

Protest of)
USA 800, INC.) Date: February 15, 1990
Solicitation No. 104230-89-A-0019) P.S. Protest No. 89-90

DECISION

USA 800, Inc. ("USA 800"), protests the award to Telecommunications Marketing, Inc. ("TMI"), of a contract for telemarketing support and postage stamp order fulfillment services (sometimes referred to as the Stamps by Phone ("SBP") program) under Solicitation No. 104230-89-A-0019.

The solicitation was issued on December 20, 1988, by the Office of Procurement, Headquarters, with a proposal due date, as extended, of February 3, 1989.^{1/} Twenty-five offers were received. Eight of the offers, including USA 800's and TMI's, were ultimately found to be within the competitive range. The contract was awarded to TMI on October 25, 1989. USA 800 was notified of the award by an October 27 letter which it received on October 30. On November 1, USA 800 requested various items of information about the award and the unsuccessful offers. On November 8, the contracting officer sent it a copy of TMI's contract, but declined to provide copies of the other unsuccessful offers.

USA 800 submitted a protest to the contracting officer which was received on November 17. On November 24 the contracting officer denied the protest as without merit because it was untimely. USA 800 sought to appeal the denial to the Postal Service Board of Contract Appeals on November 30. The Postal Service filed a motion to dismiss the appeal for lack of jurisdiction on December 23. In the meantime, a copy of the appeal which the protester forwarded to the General Counsel was received by this office on December 6 and docketed as a protest.^{1/}

In its protest, USA 800 complains that award to TMI was improper. The protester states that, as the incumbent, it believes that some of the estimated average talk times

^{1/}The due date was extended by Amendment A01 issued on January 6. The amendment contained answers to several questions submitted by prospective offerors, including one about the length of telephone calls ("talk times") by customers.

^{2/}Procurement Manual (PM) 4.5.4 e. provides that when a contracting officer denies a protest addressed to the contracting officer, we may consider a subsequent protest received within ten working days of the protester's receipt of notice of the contracting officer's adverse action.

for stamp orders had been understated in Amendment A01.^{4/} Because the solicitation was deficient, USA 800 concludes that TMI's rates can neither be reasonable nor allowable under the cost principles of Chapter 5 of the Procurement Manual ("PM"). USA 800 also suggests that TMI couldn't have understood the requirements of the solicitation and that even if it did, it offered a price so low that it eliminated price competition, contrary to PM 5.3.3 c.2.(b).^{4/} USA 800 suggests that TMI will either be forced to perform the contract at a loss, which would not be in the best interests of the Postal Service or will be able to raise its prices at a later date due to the deficiencies in the solicitation. For these reasons, USA 800 requests cancellation of the award to TMI and resolicitation.

USA 800 claims that its initial protest was timely, stating that the contracting officer received the protest fourteen working days after she notified USA 800 of the award. It views its request for additional information as essential to its protest, and did not receive the partial response to its request until November 9.

USA 800 goes on to describe its good performance record under the present contract and states that no other company is as qualified or experienced as it with respect to the SBP program. It reiterates that the awardee does not fully understand the scope of the requirements of the solicitation. USA 800 predicts that if the award to TMI is sustained, TMI will either request an increase in its contract price or will seek to terminate the agreement.

In her report on the protest, the contracting officer notes that she denied the initial protest as untimely as received both more than ten working days after USA 800 was notified of the award to TMI and more than fifteen working days after award of the contract. Further, she notes that most of the allegations of the protest went to the terms of the solicitation, and were further untimely as not having been made before the offer due date.

On the merits, the contracting officer states that the protester had misapplied the cost principles in PM Chapter 5, was mistaken in its belief that a loss contract cannot be

^{3/}As noted above, USA 800 was actually the subcontractor of the previous contractor providing Stamps by Phone services. It states that it informed the Postal Service of the alleged deficiencies before the amendment was issued. It states that when the average times were not changed in the amendment, it did not question further the Postal Service's calculations, based on its understanding that the contents of the solicitation were the responsibility of the Postal Service. Elsewhere in its protest submissions, however, USA 800 contends that it voiced its objections to the amendment before the offer due date, and that its objections are "on file." Careful review of the file and inquiries of the contracting officer have revealed no written objections prior to the offer due date. "[T]he statements of the contracting officer are given a 'presumption of correctness' which the protester bears the burden of overcoming." Marshall D. Epps, P.S. Protest No. 88-47, September 15, 1988; OSM Corp., P.S. Protest No. 88-36, August 18, 1988; E-Z Copy, Inc., P.S. Protest No. 88-17, May 11, 1988. USA 800 submitted no evidence to support its contention and, therefore, has not overcome its burden in this regard.

^{4/}PM 5.3.3 c.2. states that: "If price competition exists, it is presumed adequate, unless . . . (b) The low offeror has such a decided advantage that it is practically immune from competition"

awarded, and otherwise merely disagreed with the business judgments of the Postal Service. In her view, none of these allegations created an appropriate basis for a protest. In addition, she notes that any allegation by USA 800 regarding TMI's ability to perform is a protest against an affirmative determination of responsibility by the contracting officer and cannot be sustained absent evidence of bad faith, fraud, or failure to adhere to definitive responsibility criteria.

USA 800 submitted comments in response to the contracting officer's report. It now asserts that its contention throughout the bid protest proceedings has been that its proposal was not judged fairly. USA 800 disagrees with the conclusions of the evaluation committee with respect to its technical proposal. USA 800 states that at a debriefing held on January 4, it discovered that two members of the evaluation team were postal personnel who had "in a limited way" aided USA 800 in the preparation of their proposal under the current contract. USA 800 contends that during the pendency of the solicitation at issue, both these evaluators offered information to it that USA 800 now construes as being adverse to its interests and that both were privy to the strategies and plans of USA 800. It conceded that, due to their extensive experience in the field, it was logical to include them in the evaluation committee, but concludes that any conclusions rendered by an evaluation committee of which they were members should be biased.

Discussion

The contracting officer's determination that USA 800's original protest was untimely is correct. "[P]rotests must be received not later than ten 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." PM 4.5.4 d.

It is well settled that "untimely protests cannot be considered on their merits." BFI Waste Systems, Browning-Ferris Industries, P.S. Protest No. 88-42, July 29, 1988.

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. Unlike the Comptroller General, we have no authority to waive or disregard the timeliness issue in a particular case.

CF Air Freight, Inc., P.S. Protest No. 87-43, August 7, 1987. (Citations omitted.)

The protester misunderstands the applicable timeliness regulations. USA 800 acknowledges that it received the award notification on October 30. At that point USA 800 knew each of the components of its protest--the identity of the successful offeror, (in USA 800's view) its unrealistic price, and (again in USA 800's view) the cause of the unrealistic offer, the incorrect information contained in the solicitation. In order to be timely, the protest would have had to have been received within ten working days of that date, or November 13. To meet the requirement that the protest must have been received within fifteen working days after contract award, the protest would have to

have been received by November 16.⁴ USA 800's protest, received on November 17, is clearly untimely under both the ten-day rule and the 15-day rule.

USA 800 complains that it was delayed in submitting its protest because it was waiting for information requested from the contracting officer. Such delay does not extend the period available for protest. "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 of facts underlying its protest." Engineered Systems & Development Corporation, P.S. Protest No. 88-15, June 9, 1988; Computer Systems & Resources, P.S. Protest No. 87-38, June 24, 1987.

Further, to the extent that USA 800 complains of the contents of the solicitation, its protest is untimely for yet another reason. "[P]rotests based upon alleged deficiencies in a solicitation that are apparent before the date set for the receipt of proposals must be received by the date and time set for the receipt of proposals," PM 4.5.4 b. Pitney Bowes, Inc., P.S. Protest No. 89-86, December 20, 1989.

Finally, USA 800 belatedly alleges that its proposal was not properly evaluated. Contrary to these contentions, we find its earlier submissions barren of any reference to alleged unfairness of the evaluation of its offer. Since this is a new allegation, it also must be examined for timeliness. Assuming, arguendo, as USA 800 claims, that it first learned of the possible unfair treatment of its proposal at a January 4, 1990, debriefing, its contention is untimely raised on the same two grounds as its initial protest. First, it is untimely as raised more than 15 working days after contract award. The pendency of a protest on other grounds does not extend the time within which additional grounds of protest may be raised. CF Air Freight, Inc., *supra*; Jameson & Gibson Construction Co., Inc., P.S. Protest No. 85-54, September 17, 1985. Second, its comments, dated January 29, are untimely as being raised more than ten working days after the information on which they are based is known.

The protest is dismissed as untimely.

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[checked against original JLS 5/26/93]

⁵The letter advising of the award did not mention the date of award, which was October 25. USA 800 learned of the date of award no later than November 9, when it received a copy of the TMI contract.