McAuliffe

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Price Waterhouse

File: B-239525

Date: August 31, 1990

Edward J. Haller, for the protester.
Buel White, Esq., Verner, Liipfert, Bernhard, McPherson and Hand, for Coopers & Lybrand, an interested party.
Jo H. Dubose, Esq., Defense Fuel Supply Center, Defense Logistics Agency, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where agency reasonably classified requirement for accounting and financial services for the reconciliation of contracts as miscellaneous services in its Commerce Business Daily (CBD) announcement of the procurement, CBD synopsis meets statutory and regulatory publication requirements.

2. Where the agency published its intention of issuing a competitive solicitation in the CBD and mailed a solicitation package to the protester's correct address, the protester bears the risk of nonreceipt of the solicitation in the absence of evidence that the agency deliberately attempted to exclude the protester from participating in the procurement.

3. Procuring agency obtained full and open competition under the Competition in Contracting Act of 1984, despite having received only one proposal in response to the solicitation, where the agency made a good faith effort to obtain competition by publicizing the requirement, mailing solicitations to 36 firms, and holding 2 pre-proposal conferences attended by 5 potential offerors, and where record reasonably shows that other potential offerors did not submit proposals for business reasons.

DECISION

Price Waterhouse protests the award of a contract to Coopers & Lybrand, under request for proposals (RFP) No. DLA600-89-R-0149, issued by the Defense Fuel Supply Center (DFSC) for contract reconciliation services to support the Defense Logistics Agency (DLA) in the transfer of accounting and finance functions from several DLA field activities to the Defense Logistics Agency Finance Center in Columbus, Ohio. Price Waterhouse contends that the agency's notice of the solicitation in the Commerce Business Daily (CBD) was defective, resulting in the protester's being unreasonably excluded from competing under the RFP.

We deny the protest.

On July 14, 1989, DFSC announced in the CBD its intentions to issue a competitive solicitation for the required services. The procurement synopsis was published under CBD classification code X, miscellaneous services. The record shows that the agency mailed solicitation packages to the 31 firms that responded to the CBD notice, as well as 8 additional firms, including Price Waterhouse, which were identified by the agency as possible sources for the performance of the contract reconciliation services. The solicitation was ultimately issued on October 30. The agency held two pre-proposal conferences which were attended by five potential offerors. One offer was received by the February 12, 1990, closing date. On April 6, after determining that the offered price was reasonable, DFSC awarded a contract for $14,848,000 to the sole offeror, Coopers & Lybrand, which had performed the required services as a subcontractor in the past. Price Waterhouse, claiming that it first learned of the award to Coopers & Lybrand after reading a brief award announcement in the Washington Post on April 16, filed its protest with our Office on May 2.1/

1/ The agency, citing 4 C.F.R. § 21.2(a)(2) (1990), argues that the protest is untimely because it was filed more than 10 working days from April 16, the day the protester learned of the award. The record shows, however, that Price Waterhouse did not learn of its bases of protest (i.e., regarding an allegedly defective CBD notice and noncompetitive award) until April 18, 10 working days before it filed its protest. We consider the protest timely since the April 16 newspaper announcement only identified the awardee and dollar amount of the award for contract reconciliation

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Price Waterhouse first contends that the July 14 CBD synopsis was defective because it listed the procurement under the miscellaneous services section of the CBD instead of the expert and consultant services section (classification code H) where, the protester claims, the Department of Defense generally lists its accounting services procurements. The protester argues that the expert and consultant services section most closely describes such acquisitions. Price Waterhouse also contends that although DFSC was issuing the RFP here, the protester was misled by the CBD announcement that this was a DFSC procurement because DFSC does not typically solicit for accounting services. The protester asserts that this requirement instead should have been advertised as a DLA comptroller procurement. The protester basically argues that, due to the allegedly misclassified and misleading CBD announcement, it and possibly other potential competitors were not notified of the pending procurement and thus were precluded from submitting proposals.

DFSC responds that it properly synopsized the requirement in the CBD in accordance with the Federal Acquisition Regulation (FAR) § 5.207(b)(4)(6) (FAC 84-52), which requires that "each synopsis shall classify the contemplated contract action under the one classification code which most closely describes the acquisition." The agency maintains that CBD classification code X, for miscellaneous services synopses, is the code which most closely describes the acquisition of these accounting and financing services for the reconciliation of contracts. The contracting officer determined that since consultant services were not being procured here and since there is no classification code specifically for accounting services, the miscellaneous section was most appropriate. FAR § 5.207(g)(1) provides for the use of the miscellaneous section for all services not covered by any other code. The agency also disputes the protester's claims that listing DFSC as the contracting activity was inappropriate or misleading or that DLA should have issued the solicitation because it had done so in a previous procurement for similar services. The agency explains that DFSC's Special Acquisitions Division "has the primary responsibility for handling base contracting actions for DLA Headquarters." The agency asserts that, although a previous procurement for contract reconciliation services may have been listed as a DLA procurement (because DLA on occasion

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services and did not provide sufficient information to form the basis of the protest issues.

may assume some of DFSC's base contracting responsibilities), it was completely proper to list the present requirement as a DFSC procurement since DLA was not the contracting activity here.

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) (1988); 41 U.S.C. § 416 (1988). The regulations implementing those statutes require that the agency must specify the appropriate classification under which the CBD notice will be published. FAR § 5.207. As stated above, the only regulatory direction given to the contracting officer in choosing the proper CBD classification is to classify the contemplated contract under the one classification code which most closely describes the acquisition. FAR § 5.207(b)(4). Such classification determinations therefore necessarily involve some degree of judgment on the part of the contracting officer. 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 would violate the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(1)(A) (1988), requirement to obtain full and open competition. See Frank Thatcher Assocs., Inc., 67 Comp. Gen. 77 (1987), 87-2 CPD ¶ 480 (where we found a procurement of services misclassified as one for supplies and thus in violation of CICA since the publication of the misclassified CBD notice failed to effectively notify those service-oriented firms most likely to respond to the solicitation).

We find that the contracting officer acted reasonably in classifying this procurement of accounting related services as miscellaneous services. Although this procurement may have arguably fit within more than one of the available CBD classification codes, as DFSC points out, there is no separate classification for accounting services and this is not a consultant services procurement necessarily requiring classification under code H. In fact, Price Waterhouse admits that it regularly reviews both the expert (i.e., code H) and miscellaneous (i.e., code X) sections of the CBD for synopses of accounting services acquisitions. While Price Waterhouse has submitted synopses of recent accounting services procurements by other Department of Defense activities which are classified under expert and consultant services, the record does not establish that DFSC's or DLA's established practice is to use that classification or that DFSC otherwise acted unreasonably in classifying this requirement under the miscellaneous section. Further, since 31 firms responded to the July 14 CBD notice, there is no evidence that the synopsis location inhibited competition.

We also cannot agree with Price Waterhouse's position that listing the requirement as a DFSC procurement was somehow improper or misleading. As the contracting activity issuing the solicitation, we find that DFSC was the appropriate agency to list in the CBD announcement. Regardless of the synopsis statement that this was a DFSC procurement, the announcement specifically stated in bold print that this acquisition involved accounting and contract reconciliation services. The notice clearly established that this was a procurement in support of DLA. For whatever reason the protester failed to see and act upon the July 14 CBD notice, we cannot attribute such failure to improper action by the agency, which reasonably classified the acquisition and met statutory and regulatory publication requirements.

Price Waterhouse next alleges that DLA improperly failed to solicit the firm for this procurement, although it knew that the protester was interested in competing for these or similar services. Specifically, the protester claims that DLA knew of its interest in May 1989 when it called the agency to inquire about accounting services acquisitions, and that DLA misled the firm by suggesting the pursuit of a subcontract opportunity with the minority small business prime contractor then performing the initial phase of the contract reconciliation services. The protester asserts that the agency failed to meet the requirements in CICA for full and open competition, especially since only one offer was received, and requests that the requirement be resolicited to afford Price Waterhouse an opportunity to compete.

DFSC states that it sent a copy of the RFP to the protester. The file contains an affidavit from the DFSC contract specialist who declares that she sent a copy of the solicitation to Price Waterhouse at its correct address on or about November 1, 1989. DFSC also states that the information it gave to the protester in May 1989 was current and constructive and that the agency in no way and at no time sought to exclude the protester from competing in the present procurement.

A firm bears the risk of not receiving solicitation materials unless it is shown that the contracting agency made a deliberate effort to prevent the firm from competing, or that, even if not deliberate, the agency failed to provide the solicitation materials after the firm availed itself of every reasonable opportunity to obtain it. Crown Management Servs., Inc., B-232431.4, Apr. 20, 1989, 89-1 CPD ¶ 393; Uniform Rental Serv., B-228293, Dec. 9, 1987, 87-2 CPD ¶ 571. This rule stems from the fundamental principle

that the propriety of a particular procurement depends on whether full and open competition and reasonable prices are obtained, not on whether a particular firm was afforded an opportunity to compete. Id.

There is no evidence to show that DFSC deliberately failed to send the solicitation to Price Waterhouse. On the contrary, the record shows that the protester was one of eight additional firms identified as potential competitors and included on the bidders mailing list, and the cognizant DFSC contract specialist has submitted a statement indicating that she sent a copy of the RFP to each of the eight firms. Further, even if the agency inadvertently failed to send a copy of the solicitation to Price Waterhouse, we still cannot find that the protester availed itself of every reasonable opportunity to obtain the RFP, especially since, as we have concluded, the procurement was properly synopsized. In the 10 months which passed between the protester's June 1989 unsuccessful attempt at becoming a subcontractor of these services (at which time Price Waterhouse believed the prime contract had been canceled), and the April 1990 award of the contract to Coopers & Lybrand, the record fails to show that Price Waterhouse ever contacted DLA or DFSC to inquire about any new procurement for these services. Since the agency had no reason to believe that Price Waterhouse failed to read the CBD notice or did not receive the solicitation, we cannot find that DLA improperly misled the protester or negligently excluded the protester from the competition.

Price Waterhouse alleges that the agency failed to obtain full and open competition in this procurement since only one proposal was received and the sole offeror was the incumbent subcontractor of these services. DFSC responds that it conducted the procurement in accordance with the statutory and regulatory requirements for full and open competition, and that it in no way improperly favored the awardee.

An agency meets the CICA mandate for full and open competition when it makes a diligent, good faith effort to comply with the statutory and regulatory requirements regarding notices of the procurement and distribution of solicitation materials, and obtains a reasonable price. The Maxima Corp., B-234019, Apr. 7, 1989, 89-1 CPD ¶ 363.

In this case, we think the agency met the CICA mandate to ensure full and open competition. It provided the requisite notice. The agency sent solicitation packages to the 31 firms which responded to the CBD notice, and to several additional firms, including the protester, that had been identified as potential competitors. Two pre-proposal

conferences, were held. As to the protester's concerns that only one proposal was received due to the agency's alleged lack of notice or attempts to obtain competition, the record reasonably shows that this most likely was not the result of any lack of effort to publicize the requirement. Rather, the record reasonably shows that a lack of technical capability regarding the complexity of the project and a limiting 10 percent ceiling on labor costs ultimately caused several of the potential offerors to withdraw from the competition. There also is no evidence, and Price Waterhouse does not dispute, that the cost at which the contract was awarded was unreasonable. As a result, we find no basis to question whether full and open competition was obtained here.

The protest is denied.

Robert P. Murphy

for James F. Hinchman
General Counsel