

Protest of )  
 ) Date: January 30, 1990  
PITNEY BOWES, INC. )  
 ) P.S. Protest No. 89-86  
Solicitation Nos. 11990-89-A-0144, )  
-0145 )

ON RECONSIDERATION

Pitney Bowes, Inc. ("Pitney Bowes"), requests reconsideration of our December 20, 1989, decision dismissing as untimely its protest against award to Compu-Copy, Inc. ("Compu-Copy"), under Solicitation Nos. 11990-89-A-0144 and -0145 for coin-operated photocopier services in the Tampa and Jacksonville, Florida divisions.

The decision concluded that Pitney Bowes' protest was an allegation of an ambiguity in the specification and as such was untimely as not raised prior to the offer due date. Alternatively, the decision found the protest untimely as raised "later than ten working days after the information on which the information on which [the protest was] based...." Postal Contracting Manual ("PCM") 2-407.8 d.(3). The basis of the protest was Compu-Copy's offer to furnish photocopiers which could not copy 11" x 17" ("ledger sized") materials, a fact which we concluded Pitney-Bowes should have known as of the date the bids were opened, March 31, 1989. Although the decision dismissed the protest as untimely, it discussed, "for purposes of clarification," the bases on which we disagreed with the protester's conclusion that the Compu-Copy bid was nonresponsive.

In its request for reconsideration, Pitney Bowes contends that the question of the timeliness of its protest was not raised in the contracting officer's report, but rather was raised only in the comments on the protest filed by Compu-Copy. Pitney Bowes notes that it did not receive a copy of those comments until after the decision was issued. Pitney Bowes claims it had no notice that timeliness was at issue and it did not get an opportunity to rebut Compu-Copy's arguments in that regard. Pitney Bowes also notes it had no opportunity to respond to Compu-Copy's comments on the merits of the protest before the record was closed. For these reasons, Pitney Bowes requests that the decision dismissing its protest be vacated and that it be given the opportunity to rebut Compu-Copy's comments.

The PCM states that a request for reconsideration "must contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not considered." PCM 2-407.8 f.(10). Information not previously considered refers to that which a party believes may have been overlooked by our office or to information to which a party did not have access during the pendency of the original protest. Fort Lincoln New Town Corpora-

tion, On Reconsideration, P.S. Protest No. 83-53, November 21, 1983. Here, Pitney Bowes complains that this office based its decision, with respect to the timeliness of Pitney Bowes' protest, on information to which it did not have access during the pendency of its protest.<sup>1/</sup>

As the earlier decision stated, "[u]ntimely protests cannot be considered on their merits. 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." Pitney Bowes, Inc., P.S. Protest No. 89-86, December 20, 1989, citing BFI Waste Systems, Browning-Ferris Industries, P.S. Protest No. 88-42, July 29, 1988. "The issue of jurisdiction can be brought up sua sponte by this office." Evergreen International Airlines, Inc., On Reconsideration, P.S. Protest No. 86-07, June 9, 1986. Because of its jurisdictional nature, timeliness is always an issue and would have been considered by this office whether mentioned in any party's comments or not. Indeed, in its initial protest of October 31, Pitney Bowes affirmatively represented that its protest was timely as having been filed within ten working days of the date of award to Compu-Copy.

The resolution of bid protests is an administrative procedure which functions differently from judicial litigation. "To satisfy the due process requirements in administrative proceedings of this nature, it is not necessary that the protester be apprised of all information in the record." Bokonon Systems, Inc. -- Reconsideration, Comp. Gen. Dec. B-189064, 78-2 CPD & 101, August 8, 1978. Due process is satisfied when the protester is afforded a reasonable opportunity to present its case. Systems Research Laboratories, Inc. -- Reconsideration, Comp. Gen. Dec. B-186842, 78-1 CPD & 341, May 5, 1978.<sup>1/</sup> Accordingly, Pitney Bowes, aware of the jurisdictional requirement of timeliness, had every opportunity to present its best case on the issue.

In any event, Pitney Bowes offers no satisfactory explanation why its protest was not untimely as raised more than ten working days after the bids were opened. While its

<sup>1/</sup>Pitney Bowes' contention that it lacked access to Compu-Copy's comments is incorrect. While our bid protest regulations make no reference to the distribution of the comments of interested parties to other interested parties, it is our practice to make such distribution upon request. Pitney Bowes made no such request in the course of the protest. "[A] protester is generally required to diligently pursue information which would form the basis of its protest." J. W. Cook, Inc. -- Request for Reconsideration, Comp. Gen. Dec. B-228038.2, 88-1 CPD & 319, March 30, 1988; see also Tulsa Diamond Manufacturing Corporation, et. al. On Reconsideration, P.S. Protest Nos. 85-18, 85-20, 85-23, July 17, 1985. We note, in this regard, that in finding that a decision was not premature due to the protester's lack of opportunity to rebut the comments of an interested party, the Comptroller General has stated that although a party is entitled to file comments on the contracting officer's report, it is not necessarily entitled to file comments on an interested party's comments. Transportation Research Corporation -- Request for Reconsideration, Comp. Gen. Dec. B-231914.2, 88-2 CPD & 468, November 10, 1988.

<sup>2/</sup>These cases were decided under General Accounting Office ("GAO") regulations prior to the enactment of the Competition in Contracting Act ("CICA"), 41 U.S.C. " 403 et. seq. (1984), and stated that the GAO was obligated to make pertinent releasable information available to any interested parties **upon request** 4 C.F.R. ' 20.5 (1977)(emphasis added). The Postal Service's bid protest regulations are analagous to the GAO's pre-CICA bid protest procedures.

request for reconsideration asserts, without authority, that in the context of this procurement,<sup>1/</sup> it was "preposterous" to conclude that the protest could have been filed before the eventual award to Compu-Copy, why it was preposterous is not clear. The protest of October 31 is styled throughout in terms of responsiveness. ('Compu-Copy's bid does not meet the Postal Service's specifications." "The Award to Compu-Copy is Improper Because Compu-Copy's Offer is Nonresponsive." "[T]he equipment Compu-Copy bid does not meet the specification 4f; thus, Compu-Copy's bid is nonresponsive....") It is black-letter law that responsiveness (as opposed to responsibility) is determined from the face of the bid. Sensory Electronics, Inc., P.S. Protest No. 87-124, January 21, 1988; Data Switch Corporation, et. al., P.S. Protest Nos. 85-4, 85-5, April 29, 1985. It follows that challenges to the responsiveness of a bid must be lodged within the jurisdictional period which begins to run when the bids are opened, since it is at that time that challengers first knew or should have known of the defect in the bid which warranted its rejection for lack of responsiveness. C. L. Swanson Corporation, On Reconsideration, P.S. Protest No. 88-20, April 15, 1988. The protester offers no explanation why the defect in Compu-Copy's bid was not known or knowable as early as March 31, but even assuming that the intervening rejection of all bids justified some delay, the clock must have begun to run again no later than July 27, the date of the decision reinstating the bids. To allow Pitney Bowes to wait seven months after Compu-Copy's bid was made public and the award determination had been made would allow Pitney Bowes a "second bite at the apple" and would undermine the integrity of the competitive bidding process. C.f. L. P. Fleming, Jr. Hauling, Inc., P.S. Protest No. 83-64, December 19, 1983.

"Where information and arguments were known or available to the protester during the development of its protest but were not presented in the original proceeding, such information and arguments may not be considered in a request for reconsideration." Evergreen International Airlines, Inc., supra; Fort Lincoln New Town Corporation, supra.

The request for reconsideration is denied.

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**[checked against original JLS 5/26/93]**

<sup>3/</sup>The bids were opened on March 27, 1989. On May 18, the contracting officer rejected all bids as nonresponsive, a decision successfully challenged in Equipment Marketing Consultants Corporation and Pitney Bowes Inc., P. S. Protest Nos. 89-34 and 89-42, July 27, 1989. Thereafter the contracting officer reinstated the bids, making award to Compu-Copy on October 19.