Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ervin and Associates, Inc.

File: B-278849

Date: March 23, 1998

John J. Ervin for the protester.
Richard A. Marchese, Esq., Department of Housing and Urban Development, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency failed to mail a copy of the solicitation and its amendments to the protester despite its request to be placed on the source list is denied where the contract specialist states that he included the protester on the source list and followed procedures that should have resulted in the protester's receipt of the documents; moreover, even if the agency had failed in its obligation to provide the protester with a copy of the solicitation, the record shows that the protester did not avail itself of every reasonable opportunity to obtain the solicitation and had the last clear opportunity to avoid the firm's preclusion from competing under the solicitation.

DECISION

Ervin and Associates, Inc. protests any award under request for proposals (RFP) No. DU100C000018593, issued by the Department of Housing and Urban Development (HUD) to obtain comprehensive financial analytical services. Ervin contends that HUD intentionally excluded it from the competition by failing to provide it with a copy of the solicitation.

We deny the protest.

In May 1997, Ervin learned from a press account that HUD was planning a new procurement of these services. By letter sent by facsimile on June 27, Ervin asked the Director of the Program Support Division in HUD's Office of Procurement and Contracts to put the firm on the source list to receive a copy of the solicitation when it was issued. One month later, the Director gave the letter to the contract specialist. The letter's cover sheet bore the Director's handwritten note asking the contract specialist to place Ervin on the source list for this solicitation.

The contract specialist states that he typed Ervin's name and address into the computerized source list. This list would later generate printed labels for use on envelopes containing copies of the solicitation and its amendments. The contract specialist states, and the record confirms, that Ervin's correct name and address appear on the source list, along with the names and addresses of 69 other firms.

The procurement was synopsized in the Commerce Business Daily (CBD) on July 21. The notice advised prospective offerors that the RFP would be issued on or about August 4. Firms could submit a written request for a copy of the solicitation to the contract specialist, whose name and address was provided, or firms could download the solicitation and any amendments from HUD's Internet Home Page, whose address was also provided.

On August 25, the contract specialist states that he made copies of the solicitation; printed out labels for each firm on the source list, including Ervin; placed copies of the solicitation in individual envelopes; and attached the labels to the envelopes. He further states that he printed his office's mail code below the return address in the upper lefthand corner of each envelope so that any undelivered envelopes would be returned directly to his office. He delivered the 70 labeled envelopes containing the solicitation to HUD's mail room, and states that they were sent out by U.S. mail. He also forwarded an electronic copy of the RFP for placement on HUD's Internet Home Page where it could be downloaded and printed by interested firms. The solicitation established September 22 as the anticipated due date for receipt of proposals.

Solicitation amendment No. 0001, issued September 16, extended the closing date for receipt of proposals to October 6. Amendment No. 0002, issued October 1, extended the closing date to October 14. Amendment No. 0003, issued October 7, made no change to the closing date. The contract specialist states that, for each amendment, he made copies; printed labels for each firm on the source list, including Ervin; placed the copies in envelopes; affixed the mailing labels; printed the mail code on the envelopes; and delivered the envelopes to the mail room where they were sent out by U.S. mail. As with the solicitation, he forwarded an electronic copy of each amendment for posting on HUD's Internet Home Page.

Ervin was not one of the 11 firms submitting proposals by the October 14 closing date. On November 3, Ervin filed an agency-level protest arguing that HUD had "purposely and illegally sought to exclude Ervin from the competition" by intentionally ignoring its request to be placed on the source list, thereby failing to provide Ervin a copy of the solicitation. After HUD's December 3 denial of the agency-level protest, Ervin filed essentially the same protest in our Office.

Under the Competition in Contracting Act of 1984, agencies are generally required to obtain full and open competition through the use of competitive procedures when procuring property or services. 41 U.S.C. § 253(a)(1)(A) (1994). The dual

purpose of this requirement 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) § 5.101(a)(1) generally requires contracting agencies to publish in the CBD a synopsis of each contract action expected to exceed $25,000, as is the case here. In addition, FAR §§ 14.205-1(b),(c) requires contracting agencies to include on applicable solicitation mailing lists any firm that requests a solicitation document.

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. Wind Gap Knitwear, Inc., B-276669, July 10, 1997, 97-2 CPD ¶ 14 at 3; Laboratory Sys. Servs., Inc., B-258883, Feb. 15, 1995, 95-1 CPD ¶ 90 at 3-4; Lewis Jamison Inc. & Assocs., B-252198, June 4, 1993, 93-1 CPD ¶ 433 at 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. Wind Gap Knitwear, Inc., supra.

The Ervin employee who states that he would have received the RFP and its amendments had they been mailed states that he did not receive them. As explained above, the contract specialist states that he placed Ervin's correct name and address on the source/mailing list; printed out the labels from this list and affixed those labels to envelopes containing the relevant documents; and mailed the envelopes. He further states that, to the best of his knowledge, neither the envelope containing the RFP mailed to Ervin nor any of the three envelopes containing the amendments mailed to Ervin were returned.

While Ervin details what it alleges to be a continuing pattern of corruption, blackballing, and retaliation on the part of HUD toward the firm, these allegations are not directed toward the contract specialist and we have no reason to doubt his account of events here. Procurement officials are presumed to act in good faith and allegations to the contrary must be supported by virtually irrefutable proof that they had specific and malicious intent to harm the protester. Mictronics, Inc., B-234034, May 3, 1989, 89-1 CPD ¶ 420 at 2. Moreover, since HUD made the solicitation available to anyone in the world who wanted it by way of the Internet, the notion that HUD would attempt to preclude Ervin from competing by refusing to mail it the solicitation is not reasonable.

In any event, even if we had some basis to conclude that the agency had failed in its solicitation dissemination obligations, the record shows that Ervin, not HUD, had

the last clear opportunity to avoid the firm's preclusion from competition under this solicitation.

It is undisputed that Ervin's sole contact with HUD on this matter was its June 27 facsimile request to be placed on the source list. After approximately 3 weeks, the solicitation was synopsized in the CBD. Where a contracting agency has synopsized a proposed procurement in the CBD, a potential contractor is on constructive notice of the solicitation and its contents and has a duty to make reasonable efforts to obtain a copy of the solicitation in order to ensure that it is included in the competition. L&L Oil Co., Inc., B-246560, Mar. 9, 1992, 92-1 CPD ¶ 270 at 2. Hence, as of July 21, Ervin was on notice that the solicitation would be issued on or about August 5 and that the solicitation could be obtained by written request or by downloading from HUD's Internet Home Page. Further, as of the date of the solicitation's issuance, Ervin was on constructive notice that the anticipated closing date for the receipt of proposals was September 22.

As the solicitation's anticipated issuance date approached and passed, and the closing date approached, Ervin was still not in possession of a copy of the solicitation. Despite this fact, Ervin failed to contact HUD to inquire as to the status of its request to receive a copy of the solicitation or to make a renewed request. Ervin also failed to download the solicitation from HUD's Internet Home Page. Without taking such action as more and more time passed, the firm had no assurance that it would receive the solicitation in time to submit a proposal. We conclude, therefore, that Ervin failed to fulfill its obligation to avail itself of every reasonable opportunity to obtain the RFP, see Wind Gap Knitwear, supra, at 3-4; Ervin had the last clear opportunity to avoid the firm's preclusion from competing under the solicitation.

The protest is denied.

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