DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

024514

FILE: B-210414 DATE: March 15, 1983

MATTER OF: Manville Building Materials Corporation

DIGEST:

Post-award protest by potential supplier of roofing materials alleging that specifications requiring glass fiber roofing insulation are unduly restrictive is dismissed as untimely. Since requirement was clearly stated in Government's solicitation, protest should have been filed before bid opening.

Manville Building Materials Corporation, a supplier of roofing material, protests the specifications under a prime contract for roof construction, No. F05611-82-C-0126, between C. P. Construction, Inc. and the Department of the Air Force, United States Air Force Academy, Colorado. According to Manville, Government officials have refused to permit the prime contractor to use as an "alternative" roofing system to that specified a less expensive but comparable roofing system proposed by Manville based on its own specifications.

The Air Force solicited bids for this roof repair project under invitation for bids No. F05611-82-B-0103, which was issued on July 22, 1982 and in response to which bids were submitted on August 23, 1982. We have been informally advised by the Air Force that the contract was awarded to C. P. Construction on August 25. The solicitation specifications required the use of fibrous glass insulation, which Manville does not manufacture.

According to Manville, at its urging C. P. Construction, after award, offered to provide the Government with an "alternate" roofing system to that specified using perlite insulation, which Manville manufactures, at a lower price. This request was denied on November 8. When Manville could not persuade the Air Force to change its position through further discussions, Manville filed a protest with our Office on January 7, 1983.

Manville believes that the Government's insistence on glass fiber roofing insulation is unduly restrictive. According to Manville, such material is available at excessive cost only from one manufacturer and the requirement for it exceeds the minimum needs of the agency. (The Government's specifications in question are apparently based on Air Force Manual 91-36 which prescribes materials for projects of this type.) For the reasons discussed below, we find the protest to be untimely.

It is undisputed that the prime contract solicitation called for the use of glass fiber roofing insulation. Under our Bid Protest Procedures, protests concerning defects apparent in a prime contract solicitation must be filed before bid opening or the closing date for receipt of proposals, as appropriate. 4 C.F.R. § 21.2(b)(1) (1982); Truland Corporation; Compuguard Corporation, B-189505, September 26, 1977, 77-2 CPD 226. In this respect, the Government published the requirement in the Commerce Business Daily; we have held that such publication constitutes constructive notice of a synopsized solicitation and its contents. Lutz Superdyne, Inc., B-201553, February 20, 1981, 81-1 CPD 122.

The record is unclear whether Manville knew of the present solicitation and its requirements for fibrous glass insulation prior to bid opening in August 1982. However, even if Manville was unaware of the actual terms of the solicitation, its protest is nevertheless untimely because, as stated above, we have held that publication in the Commerce Business Daily constitutes constructive notice of the solicitation contents to all parties. We have recognized that this rule attributing constructive knowledge of a solicitation restriction to a subcontrator may be somewhat harsh when applied to a protester who actually may have been unaware of the subcontracting restriction. We believe, however, that the rule is necessary to minimize the potential for abuse at least in those instances where it otherwise would be possible for a subcontractor to file a protest that would be untimely if it were filed by the prime contractor. Lumaside, Inc., B-205220, B-205220.2, December 16, 1981, 81-2 CPD 481. We believe the same principle is applicable to potential material suppliers of prime contractors. Since Manville did not protest prior to bid opening, its protest is untimely.

Manville argues that even if its protest should be considered untimely it should be considered on the merits under the exceptions to the timeliness requirements set

forth in our Bid Protest Procedures, § 21.2(c). That rule provides that an untimely protest may be considered if it raises a question of significance to procurement practices or procedures, or for good cause shown.

We do not consider that Manville's protest presents a significant issue. The significant issue exception to our timeliness rule is limited to issues which are of widespread interest to the entire procurement community and is exercised sparingly so that timeliness standards do not become meaningless. It is not clear to us why Manville's concerns should be viewed as of such widespread interest. In any event, Manville acknowledges that future individual roofing requirements for Air Force installations would contain the specification in question. We see no reason why Manville cannot learn of such future Air Force projects through the Commerce Business Daily or otherwise and protest the specifications in a timely fashion at that time. Further, despite Manville's assertion of "excessive costs" being incurred due to the allegedly restrictive specifications, the significance of an issue for purposes of this exception does not depend upon the amount of money involved. 52 Comp. Gen. 20, 23 (1973). We therefore do not believe that this protest presents a significant issue for our consideration.

Finally, although we would consider an untimely protest for "good cause shown," this refers to some compelling reason beyond the protester's control which prevented it from filing a timely protest. International Computaprint Corp., B-186948, October 28, 1976, 76-2 CPD 357. The record in this case reveals no such reason.

Accordingly, this protest is dismissed.

Harry R. Van Cleve
Acting General Counsel

24511

DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-209687 **DATE:** March 16, 1983

MATTER OF: Dhillon Engineers, Inc.

DIGEST:

Evaluation of competitors for architect-engineer (A-E) services contract is not arbitrary even though Selection Board did not have before it the most current information concerning prior A-E awards. Although prior A-E contracts are to be considered in order to effect equitable distribution of A-E contracts, this is only one of several evaluation factors to be weighed in selecting A-E contractor. Protester has not shown that--considering all evaluation factors--selection was unreasonable.

Dhillon Engineers, Inc. (Dhillon), protests award of contract No. N62474-82-C-0457 to the firm of Valentine, Fisher and Tomlinson (Valentine) by the Western Division, Naval Facilities Engineering Command, Department of the Navy (Navy). The contract requires Valentine to perform architect-engineer (A-E) services related to upgrading the electrical distribution system at the Puget Sound Naval Shipyard, Bremerton, Washington. Dhillon contends that the Navy's evaluation of offerors was not in accord with the stated evaluation criteria nor with pertinent provisions of the Defense Acquisition Regulation (DAR) (1976 ed.).

We deny the protest.

The Brooks Act, 40 U.S.C. § 541, et seq. (1976), states the Federal Government's policy in the procurement of A-E services. While the Brooks Act is not applicable per se to the military departments covered under the Armed Services Procurement Act of 1947 (10 U.S.C. § 2301, et seq. (1976)), the Brooks Act selection procedures have been adopted in substance by the Department of Defense in DAR § 18-401, et seq. (Defense Acquisition Circular No. 76-31, October 30, 1981). Association of Soil and Foundation Engineers--Reconsideration, B-199458.2, August 13, 1982, 82-2 CPD 128.

Generally, the selection procedures prescribed require a contracting agency to publicly announce requirements for A-E services. The contracting agency then evaluates A-E statements of qualifications and performance data already on file and statements submitted by other firms in response to the public announcement. Thereafter, discussions must be held with "no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach" for providing the services requested. Based on established and published criteria, which are not to relate either directly or indirectly to the fees to be paid the firm, the contracting agency then ranks in order of preference no less than three firms deemed most highly qualified. Negotiations are held with the A-E firm ranked first. Only if the agency is unable to agree with the firm as to a fair and reasonable price are negotiations terminated and the second ranked firm invited to submit its proposed fee.

The Western Division, Naval Facilities Engineering Command, announced its intention to contract for these A-E services in the Commerce Business Daily and invited interested firms to submit standard forms 254 and 255 outlining their qualifications for the project. The announcement described the project and, with regard to qualifications and evaluation of potential contractors, stated:

> "* * * A-E selection criteria will include: (1) Recent specialized experience of the firm in the design of high voltage industrial power distribution, underground distribution systems and metal cald switchgear: (2) Professional qualifications of the staff to be assigned to this project: (3) Volume of work previously awarded by the Department of Defense to the firm, with the object of effecting equitable distribution of contracts among qualified architect-engineer firms including minority-owned firms and firms that have not had prior Department of Defense contracts: (4) Location of the firm in the general geographical areas of the project: (5) Past experience, if any, of the firm with respect to performance on Department of Defense contracts: (6) Cost control effectiveness. * * *"

Valentine was selected as the result of evaluations by a "Pre-Selection Board" and a "Selection Board." Dhillon argues that the Selection Board failed to consider the volume of work previously awarded to Valentine by the Department of Defense in contravention of the third criterion listed in the Commerce Business Daily and DAR § 18-402.1(v) (1976 ed.), which also states the Department of Defense policy of effecting equitable distribution of A-E contracts. The Navy initially reported to our Office that, as of the time of selection, neither Dhillon nor Valentine had received any contract awards from the Department of Defense in calendar or fiscal years 1981 and 1982. However, under the Freedom of Information Act (5 U.S.C. § 552 (1976)), Dhillon obtained from the Navy a list of eight contracts awarded or to be awarded to Valentine by the Western Division, Naval Facilities Engineering Command, from 1975 through November 1982. Dhillon cites these awards as evidence that the Selection Board did not consider previous awards to Valentine.

The Navy points out that three of the contracts which were listed in the material released under the Freedom of Information Act were awarded to Valentine several years before the Selection Board made its recommendation in the present procurement and were not considered since, pursuant to the procuring agency's policy, the Selection Board was to consider only contracts awarded during 1981 and 1982. The Navy also argues that two other contracts are "open end" A-E contracts which do not get listed in the computer reporting system used to determine previous A-E awards until a "call upon the contract" is made; since no call (work order) was issued under either contract, they were not listed or considered by the Selection Board. Finally, the Navy argues that the computer list of Department of Defense A-E contracts awarded is only issued four times a year. According to the Navy, there is a time lag of between 8 to 10 weeks between the end of reporting periods (December, March, June, and October) and receipt of the list by activities using the list, and the Navy states that two awards made to Valentine in early 1982 before the Selection Board evaluation could not have been discovered since the board only had the list for the quarterly period ending December 31, 1981. One other 1982 contract was awarded to Valentine after the selection was made.

Based on the above analysis, the Navy concludes that "the criterion of DAR § 18-402.1(v) was followed within the confines of the reporting system." That regulation provides:

> "* * * The selection of architect-engineer firms * * * shall * * * be based upon * * * professional qualifications * * * subject to * * *:
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> * * * * *
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> "(v) volume of work previously awarded to the firm by the Department of Defense, with the object of effecting an equitable distribution of * * * contracts among qualified architect-engineer firms * * *."

Our review of the agency selection of an A-E contractor is limited to examining whether that selection is reasonable. We will question the agency's judgment only if it is shown to be arbitrary. Leyendecker & Cavazos, B-194762, September 24, 1979, 79-2 CPD 217. In this regard, it must be remembered that the protester bears the burden of affirmatively proving its case. ACMAT Corporation, B-197589, March 18, 1981, 81-1 CPD 206.

We are unable to conclude that the Navy's selection of Valentine was arbitrary or unreasonable or unrelated to the published evaluation criteria. Both the Pre-Selection Board and the Selection Board used the Department of Defense's consolidated computer list of A-E awards to evaluate potential contractors and to apply the policy of equitable distribution of A-E contracts. We find nothing improper about using the list to effect this policy.

However, we have some problems with the way the list was used. The Navy contends that publication of the lists have a time lag of 8 to 10 weeks after the end of a reporting period and, therefore, the Selection Board did not have the most recent A-E awards before it. However, the material the Navy released to Dhillon under the Freedom of Information Act showed, as noted above, that the Navy itself had awarded two contracts to Valentine shortly before the evaluation process for the present award began. These two awards were made on

January 20 (amount of contract was $47,397) and April 28 (amount of contract was $67,082). Since, according to the Navy, there was only an 8- to 10-week lag, the January award should have been available to the Selection Board on the consolidated list published in March, because the Selection Board did not convene until July 13. While we recognize that the Pre-Selection Board met on May 5 and may not have had the March consolidated list, in our opinion, the Selection Board should have updated the evaluation information used by the Pre-Selection Board by incorporating data available on the March consolidated A-E contract list. Accordingly, we are, by letter of today, notifying the Secretary of the Navy of our opinion that an attempt should be made to update information concerning prior A-E contract awards between the Pre-Selection Board's evaluation and the Selection Board's final recommendation.

In spite of the above shortcoming, we are not convinced that the award to Valentine was improper. Even though we believe that the Selection Board should have used more current information (namely, the quarterly report ending March 31, 1982) than the Pre-Selection Board, we are not persuaded that the results would have been any different. Only the January 20 contract (worth $47,397) would have been considered since a contract awarded on February 5 had had no "calls" placed under it. Furthermore, the published criteria and section 18-402.1(v) of the DAR, supra, state that previous contracts should be considered, but do not provide for excluding any offeror just because it had done A-E work for the Navy or other Defense agencies previously. Therefore, we cannot find that the Navy's award to Valentine violated the stated policy of equitable distribution of A-E contracts among contractors. See R. Christopher Goodwin & Associatesand GeoScience Inc., B-206520, November 5, 1982, 82-2 CPD 410.

The record shows that Valentine was rated first primarily because of its extensive experience in high voltage systems/underground distribution. This experience was directly relevant to the first evaluation criterion--recent specialized experience in design of high voltage industrial power distribution and underground distribution systems. The Selection Board was satisfied with the assembled Valentine staff, including the engineer for controls and computer controls; this was relevant to the second criterion--professional qualifications of the staff.

The Selection Board also reviewed information concerning Valentine's past performance on Department of Defense contracts (criterion No. 5) and was satisfied. Even though Dhillon charges that it was considered "equally well qualified" and should have been selected because of Valentine's previous awards, we cannot find that the Navy's selection was arbitrary or unreasonable or that it violated the stated criteria since the above-enumerated criteria were considered by the Navy and could have outweighed any negative effects of updated information concerning the January A-E award to Valentine had it been brought to the Selection Board's attention. Moreover, the record does not show that the Selection Board relied solely on Valentine's demonstrated experience under a prior contract for the "study/design" effort leading to this contract. In any event, we see nothing improper about considering this prior contract since the prior contract was not the result of any unfair act of the Government.

In view of the burden of proof that a protester must carry, Dhillon has provided no basis to invalidate the award to Valentine. See R. Christopher Goodwin & Associates and GeoScience Inc., supra.

The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States