



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

Decision

Matter of: Kertzman Contracting, Inc.; Centigrade, Inc.--Entitlement to Costs

File: B-259461.2; B-259461.3

Date: May 3, 1995

Angela J. Hershfield, Esq., Corona & Balistreri, for Kertzman Contracting, Inc. and C. Kevin Bond, Esq., Ramseyer & Dunn, for Centigrade, Inc., the protesters. Michael J. Adams, Esq., and Newton L. Klements, Esq., United States Army Corps of Engineers, for the agency. Christine F. Davis, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where agency failed to comply with statutory and regulatory requirements regarding distribution of invitation for bids (IFB) solicitation amendments to a firm which requested and received a copy of a solicitation, agency reasonably determined that it had a compelling reason to cancel the IFB after bid opening and resolicit its requirements.
2. Request for declaration of entitlement to bid protest costs is denied where agency took reasonably prompt corrective action 1 day before its protest report was due.

DECISION

Kertzman Contracting, Inc. protests the decision of the United States Army Corps of Engineers to cancel invitation for bids (IFB) No. DACA05-94-B-0120 and resolicit its requirements. The Corps canceled the IFB in response to a General Accounting Office (GAO) protest filed by the apparent low bidder, Centigrade, Inc. Kertzman, the next low bidder, contends that Centigrade's protest lacked merit and that the cancellation of the IFB was therefore improper. Centigrade requests that we declare it entitled to recover the reasonable costs of filing and pursuing its protest

because the Corps allegedly unduly delayed taking corrective action in response to Centigrade's clearly meritorious protest. See 4 C.F.R. § 21.6(e) (1995).

We deny Kertzman's protest and Centigrade's request for costs.

The IFB was issued on September 2, 1994, for repairs to a natural gas pipeline system at Vandenberg Air Force Base, California. The IFB established an October 5 bid opening date. Two amendments were issued on September 9 and 23. On September 30, the Corps notified all bidders on the solicitation mailing list (via telegram) that bid opening would be extended to October 19.

On October 7, the Corps received a request from Centigrade to be included on the solicitation mailing list and to be furnished copies of all solicitation documents. The Corps received Centigrade's request the same day that it issued amendment Nos. 0003 and 0004 to the IFB. These amendments had not yet been placed in the master solicitation package, and the cognizant agency employee did not include them in Centigrade's package. Meanwhile, a second agency employee sent amendment Nos. 0003 and 0004 to all bidders, except Centigrade, assuming that the first employee had already included these amendments in Centigrade's solicitation package. As a result, although Centigrade's name was on the solicitation mailing list, it did not receive copies of amendment Nos. 0003 and 0004. As relevant here, amendment No. 0003 confirmed the October 19 extended bid opening date and also changed the minimum bid acceptance period from 30 to 60 days.

The agency received eight bids on the amended bid opening date. Centigrade submitted the low bid of \$3,196,750 and Kertzman the next-low bid of \$3,281,600. The agency rejected Centigrade's apparent low bid as nonresponsive for failing to acknowledge amendment No. 0003, which the agency considered material because it extended the minimum bid acceptance period. See John P. Ingram, Jr. & Assocs., Inc., B-250548, Feb. 9, 1993, 93-1 CPD ¶ 117.

On November 22, Centigrade protested to GAO that the Corps unfairly excluded it from the competition by failing to send it the IFB amendments. We requested an agency report by December 29. On December 28, the Corp advised our Office that it intended to take corrective action in response to Centigrade's protest. The agency explained that it had investigated the circumstances surrounding the dissemination of the solicitation and concluded that, "Centigrade's failure to receive, and subsequently acknowledge, amendment Nos. 3 and 4 resulted directly from the [Corps'] inadvertent failure to send them." The agency stated that it had a duty

to send Centigrade the amendments, see Federal Acquisition Regulation (FAR) § 14.205-1(c), and, by failing to do so, the agency was "in violation of the law." In the contracting officer's judgment, this violation prevented full and open competition and constituted a compelling reason to cancel the IFB after bid opening, as being "clearly in the public's interest." See FAR § 14.404-1(c)(10). We dismissed Centigrade's protest based upon the proposed corrective action. On December 29, Kertzman protested the agency's decision to cancel and resolicit, and, on December 30, Centigrade requested that we declare it entitled to its protest costs.

Kertzman basically argues that the Corps unreasonably canceled the IFB because Centigrade's protest was not meritorious. In particular, Kertzman contends that Centigrade did not avail itself of all reasonable opportunities to obtain the solicitation amendments, which exonerates the agency's failure to send them. See Fort Myer Constr. Corp., B-239611, Sept. 12, 1990, 90-2 CPD ¶ 200. The protester therefore contends that it should have received the award based upon its next-low responsive bid, asserting that its price was reasonable and obtained through sufficient competition.

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). The contracting officer has broad discretion to decide whether there is a compelling reason to cancel, and we limit our review to determining whether the exercise of that discretion was reasonable. Phil Howry Co., B-245892, Feb. 3, 1992, 92-1 CPD ¶ 137; Pratt & Lambert, Inc., B-245537; B-245538, Jan. 9, 1991, 92-1 CPD ¶ 48.

Under the Competition in Contracting Act of 1984 (CICA), full and open competition is the standard for awarding federal contracts. 10 U.S.C. §§ 2301(a)(1), 2304(a)(1)(A) (1994). Full and open competition means that all responsible sources who wish to do so are permitted to submit an offer. 10 U.S.C. § 2302(3); Salwen Paper Co., B-231354, May 24, 1988, 88-1 CPD ¶ 496. FAR § 14.205-1(c) implements this mandate by requiring agencies to add to a solicitation mailing list "[t]he names of prospective bidders who are furnished invitations in response to their requests . . . so that they will be furnished copies of any solicitation amendments."

In this case, the contracting officer determined that the agency had violated FAR § 14.205-1(c) and prevented full and open competition by failing to send Centigrade all IFB amendments. Kertzman does not question that the agency

violated FAR § 14.205-1(c), but claims that Centigrade should have been held responsible for the agency's oversight. Specifically, Kertzman argues that Centigrade should have asked to be on the solicitation mailing list earlier than it did, and that Centigrade knew or should have known of the existence of amendment No. 0003 because the bid documents it received did not reflect the extended bid opening date.¹

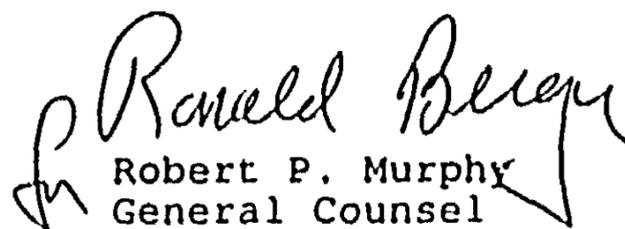
Whether or not Centigrade should have been more vigilant in pursuing the solicitation documents, the agency had a duty to send all amendments to Centigrade after receiving its request for a solicitation, but failed in this duty in violation of FAR § 14.205-1(c). See Essex Electro Eng'rs, Inc., B-234089.2, Mar. 6, 1990, 90-1 CPD ¶ 253. In our view, even if Centigrade should have known that its solicitation package was incomplete, the agency had a compelling reason to cancel the IFB to redress its violation of the FAR and to preserve the "public's interest" in full and open competition, regardless of the bids that were received. See FAR § 14.404-1(c)(10); Pratt & Lambert, Inc., supra; Total Protech, Inc., B-233264, Feb. 28, 1989, 89-1 CPD ¶ 211. As such, the contracting officer acted appropriately in taking corrective action and canceling the IFB. Id.

Centigrade requests that our Office declare it entitled to recover the reasonable costs of filing and pursuing its bid protest which resulted in corrective action by the Corps. Under our Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1), we may declare a protester entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees, where the agency takes corrective action in response to a protest. We will only do so, however, where the record shows that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. VSE Corp.--Recon. and Entitlement to Costs, B-258204.3; B-258204.4, Dec. 28, 1994, 94-2 CPD ¶ 260.

¹In this regard, Kertzman notes that Centigrade submitted a bid on the extended bid opening date, as disclosed in amendment No. 0003, which Centigrade allegedly did not receive. Centigrade explains that it obtained its information about the procurement from a trade journal, which announced the extended bid opening date, but did not advise that any amendment had been issued. We find Centigrade's explanation persuasive, in that Centigrade requested the solicitation before the agency issued amendment No. 0003 to any bidders and the agency acknowledges that it did not send that amendment to Centigrade.

Here, the Corps took corrective action the day before its agency report was due, or 24 working days after the protest was filed. Centigrade claims that the agency could have taken corrective action much sooner because, at the time its protest was filed, no facts were in dispute and the legal issues were clear. Centigrade's allegations are unfounded. In this regard, Centigrade submitted a bid on the amended bid opening date, which was reflected in an amendment that Centigrade claimed not to have received. Given this anomaly, we do not think it is unreasonable that the agency spent the time it did investigating whether Centigrade had obtained the amendments and, upon learning that the Corps had not sent them, determining whether Centigrade should nevertheless be charged with constructive notice of those amendments. The Corps's decision to take corrective action, made early in the protest process before the report due date, was precisely the kind of prompt reaction our Regulations are designed to encourage. See id.; Special Sys. Servs., Inc.--Entitlement to Costs, B-252210.2, June 8, 1993, 93-1 CPD ¶ 445. Accordingly, we find the award of costs to be inappropriate in this case.

Kertzman's protest and Centigrade's request for costs are denied.


Robert P. Murphy
General Counsel