



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Wind Gap Knitwear, Inc.

File: B-276669

Date: July 10, 1997

David P. Metzger, Esq., and Craig A. Holman, Esq., Holland & Knight, for the protester.

James H. Henry II, Esq., Henry, McCord, Bean & Miller, for Daun-Ray Casuals, Inc., an intervenor.

Catherine C. Morris, Esq., and Michael Trovarelli, Esq., Defense Logistics Agency, for the agency.

Linda Glass, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of agency's failure to solicit firm that requested a copy of solicitation in response to a procurement synopsis in the Commerce Business Daily (CBD) is denied where, although the protester knew--as a result of the CBD notice--that the agency estimated a May 25, 1996, closing date, the protester unreasonably delayed contacting the agency about its nonreceipt of the solicitation until months after its initial request (and after the September 13 actual closing date); the protester did not avail itself of every reasonable opportunity to obtain the solicitation.

DECISION

Wind Gap Knitwear, Inc. protests the award of a contract to Daun-Ray Casuals, Inc. under request for proposals (RFP) No. SPO100-96-R-0144, issued by the Defense Logistics Agency (DLA), Defense Personnel Support Center (DPSC) for Extended Cold Weather Clothing System (ECWCS) undershirts. Wind Gap contends that DPSC's failure to provide it with a copy of the solicitation improperly denied it the opportunity to compete for the contract and violated the requirement for full and open competition in the Competition in Contracting Act of 1984, (CICA), 10 U.S.C. § 2304 (a)(1) (1994).

We deny the protest.

On April 12, 1996, the agency issued a notice in the Commerce Business Daily (CBD) announcing its intent to compete an indefinite delivery contract for ECWCS undershirts for a minimum quantity of 168,000 and maximum quantity of 210,000 units with a 100-percent option quantity. The CBD notice indicated an anticipated May 25 closing date and invited interested firms to request a copy of the solicitation by facsimile.

Shortly after publication of the CBD notice, on April 22, Wind Gap sent a telefacsimile to DPSC requesting a copy of the solicitation, immediately followed by a certified letter to the same effect. The agency's computer-generated bidder's list for underwear, on which Wind Gap was not listed, contained 310 firms' names and addresses. After publication of the CBD notice, 33 firms, including Wind Gap, requested a copy of the solicitation. These 33 firms were added as a supplement to the computer-generated list. The agency reports that the computer-generated bidder's list is accompanied by preprinted mailing labels that correspond to the names on the list. Upon receipt of the bidder's list and the labels, the contract specialist compared the labels with the first two pages and the last two pages of the 21-page list and confirmed that the names on those pages of the list matched the labels. Mailing labels were then prepared for the 33 firms whose names were on the supplement to the computer-generated list. The solicitation was prepared on August 7, and the labels from the bidder's list were given to the procurement clerk. Although the bidder's list contained 343 names, due to an oversight only 162 labels were sent to the print shop for copying and distribution.

The RFP was issued on August 14 and mailed to the 162 firms for which labels had been sent to the print shop. Five proposals were received by the September 13 closing date.¹ After evaluation of the offers, it was determined that Daun-Ray's offer represented the best value to the government and was a fair and reasonable price. Award was made to Daun-Ray without discussions on January 5, 1997.²

The protester states that during late 1996, it contacted the agency to inquire about the status of the undershirts buy and was told that the buy was suspended indefinitely. While acknowledging that a contact with Wind Gap did occur at that time, the agency maintains that the topic of discussion was a different acquisition.

¹Seventeen other firms also responded, indicating that they would not be submitting an offer but wanted to remain on the bidder's list.

²Due to another oversight, the agency failed to synopsise the award decision in the CBD until May 1, 1997. Wind Gap maintains that it was prejudiced by the agency's failure to timely synopsise the award because it was denied the opportunity to file its protest in time to obtain a CICA stay of contract performance pending protest resolution by our Office. We conclude that Wind Gap was not prejudiced, since as discussed, the protester was not unreasonably precluded from competing.

On March 27, 1997, Wind Gap again contacted the agency and was told that the contract at issue in this protest had been awarded to Daun-Ray. Wind Gap filed this protest with our Office on April 3.

CICA requires 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. Western Roofing Serv., 70 Comp. Gen. 323, 325 (1991), 91-1 CPD ¶ 242 at 3. 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. To that end, Federal Acquisition Regulation (FAR) § 14.205-1 requires contracting agencies to include on applicable solicitation mailing lists any firm that requests a solicitation document. However, concurrent with the agency's obligations in this regard, prospective contractors have the duty to avail themselves of every reasonable opportunity to obtain solicitation documents. Laboratory Sys. Servs., Inc., B-258883, Feb. 15, 1995, 95-1 CPD ¶ 90 at 3-4. Where a prospective contractor fails in this duty, we will not sustain the protest even if the agency failed in its solicitation dissemination obligations, and in considering such situations, we look to see whether the agency or the protester had the last clear opportunity to avoid the protester's being precluded from competing. Id.

In this case, notwithstanding the agency's shortcomings in the distribution of the solicitation, we deny the protest, because the protester failed to diligently pursue its request for a copy of the solicitation. Wind Gap learned of the RFP from the April 12 CBD notice. Based on that notice, Wind Gap knew that proposals were estimated to be due by May 25, and it knew that it had not received a copy of the RFP as that date approached (and, in fact, passed). The protester maintains that it diligently endeavored to obtain a copy of the RFP by its April written request and its late 1996 telephone inquiry. Leaving aside the agency's disagreement concerning the subject matter of the telephone conversation, that conversation occurred several months after the published closing date (and after the actual closing date). Despite not having received a copy of the RFP, Wind Gap did not contact the agency prior to the anticipated May 25 closing date (to again request a copy of the RFP or, at least, to inquire about the status of its request for a copy of the RFP); thus, the firm had no assurance that it would receive the RFP in time to submit a proposal. The protester failed to contact the agency subsequent to its initial request as that anticipated closing date approached or before the actual September 13 closing date, even though Wind Gap was fully aware that the agency had not honored its April 22 request for a copy of the RFP. We conclude, therefore, that Wind Gap failed to

fulfill its obligation to avail itself of every reasonable opportunity to obtain the RFP, see *Laboratory Sys. Servs., Inc.*, supra; the protester had the last clear opportunity to avoid the firm's preclusion from competition under the RFP, and failed to do so.

The protest is denied.

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