



Comptroller General
of the United States

Washington, D.C. 20548

Lebowitz
147738

Decision

Matter of: Kimber Guard & Patrol, Inc.

File: B-248920

Date: October 1, 1992

Odessa G. Kimber for the protester.

Amy J. Brown, Esq., General Services Administration, for the agency.

Linda S. Lebowitz, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency deprived the protester, the incumbent contractor, of the opportunity to compete for the agency's follow-on requirements because the agency did not provide the protester with a copy of the solicitation is sustained where the record shows that the agency omitted the protester from its solicitation mailing list, the protester had a reasonable expectation that it would be solicited, and the agency received only one bid.

DECISION

Kimber Guard & Patrol, Inc. protests the agency's failure to provide it with a copy of invitation for bids (IFB) No. GS-04P-92-EWC-0085, issued by the General Services Administration for guard services at the Federal Building/Post Office/Courthouse in Bryson City, North Carolina. The protester, the incumbent contractor, argues that it was deprived of the opportunity to compete for the agency's follow-on requirements because the agency failed to provide it with a copy of the solicitation.

We sustain the protest.

On January 30, 1992, the agency published a presolicitation notice in the Commerce Business Daily (CBD) announcing its intention to issue the above-referenced IFB. The notice stated that the base contract term would be for the period

of June 1, 1992 through, May 31, 1993, and that there would be four 1-year contract option periods.¹ The notice stated that bid opening would be held on April 3, 1992.

The IFB was issued on March 2, 1992. The agency mailed copies of the IFB to 31 of the 131 prospective bidders on its solicitation mailing list. Those firms on the mailing list receiving copies of the IFB either had responded to the presolicitation notice or were randomly selected from the mailing list to receive a copy of the IFB. The protester had not responded to the presolicitation notice and was not otherwise included as one of the 131 firms on the agency's solicitation mailing list.

Qualla Security Patrol submitted the only bid by the amended bid opening date of April 15. On May 13, the agency awarded a contract to Qualla. On May 21, the protester requested information from the agency concerning the continuation of the necessary services. By letter dated May 22, the contracting officer notified the protester that despite its "quality service" as the incumbent contractor, a contract for the agency's follow-on requirements had been awarded to Qualla. The contracting officer apologized for not providing the protester with a copy of the IFB and furnished the protester with a copy of the bid abstract. On June 2, the protester filed this protest.

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. "Full and open competition" is obtained where all responsible sources are permitted to submit sealed bids or competitive proposals. 41 U.S.C. § 403(6). In pursuit of this goal, it is a contracting agency's affirmative obligation to use reasonable methods for the dissemination of solicitation documents to prospective contractors. See Phillip Sitz Constr., B-245941, Jan. 22, 1992, 92-1 CPD ¶ 101.

The Federal Acquisition Regulation (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, 14.205-1, and 15.403. 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,

¹The protester's contract was to expire on May 31, 1992.

contracting agencies are expected to solicit their incumbent contractors; accordingly, our Office, the courts, and the General Services Administration Board of Contract Appeals (GSBCA) have recognized that in light of these requirements, the incumbent generally must be solicited. Pratt & Lambert, Inc., B-245537; B-245538, Jan. 9, 1992, 92-1 CPD ¶ 48; Abel Converting Co., 67 Comp. Gen. 201 (1988), 88-1 CPD ¶ 40; Abel Converting, Inc. v. United States, 679 F. Supp. 1133 (D.D.C. 1988); Dan's Moving & Storage, Inc., B-222431, May 28, 1986, 86-1 CPD ¶ 496; The Thorson Co., GSBCA No. 8185-P, 85-3 BCA ¶ 18, 516, 1985 BPD ¶ 118, aff'd, United States v. The Thorson Co., 806 F.2d 1061 (Fed. Cir. 1986).

Here, the record establishes that the agency failed to satisfy these requirements. The record shows that as the incumbent contractor, the protester provided above-average, quality service for 3 years and had a good business relationship with the agency. The agency admits that despite the protester's satisfactory performance as the incumbent contractor, it omitted the protester from its solicitation mailing list and did not provide the protester with a copy of the IFB for its follow-on requirements. While the agency states that this omission was inadvertent, we find that this omission resulted in the protester not learning that the agency was in the process of competing its follow-on requirements.

In addition to not soliciting the protester, the agency received only one bid. In a recent similar case, Professional Ambulance Inc., B-248474, Sept. 1, 1992, 92-2 CPD ¶ ___, where the incumbent contractor was not solicited and three proposals were received, we concluded, based on the opinion of the court in Abel Converting Inc. v. United States, supra at 1141, that the agency's failure to solicit the incumbent, with the result that an identified responsible source was prevented from competing where there was only a minimal level of competition, resulted in the failure to obtain full and open competition under the CICA. Here, the incumbent contractor was denied the opportunity to compete and only one bid was received.

In Professional Ambulance, supra, we also concluded, based on Abel Converting Co., supra, that where agency error prevents the incumbent from competing, it has effectively eliminated a benchmark against which to judge the current reasonable market price, and thus has lost the best assurance of obtaining a reasonable price. In this case, the agency basically determined that the awardee's price was

reasonable since it was lower than the prices previously received, including the price submitted by the protester under its prior contract. However, without having received any other current prices, including a price from the protester as the incumbent contractor, we believe the agency could not properly determine that it had obtained the lowest possible price and we will not speculate as to what the protester's price would have been if it had been afforded an opportunity to compete for the agency's follow-on requirements.

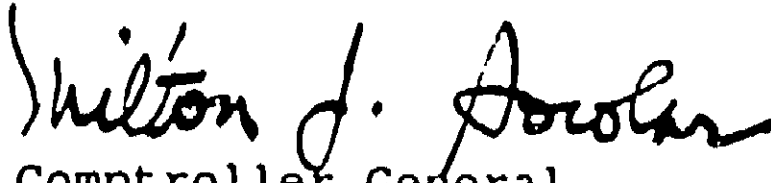
The agency also argues that its error did not deprive the protester of the opportunity to compete since the agency synopsisized its requirement in the CBD on January 30, 1992. Decisions of this Office and the courts have made clear that publication in the CBD is not sufficient notification to an incumbent which reasonably expects to be considered for the new contract and to receive a solicitation. Professional Ambulance Inc., supra; see United States v. The Thorson Co., supra; Abel Converting, Inc. v. United States, supra; Packaging Corp. of Am., B-225823, July 20, 1987, 87-2 CPD ¶ 65. Also, while the protester knew when its own contract was to expire, we believe that it had every reason to expect, particularly in light of its satisfactory performance as the incumbent contractor, that it would be solicited for the agency's follow-on requirements.

Finally, the agency argues that even if it had provided the protester with a copy of the IFB, the protester has not alleged in its protest that it would have submitted a bid for this procurement. We are not persuaded by this argument. There is nothing in the record to support the agency's speculation that the protester did not intend to submit a bid nor do we think that under these circumstances the protester was required to establish its intent to bid. Nonetheless, in its comments to the agency report, the protester states that it has been providing contracting services to the agency for 15 years and it therefore expected to receive an IFB for the agency's follow-on requirements. From these comments and the protester's pursuit of its protest, it is reasonable to assume that the protester would have submitted a bid for this procurement.

As a result of the agency's failure to solicit the protester and the fact that only one bid was received, we find that the CICA mandate for full and open competition was not met in this case. We therefore recommend that the agency resolicit its requirements, giving the protester the opportunity to compete. The award should then be made to

the low, responsive, responsible bidder. We also find that the protester is entitled to recover the costs it incurred in filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1992).

The protest is sustained.

for 
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