



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Cutter Lumber Products

File: B-262223.2

Date: February 9, 1996

Tony Palma for the protester.

E. L. Timmins for Precision Wood Products, Inc., an interested party.

Benjamin G. Perkins, Esq., and Stephen Stastny, Esq., Defense Logistics Agency, for the agency.

Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's inadvertent failure to solicit incumbent contractor does not warrant sustaining incumbent's subsequent protest where agency otherwise obtained full and open competition.

DECISION

Cutter Lumber Products protests the award of a contract to Precision Wood Products, Inc. under request for proposals (RFP) No. SPO440-95-R-0655, issued by the Defense Logistics Agency (DLA) to supply wooden pallets to nine DLA destinations located in the states of California, Utah, Texas, Ohio, Tennessee, Virginia, and Pennsylvania. Cutter contends that DLA's failure to provide it with a copy of the solicitation improperly denied it the opportunity to compete for the Tracy, California pallet requirement, one of nine contract line item numbers (CLIN) set forth in the RFP.¹

We deny the protest.

The RFP was issued as a total small business set-aside on January 17, 1995, and was distributed to 62 prospective small business contractors. Although Cutter was the incumbent for providing the required pallets to the Tracy, California destination site--CLIN 0005 of the RFP--the contract specialist who prepared the solicitation distribution list admits that because of administrative error, he failed to provide Cutter with a copy of the follow-on procurement.

¹The RFP contemplated multiple awards, and further provided that each CLIN would be awarded to the lowest-priced, technically acceptable offer.

Cutter's incumbent contract for the Tracy, California site was scheduled to expire on September 23, 1995. On August 16, the record shows that Cutter telephoned the DLA contracting office and asked when the follow-on pallet requirement for the Tracy, California site would be solicited. The contract specialist advised Cutter that she was unaware of the status for the follow-on procurement, and that the cognizant contract specialist who supervised this requirement was on vacation. On August 21, Cutter contacted the designated contract specialist and learned for the first time that a follow-on contract for the Tracy, California pallet requirement already had been solicited, and a contract awarded on June 28, 1995. That same day, Cutter filed an agency-level protest challenging DLA's failure to provide it with the follow-on RFP, which was denied; on September 22, Cutter filed this protest.

The Competition in Contracting Act of 1984 requires contracting agencies to obtain full and open competition, and this is accomplished only where (1) all qualified vendors are allowed and encouraged to submit offers on federal procurements; and (2) a sufficient number of offers is received to ensure that the government's requirements are filled at the lowest possible cost. 10 U.S.C. § 2304(a)(1)(A) (1994); 41 U.S.C. § 403(6) (1994); H.R. Rep. No. 1157, 98th Cong. 2d Sess. 17 (1984). We have concluded, therefore, that failure to solicit a successfully-performing incumbent, with the result that an identified responsible source is prevented from competing where there is only a minimal level of competition, results in a failure to obtain full and open competition. Professional Ambulance, Inc., B-248474, Sept. 1, 1992, 92-2 CPD ¶ 145. Support for our view is found in the Federal Acquisition Regulation (FAR), which 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. The FAR also provides that where—as here—agencies rotate names on an excessively lengthy mailing list, the agency should continue to include the "previously successful bidder." FAR § 14.205-4(b).

In this case, by affidavit, the cognizant contract specialist states that he inadvertently overlooked Cutter's cage code classification, which would have alerted him to the protester's incumbent status and eligibility to compete for the successor requirement. DLA contends that the contract specialist's dissemination error does not warrant sustaining Cutter's protest since despite the agency's failure to solicit the incumbent, full and open competition was obtained. The agency argues that, because 12 offers for CLIN 0005 were received—and the agency could determine that award was made at a reasonable price—the failure to solicit Cutter does not warrant sustaining its protest.

The number of competitors is often the key consideration in determining whether absence of the incumbent resulted in a failure to obtain full and open competition. For example, in Kimber Guard & Patrol, Inc., B-248920, Oct. 1, 1992, 92-2 CPD ¶ 220, we sustained the protest because the agency had received such a minimal level of competition--only one proposal--that the exclusion of the incumbent--whose price is generally a reliable and effective benchmark against which to judge the current reasonable market price--prevented the agency from concluding that reasonable prices had been received. See also Professional Ambulance, Inc., *supra* (protest sustained where three proposals were received); Transwestern Helicopters, Inc., B-235187, July 28, 1989, 89-2 CPD ¶ 95 (protest denied where 25 proposals were received). However, the fact that numerous proposals are received does not automatically guarantee that an agency has obtained a reasonable market price, see Qualimetrics, Inc., B-262057, Nov. 16, 1995, 95-2 CPD ¶ 228 (fact that numerous proposals were received did not remedy incumbent's absence as a benchmark in the competition since no other offeror proposed to supply the identical equipment which incumbent manufactured and solicitation was for multiple award Federal Supply Schedule contract). In this case, the record persuades us that the 12 offers received for CLIN 0005 provided a reasonable basis for the agency's conclusion that full and open competition, and a reasonable market price for the required pallets, was obtained, despite the incumbent's absence from the competition.

The record shows that the 12 offers received were all for the identical item. Among the 12 prices, there is a logical dividing line between the 3 lowest prices and the remaining 9; specifically, the second and third lowest prices--which are only 50 cents apart--are 22 percent lower than the fourth lowest price. The record also shows that the awardee's price is 13 percent lower than the next offeror's price; in fact, the majority of the 12 proposed prices are at least 48 percent higher than that of the awardee. Additionally, the record shows that the current awardee's price is 2 percent lower than the incumbent's prior award price; in this regard, our review of the contract pricing history for this item indicates that although the incumbent submitted the lowest price in the prior competition, when compared to other contracts awarded by DLA for this identical item, the incumbent's prior award price was one of the higher prices paid by DLA.

Given that 12 offers were received, and the current awardee's price is lower than the other competitors' prices, as well as the incumbent's prior contract price for the identical item, we see no basis to conclude that the exclusion of the incumbent from the competition prevented the agency from obtaining reasonable prices. Under these circumstances, DLA's inadvertent failure to solicit the protester did not

prevent the agency from satisfying the statutory goal of full and open competition. Consequently, we do not think it appropriate to disturb the procurement process by recommending that the requirement be resolicited.

The protest is denied.

Comptroller General
of the United States

f:\projects\pl\222301d2.wp5