



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: RII
File: B-251436
Date: March 10, 1993

Edsel Billingsy for the protester.
Terrence J. Tychan, Department of Health and Human Services,
for the agency.
Jeanne W. Isrin, Esq., and John M. Melody, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Cancellation and resolicitation of procurement was proper
where agency misclassified advertisement in the Commerce
Business Daily and so failed to effectively notify firms
most likely to respond.

DECISION

RII protests the cancellation of request for proposals (RFP)
No. NIH-NIDR-4-92-4R, and resolicitation of the requirement,
by the National Institute of Dental Research (NIDR),
National Institutes of Health, Department of Health and
Human Services, to establish and operate the National Oral
Health Information Clearinghouse (NOHIC).

We deny the protest.

The RFP, issued on May 22, 1992, as a total small business
set-aside, was mailed to 73 organizations. Four proposals
were received by the July 24 closing date, including one
from the protester. Proposals were evaluated and
discussions held with RII and the two other offerors deemed
to be in the competitive range. After receipt of best and
final offers on October 21, but prior to their review
(scheduled for November 18), the contracting officer
received a complaint from a small business that it had been
excluded from the competition. The firm maintained that the
procurement had been published under an inappropriate
category in the Commerce Business Daily (CBD), which
prevented the firm from seeing it in time to submit a
proposal. The contracting officer verified that the
procurement had been synopsisized in the May 1, 1992, CBD
under category A, for "research and development" (R&D).
After being advised by the project officer that the

clearinghouse operation was neither R&D nor in support of R&D, she concluded that the synopsis should have been advertised under category R, for "professional, administrative and management support services." After consulting with agency counsel, she determined that the misclassification had not allowed all potential offerors to compete, and hence had not met the requirement for full and open competition under the Competition in Contracting Act of 1984 (CICA).

By letter of October 30, all offerors were notified that the solicitation was being canceled and would be reissued after being synopsisized under the proper category in the CBD. Thereafter, the resolicitation was published in the November 4 CBD under category R. By letter of November 4, RII filed an agency-level protest against the cancellation and resolicitation, claiming that the procurement was not misclassified, that notice was adequate as indicated by the competition obtained (four proposals), and that cancellation at that point in the procurement worked an unfair hardship on offerors who expended effort and resources on it in good faith. RII protested the same issues to our Office on November 24. NIDR has since denied the agency-level protest.

In a negotiated procurement, the contracting officer has broad discretion in determining whether to cancel a solicitation and need only have a reasonable basis to do so. Victorio Inv. Co., Ltd., B-236024, Nov. 1, 1989, 89-1 CPD ¶ 406. An agency has a reasonable basis to cancel an RFP and resolicit where plausible evidence establishes a reasonable possibility that not to do so would be prejudicial to the government or the integrity of the competitive system. General Protection Sys., 70 Comp. Gen. 345 (1991), 91-1 CPD ¶ 308.

Congress has statutorily mandated that agencies notify potential offerors of pending procurements through publication of an announcement in the CBD. 15 U.S.C. § 637(e) (1988); 41 U.S.C. § 416 (1988); Frank Thatcher Assocs., Inc., 67 Comp. Gen. 77 (1987), 87-2 CPD ¶ 480. The regulations implementing those statutes require that the agency must specify the appropriate classification under which the CBD notice will be published. Federal Acquisition Regulation (FAR) § 5.207; Frank Thatcher Assocs., Inc., supra. Where an agency fails to synopsisize a pending procurement in the CBD in a manner reasonably expected to provide potential offerors with actual notice of the procurement, it violates CICA's requirement for full and open competition. Frank Thatcher Assocs., Inc., supra.

We find NIDR reasonably concluded that the procurement was misclassified in the CBD, that it had not given adequate notice to all potential offerors, and that cancellation and resolicitation of the requirement was warranted.

FAR part 35, entitled "Research and Development Contracting," sets forth the following description of R&D contracting (in pertinent part):

"The primary purpose of contracted R&D programs is to advance scientific and technical knowledge and apply that knowledge to the extent necessary to achieve agency and national goals. Unlike contracts for supplies and services, most R&D contracts are directed toward objectives for which the work or methods cannot be precisely described in advance. . . ."

FAR § 35.002. The term "development" also is separately described as follows:

"[T]he systematic use of scientific and technical knowledge in the design, development, testing, or evaluation of a potential new product or service . . . to meet performance requirements or objectives. . . ."

FAR § 35.001.

We think the agency correctly determined that the work under the contract here does not fit under this description of R&D. Whereas the focus in the regulation is on the advancement of scientific and technical knowledge in pursuit of objectives not precisely describable in advance, the work required under the RFP calls on the contractor only to establish and maintain a database for use as an information clearinghouse, a type of work commonly performed that can be (and was here) described very accurately. The NOHIC also is not intended to support research and development, but rather, practical, applied uses; oral health information is to be incorporated into a database available to consumers, educators, practitioners, and the public to support delivery of oral health care to people.

The contracting officer must classify procurement synopses under the CBD classification code which most closely describes the acquisition. FAR § 5.207(b)(4); Price Waterhouse, B-239525, Aug. 31, 1990, 90-2 CPD ¶ 192. Given that the required services do not appear to constitute R&D, and that they do involve consumer and professional support and education, we concur with NIDR's judgment that the procurement should have been synopsized under category R, for "professional, administrative and management support services."

The question remains whether the misclassification here warranted canceling the RFP and resoliciting the requirement. We find that it did. The determinative question is whether it was reasonable for the agency to cancel. Victorio Inv. Co., Ltd., supra. Although RII argues that "clearinghouse" procurements are sometimes advertised under category A, and that publication there thus was sufficient to put potential offerors on notice of this requirement, the fact remains that the agency was aware that at least one small business had been precluded from competing for this set-aside award due to its classification under category A. In light of our finding above that the requirement clearly was misclassified, we think the agency reasonably determined that cancellation would both be in the government's interest and promote the integrity of the competitive system by increasing the field of competition to include one known interested small business, and possibly other firms that also were unaware of the classification under category A. See Frank Thatcher Assocs., Inc., supra (misclassification in CBD rendered notice inadequate under CICA, requiring cancellation and resolicitation, despite 51 requests for the RFP and 6 offers).¹

While it is unfortunate that the agency discovered its error well into the procurement, the fact that the protester has expended resources in competing on it does not make the cancellation improper. An agency may properly cancel a solicitation no matter when the information precipitating the cancellation arises, even if that is not until proposals are submitted and the protester has incurred costs in pursuing the award. Brackett Aircraft Radio Co., B-246282, Jan. 8, 1992, 92-1 CPD ¶ 43; Victorio Inv. Co., Ltd., supra.

In the alternative, RII requests reimbursement of its proposal preparation costs. However, our Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1992), allow those costs

¹We note that the fundamental purpose of the presolicitation notice requirement is to improve small business access to acquisition information and thereby enhance competition by identifying contracting and subcontracting opportunities. FAR § 5.201(c); Pacific Sky Supply, Inc., B-225420, Feb. 24, 1987, 87-1 CPD ¶ 206.

only when we have found improper agency action, which is not the case here. See System-Analytics Group, B-233051, Jan. 23, 1989, 89-1 CPD ¶ 57.

The protest is denied.



for James F. Hinchman
General Counsel