



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Abel Converting Company
File: B-229065
Date: January 15, 1988

DIGEST

Under Competition in Contracting Act of 1984, agency is required to make a diligent good faith effort to comply with the statutory and regulatory requirements regarding notice and distribution of solicitation materials. Because the agency's effort to comply with those requirements was flawed in that the agency failed to solicit an incumbent and therefore it received only one bid on many of the line items solicited, the General Accounting Office recommends that the agency resolicit those line items under which single bids were received.

DECISION

Abel Converting Company, an incumbent contractor, protests its exclusion from bidding under invitation for bids (IFB) No. 7PRT-53157/K3/75B, issued by the General Services Administration (GSA) on July 27, 1987. The IFB requested bids for 33 line items of paper towel products.

We sustain the protest.

The protester has been an active bidder for these items since 1985. Abel states that in late 1984 or early 1985, and again in mid-1986, it submitted applications to GSA to be included on its Automated Bidders Mailing List. Despite GSA's inability to locate evidence of these requests, Abel states that it regularly received solicitation packages through June 1987. Abel states that it submitted eight to ten bids and two "no bids" in response to these solicitations. Abel is the current contractor for many of the items which are the subject of the protested solicitation.

The instant procurement was synopsisized in the Commerce Business Daily (CBD) on June 8, approximately 6 months prior to the expiration of Abel's current contract. It announced

a preinvitation notice date of "on or about" June 5, an issuance date of "on or about" July 1, and an opening date of "on or about" August 3. In fact, issuance occurred on June 27 and bids were opened August 28--with more than 5 months remaining on Abel's contract. Abel was not sent a solicitation, and GSA admits that the protester was neither on the automated list nor the contracting activity's "local" mailing list for 1987.

GSA argues that, although it inadvertently omitted sending Abel a copy of the solicitation, the procurement should not be disturbed because the agency in fact obtained full and open competition. The agency states that Abel had constructive knowledge of the procurement because of the CBD notice and should have protected its interests by requesting a copy of the solicitation.^{1/} In this regard, GSA maintains that it made a significant effort to obtain competition by publishing the CBD notice and by sending copies of the solicitation to 85 potential offerors. As a result the agency points out that it received six bids in response to the solicitation: a minimum of two bids on 19 of the solicitation items and a single bid on the remaining 14 items. Although it has yet to make award, the agency considers all the prices received reasonable as they are close to those bid under the solicitation which resulted in the current contract. Hence, GSA concludes that it satisfied its obligation to obtain full and open competition by making a good faith effort to solicit offerors and by, in fact, obtaining reasonable prices.

Under the Competition in Contracting Act (CICA) of 1984, agencies are required, when procuring property or services, to obtain full and open competition through the use of

^{1/} GSA argues that the protest is untimely because Abel was on constructive notice of the CBD announcement and its contents at the time the notice was published in June and did not protest prior to bid opening. Our rules require protests of patent IFB defects to be filed prior to bid opening. See 4 C.F.R. § 21.2(a)(1) (1987). However, the issue here is not whether the IFB was defective, but whether the agency improperly failed to send the protester a copy of the solicitation. Such an issue need be protested not prior to bid opening, but, under 4 C.F.R. § 21.2(a)(2), within 10 days of when the protester knows of this basis for protest. See Aluminum Co. of America, B-227139, July 21, 1987, 87-2 CPD ¶ 72. Indeed, GSA itself has recognized the applicability of the 10-day rule to the type of issue raised here. See Packaging Corp. of America, B-225823, July 20, 1987, 87-2 CPD ¶ 65. Under the timeliness rule applied in the two cited cases, the protest here is timely.

competitive procedures. 41 U.S.C. § 253(a)(1)(A) (Supp. III 1985). "Full and open competition" is obtained when "all responsible sources are permitted to submit sealed bids or competitive proposals." Id. §§ 259(c) and 403(7). The term has been further explained in the legislative history of CICA as meaning "all qualified vendors are allowed and encouraged to submit offers . . . and a sufficient number of offers is received to ensure that the government's requirements are filled at the lowest possible cost." H.R. Rep. No. 98-1157, 98th Cong., 2d Sess. 17 (1984). Accordingly, we give careful scrutiny to an allegation that a firm has not been provided an opportunity to compete for a particular contract. Keener Mfg. Co., B-225435, Feb. 24, 1987, 87-1 CPD ¶ 208. In this regard, we will consider that the agency has met its obligation if it can show that it made a diligent good faith effort to comply with the statutory and regulatory requirements regarding notice and distribution of solicitation materials and it obtains reasonable prices. Id.; Packaging Corp. of America, B-225823, July 20, 1987, 87-2 CPD ¶ 65.

Whether an agency's efforts in this regard are sufficient in light of the applicable statutory and regulatory requirements depends upon the facts and circumstances of each case. Significant deficiencies on the part of the agency that contribute to a firm's failure to receive a solicitation will result in our sustaining a protest. We have recognized, however, that a firm's failure to receive solicitation materials will not always warrant disturbing the procurement. See NRC Data Systems, 65 Comp. Gen. 735 (1986), 86-2 CPD ¶ 84, where we held that when the agency receives a sufficient number of offers, an agency's failure to solicit an incumbent under circumstances indicating that the agency's mistake was inadvertent does not violate CICA.

We think the circumstances of this case warrant sustaining the protest. First, the agency did not comply with the regulatory requirements concerning the mailing of solicitations to prospective bidders. The Federal Acquisition Regulation (FAR) provides that solicitation mailing lists are to be maintained by contracting activities, that the lists are to include those considered capable of filling agency requirements, and that solicitations normally are to be sent to those on the lists. FAR, 48 C.F.R. §§ 14.203-1, 14.205-1 (1986). Although the FAR permits agencies to rotate the names on a list so that not all those on an excessively lengthy list need be solicited for every procurement, the regulation clearly provides that when agencies rotate names they must solicit the "previously successful bidder." 48 C.F.R. § 14.205-4(b). From this, we think it is apparent that contracting agencies are expected

to solicit their satisfactorily-performing incumbent contractors; in fact, we, the courts, and the General Services Administration Board of Contract Appeals have recognized that in light of these requirements the incumbent normally should expect to be solicited. See Trans World Maintenance, Inc., 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239; Packaging Corp. of America, supra; U.S. v. The Thorson Co., 806 F.2d 1061 (Fed. Cir. 1986).

Second, unlike cases such as NRC Data Systems, supra, where adequate competition was obtained, here GSA received only one bid for many of the items solicited. Thus, although Abel may have been on constructive notice of the procurement through the CBD notice, under the circumstances it appears that GSA's failure to solicit the protester contributed to the agency's failure to obtain full and open competition so as to assure itself of reasonable prices for all of the items.

Accordingly, since GSA has received multiple bids for 19 of the line items, we are recommending that GSA cancel the solicitation only as to the 14 items for which it received a single bid and resolicit those requirements using full and open competitive procedures. Since our sustaining the protest furthers the purpose of the statutory requirement for full and open competition, Abel should be reimbursed the costs of filing and pursuing this protest. Packaging Corp. of America, B-225823, supra. Abel should submit its claim for such costs directly to the contracting agency. Bid Protest Regulations, 4 C.F.R. § 21.6(f) (1987).

The protest is sustained.

for 
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of the United States