

Protest of ) Date: May 10, 1991  
PLYMOUTH MOBILE WASHING, INC. )  
Solicitation No. 419990-91-A-0123 ) P.S. Protest No. 91-15

### DECISION

Plymouth Mobile Washing, Inc. (Plymouth) protests the award of a contract for vehicle washing for the Philadelphia post office and bulk mail center vehicle maintenance facilities (VMFs) to North Penn Powerwashers, Inc. (North Penn). Plymouth claims that the procurement of these services was conducted in a manner which was fundamentally unfair and which violated postal regulations.

Solicitation No. 419990-91-A-0123 was issued by the Philadelphia Procurement & Materiel Management Service Center on November 16, 1990, with an offer due date of December 7. The solicitation was for vehicle washing services at the Philadelphia post office and bulk mail center (BMC) VMFs. The solicitation listed an estimated number of various types of vehicles which would be located at the facilities,<sup>1/</sup> set forth that the vehicles would be washed 52 times per year, and requested per wash and total cost prices for each type of vehicle. While the solicitation set forth multiple locations for the vehicles, it also stated that the vehicles were not necessarily at any of the listed locations at any particular time.

Section M contained the following provision regarding how the proposals would be evaluated for award:

#### M.2 BASIS OF AWARD (VEHICLES) (Provision OA-504) (June 1988)

The Postal Service intends to award a contract to the responsible offeror(s) whose proposal(s) will be most advantageous to the Postal Service, considering cost or price and other factors specified elsewhere in this solicitation.

Each offeror is advised that the Postal Service will enter into contracts with only the offeror(s) whose proposal(s) represents the best overall value to the Postal Service. Hours of service, of both the Postal Service facility and the offeror, may be taken into account in arriving at the best overall value. Additionally, the offeror must be determined to be a "responsible contractor" by having an adequate facility or an adequately equipped mobile unit, trained personnel capable of performing the

<sup>1/</sup> While the official location for these vehicles were at the post office or BMC VMF, they were sometimes situated in locations other than the particular VMF to which they were assigned. For example, the solicitation provided that an estimated 70 1987 Stoughton trailers would be located at either the Philadelphia BMC or the Langhorne, PA, bag deposit center.

required services, and adequate financial resources.

When service performance will not be on Postal premises, costs associated with delivery to and from the contractors plant will be considered.

The solicitation also permitted multiple awards to be made:

#### M.1 EVALUATION OF PROPOSALS FOR MULTIPLE AWARDS (Provision A-16) (October 1987)

In addition to other factors, proposals will be evaluated on the basis of advantages and disadvantages to the Postal Service that might result from making more than one award (multiple awards). It is assumed, for the purpose of evaluating proposals, that \$250 would be the administrative cost to the Postal Service for issuing and administering each contract awarded under this solicitation, and individual awards will be for the items or combinations of items that result in the lowest aggregate cost to the Postal Service, including the assumed administrative costs.

Finally, the solicitation contained the following provisions concerning the explanation to prospective offerors:

#### J.6 EXPLANATION TO PROSPECTIVE OFFERORS (Provision A-6) (October 1987)

Any prospective offeror desiring an explanation or interpretation of the solicitation, drawings, or specifications must request it in writing soon enough to allow a reply to reach all prospective offerors before the submission of their proposals. Oral explanations or instructions will not be binding. Any information given to a prospective offeror concerning a solicitation will be furnished promptly to all other prospective offerors as an amendment of the solicitation, if that information is necessary in submitting offers or if the lack of it would be prejudicial to any other prospective offerors.

Nine proposals were received. Plymouth was determined to be the low offeror for the post office VMF and North Penn to be low for the BMC VMF. Since the contracting officer determined both offerors to be responsible, he began preparations to make two awards, and, as the start date for contract performance was close at hand, he called both offerors and informed them of the proposed partial award. Both Plymouth and North Penn were curious about who had won the other half of the procurement, and, at the request of each, the contracting officer informed each of them of the other offeror's price.

However, when division employees at the VMFs were informed of the contracting officer's intent to make two awards, they informed him that, because many of the vehicles assigned to the post office VMF were parked and available for washing only at the BMC VMF when they were not in service, there was no way to adhere to the estimated quantities for each VMF set forth in the solicitation. Therefore, since two awards were not practical, it was determined to amend the solicitation to require only one award and request a new round of proposals. Plymouth and North Penn were orally informed of this decision on December 14, and on December 18, Amendment A01 was issued to the nine offerors who had

submitted a proposal on the Solicitation.<sup>1/</sup> It provided, in pertinent part, as follows:

This Amendment is to clarify the vehicle washing requirement and vehicle locations. While the solicitation notes that 434 vehicles are assigned to the GPO and 8S to the BMC, they may be found at any listed location and must be washed onsite. Only one award will be made for the total of all locations. Attached is revised Page 27 with Provision A-16, Evaluation of Proposals For Multiple Awards, deleted. Also attached for your completion are Page 1 (items 7, 10 & 12), Pages 2 & 3 (price entries) for your Best And Final Offer. You must resubmit an offer to be considered for an award. Refer to the solicitation for more information or call 9315165. Return this and pages with entries by due date of 0102-91.

Eight offerors resubmitted their proposals on the amended solicitation. North Penn was low, Delmarva Mobile Wash was second low, and Plymouth third. Award was made to North Penn on January 14, 1991. On January 15, Plymouth called the contracting officer and was informed that award had been made to North Penn and that notification of the award had been sent the day before. Plymouth received the written notice of award on January 22.

On February 4, 1991, Plymouth protested to the contracting officer the award to North Penn. Plymouth summarized its position that "procurement guidelines" were violated by the Postal Service, the requirements of the solicitation were not followed, and its rights were jeopardized by the disclosure of its prices to North Penn and the procurement specialist's misrepresentations.

On February 11, the contracting officer denied Plymouth's protest as untimely. He paraphrased the relevant Procurement Manual (PM) sections concerning the timeliness of protests,<sup>1/</sup> and concluded that, since Plymouth had been orally notified of the award to North Penn on January 15, its February 4 protest was untimely filed because it was filed later than 10 working days after the information on which the protest was based was known.

On February 14, Plymouth requested reconsideration of the contracting Officers decision.<sup>1/</sup> Plymouth maintained that its protest was timely filed within 10 working days of receipt of its written notification that award had been made to North Penn. It states that reliance on the contract specialist's January 15 advice that award had been made to North Penn was unfair and without merit, since the contract specialist's earlier oral advice that Plymouth would receive award had been incorrect. Additionally, Plymouth alleges that the specialist told it on January 15 not to take any action until it received written notification of the basis for award and that the oral information given by the specialist was insufficiently specific on which to base a protest. Therefore, it perceives its protest is timely as filed within ten working days of its receipt of written notification of award.

<sup>2/</sup> There is no evidence that either Plymouth or North Penn then took issue with the issuance of the amendment or with the fact that some information about the proposals had been released.

<sup>3/</sup> These sections, (4.5.4 a., 4.5.4 b., and 4.5.4 c.), are set forth in full infra.

<sup>4/</sup> This request was sent to the contracting officer and he forwarded it to our office. We are treating it as an appeal of an initial adverse decision pursuant to PM 4.5.4 e.

Plymouth also contended that the written notification of award was deficient under PM 4.1.5 i., because it lacked information concerning the number of proposals received, the basis for the selection decision, and whether award was made without discussions. Finally, Plymouth reiterated its belief that it had been underbid because of the contracting officer's release of its price to its competitor, North Penn.

In his report to this office, the contracting officer reiterates that the oral notification of January 15 of award to North Penn was adequate to begin the running of the protest timeliness period. He denies that Plymouth had been informed in December that they would receive an award after the amendment was issued and a new round of proposals were received. He explains that the contract specialist provided Plymouth's and North Penn's pricing to the other offeror only because, upon award of the contracts, that information would soon become public. He further ) notes that Plymouth was not disadvantaged by this disclosure, since it knew North Penn's price and both parties had an equal opportunity to submit new proposals in response to the amendment which deleted the multiple awards clause. The contracting officer also notes that the award notification complied with section 3.6.4 of Handbook AS-707B, Contracting for Vehicle Washing and Polishing Agreements.<sup>1/</sup>

After a protest conference, Plymouth filed additional comments which reiterated that oral notification by the contract specialist of award to North Penn could not be binding on it. Plymouth argues that it would be unjust if oral notification by the contract specialist is sufficient to start the timeliness period for filing a bid protest but is insufficient to bind the government when the specialist told Plymouth that it had received award, that it would receive award on the amended solicitation, or that it should not file a protest until it had received written notification of the award to North Penn. Finally, it claims that Section M, as originally written, provided the contracting officer with sufficient flexibility to make either a single award or multiple awards, so that there was no need to amend the solicitation to make a single award when this was determined to be in the best interests of the Postal Service.

We first examine the allegations made by Plymouth to determine whether they are timely filed. As we have stated previously:

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. To be considered on its merits, each separate ground for protest must independently meet the timeliness requirement of the PCM.

<sup>5/</sup> This section states that "[u]nsuccessful offerors must be notified promptly after award that their offers are not being accepted." The written notice given to Plymouth was in the form set forth by Exhibit B, Part 6, referred to in Section 3.6.4 of the Handbook. Since we hold that the oral notification by the contract specialist on January 15 was sufficient to inform Plymouth of the basis for its protest, we need not address the sufficiency of the written notice.

POVECO, Inc., et al, P.S. Protest No. 85-43, October 30, 1985 (citations omitted). The timeliness provisions set forth at PM 4.5.4 are as follows:

#### 4.5.4 Timeliness.

a. The Postal Service intends to complete its purchasing actions in a timely fashion while ensuring fair treatment to firms and individuals. A protester must furnish any protest to the contracting officer or the General Counsel in a manner that will ensure its timely receipt. Protests received by the contracting officer or the General Counsel after the time limits prescribed by this section 4.5 will not be considered.

b. Protests 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.

c. Protests of alleged deficiencies in the solicitation after the receipt of initial proposals must be received not later than the next closing date and time for the receipt of proposals.

d. In all other cases, protests 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.

From the above, it is clear that Plymouth's February 4 protest against the terms of the amendment is untimely pursuant to PM 4.5.4 c., as received well after the date by which revised proposals were to have been received. Additionally, Plymouth's allegations concerning the propriety of issuing the amendment, the release of its prices to other offerors, and the alleged award to Plymouth are also untimely pursuant to PM 4.5.4 d., as protested well after ten working days from the time Plymouth first knew of these matters. We are thus precluded from reaching the merits of these issues.

Plymouth's allegation that they did not file a protest about the December 18 amendment because of representations made by the contract specialist that they would receive award on the amended solicitation is unavailing. As paragraph J.6 of the solicitation

provided, oral explanations or instructions given prior to award are not binding. See De Santis Industries, Inc., P.S. Protest No. 84-27, May 2, 1984; Jet Hardware Manufacturing Corporation, P.S. Protest No. 82-62, November 8, 1982. Even where the actions of the contracting officer have contributed to the untimeliness of a protest, the timeliness standard cannot be ignored. American Telephone Distributors, Inc., P.S. Protest No. 87-117, February 23, 1988 (citing cases). Plymouth was not entitled to rely on the contract specialist's incorrect advice, and should not have failed to file a protest because of it.

The timeliness of Plymouth's protest of the award to North Penn depends on whether the contract specialist's oral notification of award starts the running of the timeliness period. We hold that it was sufficient to do so. "A protester is 'charged with knowledge of the basis for protest' when the contracting officer conveys to the protester a position adverse to the protester's interest." Federal Systems Group, Inc., P.S. Protest No. 88-12, April 26, 1988,

quoting Computer Systems & Resources, P.S. Protest No. 87-38, June 24, 1987.<sup>1/</sup> However, "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." Federal Systems Group, Inc., supra; Evans Suppliers Co, Inc., P.S. Protest No. 84-42, June 21, 1984. Given the grounds for its protest against the award (its previous advice that North Penn had been given its prices), the oral notification of January 15 of the award to North Penn adequately informed Plymouth of the basis for its protest; its protest, filed February 4, was thus untimely filed. Any reliance Plymouth may have made on representations by the contract specialist that it should wait for receipt of the written notification of contract award was not reasonable. See De Santis Industries, Inc., supra.

Contrary to Plymouth's assertions, there is no inherent unfairness in the fact that, while the oral representations of the contracting officer or the contract specialist are not binding on the Postal Service, the oral notification of award begins the running of the timeliness period.

Two completely different Issues are involved. The nonbinding nature of oral representation implicate important policy considerations against oral contracts. Oral notification of contract award, however, presents only the issue of notice. The source of notice and the form of the notice are immaterial; once the person is on notice, the relevant time period begins. There is also a significant difference between the two notices on which Plymouth relies. The December conversation concerned the possibility that Plymouth would subsequently receive a partial award, an event which would remain contingent pending the completion of future events. The January conversation dealt with the fact of an award to North Penn which had already occurred.

The protest is dismissed.

**[Signed]**

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

**[Compared to original 5/10/95 WJJ]**

<sup>6/</sup>We ascribe no legal significance to the fact that here the advice was given by a contract specialist rather than a contracting officer.