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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pratt & Lambert, Inc.

File: B-245537; B-245538

Date: January 9, 1991

Harry R. Silver, Esq., Davis Wright Tremaine, for the protester.
William E. Hughes III, Esq., Whyte & Hirschboeck, for Hentzen Coatings, Inc., an interested party.
Robert C. Mackichan, Jr., Esq., and Margaret A. Dillenburg, Esq., General Services Administration, for the agency.
Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency failed to comply with statutory and regulatory requirements regarding notice and distribution of solicitation materials by failing to solicit an incumbent, and received only one bid, agency properly determined to cancel the solicitation, correct its mailing deficiencies and resolicit.

DECISION

Pratt & Lambert, Inc. protests the cancellation of invitation for bids (IFB) No. TFTP-91-2J-8055 (IFB 8055), issued by the General Services Administration (GSA) for various colors of polyurethane coatings for use as camouflage paint on military ground combat vehicles, and the resolicitation of that requirement under IFB No. TFTP-91-2J-8055R (IFB 8055R). Pratt & Lambert was the only bidder under IFB 8055. GSA canceled that IFB because the incumbent, Hentzen Coatings, Inc. was not provided a copy of the solicitation.

We deny the protests.

The canceled solicitation was synopsisized in the Commerce Business Daily (CBD) on May 23, 1991, approximately 6 months prior to the expiration of Hentzen Coatings' current contract. The IFB, issued on June 21, sought bids for the

polyurethane coatings on a requirements basis for the term beginning December 1, 1991, or the date of award, through November 30, 1993. Bid opening was set for July 23, 1991.

GSA maintains a Qualified Products List (QPL) for these polyurethane coatings; the products of five firms, which have been tested for compliance with government specifications, are included on the list. Additionally, the agency maintains a Centralized Mailing List of firms which have applied to be listed and which are routinely sent solicitations, and a "hand list" comprised of firms which have specifically requested a copy of the solicitation following CBD publication and QPL firms not already on the Centralized Mailing List. GSA generally mails solicitations to firms on the Centralized Mailing List and on the hand list.

In this case, GSA mailed copies of the solicitation to 493 prospective bidders listed on the Centralized Mailing List and the hand list. Because Hentzen Coatings was not included on the Centralized Mailing List and was inadvertently omitted from the hand list, it was not mailed a solicitation.

Pratt & Lambert submitted the only bid received by the July 23 bid opening date. Upon learning that only one bid had been received, and that no bid was submitted from the incumbent, GSA examined its mailing lists and discovered that Hentzen Coatings had not been included on either the Centralized Mailing List or the hand list. At approximately the same time, Hentzen Coatings learned that its name had been inadvertently omitted from the solicitation mailing list and that bids had been opened. On August 2, Hentzen Coatings protested to the agency, arguing that GSA's failure to solicit it had resulted in the agency's failure to obtain full and open competition.

On August 8, GSA determined that its failure to solicit Hentzen Coatings contributed to a failure to obtain full and open competition. Accordingly, GSA canceled IFB 8055, corrected its hand list of prospective bidders to include Hentzen Coatings, and resolicited under IFB 8055R. By letter dated September 5, Pratt & Lambert protested to our Office the cancellation of IFB 8055 and the resolicitation under IFB 8055R.

Pratt & Lambert argues that the agency's failure to solicit the incumbent contractor does not provide a compelling reason for resolicitation after bid prices have been revealed. Moreover, the protester asserts that while Federal Acquisition Regulation (FAR) § 14.404-1(c)(6) authorizes an agency to cancel a solicitation after bid opening where "only one bid is received," it may cancel only

if "the contracting officer cannot determine the reasonableness of the bid price," Pratt & Lambert contends that the agency, by its own admission, can determine price reasonableness.¹ Pratt & Lambert also argues that, since a synopsis of the solicitation was published in the CBD, Hentzen Coatings was on constructive notice of the solicitation and that its failure to see the notice was due to its own failure to use prudent business practices.

Pratt & Lambert also argues that the GSA decision to cancel was made in bad faith. Pratt & Lambert points to alleged discrepancies in the record concerning the timing of the agency's actions, and, in particular, the fact that the agency's Determination and Findings was signed by the contracting officer and the contracting specialist before Hentzen Coatings even protested to the agency. Pratt & Lambert suggests that "the protest had been granted before it had been filed"

The FAR provides that after bid opening, award must be made to the responsible bidder with the lowest, responsive bid, unless there is a compelling reason to reject all bids and cancel the solicitation. FAR § 14.404-1(a)(1). Whether the circumstances warrant cancellation is for the determination of the contracting officer, who has broad discretion to cancel a solicitation. Total Protech, Inc., B-233264, Feb. 28, 1989, 89-1 CPD ¶ 211.

Here, GSA determined that the requirement of "full and open competition" enunciated in the Competition in Contracting Act of 1984, 41 U.S.C. § 253(a)(1)(A) (1988), dictated cancellation of the IFB and resolicitation to include the incumbent. In this regard, the agency relied on our decision, Abel Converting Co., 67 Comp. Gen. 201 (1988), 88-1 CPD ¶ 40, in which GSA failed to solicit the incumbent contractor and our Office recommended that GSA cancel the solicitation as to 14 items for which it received a single

¹The protester is basing this assertion on the agency's Determination and Findings to resolicit which states "it would be possible to construct a price analysis which demonstrates the reasonableness of the prices received from the sole bidder"

bid and resolicit those requirements using full and open competitive procedures.² Pratt & Lambert argues that Abel is inapposite because, in this instance, bids have been opened and bid prices revealed.

Pratt & Lambert misconstrues the Abel decision. First, in Abel bids were opened and prices, therefore, publicly revealed. Moreover, the agency considered "all the prices received reasonable," but because the agency failed to solicit the incumbent, coupled with the fact that only one bid was received, there was a lack of full and open competition which caused our Office to recommend cancellation and resolicitation.

The fact pattern in Abel is identical to that here. As in Abel, GSA did not follow applicable procurement regulations requiring solicitation of incumbents and, as a result, received only one bid. The FAR provides that solicitation mailing lists are to be maintained by contracting activities, that lists are to include those considered capable of filling agency requirements, and that solicitations normally are to be sent to those on the lists. FAR §§ 14.203-1 and 14.205-1. Although the FAR permits agencies to rotate names on a list so that not all those on an excessively lengthy list need be solicited for every procurement, the regulation clearly provides that where agencies rotate names they must solicit the "previously successful bidder." FAR § 14.205-4(b). Thus, contracting agencies are expected to solicit their satisfactorily-performing incumbent contractors; in fact, we, the courts, and the General Services Administration Board of Contract Appeals have recognized that in light of these requirements, the incumbent should be solicited. See Trans World Maintenance, Inc., 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239; Packaging Corp. of Am., B-225823, July 20, 1987, 87-2 CPD ¶ 65; United States v. The Thorson Co., 806 F.2d 1061 (Fed. Cir. 1986).


Here, GSA failed to solicit the incumbent, and received only one bid. Although Hentzen Coatings may have been, as Pratt & Lambert argues, on constructive notice of the procurement through the CBD notice, under the circumstances, we believe that GSA reasonably concluded that its failure to solicit the incumbent caused the agency not to obtain full

²The protester in Abel appealed the General Accounting Office's decision to U.S. District Court, District of Columbia and the court ruled that the entire IFB should be recompeted. Abel Converting, Inc. v. United States, 579 F. Supp. 1133 (D.D.C. 1988).

and open competition. Accordingly, the contracting officer acted within his discretion to cancel IFB 8055 in order to take appropriate corrective action. Total Protech, Inc., supra.

Pratt & Lambert's argument that the agency acted in bad faith in canceling IFB 8055 and resoliciting the requirement is not supported by the record. To show bad faith, a protester must submit virtually irrefutable evidence that the contracting agency directed its actions with the specific and malicious intent to injure the protester. Custom Training Aids, Inc., B-241446.2, Feb. 12, 1991, 91-1 CPD ¶ 151. The protester has made no such showing here, since it is clear that the agency took appropriate corrective action irrespective of the date on which an agency-level protest was filed.

The protests are denied.


for James F. Hinchman
General Counsel