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Comptroller General  
of the United States

United States General Accounting Office  
Washington, DC 20548

## Decision

**Matter of:** Kendall Healthcare Products Company

**File:** B-289381

**Date:** February 19, 2002

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Kevin P. Connelly, Esq., Seyfarth Shaw, for the protester.

Barbara J. Stuetzer, Esq., and Phillipa L. Anderson, Esq., Department of Veterans Affairs, for the agency.

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### DIGEST

1. Protest that the agency deprived potential competitor of an opportunity to compete because the procurement was misclassified in the Commerce Business Daily is denied where the record shows that the agency reasonably classified the contemplated contract action, mailed copies of the solicitation to 14 sources, and obtained competition and reasonable prices.

2. Protester's apparent nonreceipt of solicitation provides no basis to sustain protest where agency did not violate applicable regulations governing advertisement and dissemination of the solicitation or deliberately attempt to exclude protester from the competition; rather, the protester failed to take reasonable measures to obtain a copy of the solicitation even though it did receive a copy of solicitation amendment.

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### DECISION

Kendall Healthcare Products Company (Kendall) protests the award of a contract to Novartis Nutrition Corporation under request for proposals (RFP) No. 797-NC-01-0019, issued by the Department of Veterans Affairs, National Acquisition Center (VANAC) to acquire piercing spike sets and feeding bags with attached pump (feeding pump sets). Kendall, a Federal Supply Schedule (FSS) contractor with a schedule contract for feeding pump sets, alleges that it was excluded from the competition because the procurement was misclassified in the Commerce Business Daily (CBD) and the agency failed to provide the firm with a copy of the solicitation.

We deny the protest.

On June 12, 2001, the procurement was published in the CBD under classification code 89, "subsistence." The notice announced VANAC's intention to issue a solicitation on or about July 1 for nutritional items (dietary supplements, tube feedings, and specialty thickened products), and feeding pump sets. The notice advised that the RFP would be posted on the agency's Internet web site and would be available for downloading; interested firms without Internet capabilities could contact the agency by facsimile or e-mail transmission to obtain a paper copy of the solicitation.

The RFP, issued on an unrestricted basis on July 10 and amended three times, provided for award of multiple requirements contracts for a base year, with four 1-year options. As amended, the RFP identified the procurement as a commercial item acquisition and listed 46 line items, of which 44 are for dietary supplements specifically formulated for the management of malnutrition and other medical conditions. These include ready-to-hang (RTH) products, which are premixed dietary supplements that are commercially available in 1-liter and 1.5-liter feeding bags. These RTH products are fed to patients by first piercing the feeding bag with a spike set which allows the product to flow through tubing; a pump attached to this tubing regulates the flow of the product to the patient.<sup>1</sup> In addition, the RFP included two line items for feeding pump sets, which are used with RTH products. Line item 44 sought prices for a single feeding bag that can be used to provide feeding formulas, water for hydration, or both, to patients. Line item 45 calls for dual feeding bags for the same uses.

Each award was to be made to the responsible offeror whose proposal was most advantageous to the government under the stated evaluation factors for one product group, multiple product groups, or all product groups.<sup>2</sup> RFP at 73. Offerors were advised that individual delivery orders would be issued directly to the contractor by the ordering activity and through the agency's "subsistence prime vendor" identified in attachment B of the solicitation, or through the agency's pharmaceutical prime vendor identified in attachment A to the solicitation.<sup>3</sup> RFP at 4-5. This protest involves the award of line items 44 and 45.

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<sup>1</sup> See, e.g., line items 3b, 4b, 8b, 8c, and 9b. The solicitation advised that RTH products are optional items. RFP at 73.

<sup>2</sup> In most cases, a product group consists of the product and its various flavors.

<sup>3</sup> Historically, the VA acquired its requirements for dietary supplements through direct delivery national contracts. These products used to be stocked and supplied through VA's supply depots. VANAC began contracting for these products in 1993-1994 when the agency began closing its supply depots. Contracting Officer's Statement at 1.

The agency reports that its contracting and dietetic service personnel compiled a mailing list for this procurement that consisted of 14 prospective offerors known to provide dietary supplements and feeding pump sets. The list of prospective offerors included Kendall and Sherwood Medical, a firm the contracting officer subsequently learned had been acquired by Kendall. Contracting Officer's Statement at 2. The mailing address for Kendall, as it appears on the mailing list, is 15 Hampshire Street, Mansfield, Massachusetts 02048, to the attention of Trisha Goguen, which it is undisputed is the correct address and contact person for the company. The agency reports that it mailed the solicitation materials to the 14 firms on the mailing list, including Kendall. Amendment No. 1, issued on July 23, provided a new attachment B that advised prospective offerors of the new subsistence prime vendor; the contracting officer mailed this amendment to all 14 firms on the mailing list. Kendall returned this amendment to the contracting officer (postmarked July 31, 2001), with the following handwritten notation:

Kendall is not participating in this sol[icitation].  
[signed] Trisha Goguen, July 30, 2001.

Agency Report (AR) exh. 9, Annotated Amendment. As a result, Kendall was removed from the mailing list and no subsequent amendments were sent to the firm. Of the eight offers received, four firms submitted offers for line item 44, and two of those firms also submitted proposals for line item 45. On October 15, the VANAC awarded several line items to Novartis, including line items 44 and 45, and notice of the award was published in the October 25 CBD under classification code 89.

The principal issue raised by Kendall is that the firm was excluded from the competition because the procurement had been published under an inappropriate CBD classification code. Specifically, Kendall contends that feeding pump sets are properly classified under classification code 65, "Medical, dental and veterinary equipment and supplies" and that classification code 65, not classification code 89, is the appropriate code under which VANAC should have published this procurement for dietary supplements in the CBD. Protest at 3-4; Protester's Comments at 2-4. Kendall explains that the firm identifies contracting opportunities through its review of notices announced in the CBD under classification code 65. Since it does not manufacture or sell products that are published under classification code 89, the protester states that it does not have a CBD subscription for classification code 89 and was therefore unaware of the CBD notice for the procurement at issue. Protest at 3; Protester's Comments at 14-15.

The Federal Acquisition Regulation (FAR) § 5.207 governs the preparation and transmittal of CBD notices. The FAR directs contracting officers to classify the contemplated contract action under the one classification code which most closely describes the acquisition. FAR § 5.207(c)(4)6. The FAR lists various classification codes and their corresponding description. For example, as stated previously, supplies being procured under code 65 are described as "Medical, dental, and veterinary equipment and supplies," and supplies under code 89 are described as

“Subsistence.” FAR §§ 5.207(h)(2). Of relevance to this protest is the requirement at FAR § 5.207(h)(3) that:

[o]nly one classification code shall be reported. If more than one code is applicable, the contracting officer shall use the code which describes the predominant product or service being procured. The FPDS [Federal Procurement Data System] Product and Service Codes Manual, October 1988, may be used to identify a specific product or service within each code.

The responsibility for determining the appropriate classification code rests with the contracting officer, and classification determinations necessarily involve some degree of judgment on the part of the contracting officer. Our Office will not overturn such a determination unless it is shown to be unreasonable. Price Waterhouse, B-239525, Aug. 31, 1990, 90-2 CPD ¶ 192 at 4. As discussed below, Kendall’s criticisms of the contracting officer’s determination as to the appropriate classification code for this procurement do not establish that the contracting officer’s determination was unreasonable.

At the time the notice was being prepared, the contracting officer determined that classification code 89 was the “predominant” code because the solicitation listed 43 dietary supplement line items and only two line items of medical equipment or supply items (feeding pump sets), which were to be used only with the RTH products, which were themselves optional items under the RFP.<sup>4</sup> The contracting officer further states that this determination was consistent with her prior determination to publish the 1996 procurement for dietary supplements under classification code 89 in the February 21, 1996, CBD announcement. In this regard, the contracting officer states:

Before I transferred to the National Contracting Service at the VA National Acquisition Center in 1993, I worked at the Hines Supply Depot and managed inventory including dietary supplement. The first four numbers of the National Stock Number (NSN) for all dietary supplement items were 8940, which is a subclass of Group 89 Subsistence. Inventory Management at the VA National Acquisition Center, uses Cataloging Handbook H2 [published by the Defense Logistics Agency] and that Handbook also shows that 8940 is the class code for dietary supplements.

Contracting Officer’s Statement at 2.

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<sup>4</sup> Amendment No. 3 added an additional dietary supplement item to the RFP.

In response, Kendall has submitted CBD announcements of prior dietary supplements procurements by the Department of Veterans Affairs as well as other federal agencies, such as the General Services Administration (GSA), which were published under code 65 as further support that classification code 65 was the appropriate code to be used here.

More specifically, Kendall points out that, in 1997, the contracting officer for this procurement used classification code 65 to publish five award notices in the CBD for national dietary supplements contracts. Protester's Comments at 2. However, the contracting officer for this procurement, who was also the contracting officer for the prior procurement, states that her use of classification code 65 to publish the award notices was an inadvertent error. Contracting Officer's Supplemental Statement. The contracting officer further states, and the record shows, that she published the notice of that national procurement for dietary supplements (as opposed to the award notices) in the February 21, 1996 CBD under classification code 89. AR exh. 5, CBD Notice, Feb. 21, 1996. We have no basis to question the contracting officer's statement. In our view, the more relevant point is that the contracting officer published the notice of the acquisition in 1996, as she did under this protested acquisition, under classification code 89.

Kendall further argues that the term "dietary supplement" is not a description for any of the classification codes listed in FAR § 5.207(h), and is not found under any search of classification code 89, subsistence. Kendall states that the General Services Administration (GSA) schedule contracts for dietary supplements are under Federal Supply Classification group 65, part I, section B, special item number 42-5, nutritional/dietary supplements, and therefore an FSS contractor like Kendall would reasonably assume that dietary supplements are identified under classification code 65. Protester's Comments at 4-6.

We do not believe that GSA's classification of dietary supplement under code 65 establishes that the contracting officer's decision here was unreasonable. As stated above, FAR § 5.207(h)(3) identifies the FPDS Product and Service Codes Manual as a standard classification source that may be used to identify a specific product or service within each code. That Manual, which was provided by the agency in its report on the protest, includes code 89, subsistence, under which product code 8940, entitled "Special Dietary Foods and Food Specialty Preparations," is listed. Another classification source, which assists users in choosing the appropriate product or service code, is the Federal Procurement Data Center PSC Wizard, an Internet search program. The agency reports, and the record confirms, that an on-line search of the term "dietary" directs the user to product code 8940 under classification code 89; if "dietary supplement" is the search term, the user is informed that there is no product group which contains that two word search term. AR encl. 13, PSC Wizard Search. These standard classification sources, one of which is specifically referenced in the FAR, identified product code 89 as the classification code that most closely describes the acquisition at issue here. Accordingly, the contracting

officer's classification determination was consistent with the applicable regulations, and standard classification sources, as well as the agency's prior procurement history of using code 89 when procuring dietary supplements.

Under the circumstances the record does not establish that VANAC acted unreasonably in classifying the procurement at issue here under code 89, subsistence. To the extent Kendall chose to limit its subscription and review of CBD announcements to classification code 65, this was solely its own decision. We will not attribute Kendall's failure to review the June 12 CBD notice of this procurement to the agency, which reasonably classified the contemplated contract action under an appropriate code; there is no basis to conclude that publication under code 89 in the CBD unreasonably restricted competition.

Kendall next alleges that VANAC did not comply with the requirement for full and open competition because the agency failed to provide the protester with a copy of the RFP and that this failure precluded it from submitting an offer. Kendall asserts that it has an internal system for tracking solicitations and that it is unlikely it would not have responded had it received the RFP. The protester explains that although it received amendment No. 1, nothing in the amendment provided any indication that the procurement was for feeding pump sets. Protest at 5 n.3.

The Competition in Contracting Act of 1984 (CICA) generally 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. 41 U.S.C. § 253(a)(1)(A) (1994), Cutter Lumber Prods., B-262223.2, Feb. 9, 1996, 96-1 CPD ¶ 57 at 2. 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. Concurrent with the agency's obligations in this regard, prospective contractors also must avail themselves of every reasonable opportunity to obtain the solicitation documents. Laboratory Sys. Servs., Inc., B-258883, Feb. 15, 1995, 95-1 CPD ¶ 90 at 3-4. Consequently, where a prospective contractor fails to do so, we will not sustain the protest even if the agency failed in its solicitation dissemination obligations, and in considering such situations, we consider whether the agency or the protester had the last clear opportunity to avoid the protester's being precluded from competing. Id.

Here, in light of our discussion above, we cannot attribute Kendall's apparent nonreceipt of the solicitation to any deficiencies in the agency's dissemination process or to a deliberate attempt to exclude the protester from the competition. Kendall does not dispute that the solicitation and amendment mailing lists contain the protester's correct mailing address as well as the correct name for its contact person. Kendall in fact received amendment No. 1. There were no returned envelopes showing that the solicitation mailing to Kendall was misaddressed or otherwise undeliverable. Kendall's apparent failure to receive the RFP at issue here

is not evidence of any deliberate action on the part of the agency to exclude the firm from competing. The risk of nonreceipt of solicitation documents rests with the offeror, since the contracting agency is not a guarantor that these documents will be received in every instance. In short, VANAC timely publicized the acquisition in the CBD, and furnished copies of the RFP to the firms on the mailing list. The agency ultimately received eight offers as a result of its efforts and awarded the contract for the line items at issue at a price the agency has determined to be reasonable.<sup>5</sup>

Moreover, in our view, Kendall did not avail itself of the agency's reasonable efforts to disseminate the solicitation and the amendments; the protester by its own admission, limits its CBD reviews to code 65 procurements and in this case did not contact the agency after receiving a copy of amendment No. 1. Although Kendall argues that these actions were unnecessary because VANAC published the CBD notice under a classification code it does not review and that the protester had no reason to contact the agency despite its receipt of amendment No. 1, we are not persuaded that Kendall took all reasonable measures to obtain a copy of the solicitation. Kendall learned of the RFP based on its receipt of amendment No. 1, and knew that it had not received a copy of the RFP. Despite not having received a copy of the RFP, Kendall did not contact the agency to request a copy of the RFP referenced in the amendment, or at least to inquire about the nature of the acquisition, even though the protester was fully aware that VANAC had issued a solicitation. Rather, as discussed above, Kendall simply returned the amendment to the contracting officer with the notation that the firm was not participating in the procurement, based on its assumption that the solicitation did not include items it could supply. Thus, Kendall's exclusion from the competition resulted from its own failure to act, not from any improprieties in the agency's dissemination process.

The protest is denied.

Anthony H. Gamboa  
General Counsel

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<sup>5</sup> The protester does not allege that the awardee's price is unreasonable.