and because TLM has not convinced us that Marad's procedures are arbitrary or unreasonable, we have no basis to interfere with the protested procurement merely because one firm does not find the procedures suitable.

The protest is denied in part and dismissed in part.


Harry R. Van Cleve
General Counsel

^{2/} Our Office has approved under appropriate circumstances the use of similar prequalification procedures by agencies subject to the FAR and the general procurement statutes. See Carolina Drylocks, Inc., B-218186.2, June 3, 1985, 85-1 CPD ¶ 629.