MR. Benejam

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: United States Elevator Corporation

File: B-241772

Date: March 5, 1991

Kenneth A. Kopf, Esq., for the protester.
E.L. Harper, Department of Veterans Affairs, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Firm that provided required maintenance services for 5 years for elevators it manufactured and installed as subcontractor to prime construction contractor pursuant to a maintenance provision in prime contract is not the "incumbent contractor" which the agency was required to solicit for elevator maintenance services at the expiration of the 5-year period covered by the prime contract, where subcontractor had no privity of contract with agency and has never had a prime contract with agency for the required services.

2. Failure of agency to provide subcontractor with copy of solicitation for elevator maintenance services that subcontractor previously had supplied to agency pursuant to a maintenance provision in prime contract is not a basis for requiring agency to resolicit where agency did not deliberately exclude subcontractor from competition; the procurement was synopsized in the Commerce Business Daily; the agency made reasonable efforts to distribute the solicitation to firms that had performed the services in the past or had expressed interest in the procurement; and the subcontractor did not avail itself of every reasonable opportunity to obtain the solicitation even though it knew or should have known that the 5-year maintenance period covered by the prime contract was about to expire.

3. Contention that agency cannot determine that the price of the only responsive bid received is reasonable is without merit where the agency properly determined that when compared to the government's estimate and to prior contract prices for similar services, the bid was reasonable, and the bid was submitted under threat of competition.

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4. Protest that awardee of elevator maintenance services contract lacks experience with the equipment required to be maintained under the contract is a challenge to the contracting officer's affirmative determination of responsibility, which the General Accounting Office will not review absent a showing of possible bad faith or fraud on the part of procuring officials or that definitive responsibility criteria have not been met.

5. Whether awardee actually complies with its contractual obligations is a matter of contract administration which the General Accounting Office does not review under its bid protest function.

DECISION

United States Elevator Corporation (USEC) protests any award of a contract under invitation for bids (IFB) No. 629-13-90, issued by the Department of Veterans Affairs (VA) to provide elevator maintenance services at the VA Medical Center (VAMC), New Orleans, Louisiana. USEC argues that, although it had been providing the services required under the IFB for the past 5 years, the agency improperly failed to provide it with a copy of the solicitation, preventing it from competing under the IFB.

We deny the protest.

BACKGROUND

The agency states that the protester had been providing "warranty services" for five elevators that USEC manufactured and installed at the VAMC as a subcontractor to Blake Construction Company. Blake was the prime contractor for the construction of the wing of the VAMC where the USEC elevators required to be serviced under the IFB are located. According to the agency, the period covered by the warranty provision in Blake's contract expired in July 1990.

The IFB was synopsized in the Commerce Business Daily (CBD) on July 27, 1990; the synopsis stated that the IFB would be issued on August 15, with bid opening scheduled for September 14, and warned bidders that "requests for bid documents must be in writing." The IFB contemplated award of a firm, fixed-price contract for preventive and corrective maintenance services on the five USEC-manufactured elevators, and on one "Otis elevator," for a 1-year period, with up to four 1-year options. The agency sent copies of the IFB to seven firms: two firms for which the agency had a current Standard Form (SF) 129, "Solicitation Mailing List Application," on file; four firms which responded in writing to the CBD announcement; and Hollingsworth Elevator Services,

Inc., the firm that had been providing maintenance services on the Otis elevator identified in the IFB under a contract VA awarded to Hollingsworth in 1987. According to the agency, USEC never requested the IFB and the agency does not have an SF 129 for the firm on file.

Of the seven firms sent copies of the IFB, three firms responded by the scheduled bid opening date of September 14. Of those three, Elite Elevator Services, Inc. submitted a "no bid," and Hollingsworth's bid was rejected as nonresponsive. The contracting officer found that the only remaining bidder, Jewel Elevator Services, Inc., submitted a responsive, reasonably priced bid and, finding Jewel responsible, awarded the contract to that firm on October 5.1/

FAILURE TO SOLICIT USEC

Under the Competition in Contracting Act of 1984 (CICA), agencies are required, when procuring property or services, to obtain full and open competition through the use of competitive procedures. 41 U.S.C. § 253(a)(1)(A) (1988). "Full and open competition" is obtained when "all responsible sources are permitted to submit sealed bids or competitive proposals." 41 U.S.C. §§ 259(c) and 403(6). Accordingly, we give careful scrutiny to an allegation that a firm has not been provided an opportunity to compete for a particular contract. Rut's Moving & Delivery Serv. Inc., 67 Comp. Gen. 240 (1988), 88-1 CPD ¶ 139.

An agency generally can meet its obligation to obtain full and open competition 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. Keener Mfg. Co., B-225435, Feb. 24, 1987, 87-1 CPD ¶ 208. On the other hand, significant deficiencies on the part of the agency that contribute to a firm's failure to receive a solicitation may warrant sustaining a protest. Packaging Corp. of America, B-225823, July 20, 1987, 87-2 CPD ¶ 65. More specifically, a contracting agency is expected to solicit its satisfactorily performing incumbent contractors. Federal Acquisition Regulation (FAR) §§ 14.205-4(b), 15.403; Abel Converting Co., 67 Comp. Gen. 201 (1988), 88-1 CPD ¶ 40.

1/ On October 2, prior to the award to Jewel, USEC filed an agency-level protest alleging that it was improperly excluded from the competition and challenging the proposed awardee's qualifications to maintain the five USEC-manufactured elevators. The contracting officer denied USEC's protest by letter dated October 5.

In an effort to comply with the relevant statutory and regulatory requirements, the agency here synopsized the procurement in the CBD, inviting all interested firms to request in writing a copy of the IFB, and sent the IFB to seven firms that had either responded in writing to the CBD announcement (in accordance with the synopsis instructions), or for which the agency had a current SF 129 on file, including Hollingsworth, the incumbent contractor on the Otis elevator identified in the solicitation.

USEC argues that since it has been performing the identical services called for by the IFB as a subcontractor under Blake's prime construction contract, it qualifies as the incumbent contractor, and VA thus was required to solicit the firm.

The agency's position essentially is that, except for the contract awarded to Hollingsworth in 1987 for maintenance of the Otis elevator, the services required under the IFB are a new requirement, for which the agency has never awarded a contract to USEC or to any other firm. The agency distinguishes the "warranty services" USEC was providing to Blake from the preventive and maintenance services required under the IFB, arguing that since the protester was providing the services for the USEC-manufactured elevators under the "warranty service" provision of Blake's prime contract, and not under an elevator maintenance contract with VA, USEC is not the "incumbent contractor" which the agency was required to solicit for this procurement.

USEC asserts that notwithstanding that it did not have direct privity of contract with VA, it was in effect the "previously successful" performing elevator maintenance contractor," which the agency was required to solicit. The protester contends that by not recognizing USEC as the "incumbent contractor" the agency is placing form over substance, thereby avoiding its obligation to solicit the

firm under several decisions2/ and pursuant to various FAR provisions.3/

In support of its argument that it has been performing the identical services required under the IFB, and hence that the agency was required to solicit the firm as the "incumbent contractor," the protester provided our Office with a copy of what appears to be the "warranty provision" of Blake's contract, referred to by the agency, pursuant to which the protester was providing maintenance services on the five elevators USEC installed.4/ The protester also furnished us a copy of a "Stipulated Agreement and Settlement" dated March 1988, entered into by Blake, USEC, and VA, following an appeal

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2/ The protester cites United States v. Thorson Co., 806 F.2d 1061 (Fed. Cir. 1986) (affirming General Services Administration Board of Contract Appeals decision that agency had improperly failed to solicit incumbent); Abel Converting Co., 67 Comp. Gen. 201, supra; Bonneville Blue Print Supply, 67 Comp. Gen. 96 (1987), 87-2 CPD ¶ 492; Trans World Maint., Inc., 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239; and Packaging Corp. of America, B-225823, supra, for the proposition that agencies are generally required to solicit the incumbent contractor.

3/ USEC specifically points to FAR § 14.203-1 ("IFBs or presolicitation notices shall be mailed or delivered to prospective bidders"); FAR § 14.205-4(b) (whenever a [solicitation mailing] list is rotated, bids shall be solicited from the previously successful bidder); and FAR § 14.205-1(b) (all eligible and qualified concerns that have submitted [an SF 129] or that the contracting office considers capable of filling the requirements shall be placed on the appropriate solicitation mailing list).

4/ The clause reads in pertinent part:

> "INSPECTIONS AND MAINTENANCE
>
> "A. Furnish complete maintenance and inspection service on entire elevator installation for a period of 5 years after completion and acceptance of the elevator installation by the Resident Engineer. This maintenance service shall begin concurrently with the guarantee. Maintenance work shall be performed by skilled elevator personnel directly employed and supervised by the same company that furnished and installed the elevator specified herein . . . ."

filed by Blake before the VA Board of Contract Appeals (VABCA), on behalf of USEC.5/

The relevant provisions of the settlement agreement state:

> "1. The [VA] agrees to release immediately to [Blake] and USEC [a lump sum] (which is denominated as [Blake's] and USEC's elevator warranty costs) from those monies designated for payment of elevator maintenance services under [Blake's contract] and currently being withheld from payment pending [Blake's] and USEC's performance of those services.
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> ". . . Further, [Blake] and USEC . . . warrant that the maintenance services under [Blake's contract] will be performed as therein required . . . . After the release of the above-referenced [sum], the remaining [sum] will be released in the form of monthly progress payments during the maintenance period." (Emphasis added.)

Whether USEC was the "incumbent contractor" which the agency was required to solicit for this procurement depends upon the protester's status vis-a-vis the procuring agency. The parties agree that USEC was performing maintenance services on the elevators identified in the IFB solely as a subcontractor to Blake; in fact, the protester concedes that USEC has never had a prime contract with the VA to perform the elevator maintenance services called for in the IFB. The settlement agreement entered into in response to the VABC appeal merely establishes the conditions under which the VA agreed to compensate Blake and USEC for the elevator services required under Blake's contract, and does not rise to the level of a prime contract between VA and USEC for elevator maintenance services. Accordingly, those provisions of the FAR that obligate the agency to solicit the "incumbent contractor" did not require solicitation of USEC. Cleveland Pneumatic Co., B-230316, July 6, 1988, 88-2 CPD ¶ 11 (failure of agency to solicit previous subcontractor for items it supplied to prime

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5/ Blake appealed the contracting officer's final decision to retain $225,887 from Blake's contract for elevator maintenance services. The pertinent portion of the appeal states:

> "Blake Construction Co., Inc. (hereinafter 'Appellant') on behalf of [USEC], appeals the Contracting Officer's Final Decision dated July 22, 1986, pursuant to the Contracts Disputes Act of 1978 . . . which is contained in Appellant's contract with the Agency . . . ."

contractor did not provide a basis for requiring agency to resolicit). The question remains whether the statutory requirement for the VA to obtain full and open competition and the FAR obligations for contracting officers to solicit "prospective bidders" (§ 14.203-1) or concerns the contracting office "considers capable of filling the requirements" (§ 14.205-1) imposed a duty to solicit USEC.

The protester argues that even though it had no privity of contract with VA, since its mechanics wearing "USEC" labels on their uniforms were servicing the elevators at VAMC for the past 5 consecutive years, and USEC continually interacted with VA officials during the VABCA litigation from October 1986 to November 1987, it had substantially more contact with VA than the ordinary subcontractor, which might have only occasional contact with the agency. Given the extent of its relationship with VAMC, the protester argues that it was unreasonable for the contracting office not to have known that USEC was providing the elevator maintenance services and not solicit the firm.

The contracting officer states, however, that Blake's prime contract was awarded, funded, and controlled by the VA Central Office. The VA maintains that as a consequence, until USEC filed its agency-level protest, the local contracting office was not aware that USEC was the firm providing maintenance services for the five USEC elevators identified in the IFB. We have no evidence that the agency's representation about its lack of actual knowledge is inaccurate. In addition, there are obligations on those wishing to do business with the government. Once the VA published notice of the procurement in the CBD, USEC, like other potential bidders, should have indicated its interest in competing and requested a copy of the IFB.6/ See Keener Mfg. Co., B-225435, supra. USEC failed to do so. Although the firm knew or should have known that the 5-year maintenance period covered by Blake's contract was about to expire, it made no inquiries as to the agency's plans for procuring the maintenance services following expiration of the 5-year period. Nor did USEC request a copy of the IFB or otherwise communicate with VA prior to bid opening. USEC simply did not avail itself of any reasonable opportunity to obtain the IFB.

6/ To the extent USEC argues that it was not on actual notice of the CBD announcement, publication of a procurement in the CBD constitutes constructive notice of the solicitation and its contents, even where the agency fails to send the protester a copy of the solicitation. Rut's Moving & Delivery Serv. Inc., 67 Comp. Gen. 240, supra.

USEC contends that it nonetheless should have been on the mailing list for this procurement because it was on the mailing list for the 1987 solicitation for elevator maintenance services. USEC states that VA removed the firm from the agency's mailing list after USEC failed to respond to the 1987 solicitation. The protester explains that since that solicitation was issued as a total small business set-aside, it did not respond because, as a large business and thus ineligible for award, any bid it submitted would have been rejected. While USEC states that it received a copy of the 1987 solicitation, it offers no basis for the assertion that it was actually on the VA mailing list or was removed from it after 1987.

The VA reports that its files do not contain a mailing list for the 1987 procurement, and that its mailing list for this procurement was based on SF 129s on file and specific written requests for the solicitation. Thus, the record does not establish that the VA improperly removed USEC from its mailing list, as USEC alleges, or even that USEC was on the list at all; rather, the VA used the information it did have in its files to determine to whom to send the IFB. What the record does establish is that USEC had not submitted an SF 129; did not respond to the 1987 solicitation; took no other action envisioned by FAR § 14.205-2 with respect to that solicitation;7/ and made no inquiries for 3 years as to future procurements for elevator maintenance services. Further, as stated above, even though USEC knew or should have known that its agreement to provide maintenance services under Blake's contract was about to expire, USEC failed to express any interest in competing in future procurements; again did not submit an SF 129 to the agency; and did not respond to the CBD notice.

Under the circumstances, we see no basis to object to the agency's failure to solicit USEC.

PRICE REASONABLENESS

USEC also alleges that because only three bids were received, including Elite's "no bid" and Hollingsworth's nonresponsive bid, neither of which could be considered, the contracting officer could not properly determine whether the only remaining bid, submitted by Jewel, was reasonably priced.

7/ While USEC correctly argues that since it is a large business, VA could not have properly considered a bid from the firm under the 1987 solicitation, nothing precluded the firm from carrying out the simple task of requesting that its name be placed or retained on the agency's mailing list for future procurements as contemplated by FAR § 14.205-2.

The agency responds that even if it receives less than three bids, FAR § 14.407-1(b) authorizes award if the contracting officer determines that the price offered is reasonable.

Regarding award of a contract where the agency obtains a limited number of bids, FAR § 14.407-1(b) states:

> "If less than three bids have been received, the contracting officer shall examine the situation to ascertain the reasons for the small number of responses. Award shall be made notwithstanding the limited number of bids." (Emphasis added.)

The FAR thus requires that award be made notwithstanding the limited number of bids received, if the contracting officer determines that the prospective contractor is responsible, and that the prices offered are reasonable. See FAR § 14.407-2. A determination concerning price reasonableness is a matter of administrative discretion which we will not question unless the determination is unreasonable or the protester demonstrates fraud or bad faith on the agency's part. Picker Int'l, Inc., B-232430, Dec. 12, 1988, 88-2 CPD ¶ 583. An agency properly may base a determination of price reasonableness upon comparisons with government's estimates, past procurement history, current market conditions, or any other relevant factors, including any which have been revealed in the bidding. See FAR §§ 14.407-2 and 15.805-2.

The protester does not allege that agency officials acted fraudulently or in bad faith, and our review of the record provides no basis to question the contracting officer's determination that Jewel's bid price was reasonable. A determination concerning the reasonableness of Jewel's price ($42,390) may be based solely on a comparison to the government's estimate ($57,000). Pipe, Inc., B-236461, Dec. 7, 1989, 89-2 CPD ¶ 526. Such a comparison here shows that Jewel's price was 26 percent below the government's estimate, providing a sufficient basis for the contracting officer's determination that Jewel's price was reasonable. See FAR § 15.805-2(e). The history of the procurement also reveals that a comparison of Jewel's price to Hollingsworth's contract price under the 1987 solicitation for similar services for seven different elevators ($47,100 for the base year, and $49,464 for the option period October 1, 1988 to September 30, 1989) supports the contracting officer's determination. See FAR § 15.805-2(b). Contrary to USEC's contention, the fact that only Jewel's bid could be considered does not invalidate the award in view of the fact that Jewel's price was properly determined to be reasonable and it was submitted under threat of competition. Bay Shipbuilding Corp., B-240301, Oct. 30, 1990.

AWARDEE'S RESPONSIBILITY

To the extent that USEC argues that Jewel lacks experience with the USEC-manufactured elevators, and that the awardee cannot comply with the requirements of the contract, by awarding Jewel the contract, the agency determined that Jewel was responsible. See FAR § 9.105-2(a)(1). Our Office will not review protests of affirmative determinations of responsibility absent a showing of possible bad faith or fraud on the part of procuring officials or that definitive responsibility criteria have not been met. Service & Sales, Inc., B-229602, Nov. 25, 1987, 87-2 CPD ¶ 525. Neither exception is alleged in this case. Whether Jewel actually performs the elevator maintenance services in accordance with the requirements of the contract involves a matter of contract administration which this Office does not review under its bid protest function. See 4 C.F.R. § 21.3(m)(1) (1990); Service & Sales, Inc., B-229602, supra.

The protest is denied.

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for James F. Hinchman
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