

Protest of ) Date: July 14, 1987  
Seal-Kote )  
Solicitation No. 419980-87-A-0030 ) P.S. Protest No. 87-55

### DECISION

Seal-Kote protests the failure of the Postal Service to "continue to award" the contract described in Solicitation No. 419980-87-A-0030 to Seal-Kote. It alleges that the Postal Service accepted Seal-Kote's bid and awarded the contract to Seal-Kote, but then later improperly backed out of the deal. Seal-Kote seeks performance of its alleged contract.

On January 20, 1987, the Eastern Regional Facilities Service Office issued Solicitation No. 419980-87-A-0030 which invited bids for paving and repairs of the parking lot of the Bulk Mail Center in Philadelphia, PA. Eight bids were received and opened on February 23. R.E. Rowles Asphalt Sealing Co. was the low bidder and Seal-Kote was the second low.

On March 4, the solicitation was canceled because its specifications were ambiguous. Specifically, the specifications failed to provide clearly that the contractor would not have the entire Bulk Mail Center parking lot available to work on at once. Provisions for staging the work were necessary because the facility operates 24 hours a day, 7 days a week, and consequently, must have at least a portion of its parking lot available for postal operations throughout performance of the contract.

The Contracting Officer notified all bidders as well as those firms who had requested the solicitation package of the cancellation. The letters sent to R.E. Rowles and Seal-Kote additionally pointed out that in the event the solicitation had not been canceled, their bids would have been rejected as nonresponsive because they qualified their bids. The contracting officer considered language added to Seal-Kote's bid form proposing an "or equal" material constituted a qualification. R.E. Rowles added to the bid two pages of qualifications and sought a change in the specifications.

Following receipt of the contracting officer's letter, Seal-Kote filed, on March 18, a

timely bid protest with the Contracting Officer and, on March 23, a complaint for breach of contract in the United States District Court for the Eastern District of Pennsylvania, naming the United States Postal Service as defendant.<sup>1/</sup> Because Seal-Kote had filed the district court action, the contracting officer delayed transmitting the protest to this office until June 8.

In its protest, Seal-Kote alleged: that a representative of Knabb Associates, the Architect/Engineer hired by the Postal Service to draft the specification, called Ms. Michele Hudome, the owner of Seal-Kote, and informed her that the Postal Service had awarded Seal-Kote the contract; that Ms. Hudome met with Mr. Anthony Joma, a representative of Knabb Associates, on March 4 to review the project; that on March 9, she received the contracting officer's letter canceling the solicitation; and that Seal-Kote contends that it has a contract with the Postal Service which the Postal Service should allow it to perform.

Seal-Kote made almost identical allegations in the district court action. The complaint alleges: that the Postal Service on March 3, announced that it had awarded Seal-Kote the contract; that Seal-Kote began performance of the contract on March 4; that the Postal Service subsequently changed its mind and announced it was canceling the solicitation; that Seal-Kote contends it has a contract with the Postal Service and seeks \$18,000 in lost profits, costs, attorney fees and other just relief as damages.

The contracting officer denies that representatives of the Postal Service or its Architect/Engineer ever told Ms. Hudome that she was awarded the contract and that the only correspondence he directed to Ms. Hudome was the letter advising cancellation of the solicitation.

Postal Service protest regulations provide, at section 2-407.8 f.(11), that

[t]he General Counsel may decline to decide any protest where the matter involved is the subject of litigation in any court of competent jurisdiction or has been decided on the merits in such a court. The foregoing does not apply where the court requests, expects, or otherwise expresses interest in the General Counsel's decision.

Postal Contracting Manual 2-407.8 f.(11).

The Comptroller General routinely declines to consider protests where the issues are pending in litigation before a court. N.W. Ayer, Inc., Comp. Gen. Dec. B-225632, January 16, 1987, 87-1 CPD |68 (1987); Dynalectron Corp., Comp. Gen. Dec. B-225590, January 21, 1981, 87-1 CPD |77 (1987); Monterey City Disposal Services, Inc., Comp. Gen. Dec. B-218624.3, February 6, 1987, 87-1 CPD |128 (1987). We agree with the practice of the Comptroller General and have previously suspended action on a protest until the protester withdrew its concurrent lawsuit which raised substantially the same issues. Irwin I. Grossman, P.S. Protest No. 84-55, July 23, 1984; Opal Manufacturing Co, Ltd., P.S. Protest No. 82-77, pages 6-7 fn. 1, April 4,

<sup>1/</sup> Hudome and Seal-Kote v. United States Postal Service, Civ. No. 87-1565 (E.D. Pa. filed March 23, 1987).

1983. Because the court would not be bound by our findings, contemporaneous consideration of the same issues and the same plea for relief would be duplicative and would serve no purpose. Therefore, unless the court expresses some interest in our deciding the protest, we will not consider protests where the material issues are pending before a court of competent jurisdiction.

In this case, Seal-Kote's district court claim raises the same issue as its bid protest, that is, whether the Postal Service had awarded Seal-Kote a contract. We could not reach the question whether the contracting officer properly canceled the solicitation without implicitly deciding the contract award issue because such cancellation would be improper if a contract had been awarded. Moreover, Seal Kote's complaint does not ask the court to seek our opinion on the issues raised and in fact indicates interest in judicial resolution. Consequently, we take no action on the protest.

This protest is dismissed.

William J. Jones  
Associate General Counsel  
Office of Contracts and Property Law

**[Compared to original 3/5/93 WJJ]**