

Protest of) Date: April 26, 1988
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 FEDERAL SYSTEMS GROUP, INC.)
)
 Solicitation No. 104230-88-A-0002) P.S. Protest No. 88-12

DECISION

Federal Systems Group, Inc. (Federal), protests the award of a contract under Solicitation No. 104230-88-A-0002 to any bidder other than itself. Federal contends that all bids which are lower in price than its own are nonresponsive to the solicitation, and consequently it should be awarded the contract.

Invitation for Bids (IFB) No. 104230-88-A-0002 was issued by the Office of Procurement, Headquarters, on November 4, 1987, with an offer due date of November 24, 1987. The IFB sought bids for 5500 Hayes 1200 Smartmodems or equal (line item 1) and 6500 Hayes 2400 Smartmodems or equal (line item 2). Line items 3 and 4, respectively, provided for optional quantities of 5035 Hayes 1200 Smartmodems or equal and 11,000 Hayes 2400 Smartmodems or equal. The solicitation provides in Section B - Evaluation and Award Factors (pages 10 and 11) that award shall be made to the low responsive, responsible bidder for the combination of line items 1 through 4.

There were four amendments to the solicitation.^{1/} Amendment A03, incorporated the Postal Service's responses to questions submitted by prospective bidders and extended bid opening to December 16, 1987. Amendment A04 further extended bid opening to January 8, 1988.^{1/}

^{1/}Each amendment required that a bidder acknowledge its receipt by: (a) signing and returning two copies of the amendment; (b) acknowledging receipt on all copies of the bid submitted; or (c) submitting a separate letter or telegram referencing the solicitation and amendment number.

^{2/}Bid opening was later extended to January 11, due to inclement weather in WashingtonD.C., on January 8.

One hundred sixteen (116) bids were received in response to the solicitation. The seven apparent low bids were:

<u>Bidder</u>	<u>(Line Items 1-4)</u>	Aggregate Bid
CHI Corporation		\$1,822,435.00 ^{4/}
National Computer Systems		1,883,055.05
USA-Flex		1,892,530.00
Prometheus Products		1,942,415.00
Commart, Inc.		1,966,275.00
Trigon Corporation		1,980,948.00
Federal Systems Group, Inc.		2,001,178.00

On January 12, 1988, Federal filed a protest with the contracting officer contending that the bids submitted by National Computer Systems (NCS), USA-Flex, Prometheus Products (Prometheus), Commart, Inc. (Commart), and Trigon Corporation (Trigon) contained significant errors and were nonresponsive to the solicitation. It asserted that all five bidders failed to include their corporate names on each page of the solicitation which had been marked, or failed to initial corrections or changes made to the bid, in violation of paragraph 2(b) of the "Instructions and Conditions," page 2 of the IFB.^{3/} Federal claims that the bidders did not return all pages of Amendment A03 with their bids, and failed to provide a description of the bidder's warranty coverage, as required by Paragraph 4, Section A - Items and Prices, at page 9.

^{3/}The apparent low bid submitted by CHI Corporation was rejected by the contracting officer as nonresponsive on the ground that the bid was qualified. CHI has not protested that determination.

^{4/}This provision reads:

2. PREPARATION OF OFFERS

(b) Each offeror shall furnish the information required by the solicitation. The offeror shall sign the offer and print or type his name on every page of the solicitation on which he makes an entry. Erasures or other changes must be initialed by the person signing the offer. Offers signed by an agent are to be accompanied by evidence of his authority unless such evidence has been previously furnished to the issuing office.

The protester additionally alleges that:

- (1) the bid of NCS was defective because amendments A02, A03, and A04 were not signed and the descriptive literature submitted with the bid reflects that the offered modem is incapable of operating in both a synchronous and asynchronous mode, as required by the IFB;
- (2) USA-Flex and Trigon failed to acknowledge Amendments A03 and A04;
- (3) the product offered by Commart was of foreign manufacture; and
- (4) the commercial price list or references required by the IFB were absent from the bids of USA-Flex, Commart, Prometheus, and Trigon.

The contracting officer responded to the January 12 protest by a letter dated January 20, 1988,^{4/} which sustained the protest as to the bids of Prometheus and Trigon, on the grounds of failure to acknowledge material amendments. She denied the protest as obviously without merit as to the remaining three bidders, noting that failure to list the corporate name on every page marked, or to initial all changes to the bids, were minor informalities which may be waived under Postal Contracting Manual (PCM) 2-405 and that the bidders were not required to return all pages of amendment A03 with their bids.

The warranty matter was one of responsibility, not responsiveness, and was thus premature. The contracting officer stated further: (1) NCS had acknowledged the amendments in the manner allowed by the solicitation, and its bid was responsive as its descriptive literature did not show that a nonconforming product was being offered; (2) USA-Flex had acknowledged Amendments A03 and A04; (3) an offered product's country of origin does not render a bid nonresponsive, and (4) the commercial price list was for purposes of information only and was not a requirement of the solicitation.

Federal objected to the contracting officer's adverse action in a protest received by this office on February 16, 1988. In the February 16 protest, Federal restates the issues noted in the January 12 protest and additionally contends that NCS's bid was received after the exact time set for the receipt of offers and that the uninitialed changes to NCS's bid were made by an official who lacked authority to change the bid.

In her report to this office, the contracting officer contends that the protest should be dismissed as untimely under PCM 2-407.8 d (4).^{5/} Federal telephoned the senior

^{5/}The letter was sent to Federal by certified mail, return receipt requested, on January 20. The signed receipt reflects that it was received on January 22. In subsequent submissions, the protester has denied that the letter was received by anyone in Federal's office.

^{6/}This provision provides:

(4) If a protest has been filed initially with the contracting officer, any subsequent protest to the General Counsel received within 10 working days of the protester's formal notification, actual knowledge, or constructive knowledge of initial adverse action by the contracting officer will be considered, provided the initial protest was received in accordance with the time limits in (1) through (3), above.

procurement specialist on January 21 regarding the status of its January 12 protest. In this telephone conversation, the protester was told that the protest had been sustained as to Trigon and Prometheus, but denied as to the bids submitted by NCS, USA-Flex, and Commart. The contracting officer notes that although the senior procurement specialist did not read the entire decision to the protester, she described the basis for the decision and advised the protester that the contracting officer's decision had been mailed on January 20. In the telephone conversation, the protester also referred to a separate protest which had been filed on January 11, the bid opening date. Federal was informed that this protest had not been received and should be refiled. The protester replied that the January 11 protest would be "resubmitted."¹⁷

Concerning the merits of the protest, the contracting officer states that all bidders present at bid opening, including the protester, were informed by the bid opening officer that acknowledgments of many amendments had been made by separate letters. Amendment A03, a material amendment, was acknowledged by NCS, USA-Flex, and Commart. The contracting officer states that NCS's bid was timely received as it was stamped "1:30 p.m.", the hour specified for the receipt of offers. The modems offered by NCS were currently marketed, off-the-shelf equipment. The waiver of minor in-formalities under PCM 2-405 does not amount to negotiations, as Federal alleges. The contracting officer asserts that the changes to NCS's bid involved the correction of simple multiplication errors which did not affect unit or aggregate prices; therefore, the authority of the person who made the corrections was immaterial. The bids submitted by USA-Flex and Commart were fully responsive to the solicitation. The contracting officer states that Federal's protest should be dismissed as untimely or, in the alternative, denied as "having no merit whatsoever."

The protester, through counsel, submitted additional arguments in rebuttal to the contracting officer's report, and also participated in a protest conference with this office pursuant to PCM 2-407.8 f (6). The protester urges that the February 16 protest is timely. He acknowledges that the protester was advised in the January 21 telephone call that its January 12 protest had been denied as to the three firms. However, the procurement specialist refused to provide the precise details of the contracting officer's decision, and without knowing the basis for the denial Federal could not have framed a complete protest. Concerning the contracting officer's assertion that the January 20 letter was delivered on January 22, as reflected by the signed receipt, the protester contends that the person who signed the receipt was not employed by Federal on the date in question. He asserts that the protester has not been able to ascertain to whom

¹⁷The protest of January 11 was not resubmitted to the contracting officer. However, Federal asserts that the additional issues presented in its February 16 protest were ones raised in the February 11 protest.

the January 22 delivery was made; however, the protester only received a copy of the January 20 decision from the contracting officer on February 1.

The protester further states that the issues concerning the lateness of NCS's bid and the authority of the official who made changes to the bid (which were not raised in the January 12 protest) were timely presented in a handwritten protest delivered to the bid opening official on January 11. The protester contends that although the contracting officer denied receipt of this protest, an affidavit of Federal's representative who was present at bid opening and which was submitted with its arguments clearly establishes delivery to the contracting officer's agent. The protester maintains that since the contracting officer never responded to the January 11 protest, the February 16 protest to this office, which included these matters, is timely.^{1/}

DISCUSSION

Since the requirement that a protest must be timely filed is jurisdictional, POVECO, Inc., et al., P.S. Protest No. 85-43, October 30, 1985, we must first determine whether Federal's protest before this office is timely. Under PCM 2-407.8 d (4), a protester has ten working days after an initial adverse action on a protest filed with the contracting officer to file a protest with this office.

It is undisputed that Federal knew from its January 21 telephone conversation with the procurement specialist that its protest had been denied with respect to three of the five firms. A protester is "charged with knowledge of a basis for protest" when the contracting officer conveys to the protester a position adverse to the protester's interest. Computer Systems & Resources P.S. Protest No. 87-38, June 24, 1987; Brandon Applied Systems, Inc. Comp. Gen. Dec. B-188738, December 21, 1977, 77-2

^{2/}Three firms, NCS, USA-Flex, and Commart, submitted comments during the course of this protest. NCS urges, through counsel, that the protest must be dismissed as untimely since the protest had actual knowledge of the denial of its January 12 protest from the oral notification on January 21. Further, evidence in the form of a signed receipt for certified mail shows that the protester received the written denial letter on January 22, 1988. NCS points out that the protester admits that NCS's bid was time-stamped at 1:30 p.m., and that the corrections to NCS's bid were made by a senior marketing representative of the company. Postal procurement regulations do not prohibit minor mathematical corrections. NCS's bid states categorically that the offered modems operate in either the synchronous or asynchronous mode.

USA-Flex states that it properly acknowledged all amendments, and that its warranty information was included in the specification sheet which was included with its bid. It states that the protest against it is without merit and should be denied.

Commart also urges that the protest is without merit and states that its bid was fully responsive and that the omission of its corporate name from several pages of its bid should not constitute a basis for its rejection.

CPD & 486; Sun Electric Corporation, Comp. Gen. Dec. B-202325, August 10, 1981, 81-2 CPD & 112. A protester may not delay filing a protest until it is certain that it is in a position to detail all of the possible grounds or facts underlying its protest. Computer Systems & Resources supra; Kappa Systems, Inc., Comp. Gen. Dec. B-187395, June 8, 1977, 77-1 CPD & 412; Blue Cross - Blue Shield of Tennessee, Comp. Gen. Dec. B-210227, May 23, 1983, 83-1 CPD & 555. Moreover, written notification of the adverse action or the grounds of the protest is not required; oral notification of the basis of a protest is sufficient to start the time period running. See Evans Suppliers Co., Inc., P.S. Protest No. 84-42, June 21, 1984, citing FLS, Inc., Comp. Gen. Dec. B-212066, July 21, 1983, 83-2 CPD & 109; A-Rentals, Inc., Comp. Gen. Dec. B-211326.2, May 31, 1983, 83-1 CPD & 580. Accordingly, Federal's February 16 protest is untimely as to the issues raised in its January 21 protest.

The protester argues that it filed a handwritten protest on January 11 raising issues not stated in the January 12 protest. The protester urges that its affidavit establishes the fact of delivery. We need not consider the effect of the affidavit. The contract specialist advised the protester in the January 21 telephone conversation that the January 11 protest had not been received. This conversation provided notice adverse to Federal's position with respect to its January 11 protest, and Federal should have understood it as such.^{1/} Federal's subsequent protest restating these issues was received on February 16, well beyond the ten-day limit of PCM 2-408.7 d (4). Therefore, these issues have also been untimely presented.

As our prior decisions repeatedly state, the timeliness requirements imposed by our bid protest regulations are jurisdictional. We cannot consider the merits of any issue which has been untimely raised. Bessemer Products Corporation, P.S. Protest No. 86-5, March 26, 1986; Omicopy, Inc., P.S. Protest No. 84-24, June 25, 1984, aff'd on reconsideration, July 27, 1984; Southern California Copico, Inc., P.S. Protest No. 83-2, August 31, 1983. This office has no authority to waive or disregard untimeliness. See 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.

^{9/}Adverse agency action is any action or inaction which is prejudicial to the position taken in a protest filed with the contracting officer. See Interior Steel Equipment, Co., Comp. Gen. Dec. B-208525, October 1, 1982, 82-2 CPD & 305.

The protest is dismissed.

William J. Jones
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[checked against original JLS 2/23/93]