



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Charles Snyder
File: B-235409
Date: September 1, 1989

DIGEST

Protest is sustained where agency determined that urgency required that competition be limited to local gravel sources, and then failed to solicit offer from protester solely due to his non-local mailing address, even though agency was fully aware that protester owned local gravel pit.

DECISION

Charles Snyder protests the award of a contract to S & J Enterprises, under request for proposals (RFP) No. F65501-89-R-0030, issued by the Department of the Air Force for gravel aggregate to be used at King Salmon Air Force Station, Alaska. The requirement called for an indefinite quantity of gravel aggregate for the summer 1989 construction season (up to 25,000 cubic yards), plus 4 option years (up to 20,000 cubic yards for each year). Snyder argues that he was improperly excluded from the solicitation process and thereby precluded from submitting a proposal under the solicitation.

We sustain the protest.

The RFP in issue here represents the agency's second attempt to meet this gravel requirement. On February 1, 1989, the Air Force issued RFP No. F65501-89-R-0007 for this requirement, synopsisized it in the Commerce Business Daily and sent the RFP to nine potential contractors, among them Snyder's Gravel Pit, Inc., owned by the protester. On February 23, Snyder and other interested firms attended a pre-proposal conference, but as of the closing date for receipt of proposals, March 6, only one proposal was received, the price of which was judged unreasonable. The contracting officer contacted several of the potential contractors who had not submitted proposals, including Snyder, and learned that the reason for their nonparticipation had been that

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their pits could not produce gravel as large as required by the RFP. The contracting officer then canceled the solicitation for lack of a reasonable price, initiated a review of the government's needs, and determined that a smaller size gravel would be acceptable.

At this juncture, however, the uncertainty of the gravel supply was threatening road repair and improvement projects considered essential to mission readiness. In this regard, since outdoor construction can only be performed at the base from May through September, any delay in a project can push the completion date too late into the fall, thus requiring that it be postponed until the next year. Hence, the need to establish a source was judged urgent and compelling and the Air Force executed a justification and approval for less than full and open competition to justify the use of oral negotiations with potential vendors in the immediate area only, pursuant to the authority of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(c)(2) (Supp. IV 1986). The contracting officer limited the firms solicited to the one which had responded to the previous solicitation, plus the three firms from the mailing list of the previous solicitation with mailing addresses in the King Salmon area. The protester was omitted from the mailing list because he had not submitted a proposal under the original solicitation, and his mailing address was Kenai, Alaska, several hundred miles from King Salmon.

The four firms on the mailing list were invited to a pre-proposal conference at the base on March 15 to discuss the requirement and so that negotiations could be initiated with interested parties. The requirement apparently was not otherwise advertised. Of the four, only Moorcroft Construction and the awardee, S & J, attended. During the course of discussions and on-site investigations, the government was informed that a local gravel pit was owned by Snyder and operated by Moorcroft. A written RFP was issued on March 21 and mailed to each of the four potential offerors. It provided that offers could be submitted orally or in writing by the closing date, March 27, and that oral negotiations would be conducted subsequently with all interested parties. A pre-negotiation briefing was held on March 29 and S & J was selected for award as the low responsive, responsible offeror, without further discussions. After denial of an agency-level protest, Snyder filed a protest with our Office. Performance of the contract has not been stayed due to an agency finding that the urgent and compelling status of the requirement, because of the short construction period, precludes delays in performance. See 31 U.S.C. § 3553(d)(2) (Supp. IV 1986).

Snyder does not challenge the Air Force's finding that the requirement here was urgent, but claims simply that the urgency did not justify excluding him from the competition strictly on the basis of his mailing address being outside the King Salmon area, since (1) he was readily accessible by mail or by telephone; (2) he had demonstrated his interest in the procurement and his accessibility by his attendance at the February 23 pre-proposal conference under the previous solicitation; and (3) he did own a gravel pit local to the King Salmon area, as the Air Force was fully aware, and that he, not Moorcroft, operated that pit with personnel and equipment leased from Moorcroft.

The Air Force claims that its decision to solicit only the firm that had responded to the previous solicitation and those that appeared to be located in the immediate area was proper given the urgency of the requirement. The agency states it had a good faith belief that it was soliciting proposals from all possible sources and that, although it became aware that Snyder owned a local pit, the contracting officer believed Snyder's interests were being represented by another firm, Moorcroft, which currently was operating Snyder's pit. The Air Force has determined, however, that it would not be in the government's best interest to exercise the options under the circumstances; it has advised the contracting activity to recompetete those requirements, affording Snyder an opportunity to submit an offer.

Generally, CICA requires contracting agencies to obtain full and open competition through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A) (Supp. IV 1986); TeQcom, Inc., B-224664, Dec. 22, 1986, 86-2 CPD ¶ 700. An agency may use other than competitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency were not permitted to limit the number of sources from which it solicits proposals. 10 U.S.C. § 2304(c)(2) (Supp. IV 1986); Data Based Decisions, Inc., B-232663 et al., Jan. 26, 1989, 89-1 CPD ¶ 87. When proceeding on the basis of such urgency, however, the agency still is required to request offers from "as many potential sources as is practicable under the circumstances." 10 U.S.C. § 2304(e) (Supp. IV 1986); Fairchild Weston Systems, Inc., B-225649, May 6, 1987, 87-1 CPD ¶ 479.

We find that the Air Force did not meet this standard here. Although we see nothing objectionable in the Air Force's decision to limit competition to local gravel suppliers based on the urgency caused by the short construction season, the limitation did not warrant excluding Snyder from the competition. The record clearly shows that the Air

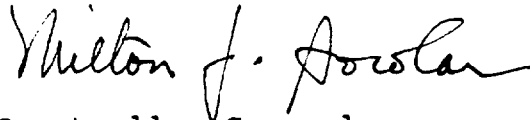
Force was fully aware, prior to receipt of proposals, that Snyder was a gravel supplier; that he was interested in competing if the size of the required gravel was reduced; and that he had a local gravel pit (which actually is adjacent to the awardee's gravel pit). In other words, Snyder not only fell within the class of firms the Air Force intended to solicit, but the Air Force was, or should have been, fully aware that this was the case.

The Air Force advances two principal reasons for excluding Snyder: (1) Snyder's mailing address was outside the base locale; and (2) the Air Force believed Snyder's interests were represented by Moorcroft. Both reasons are unpersuasive. First, since the agency's concern in imposing the limitation was apparently avoiding delays that might result from long-distance transportation of gravel, the address of the gravel pit itself, not the mailing address of the owner, was the proper consideration for purposes of deciding which firms to solicit; again, Snyder's gravel pit was in the local area. The Air Force also indicates it did not want to contract with an owner out of the local area, but it does not explain how doing so would cause delays in the procurement or otherwise negatively affect performance. In this regard, the record shows that Snyder was accessible by mail and telephone, often was present at the gravel pit, and had attended other meetings at the facility; it is not apparent to us why a more constant presence would be necessary for negotiations or contract performance.

Similarly, it is unclear to us why the Air Force believed Snyder's interests were being represented by Moorcroft. Snyder was included on the original mailing list and attended the pre-proposal conference, and the agency contacted Snyder after only a single proposal was received on the first solicitation to determine why Snyder had not submitted an offer. In its report on this matter, moreover, the Air Force indicates that it decided not to solicit Snyder, not because Snyder already was represented in the competition, but because of the local area restriction. Thus, notwithstanding that the government was advised by Moorcroft that it was operating Snyder's pit, these facts show that the Air Force either knew or should have known that Snyder and Moorcroft were unaffiliated beyond that contractual arrangement and that Snyder's pit was available for this procurement. In these circumstances, the agency's reliance on the advice of Moorcroft, a potential competitor of Snyder, was at its own risk, and does not justify the failure to solicit Snyder when the facts indicate that Snyder's pit was available and that Snyder was interested.

We conclude that the Air Force improperly failed to solicit Snyder, and sustain the protest on this basis. Because contract performance continued in the face of Snyder's protest due to urgent and compelling circumstances, it is not practicable to recommend that the Air Force resolicit the base requirement. We do recommend, however, as the Air Force proposes, that it not exercise the options under S & J's contract, and instead recompile for its needs beyond the base year. We also find the protester entitled to recover the costs of filing and pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1988); Data Based Decisions, Inc., supra.

The protest is sustained.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General
of the United States