



Comptroller General  
of the United States

447206

Washington, D.C. 20548

## Decision

**Matter of:** Freedom Elevator Corporation

**File:** B-256357

**Date:** June 10, 1994

Robert J. Miletsky, Esq., for the protester.  
John F. Mundt for Slade Industries, Inc., an interested party.  
Col. Riggs E. Wilks, Jr., and Maj. Wendy A. Polk, Department of the Army, for the agency.  
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest of agency failure to solicit a small business concern that requested a copy of solicitation is denied where, although the protester knew--as a result of agency's correspondence--that the agency intended an August or September issuance date and that the current contract would expire in December, the protester delayed contacting the agency about its nonreceipt of the solicitation until the following January, and thus did not avail itself of every reasonable opportunity to obtain the solicitation.

### DECISION

Freedom Elevator Corporation, a small business concern, protests the award of a contract to Slade Industries, Inc., under invitation for bids (IFB) No. DAKF29-94-B-0009, issued by the Department of the Army for elevator maintenance and repair services at Fort Hamilton, New York. Freedom contends that the award was improper since the Army did not send it a copy of the IFB.

We deny the protest.

### BACKGROUND

Since 1989, Freedom has performed numerous small business set-aside elevator services contracts at Fort Hamilton. In early 1992, during its performance of one of these contracts, the Army filed a size protest with the Small Business Administration (SBA), questioning Freedom's small business status. Because of Freedom's delay in answering

the SBA's size status inquiry, the SBA initially determined that Freedom was not a small business concern and Freedom's performance of the 1992 Fort Hamilton contract was subsequently terminated by the Army.

Apparently, Freedom's inadequate response to the SBA size inquiry was the direct result of the death of one of the firm's principals; ultimately, on November 3, 1992, the SBA determined that Freedom was in fact a small business concern and recertified the firm as an eligible participant for small business set-aside contracts.

After being recertified as a small business concern, by letter dated June 14, 1993, Freedom contacted the Fort Hamilton contracting director--located at Fort Dix, New Jersey --and requested that the firm be placed on the Army's elevator services bidders mailing list (BML).

By letter dated July 28, the contracting director advised Freedom that notwithstanding the 1992 size status controversy, the firm had never been removed from the agency's elevator services BML. The director further advised Freedom that:

"The [current] contract for elevator services at Fort Hamilton expires on 31 December 93. It is expected that a solicitation for next year's services will be issued in the August-September timeframe. Please feel free to contact Mrs. Edna Harris-Smith of this office, if you are interested in bidding on these services. In addition the solicitation will be advertised in the Commerce Business Daily [CBD], in accordance with the Federal Acquisition Regulation."

The director also advised Freedom of another elevator services small business set-aside procurement being conducted by the Air Force in which the firm might be interested. Finally, the contracting director provided his telephone number and invited Freedom to contact him in the event the firm had any further questions.

On November 19, the current elevator services procurement was synopsisized as a small business set-aside in the CBD; all interested firms were invited to contact the agency by letter or facsimile--at the Fort Dix contracting office--to obtain a copy of the solicitation. On December 7, the IFB was issued as a total small business set-aside to a BML comprised of 24 firms. In this regard, the record shows

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<sup>1</sup>The Fort Hamilton contracting office is located at Fort Dix.

that because the amount of this contract was estimated to be relatively small (approximately \$32,000), the contracting officer and contract specialist decided to shorten the agency's current 40-name small business elevator services contractors BML by means of a computer generated random selection process, as permitted by Federal Acquisition Regulation (FAR) § 14.205-4--which provides that where the number of bidders on a mailing list is excessive in relation to a specific acquisition, the list may be reduced--and FAR § 19.202-4(c)(2)--which provides that solicitations may be sent to "a pro rata number of small business concerns when less than a complete list is used."

The computer selection process resulted in a list of 10 small business firms. To these 10 firms, the contract specialist added the names of the 4 firms who had competed for the existing contract. Next, the contracting officer added the names of 12 firms who had responded to the November CBD synopsis for this requirement, resulting in a final BML tally of 24 firms. Although Freedom was on the initial 40-name BML, because it was not selected by the computer during the random selection process, had not participated in the predecessor procurement, and did not respond to the November CBD synopsis, it was not included on the final 24-name BML for this requirement. In this regard, neither the contract specialist nor the contracting officer was aware of Freedom's June and July correspondence with the contracting director.

At the January 12, 1994, bid opening, 10 bids were received. On January 25, while the bids were being evaluated, Freedom contacted the contract specialist and asked when the subject IFB would be issued; the contract specialist advised Freedom that the solicitation had been issued, that bid opening had been conducted, and that award was pending. On January 26, Freedom contacted the contracting director who confirmed the information provided by the contract specialist; on January 27, Freedom contacted the contracting officer and advised her that Freedom had not been solicited. On February 2, shortly after learning that the agency did not intend to cancel or resolicit the requirement even though Freedom never received a copy of the IFB, Freedom filed this protest with our Office.

#### DISCUSSION

The Competition in Contracting Act of 1984, 10 U.S.C. § 2304(a)(1)(A) (1988), requires contracting agencies to obtain full and open competition through the use of competitive procedures, the dual purpose of which is to ensure that a procurement is open to all responsible sources and to provide the government with the opportunity to

receive fair and reasonable prices. Western Roofing Serv., 70 Comp. Gen. 323 (1991), 91-1 CPD ¶ 242. In pursuit of these goals, a contracting agency has the affirmative obligation to use reasonable methods to publicize its procurement needs and to timely disseminate solicitation documents to those entitled to receive them. To that end, FAR § 14.205-1 requires contracting agencies to include on applicable solicitation mailing lists any firm that requests a solicitation document. Additionally, FAR § 19.202-4(c) requires contracting agencies to encourage maximum response to solicitations from small business concerns by sending solicitations to all such concerns on the solicitation mailing list.

However, concurrent with the agency's obligations in this regard, prospective contractors have the duty to avail themselves of every reasonable opportunity to obtain solicitation documents. Lewis Jamison Inc. & Assoc., B-252198, June 4, 1993, 93-1 CPD ¶ 433. Where a prospective contractor fails in this duty, we will not sustain the protest even if the agency failed in its solicitation dissemination obligations. Quick! The Printer, B-252646, July 20, 1993, 93-2 CPD ¶ 42; Lewis Jamison Inc. & Assoc., supra. In considering such situations, we look to see whether the agency or the protester had the last clear opportunity to avoid unreasonably precluding the protester from competing. Id.

In this case, we conclude that the protester failed to diligently pursue a copy of the solicitation. As a preliminary matter, in its June 14 letter to the Army's contracting director Freedom asked only that the firm be placed on the BML for elevator services contracts. Being placed on the BML does not constitute a guarantee of receiving a copy of every relevant solicitation, however, in light of the FAR provisions authorizing agencies to use shortened BMLs in appropriate cases. Moreover, the contracting director's July 28 letter responding to Freedom's request clearly advised Freedom that it should call the appropriate agency contracting official if it was interested in competing for the Fort Hamilton contract at issue here; that letter did not represent that the agency automatically would send Freedom a copy.

Further, as a result of the contracting director's July 28 letter, Freedom knew: (1) the agency's anticipated solicitation issuance date, (2) the telephone number of both the cognizant contracting officer and the director of contracting, and (3) that the incumbent elevator services contract would expire in December 1993. Nevertheless, when August and September 1993 passed without the firm's receiving a copy of the solicitation, Freedom did not contact the Army and tell the agency that it had not yet

received the IFB. Instead, the firm waited until late January 1994--almost 5 months after the anticipated solicitation issuance date, and 1 month after the actual expiration of the incumbent contract--to contact the agency about obtaining a copy of the solicitation.

Since Freedom knew the projected milestones of the current procurement, and did nothing to contact the agency before or near any of these milestone dates, we conclude that Freedom failed to fulfill its obligation to avail itself of every reasonable opportunity to obtain the IFB. See Lewis Jamison Inc. & Assocs., supra. Under these circumstances, the Army's failure to provide a copy of the IFB to Freedom provides no basis to sustain the protest. Id.

The protest is denied.

/s/ Ronald Berger  
for Robert P. Murphy  
Acting General Counsel