145604

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Fabricacion Especial De Maquinaria, S.A.

File: B-245792

Date: January 8, 1992

Felix Martin Perez for the protester.
Howard M. Kaufer, Esq., Defense Fuel Supply Center, for the agency.
Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency has no obligation to exercise an option in an existing contract.

2. Firm that transported government-owned fuel under Air Force service contract is not "incumbent contractor" which the Defense Logistics Agency (DLA) is required to solicit when DLA issues a request for proposals for a fuel supply requirement, even though performance of DLA's contract will involve some of the fuel transportation requirements that the firm previously performed under the Air Force contract.

DECISION

Fabricacion Especial de Maquinaria, S.A. (FEMA) protests that the Defense Logistics Agency (DLA) improperly failed to provide it with a copy of request for proposals (RFP) No. DLA600-91-R-0089 for the supply of diesel fuel oil to Zaragoza Air Base, Moron Air Base and Torrejon Air Base in Spain. The protester also objects to the Department of the Air Force's failure to exercise its option for a fuel delivery contract for one of the air bases covered under the RFP. We dismiss the protest in part and deny the protest in part.

In December 1989, the Air Force awarded a requirements contract, No. F61308-90-DV003, to FEMA to transport and deliver government-owned fuel to Torrejon Air Base in Spain from nearby storage tanks. The contract had a base period from January to September 1990, and included options for the following 2 years. FEMA successfully performed the base period, and the Air Force exercised the first option. At

the time the contract was initially awarded, the three air bases were obtaining heating fuel under an exchange agreement from bulk storage tanks that the government was leasing for this purpose. These storage tanks became unavailable, and the bases then needed to have contractors supply and deliver fuel directly to the bases.

As a result of the air bases' need for a replacement source of fuel, in January 1991, the Defense Fuel Supply Center (DFSC), a field activity of DLA which purchases fuel on a worldwide basis for the military services, published a requirement in the Commerce Business Daily (CBD) for the supply of diesel fuel oil to the three air bases in Spain, with a delivery period from July 1991 through June 1992. In February, it issued RFP No. DLA600-91-R-0089 for the heating fuel requirement. Using a source list that had been compiled from all known firms with refineries in Spain and various international oil companies, DFSC sent the RFP to 19 firms. It also posted a notice of the solicitation on the bulletin board in the contracting office.

DLA received only one offer by the March 1991 closing date, from CIA, Espanola de Petroleos, S.A. (CEPSA). CEPSA offered to supply a product called Gasoil A, which the agency determined would satisfactorily meet its requirements. The agency found that the offered price was fair and reasonable based on recent competition for a similar diesel fuel, and awarded CEPSA the contract on June 13, 1991. While CEPSA apparently began performing the contract in June, it was not until October 1, after FEMA's option was not exercised by the Air Force and the government-owned fuel was no longer available, that CEPSA began deliveries to Torrejon Air Base.

First, FEMA argues that it was improper for the agency to issue a new solicitation for the fuel requirement, rather than exercising the second 1-year option under FEMA's contract with the Air Force. FEMA's objection to the failure of the Air Force to exercise its option under FEMA's contract results from a lack of communication between the government and FEMA as to the agency's actions. FEMA complains that "here we have a government agency that opens a solicitation and awards a contract for a service that another agency has under contract." To FEMA, a successfully performing contractor, DLA's actions appeared to have unreasonably interfered with the remaining requirements under FEMA's contract with the Air Force and with the Air Force's exercise of the remaining option under that contract. While the government's lack of communication with FEMA may have created this unfortunate impression, the record nonetheless demonstrates that the Air Force did not exercise the option under FEMA's contract because their needs had changed and FEMA's contract no longer met

its needs. The agency's decision to not exercise the option therefore appears reasonable. In any event, we point out that as a legal matter, a contractor has no right to compel the exercise of a contract option, which is exercised solely at the discretion of the government, see Xperts, Inc.--Recon., B-244761.2, Sept. 6, 1991, 91-2 CPD ¶ 215; Jantec, Inc., B-243192, Mar. 14, 1991, 91-1 CPD ¶ 289. Regarding the charge that DLA's new solicitation overlapped with FEMA's Air Force contract and interfered with the remaining term of that contract, the record indicates that DLA delayed performance under its contract until after FEMA's contract had expired. This portion of the protest is dismissed.

FEMA also argues that it was the incumbent contractor for this requirement, and that DLA was required to send it a copy of the solicitation for the follow-on procurement.

Under the Competition in Contracting Act of 1984, agencies are required, when procuring property or services, to obtain full and open competition through the use of competitive procedures. 10 U.S.C. § 2301(a)(1) (1988). "Full and open competition" is obtained when "all responsible sources are permitted to submit sealed bids or competitive proposals." 10 U.S.C. § 2302(3) and 41 U.S.C. § 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. As FEMA points out, 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.

While we recognize that, based on its current successful performance of the Air Force contract, FEMA reasonably could view itself as the incumbent for the requirements solicited by DLA, the record shows that the solicitation is a first-time acquisition for DLA based on new requirements. The new procurement involves the purchase and supply of fuel and the delivery of that fuel to three bases, including one location to which the protester had been delivering government-owned fuel. In preparing its bidder's list, DLA sought firms with both fuel supply and delivery capabilities, and thus compiled its source list for this acquisition from firms with refineries in Spain and international oil companies who

could supply and deliver fuel to the bases. The record does not suggest that DLA considered FEMA to be qualified to bid on the new requirement. The agency states, and FEMA does not rebut, that FEMA is a fuel distribution company performing transportation and delivery services, not a refiner or supplier of oil. Accordingly, based on the record, we agree with DLA that FEMA was not the incumbent on this solicitation and that those provisions of the FAR that obligate the agency to solicit the "incumbent contractor" did not require solicitation of FEMA.

The remaining question is whether or not the statutory requirement for DLA to obtain full and open competition and the FAR obligations for contracting officers to solicit "prospective bidders" (section 14.203-1) or concerns that the contracting officer "considers capable of filling the requirements" (section 14.205-1) imposed a duty to solicit FEMA. For essentially the same reasons we concluded that FEMA is not an incumbent, we also conclude that DLA did not improperly fail to solicit FEMA.

As stated above, it is undisputed that FEMA is a distribution company, not a refiner or supplier of petroleum. DLA's solicitation, however, was not restricted to the delivery of the required fuel, but included the supply of the fuel as well as its transportation. DLA states that it developed its source list from a list of firms with refineries in Spain, and international oil companies. There is no reason to expect that DLA knew or should have known that FEMA was qualified to supply fuel, since there was no evidence to suggest it was anything other than a distributor.

The protest is dismissed in part and denied in part.

for James F. Hinchman
General Counsel