



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Milbar Corp.
File: B-232158
Date: November 23, 1988

DIGEST

Protest of agency's use of competitive negotiation rather than sealed bidding is denied where the agency obtained full and open competition under the solicitation and the protester has not shown that it was prejudiced.

DECISION

Milbar Corp. protests the General Services Administration's (GSA) use of competitive negotiation rather than sealed bidding to procure retaining ring pliers under request for proposals (RFP) No. FCEN-FR-A8024-N-8-2-88. Milbar also objects to the agency's decision to set aside only five of the 32 items exclusively for small business. We deny the protest.

The RFP contemplated the award of multiple indefinite quantity requirements contracts for 32 types of pliers (identified by National Stock Numbers). The contracts were to meet the needs of federal agencies using GSA as a supply source for the period December 1, 1988, or date of award, through November 30, 1990.

The RFP divided the first 21 items into five groups and provided for award to the low aggregate offeror for each group; Items 22 through 32 were to be awarded on an item-by-item basis. Items 22, 23, 25, 28 and 32 were set aside for small business.

The protester argues first that the agency was required by the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253 (Supp. IV 1986), to use sealed bidding procedures rather than competitive negotiation in conducting this procurement.

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Under CICA, agencies are required to obtain full and open competition and to use the competitive procedure or combination of competitive procedures best suited to the circumstances of the procurement. 41 U.S.C. § 253. Sealed bidding procedures are to be used if time permits, award is to be made on the basis of price and price-related factors, discussions are not necessary, and there is a reasonable expectation of receiving more than one sealed bid. 41 U.S.C. § 253; Federal Acquisition Regulation (FAR) § 6.401. If one of these factors is not present, the agency may solicit competitive proposals pursuant to negotiation procedures. Carter Chevrolet Agency, Inc., B-229679, Feb. 3, 1988, 88-1 CPD ¶ 107.

GSA explains that it did not solicit sealed bids under this solicitation since it did not anticipate bids from at least two responsible bidders on a significant number of the 32 items. The agency notes that although five firms participated in the most recent procurement for the pliers, conducted in 1986, only two firms--Milbar, which bid on 34 of 35 items in 1986, and Toolmate, which bid on 24--were expected to submit offers on more than a few items this time. The contracting officer reports that she expected to receive only one offer on nine of the 32 items. Furthermore, the contracting officer expected Toolmate to be financially capable of supplying only three of the items on which it bid. She therefore determined that the agency could not reasonably expect more than one bid on the vast majority of items and thus decided that the use of competitive negotiation was appropriate.

Milbar argues that it was inappropriate for the agency to consider Toolmate's responsibility in determining that there was not a reasonable expectation of receiving more than one bid on a number of the items.

It is true, as the protester argues, that neither the statute nor the regulations specify that the responsibility of prospective bidders is to be considered in determining if there is a reasonable expectation of receiving more than one bid for purposes of determining whether to use competitive negotiation. 41 U.S.C. § 253; FAR § 6.401. We do not, however, believe that this prevents the contracting officer from considering the capability of the prospective source or sources in making his determination. While the determination of which competitive procedure is appropriate must be based on the four criteria specified in the statute, it also involves the exercise of informed business judgment by the contracting officer. Essex Electro Engineers, Inc., 65 Comp. Gen. 242 (1986), 86-1 CPD ¶ 92. This, in our view, should consist of an assessment of whether the prospective

sources have a reasonable chance of receiving the award. It simply would not make sense to conclude that sealed bidding should be used in a situation where there is only one source that is realistically capable of producing the required product even though the contracting officer is aware of the existence of a willing, but obviously incapable source. Consequently, we agree with the agency that it may properly consider the capability or responsibility of a prospective source. We do not, however, agree that the record here supports the contracting officer's conclusion concerning Toolmate.

The contracting officer concluded that Toolmate could be expected to supply only three items, basically because the firm had been awarded only three items under an advertised solicitation for these items issued in 1986. In this regard, we note that Toolmate was awarded only three items in 1986 not because it was found responsible for no more than three items, as the agency report suggests, but rather because its bid was responsive for only three items. The preaward survey team did express reservations about the firm's financial status, recommending that Toolmate's performance be monitored; according to the contracting officer, however, performance has proved satisfactory.

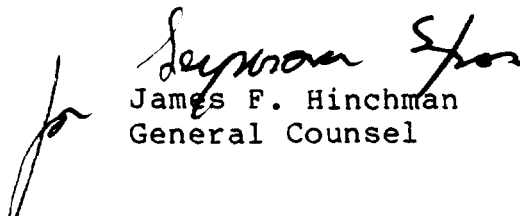
However, even if the contracting officer's conclusion as to the availability of competition is wrong, we do not find that competition was inhibited by the use of the RFP format. The RFP provided that award would be based on price, there was no requirement for the submission of technical or cost proposals and the agency has not indicated that discussions would be required. The record shows that several offers have been received, including one from the protester, and under the circumstances we see no indication--nor have the parties argued--that they would have bid any differently had the solicitation been issued as an invitation for bids. There is also no indication that any firms expected to participate were inhibited by the use of negotiations. Thus, in our view, the agency has obtained full and open competition under its solicitation.

The protester nevertheless argues that it is prejudiced in that under a negotiated procurement it will be required to submit cost or pricing data that its accounting system is not well-suited to provide. The regulations do not require the submission of cost or pricing data where the contracting officer determines that prices are based on adequate price competition, which is defined as the receipt of offers responsive to the solicitation's requirements from two or more responsible sources. FAR 15.804-3. In other words, if two or more offers are received from capable sources,

Milbar will not be required to submit cost or pricing data despite the fact that the solicitation is an RFP. Since adequate price competition is likely, we do not agree that Milbar was prejudiced by the agency's issuance of the solicitation as an RFP rather than an IFB. See Carter Chevrolet Agency, Inc., B-229679, supra.

Similarly, we do not see any useful purpose in considering the protester's second ground of protest--that the agency should have set aside an additional 17 items for small business--because the record shows that the protester was not prejudiced by the agency's failure to set aside the items in question. The abstract of offers received indicates that all timely offers for the 17 items in question were from small businesses; thus no large businesses are under consideration for award. Given this circumstance, we fail to see how the protester, as a small business offeror, was prejudiced by the agency's failure to set the items aside.

The protest is denied.



James F. Hinchman
General Counsel