

J. Cunningham



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Ktech Corporation
File: B-240578
Date: December 3, 1990

Walter R. Keller for the protester.
William K. Dix, Esq., for Science Applications International Corp., an interested party.
David C. Richard, Defense Nuclear Agency, for the agency.
James M. Cunningham, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Erroneous listing of prospective offeror's address does not justify sustaining protest against offeror's non-receipt of request for proposals (RFP) where error appears to be an inadvertent, isolated occurrence not suggestive of significant deficiencies in the contracting agency's solicitation process, and where protester did not avail itself of every reasonable opportunity to obtain the solicitation in that during the approximately 2 months following the presolicitation conference which it attended it made only one inquiry as to the status of the procurement.

DECISION

Ktech Corporation has filed a protest under request for proposals (RFP) No. DNA001-90-R-0044, issued by the Defense Nuclear Agency (DNA) for specialized nuclear services. Ktech complains that DNA improperly failed to provide Ktech with a copy of the RFP prior to the closing date for receipt of proposals.

We deny the protest.

On April 18, 1990, DNA published a notice in the Commerce Business Daily (CBD) that it would conduct a presolicitation conference on April 25 (later changed to May 11), 1990.^{1/} Ktech responded to the CBD notice by a facsimile message in

^{1/} DNA also published a CBD "sources sought" notice for this requirement on May 10.

which it advised the contracting agency that the company's Mr. Freddie W. Smith would be attending the conference. DNA thereafter invited 36 companies, including Ktech, to attend this conference. DNA's invitation to Ktech was properly addressed to: Mr. Freddie W. Smith, Ktech Corporation, 901 Pennsylvania Avenue, N.E., Albuquerque, NM 87110. Ktech received this invitation and sent to the conference Mr. Smith, who states that he was thereafter "advised [by DNA] that since [Ktech] was on the list of conference attendees, Ktech would receive the RFP when it was released." Further, Ktech states that shortly after this conference another Ktech representative telephoned DNA and was told that he "need not take any further action to receive the RFP."

DNA states that on June 1, it mailed a copy of the RFP to "each of the [43] companies on the offerors' mailing list at the address indicated on the list." As for the protester, its address shown on the list did not include Ktech's corporate name but rather set forth only the name of Mr. Smith, Ktech's representative who had attended the preproposal conference; moreover, through an apparent typographical error, the street address number was incorrectly typed as "801," rather than "901," Pennsylvania Avenue. Proposals were due and received on July 2; however, no proposal was received from Ktech, which had failed to receive a copy of the RFP. On July 19, more than 2 months after the presolicitation conference was held, Ktech called the contracting agency to inquire as to the status of the procurement. Upon being advised that proposals already had been received and evaluated, Ktech protested to our Office.

Ktech argues that it took "complete and sufficient action" to obtain a copy of the RFP and that, but for DNA's error, it would have received the RFP. Consequently, Ktech argues that it should now be allowed to compete under the RFP.

Subsequent to the enactment of the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(1)(A) (1988), which sets forth a requirement for "full and open competition" (see, for example, 10 U.S.C. § 2301(a)(1)), we have sustained protests and recommended recompetition where we found that a contracting agency's failure to transmit solicitation documents to a prospective competitor--though inadvertent and not deliberate--was the result of significant deficiencies on the part of the contracting agency. See, for example, EMSA Ltd. Partnership, B-237846, Mar. 23, 1990, 90-1 CPD ¶ 326; Essex Electro Eng'rs, Inc., B-234089.2, Mar. 6, 1990, 90-1 CPD ¶ 253. However, a prospective competitor bears the risk of lost solicitation documents when the failure is solely the result of the contracting agency's inadvertence and not also the result of significant deficiencies. See Leavenworth Office Equip., B-220905, Nov. 12, 1985, 85-2 CPD ¶ 543

(agency mistakenly misaddressed solicitation package intended for the incumbent contractor); James L. Clark, Jr., Plumbing & Heating Co., Inc., B-220673, Oct. 29, 1985, 85-2 CPD ¶ 484 (agency's failure to send amendment to the protester was apparently an isolated oversight.) As we stated in NRC Data Sys., 65 Comp. Gen. 735 (1986), 86-2 CPD ¶ 84:

"Although the CICA standard of full and open competition requires an agency to take reasonable steps to ensure that a procurement is open to all responsible sources, that requirement should not be read so broadly as to require an agency either to accept a late submission or to resolicit whenever the agency contributes to a prospective contractor's failing to receive solicitation materials in a timely manner. Not only would this be inefficient from the government's perspective, but the integrity of the system would be undermined if the other bidders or offerors could not rely on the finality of bid or proposal closing dates. Rather, we think an agency has satisfied CICA's full and open competition requirement when it makes a diligent, good-faith effort to comply with the statutory and regulatory requirements regarding notice of the procurement and distribution of solicitation materials, and it obtains a reasonable price. The fact that inadvertent mistakes occur in this process should not in all cases be grounds for disturbing the procurement."

See also Kahr Bearing, B-228550.2; B-228551, Feb. 25, 1988, 88-1 CPD ¶ 192; Valistar Int'l Corp., B-227905, Sept. 16, 1987, 87-2 CPD ¶ 259.

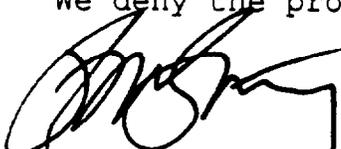
In addition, prospective contractors also have an obligation to avail themselves of every reasonable opportunity to obtain solicitation documents. See, e.g., Fort Myer Constr. Corp. B-239611, Sept. 12, 1990, 90-2 CPD ¶ 200. While in a negotiated procurement, as here, there may be a lesser duty on the prospective contractor to do so than in a sealed bid procurement, Fort Myer Constr. Corp., B-239611, supra, it nevertheless remains a factor to be considered in determining whether a procurement should be disturbed because of an inadvertent failure to provide solicitation documents.

We conclude that here DNA satisfied CICA's full and open competition requirement. DNA published two notices in the CBD concerning the RFP and invited to a presolicitation conference 36 prospective offerors, including Ktech, who attended it.

DNA further mailed a copy of the RFP to 51 prospective offerors who were listed on the offerors' list for the RFP.

Although Ktech's address as shown on the offerors' list included only its employee Mr. Smith's name and contained one incorrect digit in the street number, there is nothing in the record to indicate that these errors were other than inadvertent or that they resulted from any significant deficiency on DNA's part. We further question whether Ktech availed itself of every reasonable opportunity to obtain the solicitation. We recognize that Ktech was assured that by virtue of having expressed an interest in the procurement and sending a representative to the presolicitation conference, it would be placed on the offerors' mailing list (and in fact it was) and that it need do nothing more to obtain a copy of the solicitation. Yet, we note that apart from one telephone call made shortly after the conference was held, Ktech made no further inquiries of the contracting agency for approximately 2 months, by which time the RFP had been issued and proposals received. The fact that Ktech did not make at least one more inquiry during the month following the presolicitation conference, and permitted approximately 2 months to expire before it made a second inquiry, contributed to the circumstances that the errors in the mailing list were not more timely discovered. Finally, we understand that DNA did receive three offers under the RFP and, therefore, competition for the services was obtained. See Kahr Bearing, B-228550.2; B-228551, supra. Given these circumstances, we conclude that DNA's inadvertent error does not justify sustaining the protest.

We deny the protest.


James F. Hinchman
General Counsel