

Ms. Miller



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Herndon & Thompson
File: B-240748
Date: October 24, 1990

Raymond H. Royce, Esq., Royce & Brain, for the protester.
Sherry Kinland Kaswell, Esq., Department of the Interior, for
the agency.
Behn Miller, Office of the General Counsel, GAO, participated
in the preparation of the decision.

DIGEST

Protest after bid opening that solicitation was improperly
restricted to Indian-owned firms pursuant to the Buy Indian
Act is dismissed as untimely where set-aside status was
clearly stated on cover sheet of the solicitation and was
included in the Commerce Business Daily notice of the
procurement.

DECISION

Herndon & Thompson (H&T) protests the rejection of its bid
under invitation for bids (IFB) No. 0-009, issued by the
Department of the Interior, Bureau of Indian Affairs (BIA),
for road construction at English Bay, Alaska. Specifically,
H&T protests the IFB's restricted status as a Buy Indian
set-aside.

We dismiss the protest.

The IFB at issue represents the agency's third attempt to
secure a contractor to rehabilitate a storm damaged highway
in English Bay, Alaska. On August 1, 1989, the BIA issued the
first IFB (No. 9-021) as a Buy Indian set-aside; although two
bids were received, the IFB was subsequently canceled because
the contracting officer determined that the offered prices
were unreasonably high. In an effort to secure a more
reasonable price, a second IFB (No. 0-001) was issued on
November 3 as an unrestricted procurement; H&T and SKW/Eskimo
submitted the only bids. Although the purpose of the IFB's
unrestricted status was to enhance competition and thus
increase the likelihood of obtaining a reasonable price, after
reviewing the bids, the contracting officer determined them

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to be unreasonably high and accordingly canceled the solicitation.^{1/}

To reduce the cost of construction, the BIA revised and modified one of the solicitation's structural design requirements; this modification was incorporated into IFB No. 0-009, which was issued on June 25, 1990, as a Buy Indian set-aside and is the subject of this protest. Three companies responded to the IFB; although H&T was the apparent low bidder, the contracting officer rejected H&T's bid because the company is not an Indian-owned enterprise.^{2/} In its protest, H&T argues that the procurement was not validly set aside and that as low bidder, it was entitled to award.

Under our Bid Protest Regulations, a protest based on an impropriety apparent from the face of the solicitation must be filed before the time set for bid opening. 4 C.F.R. § 21.2(a)(1) (1990). In this case, the IFB cover page clearly stated: "BUY INDIAN/LABOR SURPLUS AREA SET ASIDE". Moreover, since notice of the solicitation's status as a Buy Indian set-aside was published in the Commerce Business Daily (CBD) on June 12, H&T is charged with constructive notice of the solicitation's restricted status. Accordingly, since H&T did not file a protest concerning the set-aside restriction until after the July 30 bid opening date, the protest is untimely and we will not consider it on the merits. Inter-state Brands Corp., B-225550, Mar. 3, 1987, 87-1 CPD ¶ 242.

In its comments on the agency report, H&T maintains that the set-aside status of the IFB was not apparent since a synopsis of the solicitation advertised in The Plans Room, a privately published listing of all federal procurements for the state of Alaska, failed to report the IFB's Buy Indian restriction.

Congress has statutorily mandated that agencies notify potential offerors of pending procurements through publication of an announcement in the CBD. See 15 U.S.C. § 637(e) (1988); 41 U.S.C. § 416 (1988); Price Waterhouse, B-239525, Aug. 31, 1990, 90-2 CPD ¶ _____. Because the CBD is the official public notification medium by which agencies identify proposed

^{1/} Under both IFBs, the contracting officer rejected the offered prices as unreasonably high since they amounted to twice the cost of the project engineer's price estimate.

^{2/} Apparently, this IFB was issued as a Buy Indian set-aside based on the contracting officer's determination that an unrestricted procurement would not enhance the chance for price reasonableness as evidenced by the response to the November 3 unrestricted IFB.

contract actions and contract awards, when a procuring activity publishes a synopsis of a procurement in the CBD, protesters are charged with constructive notice of its contents. See AAR Brooks & Perkins, B-220206, Sept. 30, 1985, 85-2 CPD ¶ 358.

In this case, the June 12 CBD notice set forth all pertinent details regarding the instant procurement, including the solicitation's closing date, the IFB's Buy Indian set-aside status and a definition of a qualifying Indian-owned business concern; regardless of whether H&T actually read the June 12 CBD notice, it is charged with constructive notice of the solicitation and its contents. Id. The fact that The Plans Room synopsis contained inaccurate or misleading information did not affect or alter the IFB's status as a Buy Indian Act set-aside; accordingly, the fact that H&T chose to rely upon a privately published synopsis of the CBD rather than the CBD notice itself does not exempt H&T from our timeliness requirements.

The protest is dismissed.

Christine S. Melody
Christine S. Melody
Assistant General Counsel