

The Comptroller General
of the United States

Washington, D.C. 20548

87-2 CPP 450

PR

Decision

Matter of: Frank Thatcher Associates, Inc. X

File: B-228744

Date: November 12, 1987

DIGEST

Procuring agency which misclassifies advertisement in the Commerce Business Daily (CBD) has failed to effectively notify firms most likely to respond to a pending procurement and, therefore, violated the Competition in Contracting Act of 1984 (CICA) requirements to obtain full and open competition.

DECISION

Frank Thatcher Associates, Inc., protests the procedures followed by the Forest Service, United States Department of Agriculture, in soliciting proposals to conduct a microwave feasibility study under request for proposals (RFP) No. R3-87-30. Thatcher maintains that it was excluded from competition due to misclassification in the Commerce Business Daily (CBD) of the notice advertising this procurement. We agree, since the misclassified notice failed to effectively notify those firms most capable of responding to this procurement such that the Forest Service failed to obtain "full and open competition" as required by the Competition in Contracting Act of 1984 (CICA). The protest is therefore sustained.

Congress has statutorily mandated that agencies notify potential offerors of pending procurements through publication of an announcement in the CBD. 15 U.S.C. § 637(e) X (Supp. III 1985); 41 U.S.C. § 416 X (Supp. III 1985). The regulations implementing those statutes require that the agency must specify the appropriate classification under which the CBD notice will be published. Federal Acquisition Regulation, 48 C.F.R. § 5.207 X (1986).

Here, the request for contract action on which the CBD notice was based called for a feasibility study to develop specifications for procurement of the microwave portion of national forest radio systems. The Forest Service states

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that a procurement clerk handling the request incorrectly concluded that equipment would be purchased under the planned solicitation. Accordingly, the clerk requested that the notice advertising the procurement be published in the CBD in the section headed "Supplies, Equipment and Material." The notice appeared in the CBD on May 8, 1987. The Forest Service acknowledges that the notice was misclassified and should have been published in the CBD section headed "Services."

The Forest Service issued the RFP on June 26, 1987 and established a closing date of July 27. Thatcher indicated that it did not learn of the pending procurement until after the closing date.

Thatcher bases its protest on the fact that it is a consulting engineering company which only provides professional services, not supplies, equipment or material. As such, it does not review all CBD notices published daily, since a typical copy of the publication has more than 60 pages and 1,200 notices. Thatcher argues that, due to the misclassification, it and other consulting firms were not notified of the pending procurement and thus were precluded from submitting proposals.

In responding to the protest, the Forest Service argues that, despite the misclassification, the protest should be denied because the misclassification was inadvertent, adequate competition was obtained,^{1/} and award was made at a reasonable price. The Forest Service relies on decisions of our Office--decided prior to CICA--in which we denied protests concerning misclassified CBD notices where the agency attempted to notify offerors, there was no deliberate attempt to exclude the protester, and award was made at a reasonable price. E.g., Morris Guralnick Associates, Inc., B-214751.2, Dec. 3, 1984, 84-2 C.P.D. ¶ 597 (concerning a virtually identical situation where a CBD notice for a services contract was improperly classified under "supplies, equipment and material" instead of "services"); Hartridge Equipment Corporation, B-209061, Mar. 1, 1983, 83-1 C.P.D. ¶ 207. As discussed below, enactment of CICA has placed a greater burden on agencies to take positive, effective steps towards ensuring that all responsible sources are permitted to compete.

^{1/} Solicitation packages were mailed to firms on the agency's mailing list as well as firms specifically requesting the material. A total of 51 solicitations were mailed and 6 offers were received.

Since April 1, 1985, the effective date of CICA, agencies have been required to "obtain full and open competition through the use of competitive procedures." 41 U.S.C. § 253(a)(1)(A) (Supp. III 1985). "Full and open competition" is defined as meaning that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement." 41 U.S.C. §§ 259(c) and 403(7). The legislative history of CICA reveals that Congress established "full and open" competition as the newly required standard because of its "strong belie[f] that the procurement process should be open to all capable contractors who want to do business with the government." (Emphasis supplied.) H.R. Rep. No. 861, 98th Cong., 2d Sess. 1422 (1984). In view of this clear statement of the government's policy and the clear expression of Congress' intent that a new procurement standard--"full and open" competition--will govern, our Office must give careful scrutiny to the allegation that potential offerors have not been provided an opportunity to compete for a particular contract. Dan's Moving & Storage, Inc., B-222431, May 28, 1986, 86-1 C.P.D. ¶ 496; Trans World Maintenance, Inc., 65 Comp. Gen. 401 (1986), 86-1 C.P.D. ¶ 239.

Our Office has held that under CICA, an agency's failure to synopsize pending procurements in the CBD in a manner reasonably expected to provide potential offerors with actual notice of the pending procurement violates CICA's requirement to obtain full and open competition. Pacific Sky Supply, Inc., B-225420, Feb. 24, 1987, 87-1 C.P.D. ¶ 206; Reference Technology, Inc., B-222487, Aug. 4, 1986, 86-2 C.P.D. ¶ 141. Specifically, in Reference Technology, we considered a situation where an agency published a CBD notice omitting certain specific items to be procured. In that case, the protester, and firms like it, had no reason to know of the pending acquisition of the omitted items since those firms produced only the omitted items, and not the items publicized. We concluded that despite the agency's good faith effort to publicize the procurement, it had not complied with CICA's requirement to obtain full and open competition.

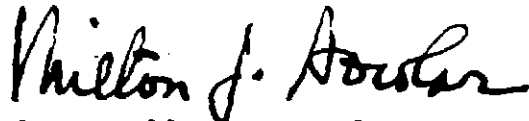
Similarly, we believe that here, due to the misclassification, the Forest Service failed to effectively notify and solicit those firms most likely to respond to the solicitation, that is, those firms specializing in providing the type of services the Forest Service sought. In situations such as this, CICA requires an agency to go beyond mere attempted notification of potential offerors. Under CICA, an agency must take positive, effective steps towards ensuring that all responsible sources are permitted to compete, and may not justify its failure to succeed by relying on its efforts rendered ineffective by its own

mistakes. Further, in this instance, the Forest Service could have easily verified whether the CBD notice was properly published and taken corrective action prior to issuance of the RFP, since the misclassified notice appeared on May 8, and the RFP was not issued until June 26.

Accordingly, we conclude that in causing the misclassification of the CBD notice, the Forest Service failed to effectively notify that segment of potential offerors most likely to respond, and thereby violated CICA's requirement to obtain full and open competition.

The protest is sustained.

We are unable to recommend resolicitation of this procurement since we understand that the contract has been substantially performed.^{2/} As a result we find that Thatcher is entitled to recover its costs of filing and pursuing this protest. 4 C.F.R. § 21.6(e)X. The protester should file its claim for costs directly with the contracting agency.
4 C.F.R. § 21.6(f)X

for 
Comptroller General
of the United States

PROCUREMENT

Competitive Negotiation
Requests for proposals
Competition rights
Contractors
Exclusion

^{2/} The Forest Service has provided our Office with written notice of its determination that urgent and compelling circumstances existed which did not permit awaiting our decision on this matter. Accordingly, contract performance was begun, notwithstanding the pendency of this protest, as permitted by statute and regulation. 31 U.S.C. § 3553(d)(2)✓ (Supp. III 1985); 4 C.F.R. § 21.4(b)(2)X(1987).