

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-185994

DATE: June 28, 1976

MATTER OF: Capitol Oil Company

61070

99385

DIGEST:

Publication of notice of intent to procure in Commerce Business Daily is constructive notice of information and protest against issuance of IFB and failure to solicit protester should have been filed within the time stated in 4 C.F.R. § 20.2 (1976) in order to be timely.

The protest of Capitol Oil Company alleges that the contract awarded to the Amerada Hess Corporation (Hess) by the Defense Fuel Supply Center (DFSC) to supply No. 2 fuel oil to the Coast Guard, Curtis Bay, Maryland, is illegal because: (1) Capitol and DFSC had a pre-existing contract covering the same requirements; (2) under Federal Energy Administration (FEA) regulations, DFSC was required to continue Capitol as the supplier; (3) DFSC failed to solicit Capitol for the procurement; and (4) Capitol's price would have been lower than Hess.

Invitation for bids (IFB) DSA600-76-B-0003 solicited bids for 1,724 items of various petroleum products, including fuel oil No. 2, for various geographical regions during the period from February 1, 1976, through July 31, 1977. Multiple awards were contemplated. DFSC reports that the IFB was synopsized in the Com . . . ily (CBD) on November 12, 1975, and scheduled for bid opening on December 9, 1975. IFB's were mailed to 228 potential bidders on DFSC's mechanized bidder's mailing list. Additionally, DFSC states that copies of the IFB were available upon request at procurement offices. The five bids received for No. 2 fuel oil ranged from Hess' low bid of \$0.3235 per gallon to \$0.3580 per gallon. Capitol did not bid.

Under FEA (formerly Federal Energy Office) regulations issued during the time of the oil embargo (Mandatory Petroleum Allocation Regulations, 39 Federal Register 1923, 1944, January 15, 1974), suppliers of middle distillates (including No. 2 fuel oil) were required to supply all of their wholesale purchasers of record during a stipulated base time period. (See subpart G §§ 211.122, 211.124.) Further, sellers were prohibited from selling middle distillates to others until all of their base period buyers' requirements were satisfied.

Under this scheme, Capitol was the base period supplier for Curtis Bay. Consequently, on September 16, 1974, DFSC awarded Capitol contract No. DSA600-75-D-4197 to supply item 4405-461 (No. 2 fuel) in the estimated quantity of 475,935 gallons for the period of September through December and 824,065 gallons for the period covering March through February.

On April 3, 1975, DFSC solicited priced offers to continue the relationship of contract -4197 as a fixed price, with economic adjustment, indefinite quantity contract, rather than as the basic ordering type agreement then existing. Also, DFSC stated in the April 3 letter that the contract was awarded pursuant to FEA's directive which was scheduled to expire on August 31, 1975, with the expiration of the FEA Mandatory Petroleum Allocation Regulations. As a result, DFSC expressed its desire to extend the then current contract through July 31, 1976, on the basis of priced offers for each item the base period supplier was obligated to supply. DFSC further stated that upon "* * * receipt and evaluation of your offer, and when we agree on a fair and reasonable price for each item, we will amend your current contract and incorporate the agreed upon prices."

Capitol submitted its offer on April 16, 1975. DFSC states that this offer was not accepted. Instead, since the Mandatory Petroleum Allocation Regulations expired on August 31, 1975, DFSC issued the protested solicitation to obtain competition for the award. In the interim between the lapse of the FEA regulation and the award of the protested contract, DFSC temporarily delegated authority to the local activities to effect their own purchases. Under this arrangement, Capitol continued to supply No. 2 fuel oil to Curtis Bay on the same terms as prevailed during the existence of the FEA regulations.

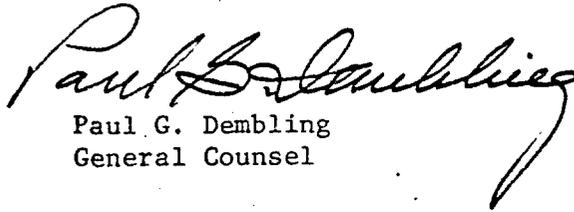
DFSC reports that Capitol was not on its mechanized bidder's mailing list. This resulted from Capitol's failure to complete and return the application sent it in April 1974. Also, although an incumbent supplier should normally be solicited for subsequent procurements, Capitol was not in this instance because it had not contracted with DFSC prior to the Mandatory Petroleum Allocation Regulations.

DFSC maintains that Capitol's protest is untimely filed under our Bid Protest Procedures, 4 C.F.R. § 20 (1976). DFSC cites Non-Linear Systems Inc., B-182636, February 12, 1975, 75-1 CPD 91, for the proposition that publication of a notice of intent to procure in the CBD is notice to all parties. Thus, DFSC states that since the notice was published on November 12, 1975, in the CBD and Capitol did not file its protest until March 1, 1976, the protest was late.

Capitol has responded to this position. First, regarding Capitol's failure to complete and return the application for the bidder's mailing list, Capitol indicates that it saw no need to be placed on the DFSC mailing list because it already possessed a contract with the Coast Guard. Capitol was unaware that DFSC would be purchasing the fuel requirements for the Coast Guard and assumed that the Coast Guard would continue its own purchasing. Regarding constructive knowledge of the CBD notice, Capitol states that there was a "* * * lack of availability of such notice to Capitol." Moreover, Capitol maintains that since it believed it possessed the contract to supply fuel until July 31, 1976, it saw no need to request any copy of the solicitation.

Notwithstanding the explanation offered, Capitol's protest is untimely filed under our Procedures. We have held that publication of a notice of intent to procure in the CBD amounts to constructive notice to all parties. Non-Linear Systems Inc., supra; MB Associates, B-184564, August 12, 1975, 75-2 CPD 104; Rescom Incorporated, B-184634, September 10, 1975, 75-2 CPD 142. Since Capitol's protest bases concern the question whether the IFB should have been issued, and alternatively, the failure to solicit Capitol, the notice in the CBD should have alerted Capitol to the bases of its protest which should have then been filed within the time stated in 4 C.F.R. § 20.2 (1976) in order to be timely.

We must decline to consider the merits of Capitol's protest.


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General Counsel