

Protest of) Date: August 7, 1987
CF AIR FREIGHT, INC.)
Under Solicitation ANET-87-02) P.S. Protest No. 87-43

DECISION

CF Air Freight, Inc., (CF) protests the award of a contract for the air transportation of Express Mail to Evergreen International Aviation, Inc., (Evergreen).^{1/} CF alleges that the Postal Service improperly evaluated both its and Evergreen's proposal, which resulted in the improper award of the contract to Evergreen.

Background

Solicitation No. ANET-87-02 was issued by the Office of Transportation and International Services, Mail Processing Department, U. S. Postal Service Headquarters, on March 6, 1987. The solicitation requested proposals for air transportation of Express Mail and Priority Mail within a 21-city network. Proposals were due on April 3, with service commencing on or after June 6.

The solicitation provided, in pertinent part, as follows:

Offers must be in the form of a closed loop network consisting of a matrix of city points. While the proposed network need not include all the points shown in Specifications Part A, the number of such points served will be considered in the Postal Service's evaluation of proposals for award. Offers will not be accepted unless they propose to provide service from each point on the offeror's proposed network to each other point on the offeror's network, with the exception of origin-destination pairs for which the minimum and maximum weights of mail stated in Specifications Part A is zero. (For purposes of this solicitation "origin-destination pair" shall refer to the proposed city point where the Postal Service tenders mail and the city point where such mail is to be delivered to the Postal Service.)

^{1/}Four other protests have been made against award of this contract. CF has also filed suit against the Postal Service in the U.S. District Court for the District of Columbia, CF Air Freight, Inc. v. United States Postal Service, Civ. No. 87-1530. Our bid protest regulations provide that we may decline to decide a protest where the matter involved is the subject of litigation, except where the court requests, expects, or otherwise expresses interest in a decision. Postal Contracting Manual (PCM) 2-407.8 f. (11). Since we are aware that the District Court expects us to render a decision, we will do so. See Irwin I. Grossman, On Reconsideration, P.S. Protest No. 84-55, December 7, 1984.

The frequency of service required is daily, five days per week, Monday through Friday.

For each origin-destination pair on the proposed network the offeror must propose a contract tender time no earlier than 2200 hours local time at origin and a contract delivery time no later than 0700 hours local time at destination. See Special Provisions Clause 18.B.^{1/2}

Proposals were required to include a complete description of the operation of the offered network, including its city points and airports, the proposed tender and delivery times at each OD pair, flight itineraries and specification of block times for departures and arrivals and type of aircraft. The solicitation gave offerors the option of offering dedicated aircraft which would be exclusively used for mail transportation, or offering guaranteed lift which would guarantee a minimum payload for mail on an aircraft which could carry other cargo. Rates for dedicated aircraft would be calculated on a per-trip rate while rates for guaranteed lift would be per pound of mail carried. In addition, offerors had the option of providing service based on a hub-and-spoke arrangement or direct origin-to-destination trips.^{1/1}

The solicitation contemplated contract modification after award by mutual agreement to allow increases in volumes of mail on the city pairs of the contractor's network and to add up to thirteen additional cities to the network. The solicitation further provided, however, that, "the schedules, including aircraft type, under any contract awarded under this solicitation will remain fixed for the term of the contract" and that "the Postal Service will not agree to changes that do not benefit the Postal Service."

In the evaluation of proposals, the relative superiority of proposed service would be a greater factor than price; however, for closely ranked proposals, price advantage would be more significant than technical superiority. The solicitation ranked service factors in the following order of importance:

- (1) the degree to which an offeror's proposed network would speed delivery of the mail and enhance the efficiency of postal operations;
- (2) the total volume of mail for which an offeror's proposed network would provide air transportation;
- (3) the number of points listed in Specifications Part A which are included on an offeror's proposed network;
- (4) the length of time between required tender and delivery (with tighter time frames preferred); and
- (5) the extent to which the proposal offers to provide service via aircraft dedicated to the transportation of mail under the solicited contract.

^{2/} Amendment 1, dated March 19, advised offerors that earlier tender times would be considered for the west coast points of LAX, SFO, and SEA.

^{3/}The solicitation also permitted mixtures of dedicated aircraft/guaranteed lift and hub-and-spoke/direct service, as long as the offeror did not propose to use both types of service on the same origin-destination pair.

Out of thirty-four carriers solicited, eighteen offers were received. Representatives of the contracting officer held negotiations with all offerors in the competitive range.^{4/} Negotiations were conducted with CF on April 15. CF had submitted a proposal which offered nine tender and nine delivery times which fell outside the required time limits set forth in the solicitation. CF was informed that these times were non-negotiable.^{4/} CF's proposal also deviated from the solicitation's requirements in four additional areas. First, CF reserved the right to change its flight schedule "to increase operational efficiencies." Second, CF conditioned its proposal on the waiver of the liquidated damages provision of the solicitation (Special Provision 21 B.). Third, CF did not propose sufficient lift capacity for some of the origin-destination pairs. Fourth, CF stated that, in the future, service to San Francisco could use the San Jose or Oakland airports instead of the San Francisco Airport. At least the first three of these nonconformities were also discussed with CF in the negotiations.

Negotiations with all offerors were completed on April 19. Best and final offers were requested from the offerors. The contracting officer has stated that no actual date for receipt of best and final offers had been set but that it was made known that award would be made by April 24.^{4/} CF's best and final offer, submitted April 20, conformed the tender and delivery times for all cities except Denver, Miami and Orlando to the requirements of the solicitation.^{4/} The best and final offer also removed the exception CF had taken to the liquidated damages provision, guaranteed lift sufficient to accommodate the maximum weights and said that any schedule changes (as opposed to flight changes) would be made only pursuant to mutual agreement between it and the Postal Service; however, the possible change from San Francisco Airport remained. Based on its submission, the evaluators and the contracting officer concluded that CF had determined it could not offer tender times within the required time limits of the solicitation. Therefore, they did not evaluate or rank CF's proposal because they determined it to be technically unacceptable.

Between April 20 and April 23, the members of the committee met to conduct their final review of those proposals within the competitive range. On April 23 they ranked the top seven offers in order of technical preference and made their recommendations to the contracting officer. Evergreen was ranked first by the evaluators. On April 24, the contracting officer telephoned the Chairman of the Board of Evergreen and stated that the Postal Service had accepted Evergreen's best and final offer. On April 27, her staff

^{4/}All offerors were orally informed that the Postal Service would only negotiate with offerors who offered all 21 city points of service.

^{5/}There is a factual discrepancy over CF's response to this position. CF asserts that it expressly stated that it would change the tender and delivery times to conform with the solicitation and would submit a revised proposal. The contracting officer states that CF said it would go back and take a look at the schedule and that CF's representatives said they thought they could come within the required times.

^{6/}PCM 19-131.74(b) requires that all offerors shall be informed of the specified date of closing of negotiations and that any revisions should be submitted by that date.

^{7/}The tender times for these three cities were changed, but as changed did not meet the solicitation requirements.

called the other offerors and informed them of the award to Evergreen. At a meeting with Evergreen's representatives the morning of April 30 in Washington, D.C., the contracting officer's representative handed Evergreen's Chairman of the Board a written acceptance of its offer signed by the contracting officer. Subsequently, P.S. Form 7405, Transportation Services Bid or Proposal and Contract, was signed by the Director of the Office of Transportation and International Services and the Chairman of the Board of Evergreen on the morning of May 7, at an annual price of \$68.4 million.

CF was among the offerors notified of the award to Evergreen on April 27. In that notification, CF was told that its offer had been found technically unacceptable because of the nonconforming tender times. In response, CF's representatives advised that the incorrect tender times were the result of typographical errors, and that they would submit a revised best and final offer to correct them. An offer so revised was received by the contracting officer at 10:04 a.m., April 30, subsequent to Evergreen's receipt of the written acceptance of its proposal from the contracting officer.

CF's Protest

On May 13, CF filed a protest alleging the following grounds:

1. The USPS improperly assigned an inordinate scoring weight to the fifth and lowest ranked element for technical evaluation in determining the proposed contract awardee.
2. The USPS incorrectly calculated the total cost to the USPS of the offered network in comparing CF's guaranteed lift (shared expense) and Evergreen's dedicated aircraft.
3. Although CF believed that CF and Evergreen were closely ranked, in violation of its evaluation criteria, the USPS awarded the contract to Evergreen, notwithstanding CF's lower cost.

The protest alleged that, by making Evergreen's use of dedicated aircraft the basis for award, the contracting officer failed to follow the evaluation factor ranking set out in the solicitation, miscalculating the proposals. It also stated that, while CF was without knowledge of the actual cost calculations, it believed that the contracting officer inaccurately calculated costs so that CF's cost advantage was minimized. CF noted that the solicitation stated that, while the technical (service) scoring would be more heavily weighted than pricing, price would be more significant for "closely ranked proposals." Although CF argued that its proposal was technically superior to Evergreen's, it claimed that, at the very least, its proposal should have been judged to have been "closely ranked" with Evergreen's proposal, and, therefore, award made to CF because of CF's large price advantage.

Contracting Officer's Report

The contracting officer first contends that the protest is untimely pursuant to Postal Contracting Manual (PCM) 2-407.8 d. (3) because it was received more than 10

working days after CF knew or should have known the information on which it was based. She states that two representatives of CF were told on April 28 that CF's proposal had been rejected without being evaluated because of the nonconforming tender times. The protest was not received until May 13, eleven working days after the basis for the exclusion of its offer was known to CF.

The contracting officer further notes that the protest fails on the merits because CF's proposal was technically unacceptable and, therefore, was not evaluated or ranked. Even if the revised offer had been considered, it would not have been ranked higher than Evergreen's proposal because Evergreen would have been considered superior in three evaluation factors: evaluation factor 1 (efficiency of service) because CF's offer included cities other than those solicited whose additional flight segments would increase the risk of performance failures; evaluation factor 4 (tender and delivery times) because the total network transit time for Evergreen was 2 hours and 40 minutes less than CF's offer; and, as CF's protest acknowledges, evaluation factor 5 (dedicated aircraft) because Evergreen offered all dedicated aircraft versus CF's offer exclusively of guaranteed lift. (The two proposals ranked equally in the remaining factors, volume of mail carried and number of cities served.) Evergreen's offer was so significantly technically superior to CF's that the proposals would not have been closely ranked, so that the solicitation's provisions for the consideration of price for closely ranked proposals would not have come into play. CF's annual price of \$52,742,430 never became a factor because CF's proposal was technically unacceptable.

Rebuttal Comments

In its June 19 reply comments CF contends that the failure of the contracting officer to recognize that the unacceptable tender times in the best and final offer were typographical errors was unreasonable. The typographical errors were obvious because of assurances made by CF's representative at the negotiations that all nonconforming times would be changed, as well as the discrepancies between the normal on-the-ground operational delay after the cut-off time for tender of mail until the departure time of the aircraft and the delay at the three cities for which erroneous tender times were given. The changes in the other previously nonconforming times should have alerted the contracting officer to this error and she should have sought clarification instead of rejecting the proposal. Because the contracting officer had notice of these errors prior to issuing the written notice of award, she should have considered the revised offer or at least postponed award until the errors were clarified. In accordance with the Comptroller General's decision in Southern Systems, Inc., Comp. Gen. Dec. B-224533, 87-1 CPD | 214,^{1/} CF argues that the contracting officer's ignoring of its mistake requires remedial action.

CF states that, even with the errors, its best and final proposal met the minimum needs of the Postal Service and its deficiencies were not sufficient to warrant exclusion. Meaningful discussions should have been held to resolve the minor deficiencies by which the contracting officer justified the rejection of CF's proposal. Since the

^{B/}In Southern Systems, the Comptroller General held that the contracting officer should have requested clarification of an offeror's mistaken use of the word "prepay" in place of "prepare," which resulted in an unreasonable condition inconsistent with the offeror's prior best and final offer.

solicitation provided that "the number of points served will be considered in the Postal Service's evaluation for award," CF's alleged failure to serve three airports within the required tender times should only have led to a downgrading of its proposal, not an outright rejection.

CF's proposal was not deficient as to evaluation factors 1 and 4. The additional cities offered were meant to accommodate the possible system expansion contemplated under the RFP. The time difference in network transit time between Evergreen and CF was inconsequential since it is the total difference for all 21 daily flights on the network. Therefore, there was insufficient evidence on which to reject CF's proposal.¹⁷

CF claims that the contracting officer has acted unreasonably and prejudicially toward it throughout the procurement process. It states that the contracting officer's remarks with respect to how it would have been evaluated are only opinions and were not based on the evaluation criteria, since it was not evaluated by the technical evaluation committee. Further, the contracting officer's conclusions are flawed because the comparison between Evergreen and CF rests on Evergreen's schedules as proposed in their best and final offers which are no longer applicable because Evergreen's proposed hub of Smyrna, TN, was changed by oral agreement to Terre Haute, IN, which necessarily changed the flight schedules and tender and delivery times.

Finally, CF contends that its protest is not untimely because it did not know that the proposal was rejected as technically unacceptable until the June 5 temporary restraining order hearing in the District Court. CF claims that its representatives were led to believe that the fifth evaluation factor and price were the factors that led to nonaward, and price information was not known until the Postal Service released the contract on May 12.¹⁸

On this rebuttal the contracting officer states that there was nothing in CF's offer or in the record of negotiations which would have alerted her to the tender times being in error, and since the error showed up for three cities it was not a mere typographical error. CF's failure to meet three of the tender times was not surprising to the contracting officer since CF was attempting to adapt an existing network to accommodate differing schedule requirements. The contracting officer also notes that she negotiated with a number of offerors who were "technically unacceptable" in an attempt to make them acceptable; in CF's case, that effort was unsuccessful.¹⁹

^{9/}CF also reasons that it was unfairly excluded from being evaluated and ranked because, having been found to be in the competitive range for purposes of negotiations, it could not be found to be outside the competitive range (i.e., technically unacceptable) after submission of its best and final offer. It distinguishes Comptroller General cases which have allowed this procedure as instances where "the best and final offers ... totally and materially failed to conform with the RFP requirements." See 55 Comp. Gen. 374 (1975).

^{10/} CF has supported its protest with sworn affidavits attesting to its version of the facts. Such affidavits are not conclusive evidence of the facts sworn, but merely persuasive evidence of such facts. See, e.g., Carini's Inc., P.S. Protest No. 83-65, December 13, 1983.

^{11/}In clarifications requested by this office, the contracting officer states that one amendment to the Evergreen contract has been prepared but not yet executed which implements the parties' oral

On July 13, CF further supplemented its comments, drawing attention to various alleged factual inconsistencies in the contracting officer's statements regarding her negotiations with CF, arguing that her representative told CF on April 15 that its best and final offer would be subject to a "final evaluation" which never occurred, and that the as-yet unexecuted amendment to Evergreen's contract changing the hub will increase contract costs to the Postal Service, reemphasizing the improprieties of this procurement.

agreement to change the hub from Smyrna, TN, to Terre Haute, IN, to add two new cities and to change aircraft type on one segment to accommodate increased mail volume due to the two new cities.

Discussion

Given the seriatim nature with which the issues presented by this protest have developed, there are several questions of timeliness raised. We begin from first principles: a protest must be timely filed with our office for us to have authority to render a decision on the merits. PCM 2-407.8 d. (3), the pertinent provision, states that:

(3) In all ... cases [other than those apparent on the face of the solicitation], protests must be received not later than 10 working days after the information on which they are based is known or should have been known, whichever is earlier; provided that no protest will be considered if received more than 15 working days after award of the contract in question.

As we stated in POVECO, Inc., et al., P.S. Protest No. 85-43, October 30, 1985:

The requirement that a protest be timely filed is jurisdictional; we cannot proceed to a discussion of the merits of any issue which has been untimely raised. See Omnicopy, Inc., P.S. Protest No. 84-24, June 25, 1984; Southern California Copico, Inc., P.S. Protest No. 83-2, August 31, 1983. Unlike the Comptroller General, we have no authority to waive or disregard the timeliness issue in a particular case. Cf. Air Transport Association of America, P.S. Protest No. 84-29, May 17, 1984, aff'd on reconsideration, June 1, 1984; James W. and Joan C. Carroll, P.S. Protest No. 82-13, August 27, 1982. To be considered on its merits, each separate ground for protest must independently meet the timeliness requirement of the PCM. Cf. Jameson & Gibson Construction Co., Inc., P.S. Protest No. 85-54, September 17, 1985; Simulators Limited, Inc., Comp. Gen. Decs. B-208418.2, B-213046.2, April 23, 1984, 84-1 CPD | 453.

The three bases for the protest enunciated in CF's initial filing were that the evaluation factors had been improperly used, that the costs of the proposals had been incorrectly figured, and that the award violated the evaluation criteria that award be made to the lowest cost offeror among "closely ranked" offerors. As to these three grounds for protest, the protest is timely, as the protest file does not show that these items were discussed in the April 28 telephone conversation between CF and the contracting officer.

Submissions in the course of a bid protest which establish new and independent bases for protest must independently meet the timeliness requirements set out in the protest regulations. Evergreen International Airlines, Inc., P.S. Protest No. 86-07, May 5, 1986. The subsequent filings by CF have raised a multitude of new issues, including the alleged typographical error in its best and final offer, the exclusion of CF after its initial inclusion within the competitive range, and the change in Evergreen's hubs. Since these new bases were first raised more than 15 working days after award,^{12/} they

^{12/}The contract was awarded at least as early as April 30 when a written acceptance was handed to Evergreen. Although PCM 19-807.2 contemplates the use of a P.S. Form 7405 to be executed to effect contract award, it is well established that all that is required for a binding contract is an offer, an

are untimely and must be dismissed. Id.; Chas. Levy Transportation Co., P.S. Protest No. 85-79, October 31, 1985.¹⁷

We are left, then, with the three narrow grounds of protest set out in CF's May 13 letter. As to whether the contracting officer assigned inordinate weight to the fifth element of the technical evaluation, we note that she had indicated that Evergreen's proposal was also more advantageous as to evaluation factors one and four. Although CF criticizes this as a mere "opinion" of the contracting officer without basis in the technical

acceptance and consideration, regardless of whether the parties intend to execute a formal document. See, e.g., United States v. Swift & Co., 270 U.S. 124 (1926); Penn-Ohio Steel Corp. v. United States 354 F.2d 254 (Ct. Cl. 1965). Thus, delivery of the written acceptance by the contracting officer formed a binding contract.

It would make no difference if the award date were May 7 as CF alleges since its comments were still submitted more than 15 working days after May 7. CF claims that these further issues were timely raised because CF did not know of them until it received the contracting officer's report. However, the fact remains that these issues were not raised by CF in a timely manner, and cannot, therefore, form the basis of a grounds for protest.

The contracting officer is without authority to waive the timeliness requirements. See Air Transport Association of America, On Reconsideration, P.S. Protest No. 84-29, June 1, 1984; James W. and Joan C. Carroll, P.S. Protest No. 82-13, August 27, 1982. That a contracting officer has delayed in disclosing information does not excuse a protester's delay. See Cincom Systems, Inc., P.S. Protest No. 76-80, April 25, 1977. Therefore, the issues newly raised in CF's June 19 and July 13 submissions are not for consideration.

^{13/}CF's oral notice on April 28 was effective to notify the contracting officer of a mistake. We are not aware of any PCM provisions addressing the question whether the contracting officer had a duty to reopen negotiations prior to award of the contract. But cf. FAR ' 15.607 (1984.) The PCM contemplates that mistakes in negotiated procurements will be resolved through discussions or clarification. However, even FAR ' 15.607 does not apply when the mistake is not claimed until after the agency has completed discussions. See Standard Manufacturing Company, Comp. Gen. Dec. B-220455, March 31, 1986, 86-1 CPD & 304. When an offeror claims a mistake in its best and final offer, the contracting officer has discretion as to whether to reopen negotiations. See id.; Electronic Communications, Inc., 55 Comp. Gen. 636 (1976). Reopening negotiations must be clearly in the government's interest. Alchemy, Inc., Comp. Gen. Dec. B-207338, June 8, 1983, 83-1 CPD & 621. Given the perceived urgent need to make award in time to begin service by June 6, we could not find that the contracting officer abused her discretion in declining to reopen negotiations.

CF's argument that once its initial proposal was found to be within the competitive range its best and final offer could not be found to be technically unacceptable is without merit. A determination that a proposal is in the competitive range for purposes of discussion does not necessarily mean that the proposal is acceptable as initially submitted, but may indicate only that there is a real possibility that it can be improved without major revision to the point where it becomes most acceptable. A. T. Kearney, Inc., Comp. Gen. Dec. B-205025, June 2, 1982, 82-1 CPD & 518. After reviewing CF's best and final offer, the contracting officer could properly determine that it was not technically acceptable because of the tender times and thus no longer in the competitive range. A proposal initially in the competitive range may be excluded from the competitive range later where it is found to be technically unacceptable after discussions. Id.

evaluator's determinations, the file supports these conclusions, which we could not set aside unless they are arbitrary or capricious or not otherwise supported by substantial evidence. See POVECO, Inc., P.S. Protest No. 85-43, October 30, 1985; American Airlines, Inc., P.S. Protest No. 84-72, December 14, 1984. Since Evergreen's proposal was technically superior to CF's in three areas and equivalent in two areas, the contracting officer's determination that Evergreen's proposal was technically superior to CF's, and that their proposals were not "closely ranked" was reasonable and supported by substantial evidence.

The allegedly incorrect calculation of cost and the price differential between Evergreen's and CF's proposal do not affect the propriety of the award. Although CF's price was lower than

Evergreen's, price never became a factor. Since the solicitation provided that price would be a factor only for closely ranked proposals and CF's proposal was reasonably determined not to be "closely ranked," these grounds for the protest must fail.

The protest is dismissed in part and denied in part.

William J. Jones
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Office of Contracts and Property Law

[Compared to original 3/4/93 WJJ]