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P. Williams



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Republic Floors, Inc.

File: B-242962

Date: June 18, 1991

Phil B. Hammond, Esq., Hammond & Tellier, for the protester.
R. W. Jones for Jones Floor Covering, Inc., an interested party.

Craig E. Hodge, Esq., and Michael I. Stump, Esq., Department of the Army, for the agency.

Paula A. Williams, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency failed to send the protester two material solicitation amendments in violation of applicable regulatory requirement governing the dissemination of solicitation materials, and the record shows significant deficiencies in the contracting agency's procedures in sending out solicitation amendments which contributed to the protester's exclusion from the competition and resulted in the receipt of only two responsive bids, the protester was improperly excluded from the competition in violation of the Competition in Contracting Act of 1984, which requires "full and open" competition.

DECISION

Republic Floors, Inc. protests the rejection of its bid as nonresponsive and the award of a contract to Jones Floor Covering, Inc. under invitation for bids (IFB) No. DAAG60-91-B-0008, issued by the Department of the Army for replacing sheet vinyl floor covering. The Army rejected Republic's bid because the firm failed to acknowledge and complete two amendments to the IFB. Republic contends that the agency's failure to send Republic the amendments prevented the protester from furnishing the required amendment information.

We sustain the protest.

The Army synopsisized the requirement in the Commerce Business Daily (CBD) on October 29, 1990, and invited interested parties to submit written requests for the bid documents. The

IFB was issued on November 23, with a December 27 bid opening date, and copies were mailed to 31 interested parties who were either on a bidders mailing list (BML) or had submitted a written request for the bid package. On December 6, the Army issued amendment No. 0001 to the solicitation which included the certificate of procurement integrity that bidders were required to complete and return with their bids. This amendment package was mailed to 29 interested parties, including Jones, who were on the BML as of that date. According to a declaration signed by the Army's contract specialist, although she had received a written request from Republic for the bid documents and had mailed a solicitation package to Republic, she inadvertently failed to enter Republic's name or address on the BML; thus, the amendment was never sent to the protester. Allied Painting and Decorating and Meris Construction Corp., two other firms that responded by the bid opening date, were also not placed on the BML and this amendment was not mailed to these firms.

Amendment No. 0002, issued on December 17, incorporated a liquidated damages clause into the solicitation and was mailed to 33 interested parties who were on the BML as of that date. Although Jones, the awardee, was on the BML as of the date of issuance of the second amendment, it apparently had not received this amendment as of December 21. On that date, Jones telephoned the contracting agency to confirm that only one amendment had been issued, learned of the issuance of amendment No. 0002, and requested and received a copy by facsimile transmission. Republic, Allied and Meris were still not listed on the BML and again were not furnished copies of the amendment by the Army.^{1/} Neither amendment changed the scheduled December 27 bid opening date.

Four firms submitted bids by the scheduled bid opening date. Of those four, only two--Jones and Allied--acknowledged receipt of both amendments and returned executed certificates of procurement integrity. Republic was the apparent low

^{1/} During the pendency of this protest and in response to an inquiry from the contracting agency, Allied indicated that it received amendment No. 0001 on December 17 and amendment No. 0002 on December 24, but does not state how it obtained copies of either amendments. In this regard, the Army reports that Allied received neither the bid package nor the amendments from the agency.

Meris acknowledged receiving both amendments prior to December 27 but noted that it had not kept a record of the dates of actual receipt. Meris also did not identify the source through which it received the amendments.

bidder at \$231,935, but it failed to acknowledge either amendment and did not include a signed certificate of procurement integrity. Since the amendments were material, the Army rejected Republic's bid as nonresponsive and made award to Jones, the second low, responsive, responsible bidder for \$245,474.75. Performance of the contract has been suspended pending our decision.

Republic protests that it was improperly excluded from the competition as a result of flaws in the Army's conduct of the procurement, which frustrated the mandate of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(1)(A) (1988), that contracting agencies obtain full and open competition through the use of competitive procedures.

The Army explains that its failure to add Republic's name to the BML and to send the amendments to the protester was an inadvertent mistake and not a deliberate attempt to exclude the firm from the competition. The agency attributes this mistake to the inexperience of the contract specialist who started working in the particular procurement office only 22 days prior to the issuance of the CBD announcement. Further, the agency argues that since the protester did not avail itself of every reasonable opportunity to obtain the amendments prior to bid opening, and the agency was not on notice of Republic's nonreceipt of the amendments prior to bid opening, the protester must bear the risk of nonreceipt. Finally, the agency asserts that the contract was properly awarded to Jones since adequate competition was achieved and reasonable prices obtained.

To meet its obligation under CICA to obtain full and open competition an agency must use reasonable methods to disseminate solicitation materials to prospective competitors. See North Santiam Paving Co., B-241062, Jan. 8, 1991, 91-1 CPD ¶ 18. In particular, the contracting agency is required by regulation to add to the BML all firms that have been furnished IFBs in response to their requests so that they will be furnished copies of any amendments unless it is known that the request was made by an entity which is not a prospective bidder. Id., FAR § 14.205-1(c). Concurrent with the agency's obligations in this regard, prospective contractors have an obligation to avail themselves of reasonable opportunities to obtain solicitation documents, particularly in a sealed bid procurement. 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 availed 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, 91-1 CPD ¶ 242; Fort Myer Constr., Corp., B-239611, supra.

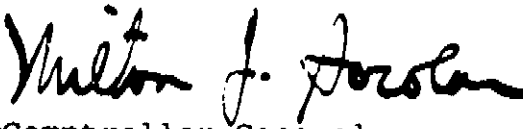
As noted above, the FAR requires that the names of prospective bidders who are furnished invitations in response to their request be added to the BML so that they will be sent copies of any solicitation amendments. FAR § 14.205-1(c); Essex Electro Eng'rs, Inc., B-234089.2, Mar. 6, 1990, 90-1 CPD ¶ 253. Here, the Army admits that it failed to comply with this regulatory requirement. The agency sent the IFB to all interested firms that had either responded in writing to the CBO announcement or which the agency had on its BML, but there is no evidence that the agency made any attempt to ensure that those firms were included on the BML for either amendment. The record shows that of the 31 firms that were sent the IFB, 8, including the protester, were not on the BML for either amendment. In addition, Jones, whose name appeared on the BML at all relevant times, apparently did not receive a copy of amendment No. 0002 in the normal course of events. The agency's position essentially is that the final responsibility rests with the protester to ensure that it received all solicitation amendments in a timely manner. We disagree

Republic could have contacted the agency during the period between the issuance of amendment No. 0001 and the bid opening date to confirm that it had received all documents pertaining to this solicitation. We do not believe, however, that prospective contractors are obligated to telephone agencies whenever there is a 3-week period between the last amendment they receive and bid opening. In this case, we find that the agency's deficiencies in disseminating the bid materials, not a failure by the protester to avail itself of a reasonable opportunity to obtain the materials, resulted in the failure of the protester and other bidders to receive the amendments, and warrant sustaining the protest.

As a result of the agency's actions, of the four bids which were received, only two were responsive. Where so few firms participate in a competition, the absence of even one responsible firm due to the agency's regulatory violation so diminishes the level of competition and undermines the CICA mandate for full and open competition that a compelling reason to resolicit the requirement is established. See Trans World Maintenance, Inc., 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239; Able Converting, Inc. v. United States, 679 F Supp. 1133 (D.D.C. 1988). Accordingly, we believe that the appropriate remedy is for the agency to terminate Jones' contract and resolicit the requirement, giving all responsible

sources a fair opportunity to compete on the resolicitation. We also find that Republic is entitled to be reimbursed its protest costs, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1991).

The protest is sustained.


Acting Comptroller General
of the United States