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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

# Decision

**Matter of:** Oregon Potato Company

**File:** B-294839

**Date:** December 27, 2004

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Richard A. Sargent for the protester.

Michael Gurwitz, Esq., Department of Agriculture, for the agency.

Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, participated in the preparation of the decision.

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## DIGEST

Protest regarding procurement for supply of commodity for export overseas is sustained where the solicitation failed to advise offerors that an offer would not be considered if, in a separate procurement seeking bids to transport the commodity to the ultimate destination, the agency failed to receive a bid corresponding to an offeror's proposed delivery location. Without this information, offerors lacked sufficient information to prepare their offers intelligently and to compete on an equal basis.

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## DECISION

Oregon Potato Company (OPC) protests the rejection of its offer under invitation No. 094E, issued by the Commodity Credit Corporation, Farm Service Agency, Kansas City Commodity Office, for dehydrated potato flakes for export to the nation of Moldova. OPC argues that the invitation failed to disclose a key factor necessary for the firm to intelligently prepare its offer.

We sustain the protest.

The invitation, issued on September 3, 2004, called for a specified quantity of potato flakes divided between two shipping periods. With regard to delivery of the potato flakes by the offeror, the invitation stated that “[d]elivery will be either [free alongside steamer (f.a.s.)], intermodal plant, or intermodal bridge as specified in the contract.” Invitation at 2. With regard to specific delivery locations, the invitation stated that offerors should submit prices for the potato flakes based on delivery by the offeror to any location listed on the agency's form KC-362, the offeror's plant location, or any of the nine plant locations already listed in the invitation. The form

KC-362 is a list of U.S. ports of export and “U.S. intermodal points,” which are plant locations and bridges identified by city and state.

Offerors were advised that award would be made on the basis of “the total cost to the Government to deliver the product to the ultimate destination.” Announcement DPP1 ¶ 4.B.<sup>1</sup> In this regard, the agency, in a separate procurement action using the services of a freight forwarding agency, issued a solicitation seeking bids to transport the potato flakes from the United States to Moldova. The agency’s intention was to add to an offeror’s price for supply of the potato flakes, the price of shipping the potato flakes to Moldova from the delivery location specified by the offeror. Thus, the evaluated price would consist of the offeror’s price plus the cost of transportation from the offeror’s specified delivery location to Moldova.

OPC submitted offers for both quantities sought, specifying the delivery location as f.a.s. Tacoma, Washington, one of the ports listed on the agency’s form KC-362. Although the invitation invited offers for locations on the KC-362, and although f.a.s. Tacoma was a location on the KC-362, the agency in fact received no bids for transportation from Tacoma to Moldova under its freight services solicitation.<sup>2</sup> Because there was no transportation bid corresponding to OPC’s proposed delivery location, the agency concluded that it could not calculate the cost of OPC’s offer, and therefore did not consider the offer for award. The invitation nowhere stated that the lack of a corresponding transportation bid would render an offer ineligible for award.

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<sup>1</sup> The invitation here was issued subject to the terms and conditions of the agency’s Announcement DPP1, a document which sets out general requirements pertaining to purchases of dehydrated potato products for use in export programs.

<sup>2</sup> In fact, it appears that the agency requested transportation bids only for the production plant locations listed in the invitation itself. That is, the freight solicitation seeking transportation bids stated that “carriers are encouraged to offer on all of the following intermodal plant points,” and continued with a listing of the specific production plant locations listed in the invitation or otherwise identified by potential suppliers. When asked by our Office why it did not specifically seek bids also for the ports and other locations listed in the form KC362, the agency replied that the specific locations were intended only as an addition to the locations listed in the KC-362. In this regard, the agency pointed to language in note 9 of the freight solicitation stating that “commodity, loadport, and intermodal point abbreviations [are] as per USDA Form KC-362,” and asserted that the freight carriers’ standard procedure is to bid on the ports and bridges listed on the KC-362. Despite the reference to the KC-362, given the language in the freight solicitation encouraging carriers to bid on the specifically listed plant production locations, the clear implication is that the agency was interested in receiving bids only for those locations.

A solicitation must contain sufficient information to allow offerors to compete intelligently and on an equal basis. Sea-Land Serv., Inc., B-246784.2, Aug. 24, 1992, 92-2 CPD ¶ 122 at 10. Offerors can compete on equal terms only if they know in advance the basis on which their proposals will be evaluated. Roth-Radcliff Co. Inc., B-213872.2, June 1, 1984, 84-1 CPD ¶ 589 at 5.

Here, in bidding f.a.s. Tacoma, OPC offered delivery of the requested commodity at a location listed in the KC-362, as specifically authorized by the terms of the invitation. However, OPC lacked a critical piece of information necessary for it to compete intelligently and on an equal basis—that acceptance of its offer depended on receipt by the agency of a transportation bid matching its delivery location, in a solicitation for freight bids that was being conducted roughly concurrently with the procurement for the potato flakes. OPC thus bid f.a.s. Tacoma without the knowledge that it risked being ineligible for award if the transportation solicitation did not produce a corresponding transportation bid. The agency’s failure to alert offerors to this potentially fatal pitfall meant that OPC lacked sufficient information to bid intelligently on this invitation; that is, had OPC known about the risk that its offer might not be considered depending on the outcome of the solicitation for transportation bids, it might have offered delivery to other locations (for example, to its plant location, as did the other offerors), or decided not to compete at all.

The agency makes two arguments that we find unpersuasive. First, as the agency argues, there is no dispute that the protester was on notice that the basis for the contract award would be total cost to the government, namely, the price of the potato flakes plus the price for freight to Moldova. This is not the same thing as being on notice that the agency will not consider any offers proposing delivery of the commodity to a location for which there is no freight bid received. Nor, contrary to the agency’s argument, is our conclusion here inconsistent with the principle that the government may impose substantial amounts of risk on an offeror. The defect here is that offerors were not advised of the degree of that risk, a factor critical to preparing their offers.

In similar circumstances, we generally would recommend that the solicitation be amended and reissued. That remedy is not feasible in this case, however, since the agency proceeded with performance of the contract, citing the urgent need to deliver the potato flakes to Moldova. Accordingly, we recommend that OPC be reimbursed the costs of preparing its offer, as well as its costs of filing and pursuing this protest, including reasonable attorneys’ fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d) (2004). OPC should submit its certified claim for such costs, detailing the time

expended and costs incurred, directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Anthony H. Gamboa  
General Counsel