



Decision

Matter of: Gourmet Distributors

File: B-259083

Date: March 6, 1995

Ted Muehleisen for the protester.
C. Joseph Carroll, Esq., Department of Justice, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency did not use reasonable methods to obtain full and open competition where it improperly classified the announcement of a beverage vending services procurement published in the Commerce Business Daily, in that the classification category selected was for leasing or renting equipment, which the procurement did not contemplate.

DECISION

Gourmet Distributors protests invitation for bids (IFB) No. 168-0173, issued by the Department of Justice, Federal Bureau of Prisons, for vending beverage services at the Metropolitan Correctional Center, San Diego, California. Gourmet alleges that the synopsis of this solicitation published in the Commerce Business Daily (CBD) was misclassified, which prevented the protester from submitting a bid.

We sustain the protest.

On July 29, 1994, the agency synopsisized this procurement in the CBD under the classification category W, "Lease or Rental of Equipment." The agency issued the IFB on August 29. The IFB specifies the number and location of beverage vending machines that the contractor will place in the prison. Under the IFB, the contractor retains ownership of these machines and is responsible for maintaining and stocking the machines. The contractor is to pay the agency a commission based on a fixed percentage of the gross sales from the vending machines. The IFB states that bidders should bid in terms of a fixed

percentage commission rate and that award would be based on the most advantageous commission rate.

The agency sent solicitations to four prospective bidders. Bid opening was on October 14. The agency received two bids.

Gourmet did not learn of the IFB until October 20 and on October 21 filed this protest. Gourmet states that, although it reads the CBD for announcements of vending service procurements, it does not read announcements under category W because it neither leases nor rents equipment. Gourmet alleges that the agency incorrectly classified this IFB under category W, rather than an applicable classification, and thus did not effectively notify prospective offerors of the solicitation.

The Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(a)(1)(A) (1988), requires civilian contracting agencies to obtain full and open competition through the use of competitive procedures, the dual purpose of which is to ensure that a procurement is open to all responsible sources and to provide the government with the opportunity to receive fair and reasonable prices. Custom Envtl. Serv., Inc., 70 Comp. Gen. 563 (1991), 91-1 CPD ¶ 578. In pursuit of these goals, a contracting agency has the affirmative obligation to use reasonable methods to publicize its procurement needs and to timely disseminate solicitation documents to those entitled to receive them. Holiday Inn--Laurel, B-249673.2, Dec. 22, 1992, 92-2 CPD ¶ 428. Where an agency relies on advertisements in the CBD to satisfy this obligation, such announcements must be published under the most appropriate classification category. Frank Thatcher Assocs., Inc., 67 Comp. Gen. 77 (1987), 87-2 CPD ¶ 480. If an agency misclassifies the announcement in the CBD, the agency has failed to effectively notify the firms likely to respond to a pending procurement and has thus failed to use reasonable methods to obtain full and open

¹Gourmet states, without agency contradiction, that there are 65 prospective bidders for this procurement in San Diego County.

²Even though the Bureau of Prisons is not using appropriated funds to pay for these services, but is receiving commissions from the contractor, this is considered a procurement of services by a civilian agency through a contract that is subject to the requirements of CICA, 41 U.S.C. § 253. See T.V. Travel, Inc. et al.--Recon., 65 Comp. Gen. 109 (1985), 85-2 CPD ¶ 640; Premiere Vending, 73 Comp. Gen. 201 (1994), 94-1 CPD ¶ 380.

competition.³ Id.; KII, B-251436, Mar. 10, 1993, 93-1 CPD ¶ 223.

Here, the agency is soliciting bids for beverage vending machine concession services. The agency grants space to the contractor in which the contractor will place its vending machines; in return, the agency receives a commission on the sales made through the contractor's machines. The agency states that it classified this procurement under category W because the contractor will presumably have to rent or lease equipment to perform the contracts. However, category W only encompasses the rental or lease by the government of equipment. Since the agency will neither rent nor lease equipment under this contract, category W is not an appropriate classification for this IFB.

The protester alleges that the only category for this IFB would be category S, "Utilities and Housekeeping Services." We agree. The CBD lists, as examples of the services included under this category, food services and facilities and operations support services. The purpose of this procurement is to make available beverages for purchase by inmates and prison personnel. Both food services and operations support services would seem to reasonably encompass such a procurement, far more so than the equipment rental category. Indeed, we find no other CBD classification where such vending services should be advertised, and our review of the recent CBDs shows that vending machine services are almost always synopsisized under

³Some procurements may be difficult to classify under any one category and will require some degree of judgment on the part of the agency. Price Waterhouse, B-239525, Aug. 31, 1990, 90-2 CPD ¶ 192. We will uphold an agency's selection of categories in classifying CBD announcements where the classification category selected can be reasonably expected to provide potential offerors with actual notice of the pending procurement. See King-Fisher Co., B-250791, Feb. 2, 1993, 93-1 CPD ¶ 94; Price Waterhouse, *supra*.

category S.⁴ Thus, the agency erred in synopsisizing this procurement under category W.

Since the agency relied upon the CBD synopsis to publicize this procurement and then misclassified the synopsis, it failed to provide effective notice of this procurement and, thus, did not use reasonable methods to obtain full and open competition. Frank Thatcher Assocs., Inc., supra.

We recommend that the agency cancel the IFB and reissue it with a synopsis published in the CBD under an appropriate classification. Gourmet is entitled to the reasonable costs of filing and pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). The protester should file its certified claim for costs directly with the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

\s\ James F. Hinchman
for Comptroller General
of the United States

⁴The few instances where we have found vending services classified under other categories involved either the Bureau of Prisons, or are obvious misclassifications or instances where the vending services are just one part of the requirement which can be properly classified elsewhere. As a general rule, the Bureau of Prisons has synopsisized for similar services under category S. However, the agency reports that it has synopsisized for vending services under at least six other categories. This suggests that the agency needs to be consistent in advertising these procurements in the future. See Do-Well Servs. & Supplies, Inc., 70 Comp. Gen. 187 (1991), 91-1 CPD ¶ 48.