

DECISION

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

FILE: B-220608 **DATE:** January 30, 1986
MATTER OF: Western Pioneer, Inc., d.b.a.
Delta Western

DIGEST:

Neither the omission of a firm from the solicitation mailing list nor the alleged inadequacy of the Commerce Business Daily notice of the procurement prevents award and requires resolicitation where there was a significant effort to obtain competition, reasonable prices were obtained, and there was no deliberate attempt to exclude the protester from competing.

Western Pioneer, Inc., doing business as Delta Western (Delta), protests the proposed award of a contract by the Defense Fuel Supply Center (DFSC), under request for proposals (RFP) No. DLA600-85-R-0161. The solicitation was for the supply of fuel to various military activities including the United States Air Force base in Galena, Alaska, for fiscal year (FY) 1986. Delta protests that it was improperly excluded from participating in the competition because it did not receive a copy of the solicitation.

We deny the protest.

Background

On December 17, 1984, the protester wrote to DFSC's contracting office and requested an application for placing the firm on the agency's bidders list. On January 8, 1985, DFSC sent Delta its standard forms on which firms can indicate the types of products and geographic areas for which they would like to receive solicitations. The protester completed the forms in late March and returned them to DFSC, where they arrived on April 2.

A synopsis of the solicitation was published in the Commerce Business Daily (CBD) on April 4, indicating the fuels that the agency would be procuring and listing the

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RFP number and the closing date for receipt of proposals (May 16, 1985). On April 11, DFSC sent its current bidders mailing list and the solicitation to the DFSC office that would print the RFP and mail it to the firms on the list. The record indicates that standard practice is to obtain the mailing list for a particular procurement approximately 7-10 days prior to the date the solicitation is sent to the printer. The agency reports that in this case, the mailing list that was sent to the printing office was probably obtained between March 29 and April 3.

On April 15, the Contracting Support Office advised Delta by letter that the firm had been added to the solicitation mailing list. The next day, the RFP was issued to the 394 potential bidders on the mailing list that was included with the RFP when it was forwarded on April 11 for printing and mailing. Delta was not on this list and it did not receive a copy of the RFP.

On September 20, Delta's vice president telephoned DFSC to inquire about the agency's fuel needs for 1986 and to express his firm's intention to submit an offer. He was advised that the FY 1986 requirement had already been solicited and that it was too late for Delta to submit an offer. On October 1, Delta filed this protest, alleging that it had been improperly excluded from competing for the DFSC contract.

Analysis

Delta contends that the agency's failure to send it a copy of the RFP for the FY 1986 solicitation violated the Competition in Contracting Act's requirement for the use of full and open competitive procedures in Department of Defense procurements. 10 U.S.C.A. §§ 2301, 2305(a)(1) (West Supp. 1985). The protester also cites several Federal Acquisition Regulation (FAR) provisions that emphasize the basic policy to permit all responsible sources to submit proposals so that the government will have the benefit of maximum competition in procuring goods and services. The protester relies in particular on FAR sections 5.102(a)(1) and 14.205-1(b). Section 5.102(a)(1) provides that the contracting officer shall maintain a reasonable number of copies of solicitations publicized in the CBD and, upon request, shall provide or mail copies, if available, to potential sources not initially solicited. 48 C.F.R. § 5.102(a)(1) (1984). Section 14.205-1(b) provides that all eligible and qualified concerns that have submitted solicitation mailing list applications or that are capable of filling the requirements of a particular acquisition shall

be placed on the appropriate solicitation mailing list. 48 C.F.R. § 14.205-1(b) (1984).^{1/} The protester also contends that the synopsis of the procurement that appeared in the CBD was inadequate because it did not indicate that it included fuel for the Galena Air Force Base, but instead stated that the fuel was for delivery to "various inland and west coast activities."

The propriety of a procurement depends on whether adequate competition and reasonable prices were obtained--not whether a particular firm was given the opportunity to submit a proposal. Washington Patrol Service, Inc., B-217488, Aug. 16, 1985, 85-2 CPD ¶ 178. Further, neither the omission of a firm from the solicitation mailing list nor the alleged inadequacy of a CBD notice prevents award and requires resolicitation as long as there was a significant effort to obtain competition, reasonable prices were obtained, and there was no deliberate or conscious attempt to exclude the protester from competing. Solon Automated Services, Inc., 63 Comp. Gen. 312 (1984), 84-1 CPD ¶ 473.

On the issue of whether adequate competition was sought, we note that the agency placed a notice in the CBD and mailed solicitations to all 394 firms on the solicitation mailing list. We consider these actions to constitute a significant effort to obtain competition. Id.; see Blast Deflectors, Inc., B-212610, Jan. 9, 1984, 84-1 CPD ¶ 56. While Delta suggests that these efforts were inadequate because the CBD notice did not specifically indicate that fuel for Alaska was included, we do not find this a sufficient basis to conclude that the agency's efforts to seek competition were inadequate.^{2/} In any event, the

^{1/} Section 14.205-1(b) applies to procurement by sealed bidding. However, FAR § 15.403, which applies to procurement by negotiation, provides that contracting officers shall establish, maintain and use lists of potential sources in accordance with section 14.205.

^{2/} We note that in its application for inclusion on the solicitation mailing list for Alaska, Delta was given a choice of indicating that it was interested in bidding on fuels for delivery either to east coast/gulf sites or inland area/west coast sites. Delta checked the box for inland area/west coast. This suggests to us that Delta, as well as other potential offerors, was aware that Alaska was included in inland area/west coast.

agency advises that 57 offers were actually received in response to the RFP, including at least three offers for each fuel type for delivery to Galena. It thus appears that adequate competition actually was obtained. See Maryland Computer Services, Inc., B-216990, Feb. 12, 1985, 85-1 CPD ¶ 187.

Concerning the reasonableness of the prices obtained, the agency states that the prices offered by the firm that is in line for award are fair and reasonable. A determination concerning price reasonableness is a matter of administrative discretion which we will not question unless it is clearly unreasonable or there is a showing of fraud or bad faith. ORI, Inc., B-215775, Mar. 4, 1985, 85-1 CPD ¶ 266. On the record before us, we find no basis to question the determination of price reasonableness here.

There remains the issue of whether the protester has shown that the agency made a deliberate or conscious effort to exclude Delta from participating in the competition. Delta specifically alleges that this was the case.

Delta contends that DFSC was aware of the firm's interest in Galena fuel procurements well in advance of the issuance of the FY 1986 RFP and infers from that knowledge a deliberate and conscious effort on the agency's part to exclude Delta from competing. The protester refers to a telephone call it made to DFSC in November 1984, requesting information about fuel supply solicitations, followed by the December letter to DFSC, requesting an application for placement on the bidders mailing list, to show that DFSC was aware of Delta's interest in competing. Delta also emphasizes that the arrival of its completed application at DFSC on April 2 was 2 weeks prior to the issuance of the RFP on April 16, and that the letter from the agency confirming that Delta had been placed on the bidders list also preceded the RFP mailing.

Delta also describes in detail its involvement in negotiations with DFSC in February-April of 1985 for a contract to transport petroleum products to Galena for the FY 1985 requirement. The record indicates that DFSC had already contracted with another firm, MAPCO, to supply Galena's fuel requirements, when it engaged in negotiations with Delta for a separate contract to transport the fuel. However, the agency later modified the contract with MAPCO to include the transportation of the fuel and notified Delta that the separate transportation requirement no longer existed. In response, Delta filed an action in the

United States Claims Court (Western Pioneer, Inc. v. United States, No. 240-85C), challenging the government's procedures. The complaint was dismissed on procedural grounds.^{3/}

The protester also reports that in connection with this litigation, a United States Senator wrote to the Secretary of Defense on June 18 to express his concern about the procurement practices of DFSC. On July 31, the Defense Logistics Agency responded to the Senator's inquiry, assuring the Senator that the agency would seek to maximize competition for future requirements. Delta points out that this letter stated, "The next solicitation for any transportation to Galena . . . will be issued by the Fort Richardson [Transportation Officer] in 1986." The protester notes that negotiations on the FY 1986 fuel supply contract had closed a week before the letter was sent and concludes, "this pattern of activity suggests that there may indeed exist a deliberate effort to prevent Delta from competing for what has historically been a sole source procurement."

We conclude that none of the circumstances relied on by the protester adequately establish that the agency deliberately intended to exclude Delta from the competition. For example, we believe the fact that the letter advising Delta that it had been placed on the solicitation mailing list was sent the day before the RFPs were mailed using a list that did not include Delta reflects only inadvertence on the agency's part, caused by the difficulties in coordinating the different administrative tasks involved. (As noted earlier, the agency states that it customarily obtains the mailing list 7-10 days prior to sending the RFP, along with the list, to be printed and mailed.) Although the agency's letter may have induced reliance on Delta's part, we have found that even a bidder's reliance on the alleged assurances of an agency that the firm's name would be kept on the bidders list does not constitute a reason to cancel a solicitation and resolicit. King Kong Services, B-219807, Aug. 14, 1985, 85-2 CPD ¶ 171.

Regarding the 1985 transportation contract difficulties, the agency emphasizes that the requirement there was for the transportation of fuel and not the supply

^{3/} The court found, however (on the issue of proposal preparation expenses), that Delta had not shown "any viable basis on which the amendment of the MAPCO contract could be faulted in the actual circumstances involved."

of fuel, as here. DFSC contends, therefore, that no conclusions about Delta's interest in the 1986 fuel supply solicitation were reached or warranted. We think the agency's position is reasonable. Moreover, even if DFSC could be charged with knowledge of Delta's potential as a supplier of fuel, we do not consider this proof of a deliberate attempt to exclude Delta. Rather, we believe that the public advertisement of the procurement here is evidence that the agency did not deliberately exclude Delta. See Solon Automated Services, Inc., 63 Comp. Gen. 312, supra.

Regarding the statements made by the agency in its response to the Senator's inquiry, we find no inconsistency with these statements and the actual events. Although negotiations on the FY 1986 fuel supply contract were closed when the letter was sent, both the letter and the Senator's inquiry clearly concerned future competition for fuel transportation, not fuel supply. In this connection, the letter stated that the f.o.b. point for the supply contracts had not been determined and that if the contracts were awarded on an f.o.b. origin basis, transportation would be obtained competitively. This statement is not inconsistent with the fact that negotiations for the fuel supply contract were closed (as the closing of negotiations does not necessarily indicate that award decisions had been made). In any event, there is no basis to infer from the agency's letter any deliberate intent to exclude Delta from the FY 1986 fuel supply procurement at issue here, since the May 16 closing date for receipt of proposals had already passed when the Senator's inquiry was received.

Accordingly, we conclude that the record does not support a finding that there was a deliberate attempt by the agency to exclude the protester from the competition.

Delta also contends that the agency did not comply with the requirements of 15 U.S.C.A. § 637(e)(3)(a) (West Supp. 1985) that a CBD notice of a procurement be published at least 15 days prior to the issuance of a solicitation. Delta notes that the CBD notice here was published on April 4, 1985, and the solicitation was issued on April 16, 1985. Delta has not shown how it was prejudiced by the agency's failure to wait the full 15 days before issuing the solicitation, however, and it is apparent that this failure did not prevent the protester from submitting an offer. Accordingly, Delta's contention provides no basis to sustain its protest. See Tri-Com, Inc., B-214864, June 19, 1984, 84-1 CPD ¶ 643.

The protest is denied.

for Seymour Efra
Harry R. Van Cleve
General Counsel