



Comptroller General
of the United States

759212

Washington, D.C. 20548

Decision

Matter of: Energy Management Systems
File: B-258391
Date: November 23, 1994

Tanya M. Davis for the protester.
Kathleen McCartney, Esq., General Services Administration,
for the agency.
Christine F. Davis, Esq., and Guy R. Pietrovito, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

An agency's failure to solicit the protester is unobjectionable where the agency did not violate applicable regulations governing the advertisement and dissemination of the solicitation or deliberately attempt to exclude the protester from the competition; rather, the protester failed to take reasonable measures to obtain a copy of the solicitation.

DECISION

Energy Management Systems (EMS) protests the award of a contract to Mid-Atlantic Service and Supply Corporation under invitation for bids (IFB) No. GS-11P-94-MQC-0050, issued by the General Services Administration (GSA), for the removal and replacement of solar film on the windows of the Office of Personnel Management building in Washington, D.C. EMS complains that GSA did not provide it a copy of the solicitation.

We deny the protest.

On June 29, 1994, GSA began advertising the procurement by sending pre-solicitation notices to the 29 vendors on its bidder's mailing list (BML) for solar energy systems. The pre-solicitation notice described the proposed solar film procurement and advised bidders that they would be on the mailing list for this procurement if they so requested. In addition, on July 1, GSA published a synopsis of the

¹Firms are included on the BML by sending GSA a Standard Form (SF) 129, "Solicitation Mailing List Application."

procurement in the Commerce Business Daily (CBD); the synopsis referred prospective bidders to the contracting officer as the agency contact for this procurement. Eighteen firms ultimately requested and received copies of the IFB, either by responding to the pre-solicitation notice or the CBD announcement.

GSA issued the IFB on July 20 and requested bids by August 12. An IFB amendment later extended the bid opening date to August 23. On that day, GSA received bids from two firms, a low bid of \$114,403 submitted by Mid-Atlantic and a bid of \$548,000 from another firm. GSA made award to Mid-Atlantic on August 25.

On August 29, EMS contacted the contracting officer for information about the instant procurement and learned that award had been made. The protester asked the contracting officer why it had not received a copy of the solicitation, and the contracting officer replied that EMS had not requested a copy, i.e., EMS did not respond to the CBD notice or submit an SF 129 for inclusion on the BML.

EMS does not dispute that it did not apply for inclusion on the BML, did not review the CBD for information relative to this procurement, and did not communicate its interest in the procurement to the contracting officer until after award had been made. However, the protester asserts that it did timely communicate its interest to the GSA project designer and budget estimator for this procurement. During May and June of 1994, the protester provided these individuals with budgetary and warranty information based upon a set of draft specifications. According to EMS, these individuals advised that a solicitation would be issued by early September and that EMS should expect to receive a copy. EMS states that, because of these assurances, "there was no need for [its] perusal of the CBD" or any further action on its part.

²The government estimate for these services was between \$100,000 and \$250,000.

³Initially, the contracting officer mistakenly advised EMS that he had mailed the firm a copy of the IFB, but corrected himself in a conversation 10 minutes later after consulting the solicitation mailing list. While the protester speculates, based upon the contracting officer's initial error, that someone may have removed EMS' name from the solicitation mailing list, there is no support for this proposition.

⁴GSA claims that EMS has mischaracterized its conversations with these individuals, who allegedly referred the protester to the CBD for further information about the procurement.

The Competition in Contracting Act of 1984, 41 U.S.C. § 253(a)(1)(A) (1988), requires contracting agencies to obtain full and open competition through the use of competitive procedures. Toward this end, contracting agencies must use reasonable methods to publicize their procurement needs and to disseminate solicitation documents to those entitled to receive them. Freedom Elevator Corp., B-256357, June 10, 1994, 94-1 CPD ¶ 361. For example, contracting agencies are generally required to publish in the CBD a synopsis of each contract action expected to exceed \$25,000, as in this case. See 41 U.S.C. § 416(a); Federal Acquisition Regulation (FAR) § 5.101(a). Additionally, FAR § 14.205-1(b) requires contracting agencies to include on applicable solicitation mailing lists any firm that requests a solicitation document.

Concurrent with the agency's obligations in this regard, prospective contractors must also avail themselves of every reasonable opportunity to obtain the documents, especially in a sealed bid procurement. See Fort Myer Constr. Corp., B-239611, Sept. 12, 1990, 90-2 CPD ¶ 200; Electromagnetix Corp., B-249623, Oct. 29, 1992, 92-2 CPD ¶ 295. Consequently, a prospective bidder's nonreceipt of solicitation documents will not justify overturning an award absent significant deficiencies in the agency's dissemination process; a deliberate attempt by the agency to exclude the bidder from the competition; or the failure to receive fair and reasonable prices. North Santiam Paving Co., B-241062, Jan. 8, 1991, 91-1 CPD ¶ 18.

Based upon the record before us, we cannot attribute the protester's failure to receive a copy of the IFB to any deficiencies in the agency's dissemination process or to a deliberate attempt to exclude the protester from the competition. Rather, the record reflects that the protester failed to take reasonable measures to obtain a copy of the solicitation. GSA timely publicized the acquisition in the CBD, sent pre-solicitation notices to all firms appearing on a BML for projects of this type, and furnished copies of the solicitation to the 18 firms that responded to the CBD announcement or pre-solicitation notice. The agency ultimately received two bids as a result of its efforts and awarded the contract at a price it considered to be fair and reasonable.

⁵The protester does not allege that the awardee's price is unreasonable.

EMS did not avail itself of the agency's reasonable efforts to advertise the procurement and disseminate the solicitation; the protester neither reviewed the CBD for relevant information nor applied for inclusion on the BML.⁶ Either of these actions would have ensured the protester's receipt of the solicitation. Although EMS argues that these actions were unnecessary because GSA's budget estimator and project designer allegedly guaranteed receipt of the solicitation--an allegation the agency disputes--these individuals were not designated agency contacts responsible for the dissemination of the solicitation. The responsible individual, identified in the CBD announcement and the solicitation, was the contracting officer, and EMS did not timely contact this person. Thus, we are not persuaded that EMS took all reasonable measures to obtain a copy of the solicitation. See Fort Myer Constr. Corp., supra; Simmler, Inc., B-233503, Feb. 22, 1989, 89-1 CPD ¶ 192. The record shows that EMS' exclusion from the competition resulted from its own passivity, not from any improprieties in the agency's dissemination process.

EMS also protests that the awardee will not be able to fulfill various obligations during performance of the contract, *i.e.*, that Mid-Atlantic will not deliver a proper manufacturer's glass breakage warranty; perform a proper glass stress analysis; or comply with the IFB's subcontracting limitation. EMS casts these issues as matters of bid responsiveness, but they in fact relate to Mid-Atlantic's ability to perform the contract--a matter of contractor responsibility. Responsiveness deals with a bidder's unequivocal promise, as shown on the face of its bid, to provide the items or services specified by the material terms of the IFB. American Spare Parts, Inc., B-224745, Jan. 2, 1987, 87-1 CPD ¶ 4. Here, Mid-Atlantic took no exception to any of the performance obligations specified in the IFB, thus making its bid responsive. Whether or not the awardee can ultimately carry out these performance obligations relates to its affirmative responsibility. See RetroTEC, Inc., B-255346, Feb. 22, 1994, 94-1 CPD ¶ 131. We do not review matters of affirmative responsibility absent a showing of possible

⁶The protester asserts that GSA used the wrong BML in this case--the one for Solar Energy Systems rather than Solar Film Projects. As EMS did not register itself as a bidder on either BML, it is of no consequence to the protester which BML was selected. In any event, we note that the two BMLs share several bidders in common and that the selected BML does not appear inappropriate to the instant procurement.

fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied. 4 C.F.R. § 21.3(m)(5). Such a showing has not been made in this case.

The protest is denied.

/s/ Ronald Berger
for Robert P. Murphy
Acting General Counsel