



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Custom Environmental Service, Inc.

File: B-242900

Date: June 18, 1991

Joel S. Rubinstein, Esq., Sadur, Pelland & Rubinstein, for the protester.
William E. Phillips for Custom Lawn Service, an interested party.
Kenneth R. Pakula, Esq., General Services Administration, for the agency.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency violated provisions of Federal Acquisition Regulation governing the distribution of amendments and caused the improper exclusion of the protester from the competition where (1) unreasonable actions by agency personnel resulted in the agency mailing an amendment setting a new bid opening date to the protester's former address, which in turn caused the protester to receive the amendment 1-hour prior to bid opening; (2) the protester did not fail to avail itself of a reasonable opportunity to obtain the amendment; and (3) only one responsive bid was submitted and four prospective bidders were eliminated from the competition because of the agency's actions.

DECISION

Custom Environmental Service, Inc. (CES) protests the proposed award of a contract to Custom Lawn Service (CLS) under invitation for bids (IFB) No. GS-11P-90-MJD-0052, 1/ issued by the General Services Administration (GSA), for landscape maintenance services for a 1-year base period and four yearly

1/ The solicitation was originally issued as IFB No. GS-11P-90-MJC-0052, for a firm, fixed-price contract. On September 27, 1990, amendment No. 5 changed the type of contract to an indefinite quantity contract. Amendment No. 8 modified the IFB number by changing the letter preceding the numbers "0052" from "C" to "D."

options. CES contends that GSA did not timely provide it with the amendment announcing the revised bid opening date, which caused CES to be eliminated from the competition.

We sustain the protest.

The IFB was issued on July 17, 1990, with an original bid opening date of August 21. Subsequent amendments extended the bid opening date to September 20. On September 7, CES filed a protest with our Office challenging the IFB's format as amended.^{2/} We denied CES' protest in Custom Envtl. Serv., Inc., B-241052, Jan. 15, 1991, 70 Comp. Gen. ____, 91-1 CPD ¶ 38.

On January 18, GSA issued amendment No. 8 announcing a new bid opening date of February 5 at 1:30 p.m. GSA posted the new date in its regional office bid room on both the weekly and the monthly bid opening schedules, and mailed a copy of the amendment to each of the 80 potential bidders named on the original bidders list, including CES, on January 22.

On February 5, CES phoned GSA's contract specialist^{3/} 1-hour before bid opening to say that CES had just received a misaddressed copy of amendment No. 8. CES requested a postponement of the bid opening--which according to the amendment was scheduled within the hour. The contract specialist told CES that she would look into the matter and call CES back. GSA reports that the contract specialist's first action after receiving CES' call was to look for the procurement clerk,^{4/} because the clerk could access amendment

^{2/} CES objected to the amended IFB pricing schedule that invited bids on a single percentage factor or net basis rather than soliciting prices for the multiple items of work.

^{3/} Two contract specialists have been assigned to the instant procurement. The first contract specialist served from the IFB's issuance in July 1990 until January 14, 1991 (the day before our decision resolved CES' protest), at which time the second (and current) contract specialist assumed the position.

^{4/} The procurement clerk sets up solicitation files and maintains and updates the computerized bidder's mailing list. The procurement clerk works with 22 contract specialists. The contract specialists prepare solicitations and amendments that they then pass on to the procurement clerk for mailing. The procurement clerk mails the documents using labels generated from the computer's mailing list. The procurement clerk retains a copy of each mailing (i.e., copies of the labels affixed to the envelopes) for inclusion in the appropriate contract file.

No. 8's mailing list on the computer. Unable to locate the procurement clerk, the contract specialist looked in the solicitation file seeking a copy of the amendment No. 8 mailing list. She only found copies of the mailing lists for the initial solicitation and amendment Nos. 1 through 7. Unable to find the amendment No. 8 mailing list, the contract specialist proceeded to the 1:30 p.m. bid opening, which she conducted as scheduled. She did not get back to CES prior to bid opening. Only two bids were received by bid opening, one of which was nonresponsive for failing to submit the required bid guarantee; only CLS' bid was responsive.

CES contends that GSA violated the Federal Acquisition Regulation (FAR) when it (1) failed to timely provide CES with a solicitation amendment setting the new bid opening date, and (2) refused to postpone bid opening after CES advised GSA of the amendment's late receipt before the scheduled opening.

The Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(a)(1)(A) (1988), requires contracting agencies to obtain full and open competition through the use of competitive procedures, the dual purpose of which is to ensure that a procurement is open to all responsible sources and to provide the government with the opportunity to receive fair and reasonable prices. North Santiam Paving Co., B-241062, Jan. 8, 1991, 91-1 CPD ¶ 18. In pursuit of these goals, it is a contracting agency's affirmative obligation to use reasonable methods, as required by the FAR, for the dissemination of solicitation documents, including amendments, to prospective competitors. Id.; FAR §§ 14.203-1, 14.205, 14.208.

FAR § 14.208 specifically requires all prospective contractors, who have been furnished IFBs, to be furnished copies of the amendments to the IFB. Concurrent with the agency's obligations in this regard, prospective contractors have the duty to avail themselves of reasonable opportunities to obtain solicitation documents. Fort Myer Constr. Corp., B-239611, Sept. 12, 1990, 90-2 CPD ¶ 200. Thus, a prospective contractor normally bears the risk of not receiving a solicitation amendment unless there is evidence (other than non-receipt by the protester) establishing that the agency failed to comply with the FAR requirements for notice and distribution of amendments, Shemya Constructors, 68 Comp. Gen. 213 (1989), 89-1 CPD ¶ 108, provided that the prospective contractor avails itself of reasonable opportunities to obtain the documents. EMSA Ltd. Partnership, B-237846, Mar. 23, 1990, 90-1 CPD ¶ 326; Western Roofing Serv., B-232666.4, Mar. 5, 1991, 70 Comp. Gen. ____, 91-1 CPD ¶ 242; Fort Myer Constr. Corp., B-239611, supra.

As discussed below, GSA's dissemination of amendment No. 8 failed to comply with applicable regulations governing the distribution of amendments. In our view, this failure, rather than CES' failure to affirmatively seek a copy of the amendment, caused CES' elimination from the competition.

According to GSA, its problems with the solicitation mailing list began when an attempt was made to change the contract type--from a fixed-price to an indefinite quantity--in its existing computer records,^{5/} just prior to issuing Amendment No. 8, which announced the revised bid opening date. Under GSA's method of identifying documents, this entailed changing the solicitation number. In making this change, the contract specialist canceled the original solicitation number in the computer. This had the effect of deleting the original bidders' mailing list from the computer's data base because of the peculiarities of the GSA computer software.^{6/}

The contract specialist prepared approximately 100 copies of amendment No. 8 for distribution and gave them to the procurement clerk for mailing late on Friday afternoon, January 18. On Tuesday morning, January 22,^{7/} the procurement clerk unsuccessfully tried to use the bidders' mailing list on the computer in order to generate mailing labels. This attempt was unsuccessful because the current mailing list had been deleted from the computer data base and no replacement had been entered. Unable to generate the mailing labels with the computer, and apparently in order to make an afternoon mail pick-up, the procurement clerk used the names and addresses on

^{5/} Amendment No. 5 changed the contract type from fixed price to indefinite quantity. However, GSA did not update its computer records when that amendment was issued to reflect this change.

^{6/} GSA reports that the contract specialist did not know that canceling the original solicitation number would delete the current updated bidders' list associated with the original solicitation number. There is no indication that the contract specialist mentioned her cancellation of the original solicitation number to the procurement clerk. The contract specialist should have made a copy of the current mailing list before she deleted the original solicitation number if she knew that such a change would destroy the current mailing list.

^{7/} Monday, January 21 was a federal holiday.

her copy of the amendment No. 1 mailing list^{8/} to manually type the labels. The procurement clerk apparently did not tell the contract specialist that the current mailing list had disappeared from the computer, nor did she obtain the current amendment No. 7 mailing list from the contract file or specialist. The result was a mailing list that used CES' former address and omitted the names and addresses of three other firms that had expressed interest in the procurement after the solicitation was issued and whose names first appear on the amendment No. 3 mailing list. Therefore, we find that GSA failed to comply with the FAR requirement that prospective bidders be supplied with amendments.

We think CES met its duty to avail itself of reasonable opportunities to obtain this amendment. The record shows that CES repeatedly contacted the first contract specialist prior to our January 15 decision on CES' protest and was told that GSA would issue an amendment establishing a new bid opening date after our Office issued its decision.^{9/} CES was not told to check the schedules in the GSA bid room, instead it was told that GSA would send it an amendment. Under the circumstances, we do not believe CES was obligated to specifically check with the agency in a 3-week period from issuance of our decision on its protest and the bid opening date.

Finally, we do not agree with GSA's assertion that the competition was sufficiently adequate so that there is no compelling reason to cancel the IFB and resolicit, notwithstanding its failure to properly distribute the amendment. Only one responsive bid was received and at least three other prospective bidders were eliminated from the bidding as a result of GSA's use of an obsolete mailing list. When so few firms participate in a competition, the absence of even one responsible bidder due to the agency's regulatory violation so diminishes the level of competition that a compelling reason to resolicit the requirement is

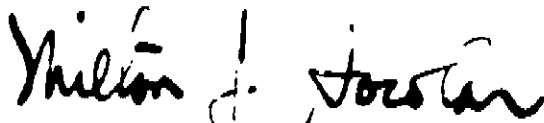
^{8/} The procurement clerk had earlier given the mailing lists for amendment Nos. 2 through 7 to the contract specialist, but had retained a copy of the mailing list for amendment No. 1.

^{9/} The parties have submitted conflicting affidavits as to whether CES contacted the first contract specialist after January 15 regarding the status of the procurement. There is no evidence that CES was apprised that a new contract specialist was now responsible for the procurement. Also, the parties have submitted inconclusive conflicting affidavits as to whether GSA technical personnel may have apprised CES of amendment No. 8 or the new bid opening date.

established. See Trans World Maintenance, Inc., 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239; Abel Converting, Inc. v. United States, 679 F. Supp. 1133 (D.D.C. 1988).

The protest is sustained.

We recommend that GSA cancel the IFB and resolicit. CES is also entitled to the costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1991).



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