

DECISION

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

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FILE: B-214751.2 **DATE:** December 3, 1984
MATTER OF: Morris Guralnick Associates, Inc.

DIGEST:

1. The misclassification of a procurement notice in the Commerce Business Daily, and thus the failure to publish a proper notice required under Public Law No. 98-72, does not warrant resolicitation of the requirement where the agency: (1) acted within the spirit of the statute by attempting to publish a proper notice; (2) satisfied the overriding purpose of the statute by attempting to generate small business competition; (3) made award at a reasonable price; and (4) is not shown to have purposely precluded the protester from competing.
2. A protester's speculation that the agency may have sought to prevent it from competing by misclassifying a procurement notice and not mailing it a solicitation is not sufficient where the only evidence in the record shows that the misclassification was inadvertent and that the agency actually mailed the protester a copy of the solicitation but at the wrong address.
3. GAO will not conduct an investigation in connection with its bid protest function in order to determine the validity of a protester's speculation that an agency acted improperly.

Morris Guralnick Associates, Inc. protests the award of any contract under request for proposals (RFP) No. N00/228-84-R-2022, issued by the Department of the Navy for communication equipment design services. Guralnick principally argues that it was denied an opportunity to reply

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to the RFP since the synopsis of the procurement was misclassified in the Commerce Business Daily (CBD) and thus did not constitute a "proper notice" of the procurement as required under Public Law No. 98-72, Aug. 11, 1983. Because Guralnick also did not receive a copy of the RFP by mail, it surmises that the Navy may have purposely attempted to restrict the competition. It asks that we investigate this possibility. We deny the protest.

The procurement synopsis was published in the December 15, 1983 issue of the CBD. Instead of being listed in the section reserved for procurements of "Services," it appeared in the "Communications Equipment" category under the section for procurements of "Supplies, Equipment and Materials." The Navy has determined that this misclassification occurred as a result of its inadvertent failure to include a service category code in its telegraphic transmission of the notice to the CBD. Lacking this code, the CBD was left to determine an appropriate classification, and apparently included the notice in the "Communications Equipment" category because the procurement involved the designing of such equipment.

Aside from the CBD notice, the Navy reportedly mailed copies of the RFP to 37 potential offerors including Guralnick and two firms which had responded to the notice even as misclassified. Two proposals were received and, following negotiations with both offerors, award was made to M. Rosenblatt & Son.

Public Law No. 98-72 amended section 8(e) of the Small Business Act, 15 U.S.C. § 637 (1982), to enhance small business competition by improving small business access to procurement information and does require that a proper notice be published in the CBD for all procurements of \$10,000 or more (with certain exceptions). We must agree with Guralnick that due to the misclassification the notice here cannot be considered proper or adequate as a technical matter. In order to serve the purpose of this legislation, a design services procurement should be synopsisized somewhere under the CBD section for "Services." Firms which perform services should not be required to page through CBD sections related to supply contracts in order

to learn of the government's needs.^{1/} While we thus find that the CBD notice provided did not strictly conform to the statutory requirement, we must also conclude that the agency's failure to fully satisfy the notice requirement does not warrant a reprourement.

Public Law No. 98-72 contains no expression of a congressional intent to require agencies to terminate otherwise proper awards or cancel otherwise valid procurements and reprocur in every instance where the exact letter of the notice requirement has not been met, and we find no other indication that this was Congress' intent. The legislative history for 98-72 indicates that contracting agencies were partially or totally ignoring the existing CBD notice requirement in section 8(e) of the Act (implemented by Federal Procurement Regulations, Section 1, Part 10 and Defense Acquisition Regulation, Section 1, Part 10), and that it was this disregard, in large part, which led Congress to enact the legislation. See H.R. Rep. No. 98-3, 98th Cong., 1st Sess., reprinted in 1983 U.S. Code Cong. & Ad. News 710, 713. The legislation thus appears to have been directed at preventing agencies from reducing small business competition by continuing to ignore the notice requirement.

The Navy did not ignore the notice requirement in this case. It attempted to publish a proper notice in the CBD and failed to do so only because of an omission of a

^{1/}The Navy argues that Guralnick's protest is untimely because the CBD synopsis should have placed it on notice of the facts in issue and Guralnick did not protest within 10 days of the publication date. We find that because the synopsis was misclassified, it did not place Guralnick on notice and thus did not trigger the running of the timeliness period. See 4 C.F.R. §21.2(b) (1984). Guralnick filed a protest with the Navy within 10 days after it learned of the procurement, and thereafter timely protested to our Office even though it was requested to furnish a more detailed statement of protest in accordance with 4 C.F.R. § 21.2(d).

classification code which, according to the Navy's uncontroverted explanation, was inadvertent. The notice was actually published, moreover, and two firms were aware of it. At the same time, it does not appear that small business competition was rendered ineffective by the misclassification, since although Guralnick believes more firms would have competed had the notice been proper, it appears several small businesses were sent the RFP. We conclude that since the Navy acted within the spirit of 98-72 and the overriding purpose of 98-72--inclusion of small businesses in competitions for federal procurements--was served, the inadequacy of the notice is not by itself sufficient cause for requiring the Navy to resolicit this requirement.

Guralnick also seems to argue that there was no significant effort to obtain competition because although communication system design is a highly competitive field, only two proposals were received. Guralnick claims several additional small and large businesses might have competed had the Navy handled the procurement properly. The fact that only two proposals ultimately were received, however, has no direct bearing on the adequacy of the effort to obtain competition; we have found a sufficient effort even where only one offer was received. See, e.g., Hartridge Equipment Corporation, B-209061, Mar. 1, 1983, 83-1 CPD ¶ 207.

The Navy here assembled a list of potential offerors, solicited 37 firms, and in addition sent out two RFPs based on responses to the CBD notice. This solicitation scheme, we find, represents a significant effort to obtain competition. Given the Navy's effort, it appears that although only two proposals were submitted, they were submitted under the threat of competition. The record indicates, furthermore, that the \$5,068,486 award price actually was \$19,000 below the Navy's estimate for the requirement. Guralnick does not argue, and we find no evidence, that the award price was unreasonable.

Guralnick's speculation that the Navy intentionally sought to exclude it from the competition is unsupported in the record. There is no evidence that the misclassification of the CBD notice was purposeful rather than inadvertent and, in fact, Guralnick does not challenge the verity

of the Navy's explanation. Similarly, the record contains no evidence that the Navy intended to prevent Guralnick from receiving a copy of the mailed RFP. The Navy explains, and again Guralnick does not dispute, that a copy of the RFP in fact was mailed to Guralnick, but that the Navy unknowingly was in possession of an incorrect address for the firm. Although Guralnick argues that the Navy should have had its proper address, there is no basis on this record for a finding that the Navy purposely mailed the RFP to an incorrect address to preclude Guralnick from competing. Guralnick further speculates that the Navy may have misclassified the CBD synopsis to mislead the agency's small business expert and thereby prevent this procurement from being set aside for small business. Again, Guralnick has not presented evidence showing that its speculation is anything more than that.

Guralnick asks that we investigate the possible improprieties it suspects. Our Office does not conduct investigations in connection with bid protest reviews for the purpose of determining the validity of a protester's speculations. Pluribus Products, Inc., B-214924, May 23, 1984, 84-1 CPD ¶ 562.

The mere fact that the protester did not receive a copy of the RFP, we note, does not constitute a sustainable basis of protest under the circumstances here. See Ontario Knife Company, B-205142, Feb. 10, 1982, 82-1 CPD ¶ 125.

The protest is denied.

for 
Comptroller General
of the United States