



**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Chem-Fab Corporation

**File:** B-277795

**Date:** October 27, 1997

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Mark F. Petrovic for the protester.

Ronald M. Pettit, Esq., Defense Logistics Agency, for the agency.

Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest that the agency deprived a potential offeror of an opportunity to compete because the firm allegedly did not receive a mailed copy of the solicitation and amendment is denied where the record shows that the agency followed established procedures for disseminating solicitation documents, and there is no evidence in the record of any deficiencies in the agency's solicitation process or of a deliberate attempt by the agency to exclude the protester.

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## DECISION

Chem-Fab Corporation protests the award of a contract to Vanaero Company under request for proposals (RFP) No. SPO740-97-R-0775, issued by the Defense Logistics Agency, Defense Supply Center Columbus (DSCC), for skid tube assemblies. Chem-Fab, one of three approved sources for this item, contends that DSCC improperly failed to provide the firm with a copy of the RFP, that this failure precluded it from submitting an offer, and that the requirement should be canceled and resolicited to provide Chem-Fab an opportunity to compete.

We deny the protest.

The RFP was issued on May 30, 1997, as a small business set-aside. The RFP subsequently was amended on June 9, to identify the precise quantity of items to be procured. The closing date was extended to June 20. Due to the need to fill back-orders for this critical application item, a Justification For Other Than Full and Open Competition on the basis of urgency was executed prior to the issuance of the RFP. Due to the urgency, and as permitted by Federal Acquisition Regulation (FAR) § 5.202(a)(2), the buy was not synopsisized in the Commerce Business Daily (CBD).

The record contains a copy of the bidder's mailing list for the solicitation which lists the name and address of three small business vendors, including Chem-Fab,

which are approved sources for the item. The record contains individual printouts for each vendor, which apparently were used to generate the mailing list. The record contains a copy of the mailing list for the amendment, which also lists Chem-Fab and the other two approved sources. The mailing list for the amendment contains the following certification:

AMEND NO.   1    
MAILED \_\_\_\_\_ INITIALS \_\_\_\_\_

The certification was completed with the date "5/9" and was initialed.<sup>1</sup>

The DSCC buyer for this acquisition furnishes an affidavit in which he states that "[t]o the best of my recollection, I mailed Chem-Fab a copy of the original solicitation at the time the initial mailing went out." The buyer also explains that the certification on the mailing list for the amendment shows a mailing date and is initialed by an individual in DSCC's bid room as being mailed. The buyer states that "[t]here is nothing in [the] file to indicate that Chem-Fab was excluded from either mailing," and there is "no returned mail in the file to indicate that Chem-Fab's mailings were returned as undeliverable." DSCC received offers from the other two approved sources and awarded to Vanaero, the low-priced offeror.

In response to the agency report, Chem-Fab continues to assert that it was wrongly excluded from the competition because of the agency's failure to synopsise the requirement. It also asserts that it has an internal system for tracking solicitations and that it is unlikely it would not have responded, had it received the RFP or amendment, since it has repeatedly in the past furnished quotes to DSCC for this item. Finally, Chem-Fab points out that it was solicited for the "left-hand" version of this same item within a month after the issuance of the protested RFP and responded to that solicitation.

Under the Competition in Contracting Act of 1984 (CICA), agencies are required to obtain full and open competition through the use of competitive procedures when procuring property or services. 10 U.S.C. § 2304(a)(1)(A) (1994). "Full and open competition" is obtained when "all responsible sources are permitted to submit sealed bids or competitive proposals." 10 U.S.C. § 2302(3)(D); 41 U.S.C. § 403(6). Accordingly, we carefully scrutinize allegations that a firm has not been provided an opportunity to compete for a particular contract and take into account all of the circumstances surrounding the firm's nonreceipt of the solicitation materials, as well as the agency's explanations. Sutton Designs, Inc.--Recon., B-235382.2, Aug. 11,

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<sup>1</sup>Although the date of mailing was inserted as "5/9," the agency points out that this is an obvious error, since that date predates the issuance of the solicitation. The agency reports the correct date is "6/9," the date on which the amendment was issued and mailed. We have no basis to question the agency's position.

1989, 89-2 CPD ¶ 131 at 2. We will, however, conclude that the agency has met its obligation if it has made a diligent, good faith effort to comply with the statutory and regulatory requirements regarding notice and distribution of solicitation materials and it obtains competition and reasonable prices. Air Masters Corp., B-262213, Sept. 12, 1995, 95-2 CPD ¶ 110 at 3; Metropolitan Int'l Resources, Inc., B-258011, B-258012, Nov. 17, 1994, 94-2 CPD ¶ 196 at 2.

Here, we find DSCC satisfied the statutory and regulatory requirements governing notice and distribution of solicitation materials, since no basis exists in the record to attribute the protester's apparent nonreceipt of the solicitation and amendment to any deficiencies in the agency's dissemination process or to a deliberate attempt to exclude the protester from the competition.

Initially, to the extent Chem-Fab challenges DSCC's failure to synopsise the requirement, as the agency correctly points out, FAR § 5.202(a)(2) provides that the contracting officer need not submit a notice of a proposed contract action for publication in the CBD where the contract action is based, as here, on unusual and compelling urgency under FAR § 6.302-2. The protester agrees that the use of the exception to full and open competition under FAR § 6.302-2 was justified here. While we recognize that notice in the CBD might have helped Chem-Fab because Chem-Fab's tracking system, like other vendors' systems, identifies contracting opportunities through the CBD, DSCC properly waived the synopsis requirement.

Further, Chem-Fab does not dispute that the solicitation and amendment mailing lists, which were provided in the agency report on the protest, contain the firm's correct mailing address. The record also contains specific evidence that the amendment was mailed to the vendors on the list, including Chem-Fab. There were no returned envelopes showing that the two mailings to Chem-Fab were misaddressed or otherwise undeliverable. Chem-Fab further states that it received the solicitation for the other version of the same item during the same time period as the protested acquisition was pending. Chem-Fab's apparent failure to receive either the RFP or amendment under the protested acquisition in no way shows purposeful or deliberate action on the part of the agency to exclude the firm from competing. As a general rule, the risk of nonreceipt of solicitation documents rests with the offeror because the contracting agency is not a guarantor that these documents will be received in every instance. Air Masters Corp., *supra*, at 3-4.

Since there is no showing here that DSCC failed to mail the solicitation and amendment to Chem-Fab at its correct address, there is no basis to sustain the protest.<sup>2</sup>

The protest is denied.

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<sup>2</sup>Chem-Fab's representative furnishes an affidavit, describing a conversation with the buyer on August 13, 1997, in which the representative learned of the award and the buyer advised that "the solicitation had been synopsisized many times," which was not accurate. Thus, Chem-Fab argues that the buyer's statements in his affidavit to our Office are similarly unreliable. We are not prepared to say that the buyer's August statement, apparently made extemporaneously and without reference to the contract file, establishes that the buyer's affidavit based on his recollections and reference to the contract file are not to be given weight. In our view, the contract file mailing list records furnished with the agency report provide sufficient support for our conclusion that DSCC followed the established procedures for disseminating solicitation documents, that there is no indication in the record of any deficiencies in the solicitation process, and that there is no evidence that the agency deliberately attempted to exclude the protester from the competition.