



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: United Communications Systems, Inc.

File: B-279383

Date: June 2, 1998

Gerard F. Doyle, Esq., and Ron R. Hutchinson, Esq., Doyle & Bachman, for the protester.

Rand L. Allen, Esq., and Scott M. McCaleb, Esq., Wiley, Rein & Fielding, for Datatrak Information Services, Inc., an intervenor.

Charles A. Walden, Esq., Department of Justice, and Marie Adamson Collins, Esq., and Roger D. Waldron, Esq., General Services Administration, for the agencies.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office will not exercise its discretion to waive timeliness requirements with respect to untimely protest of ordering provisions under General Services Administration multiple-award schedule contract for information technology where protester has received orders and accepted benefits under the ordering provisions.

DECISION

United Communications Systems, Inc. (UCS) protests the Drug Enforcement Administration's (DEA) issuance of an order for information technology technical services to Datatrak Information Services, Inc. (DIS) under DIS's multiple-award schedule (MAS) contract (No. GS-35F-4513G) (hereafter, No. 4513G) with the General Services Administration (GSA). UCS argues that DEA improperly failed to synopsise its requirement in the Commerce Business Daily (CBD) and compete it among interested potential offerors. UCS specifically challenges DEA's reliance on the provisions of Federal Acquisition Regulation (FAR) § 8.404 as authority for not synopsizing the agency's requirement.

We dismiss the protest as untimely filed.

On August 16, 1995, GSA issued solicitation No. FCI-96-DL0001B (hereafter, No. DL0001B), for offers for the award of contracts under GSA's Federal Information Processing (FIP) MAS program, group 70, part I, sections B and C, for commercial automatic data processing (ADP) equipment, software, service and maintenance. On July 8, 1996, GSA published in the Federal Register a notice and interim rule--41 C.F.R. § 201-39.801-1--providing that GSA's FIP MAS program would

be part of the Federal Supply Schedule program and that FIP MAS schedule contracts therefore would be governed by FAR Subpart 8.4, Federal Supply Schedules. 61 Fed. Reg. 35,635 (1996). In addition, on November 12, 1996, GSA issued amendment No. 4 to solicitation No. DL0001B, which added a clause that referenced FAR § 8.404 in connection with use of the schedules, and specifically provided that "[a] delivery order for quantities that exceed the maximum order may be placed with the contractor selected in accordance with FAR 8.404." In this regard, FAR § 8.404(a) (June 1997) provided that "[w]hen placing orders under a Federal Supply Schedule, ordering activities need not seek further competition [or] synopsise the requirement"

Meanwhile, on June 26, 1996, UCS submitted an offer in response to solicitation No. DL0001B. UCS acknowledged amendment No. 4 on December 4, and was awarded a MAS contract on January 6, 1997. Thereafter, on February 24, DIS was awarded MAS contract No. 4513G under solicitation No. DL0001B.

DEA is procuring the information technology technical services as part of Phase II of its Firebird Project, which involves an upgrade of DEA's ADP infrastructure--as it relates to office automation, text processing, image processing and enhanced communications systems--to an open system architecture. DEA established blanket purchase agreements (BPA) with DIS on January 6, 1998, and with UCS on January 28, under their GSA MAS contracts. (UCS had been furnishing technical services to DEA in connection with Phase I of the Firebird Project under a Small Business Administration 8(a) contract with DEA.) On February 24, DEA requested a quotation from DIS under its BPA; on February 26, the agency issued an order to DIS under the BPA in the amount of \$1,732,308.48.

UCS argues that DEA's issuance of the order to DIS without first synopsisizing its requirement and competing it among interested potential offerors is inconsistent with the requirement in 41 U.S.C. § 416(a)(1)(A) (1994) and 15 U.S.C. § 637(e)(1)(A) (1994) that agencies synopsise requirements where they intend to "(i) solicit bids or proposals for a contract for property or services for a price expected to exceed \$25,000; or (ii) place an order, expected to exceed \$25,000, under a basic agreement, basic ordering agreement, or similar arrangement" In addition, UCS notes that 41 U.S.C. § 259(b)(3) (1994) provides that the procedures established for GSA's MAS program satisfy the general requirement in 41 U.S.C. § 253(a)(1) (1994) for use of competitive procedures, "if--(A) participation in the program has been open to all responsible sources; and (B) orders and contracts under such procedures result in the lowest overall cost alternative to meet the needs of the Government." 41 U.S.C. § 259(b)(3). UCS argues that a contracting officer cannot determine, months after GSA MAS contracts have been awarded, that an order under such a contract will result in the lowest overall cost alternative without synopsisizing the requirement and evaluating responses. See Systemhouse Fed. Sys., Inc., GSBICA 10277-P, 90-1 BCA ¶ 22,435. UCS concludes that, under these statutory provisions, DEA was required to synopsise its requirement. To the

extent that the provisions of FAR § 8.404(a) authorized placement of an order under DIS's GSA MAS contract without seeking further competition and synopsisizing the requirement, UCS argues that the regulation is inconsistent with the applicable statutory authorities and thus cannot serve as the basis for the agency's action here.

Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to closing time shall be filed prior to that time; alleged improprieties which do not exist in the initial solicitation, but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1998). The primary purpose of these timeliness rules is to afford parties a fair opportunity to raise objections they may have to the terms of a solicitation prior to the submission of offers, without unduly disrupting or delaying the procurement. Atlantic Coast Contracting, Inc., B-259082.3, July 17, 1995, 95-2 CPD ¶ 21 at 4.

Here, by incorporation of FAR § 8.404(a), amendment No. 4 authorized the placement of orders without seeking further competition and synopsisizing the requirement. UCS acknowledged amendment No. 4, submitted an offer under the terms of the solicitation including amendment No. 4, and accepted award without protesting the revised terms of the solicitation. UCS has subsequently received orders under its contract. Although the express requirements of our timeliness rules are phrased in terms of the solicitation closing time, we believe that in the context of the current "continuous" open seasons for the submission of proposals for the award of GSA MAS contracts, where awards often are made before the close of the open season, it would be inconsistent with the purpose of our timeliness rules to permit a firm, as here, to submit a proposal, accept award (and even receive orders under the resulting contract), and only then challenge the terms of the solicitation. In any case, UCS did not file its protest until after the open season under solicitation No. DL0001B had closed (by notice published in the CBD) on December 17, 1997. UCS's protest therefore is untimely.

UCS asserts that, even if the protest is untimely, we should consider the issue raised as significant to the procurement system and entertain the protest pursuant to 4 C.F.R. § 21.2(c), which provides discretion for our Office to waive timeliness requirements in certain cases. We decline to do so here. According to GSA, UCS has reported receiving orders (since October 1, 1997) in excess of \$700,000 under its GSA MAS contract. Indeed, UCS's sales literature highlighted the lack of any synopsis requirements when describing the benefits afforded under its Federal Supply Schedule contract. We do not consider it an appropriate exercise of our discretion to consider UCS's challenge to the ordering provisions under which it has

accepted such benefits. See Wilkinson v. Legal Servs. Corp., 80 F.3d 535, 538-539 (D.C. Cir. 1996); Robertson v. Fed. Election Com'n, 45 F.3d 486, 490 (D.C. Cir. 1995).

The protest is dismissed.

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