

Protest of) Date: November 1, 1988
J.W. BATESON COMPANY, INC.)
Alhambra GMF and Warehouse, CA) P.S. Protest No. 88-44

DECISION

Through its counsel, J.W. Bateson Company, Inc. ("Bateson") protests its exclusion from the list of firms prequalified for the competition for the construction of the Alhambra General Mail Facility and Warehouse at City of Industry, California. As is set out more fully below, Bateson asserts that the prequalification procedure followed in this instance improperly limited the number of selected firms to a maximum of seven.

Background

The San Bruno Facilities Service Center ("FSC") issued a pre-qualification package for the Alhambra General Mail Facility and Warehouse, under Solicitation No. 059984-88-A-0050, on May 30, 1988. Notice of the soliciting of prequalification statements appeared in the Commerce Business Daily ("CBD") of June 6. Both the CBD notice and the prequalification package stated that not more than seven firms would be placed on the list of prequalified contractors. By letter dated June 30, and received July 6, Bateson, which was among the firms that submitted prequalification statements, was notified that it was not selected for inclusion in the list of prequalified firms. In a letter to the chairman of the evaluation committee dated July 12, Bateson expressed its disappointment with the committee's decision excluding it from the list of prequalified contractors and requested further information. In a letter to Bateson dated July 15, the chairman of the evaluation committee advised that it was impossible to provide a response to the July 12 letter within two days. (A letter in response to the July 12 letter was dated July 22.) Bateson's protest was received by this office July 20.

In addition to its protest, Bateson presented arguments in comments, dated August 11, submitted in response to the contracting officer's report, as well as in further responsive comments dated September 21 and in the conference held in this matter on October 3. Bateson contends that the provisions of the Postal Contracting Manual ("PCM") governed the procurement process at issue and that the prequalification procedure was impermissible under the PCM. Bateson further contends that, even if the Procurement Manual ("PM") were applicable, the maximum of seven prequalified firms is inconsistent

with both the procedure prescribed by PM 11.5.4.b, and the Postal Service's procurement policy.

The contracting officer submitted comments on the protest in his statement of August 2, and in further comments dated September 1. In addition to his arguments supporting the use of the prequalification process and the seven-firm limitation, the contracting officer argues that the protest is untimely because it was received more than ten working days after Bateson responded to the CBD item that put Bateson on notice that the seven-firm limitation would apply. Thus, he argues that the protest should be dismissed under PM 4.5.4 either as a protest based on alleged solicitation deficiencies (but received after date for proposal receipt) or an "other cases" protest (received more than 10 working days after underlying information was known or should have been known). He also notes that the Comptroller General treated a prequalification package as a solicitation for purposes of determining a protest's timeliness in Santa Fe Engineers, Comp. Gen. Dec. B-218268, June 3, 1985, 85-1 CPD & 631. Finally, in response to Bateson's suggestion that the protest be considered despite its untimeliness, the contracting officer contends that the instant protest does not come within the narrow exception to the general timeliness standard set out in American Telephone Distributors, Inc., P.S. Protest No. 87-117, February 23, 1988.

In response to the contracting officer's assertion that its protest is untimely or premature, Bateson argues that it had no basis for protest until the evaluation committee excluded it from the list of prequalified firms, and that its conclusion that the prequalification package is not a solicitation does not remove it from this office's bid protest jurisdiction. Given its size and experience, Bateson asserts, it did not anticipate that it would not be among the prequalified contractors for the project. Based upon its bidding experience, Bateson expected that fewer than seven firms would submit prequalification statements; it views any conclusion that its protest is untimely as a requirement that it act as a private attorney general in enforcing laws and regulations without regard to their effect on the firm.

Bateson also argues that it initially submitted a timely protest to the contracting officer (in the form of its July 12 letter to the chairman of the evaluation committee), and that its protest to the General Counsel promptly followed its receipt of notice of the contracting officer's adverse action. Even if the instant protest is untimely, Bateson urges that the issues it raises be considered under the approach taken in American Telephone Distributors, Inc., *supra*.

Five firms indicated an interest in the protest, and two submitted substantive comments. Both of these firms opposed the seven-firm limitation, and supported full and open competition.^{1/}

^{1/} One of the commenters, Blount, Inc., complained of its own exclusion from the list of prequalified contractors. These arguments are unavailing even if regarded as a protest, as the undated letter of comment was received on August 9, 1988, more than one month after the evaluation committee completed its work.

Discussion

Bateson's protest raises an initial issue of timeliness. We adopt the reasoning and approach taken by the Comptroller General in Santa Fe Engineers, supra, and treat the prequalification package as a solicitation for purposes of determining the timeliness of the protest. The prequalification process is an integral part of the contract formation process; firms that do not participate at the prequalification stage cannot be eligible for participation in later stages. In addition, and as the Comptroller General noted in Santa Fe Engineers, this approach is consistent with the goals of expeditiously considering protests while avoiding undue disruption of the procurement process.

Bateson's protest is clearly untimely under this standard, inasmuch as it was received by this office almost a full month after June 21, 1988, the date set for the receipt (or postmark) of prequalification statements. Even Bateson's letter of July 12 to the chairman of the evaluation committee fails to meet this deadline, so that we do not need to determine whether that letter constituted a protest submitted to the contracting officer. This conclusion is not affected by the choice governing regulations, as the relevant standard of PCM 2-407.8 d. is the same as that of PM 4.5.4.

It is well-established that our timeliness regulations are jurisdictional, so that we may not consider untimely protests on their merits. See Service America Corporation, P.S. Protest No. 87-119, December 15, 1987, aff'd on reconsideration, January 20, 1988; Bessemer Products Corporation, P.S. Protest No. 86-5, March 26, 1986; Poveco, Inc., P.S. Protest No. 85-43, October 30, 1985. This office also lacks authority to waive or disregard untimeliness. Air Transport Association of America, P.S. Protest No. 84-29, May 17, 1984, aff'd on reconsideration, June 1, 1984.

In addition to its assertion that the instant protest was first submitted to the contracting officer, Bateson counters the contracting officer's argument on timeliness with several arguments. However, none of these overcomes the straightforward conclusion that the protest is untimely. First, Bateson asserts that it did not expect more than seven firms to seek prequalification, and should not be required to pursue a protest until any perceived deficiency has a practical effect. The standard espoused by Bateson would render the timeliness requirement for protests against the terms of solicitations largely meaningless, as any potential protester could refrain from protesting the terms of a solicitation in the hope that a perceived deficiency would not work to its disadvantage -- or might even work in its favor. Under our regulations, such potential protesters are not "required" to protest, but do bear the risk that perceived deficiencies will work to their disadvantage.

Second, Bateson describes its protest as one against its exclusion from competition, an exclusion that did not occur until the evaluation committee determined that Bateson would not be included in the list of prequalified firms. This argument begs the question, however, because Bateson's protest makes it clear that its objection is to the seven-firm limitation. There is no indication, in any of the three grounds stated for the protest, that Bateson objected to the manner in which the evaluation committee performed its work - - except insofar as the committee applied the seven-firm limitation that was apparent in the prequalification package, and also in the CBD notice of its issuance. Bateson argues, in its protest, that its size and experience make the seven-firm limitation "more

irrational," but does not contend that it should have displaced any of the seven firms selected by the committee.

Bateson's two remaining arguments are grounded in American Telephone Distributors, Inc., supra. The first, that its protest could be subject to an exception to the general principles of timeliness, is not supported by the "narrow principle" affirmed in that decision, that

when the contracting officer, in violation of the regulatory provisions governing notice of award, makes the filing of a timely protest impossible, the running of the timeliness period is tolled until the protester knows or should have known of the award.

American Telephone Distributors, Inc., supra. There is no indication in the record before us that the contracting officer in any way prevented the filing of a timely protest, much less that the violation of any regulation is related to the tardiness of the instant protest.

Finally, Bateson urges us to comment upon the issues raised by its protest in order to make known our views on an important issue. Such comment is unnecessary here, as the propriety of the seven-firm limitation is addressed on the merits in another protest decision, J.W. Bateson Company, Inc., P.S. Protest No. 88-52, November 1, 1988.

The protest is dismissed as untimely.

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[checked against original JLS 3/3/93]