

December 22, 1995

P.S. Protest No. 95-45

EARTH MANAGEMENT INC.

Solicitation No. 072368-95-A-0545

DIGEST

Protest against contracting officer's failure to solicit offeror on solicitation mailing list is denied. Adequate competition was obtained in the procurement, the offers received were reasonable as to price, and the failure to use the mailing list was not intentionally planned to deprive offerors on the list of an opportunity to participate in the procurement.

DECISION

Earth Management Inc. (EMI) protests its failure to be solicited to provide vehicle washing services in Mesa, AZ. On August 22, the Denver Purchasing and Materials Service Center issued solicitation 072368-95-A-0545 seeking offers to wash 334 postal vehicles at seven postal facilities in Phoenix, AZ. According to the contracting officer, copies of the solicitation were provided to eleven prospective offerors; three firms identified by the Mesa post office and eight firms which had previously submitted offers to provide vehicle washing services in Mesa. The solicitation was also posted at the Mesa post office and at its associate offices.

Three offers were received. Two offers were from firms on the list of prospective offerors; the third was from a Mesa firm which learned of the solicitation from its letter carrier. A contract was awarded to Shatkus Steam Cleaning Service, one of the solicited firms, on the basis of price, on September 30.

By letter dated October 3, EMI asked the contracting officer for information concerning the award of the Mesa contract and "why it was not notified of the solicitation and why [it] was precluded from the bid process." Not having received a reply to that letter, on October 17

EMI submitted a protest to this office.

The protester states that it received a vehicle washing contract for Tucson, was an active participant in a recent solicitation for such services in Phoenix, and "was registered both at the Phoenix Vehicle Maintenance Facility (VMF) and the Denver Purchasing and Materials Center . . . as a vendor for all vehicle washing" services. Further, it states that it has "telephone directory Yellow Page advertisements and a local office" in Mesa. It contends that it has been "entirely precluded from the 'competitive' bid process," and that it would have responded to the solicitation "with a detailed proposal." It views its exclusion as arbitrary, and contends that because the Postal Service circumvents "the free market system," it is forced to accept inferior goods and services because competition is inadequate. The protester cites various portions of the Procurement Manual and Title 39, Code of Federal Regulations, which it says establish "accepted [postal] purchasing practices" from which it views this procurement as deviating.¹

The contracting officer replied to the protester's October 3 letter on November 2. The letter included the following paragraph:

We are sorry that you were not notified of the solicitation, but we are not required to send a solicitation to every known source for each requirement as we rotate our mailing list if not provided [a] sufficient number of sources [sic]. However, we were provided with [a] sufficient number of sources to ensure a fair and reasonable price as required by PM 4.3.1 d.

The contracting officer's statement on the protest of November 3 provided an outline of the

¹ The relevance of the sections of the regulations which the protester cites are unclear. The cited regulations discuss, in general, the following topics:

PM A.3 (PM pages A-336 - 337)

The establishment and use of solicitation mailing lists.

PM 2.1 (PM pages 41 - 46)

Procurement planning "by which the efforts of the requirements and purchasing organizations are coordinated and integrated . . . to fulfill needs of the Postal Service . . ." (PM 2.1.1 a.)

PM 4.1 (PM page 85)

The four types of postal purchasing, as follows: Standard purchasing, simplified purchasing, local buying, and noncompetitive purchasing.

39 CFR Chapter 1, Subchapters A and F (pages 8 - 25 and 149 - 168)

The bylaws of the Postal Service Board of Governors (Subchapter A). The Code of Ethical Conduct for Postal Employees and provisions for the garnishment of wages of employees of the Postal Service and of the Postal Rate Commission (Subchapter F).

process by which offerors were notified of the requirement, but offered little detail. This office requested additional information and sought the contracting officer's responses to some of the protester's specific assertions. That response included the following points:

- The Mesa solicitation was a "structured" procurement authorized by PM 8.6, to which the provisions of Handbook AS-707B, Contracting for Vehicle Washing and Polishing Agreements, October, 1989, applied.
- EMI's request to the Denver office that it be considered for vehicle washing contracts resulted in it being placed on the National Supply List.² However, the office did not use the National Supply List for this requirement, since it believed that the eleven sources which it had identified were sufficient.
- The Denver office does not have access to all of the telephone yellow page directories for the area it serves, and there is no requirement that such sources be used to identify potential offerors.
- The Denver office expects the "requirement office" (*i.e.*, the Mesa post office) to identify at least three qualified sources when its requirement is submitted, but it does not supervise or review the local selection process.

The protester did not respond to the contracting officer's submissions.

DISCUSSION

The usual context in which the question of the failure to solicit arises is with respect to the failure to provide an incumbent contractor with the solicitation for the successor contract.

[In such cases, w]e review the matter from the standpoint of the following factors:

- (1) Whether adequate competition was obtained;
- (2) Whether the offers received were at a reasonable price;
- (3) Whether the failure to comply with requirements intended to secure competition was inadvertent.

In our review, we look at the matter from the perspective of the Postal Service, rather than that of the omitted bidder.

² The contracting officer states that the National Supply List was created "In response to PM A.3.1." That section directs "purchasing activities" to establish solicitation mailing lists of "eligible and qualified concerns that have submitted mailing list applications, [and of firms] that the activity considers capable of meeting requirements of [the] particular purchase." The solicitation mailing list thereby established need not be used "when the requirements of the purchasing activity can be obtained within the local trade area through simplified purchase procedures."

Amos L. Griffin, Sr., P.S. Protest No. 87-61, July 30, 1987 (citations omitted).

A similar standard applies in other situations. See, e.g., *Fred Israel*, 49 Comp. Gen. 707 (1970) (procurement upheld despite failure to solicit specific bidder from mailing list; adequate competition was obtained; record evinced no conscious or deliberate intention to exclude bidder; and applicable regulation allowed names on mailing list to be rotated) and *J.L. Associates, Inc.*, Comp. Gen. Dec. B-215730, November 6, 1984, 84-2 CPD 505 (solicitation upheld despite failure to synopsise procurement as required where omission was inadvertent, adequate competition and reasonable prices were generated, and there was no evidence of intent to exclude protester from competing).³

Here, the contracting officer solicited eleven firms and received three offers, of which he found the low offer fair and reasonable. The first two factors set out above were thus met. The third factor was also met, at least to the extent that the failure to solicit prospective offerors on the solicitation mailing list was not intentionally planned to deprive them of an opportunity to participate in the procurement. (And, of course, no prospective offeror was deprived of that opportunity. Had EMI learned of the procurement from one of the posted notices or from some other source, it could have submitted an offer.)

The solicitation here was issued under the structured procedures of Handbook AS-707B. That handbook provides that "[u]nless otherwise stated in this [handbook], the policies and procedures set forth in the PM and [Handbook] [AS-]707[, Procurement Handbook,] apply to procurements of vehicle washing and polishing services." Because Handbook AS-707B does not discuss the manner in which procuring activities are to use source lists, the procedures of PM A.3.1 apply to vehicle washing contracts.

The contracting officer appears to understand that A.3.1 does not require the use of the solicitation mailing list if adequate competition can be found locally. That understanding would be correct only if the services at issue here were procured under the simplified purchasing procedures which are set out in PM 4.3. Nothing in Handbook AS-707B gives any indication that the procurements there described are considered to be simplified purchases. Accordingly, the procuring activity should have used the solicitation mailing list which it maintained, and on which EMI's name appeared, in connection with the vehicle washing requirement for Mesa.⁴ Its failure to do so, however, does not require the

³ The rule is somewhat different in recent Comptroller General decisions under the Competition in Contracting Act of 1984 (CICA), which mandates full and open competition and imposes "an affirmative obligation" on agencies "to timely disseminate solicitation documents to those entitled to receive them." *Holiday Inn-Laurel*, Comp. Gen. Dec. B-249673, December 22, 1992, 92-2 CPD 428 (contract should be terminated and requirement resolicited where agency failed to use most recent edition of bidder's list, thereby excluding protester from competition; agency made no contention that bidder's list was excessively long). CICA is not applicable to the Postal Service, and decisions of the Comptroller General under its standards are not persuasive. *Federal Properties of R.I., Inc., On Reconsideration*, P.S. Protest No. 93-02, July 9, 1993.

⁴ EMI's inclusion on the list would not mean that it would receive every solicitation. If a list becomes overly long, it "may be reduced by any equitable method." PM A.3.3 a.

resolicitation of the requirement. *Amos L. Griffin, Sr., supra.*

The protest is denied.

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