

Protest of) Date: December 27, 1991
QMC, Inc.)
Solicitation No. 239990-91-A-0068) P.S. Protest No. 91-52

DECISION

QMC, Inc., protests the award of a contract for cafeteria food services with satellite vending under Solicitation No. 239990-91-A-0068 for the Suburban, MD, general mail facility/vehicle maintenance facility (GMF/VMF) to ARA Services, Inc. (ARA). QMC contends that its offer was improperly evaluated and that the solicitation did not provide an adequate forum for it to express the intent of its offer.

The solicitation was issued by the Procurement and Materiel Management Service Office, (P&MMSO) Columbia, MD, on December 26, 1990 with an offer due date, as amended, of February 11, 1991. The solicitation sought a combination manual cafeteria with supplemental vending. The solicitation required that the manual cafeteria be based on what is known as the "Van Nuys concept," in which food is prepared off-site. In addition, the solicitation sought four satellite vending services. The Solicitation Instructions and Conditions stated at paragraph 9 that award would be made "to the responsible offeror whose proposal (price and other factors considered) is most advantageous to the Postal Service." The solicitation also warned offerors that the Postal Service "may award a contract, based on initial offers received, without discussion of such offers. Accordingly, each initial offer should be submitted on the most favorable terms from a price and technical standpoint which the offeror can submit to the Postal Service."

The solicitation's Guidelines for Preparation of Food Service Proposal set forth detailed descriptions of the six evaluation criteria: A) Reputation, Experience, and Resources, 50 points; B) Sanitation Practices, 100 points; C) Personnel Staffing and Management, 250 points; D) Menu Prices, Portion Sizes, and Management Controls, 300 points; E) Menu Variety, 200 points; and F) Budget (pro forma), Accounting System, and Controls, 100 points.^{1/}

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The solicitation stated that each offeror "shall provide the menu they propose to implement . . . in accordance with" the evaluation criterion entitled Menu Variety, and required offerors to "provide a sample priced cafeteria menu for a six (6) day period. This sample menu must be separate and distinct from the other menu requirements set forth in this Solicitation."

The cover letter accompanying the solicitation stated that an original and two copies of the proposals should be submitted, and that the proposals should be organized, documented, and bound in one volume, with each section tabbed according to the headings set forth in the guidelines, and also noted that a preproposal conference and tour of the cafeteria facilities would be held on January 17 at the Gaithersburg, MD, postal facility. Three offers were received. On February 22, during the course of this procurement, the Columbia, MD, P&MMSO was closed, and responsibility for the solicitation was transferred to the Greensboro, NC, P&MMSO. On February 22, QMC sent a letter to the contracting officer in Greensboro stating that it had requested and received permission from the Columbia procurement office to resubmit its offer in order to modify the hot food portion of its bid. The contracting officer in Greensboro accepted QMC's late modification on February 26.^{1/} The offers were evaluated in April. On June 20, the contracting officer notified QMC that its proposal had been determined to be outside the competitive range and that it would no longer be considered for award. ARA received award of the contract on July 29. QMC's protest was received by our office on August 9.

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QMC contends that its offer responded to all the solicitation requirements, offered an adequate and varied menu at competitive prices, exhibited QMC's ability to prepare the food off-site, and demonstrated that it was experienced and financially capable of performing the contract. It complains that the evaluation process did not provide it with adequate means to convey the intent of its proposal and that the process was biased against small businesses that are less experienced with the complexity of the government procurement process than large businesses. It alleges that the solicitation process precludes "uninitiated but capable" contractors from obtaining contracts. Finally, it complains that it has not been provided specific reasons for the rejection of its offer.¹⁷ It asks that the contract award be overturned on the basis that it was denied due process in the evaluation process.

In his statement, the contracting officer states that the solicitation and evaluation processes were standard and the solicitation contained information on how to submit a proposal. He notes that QMC attended the preproposal conference at which procurement personnel apprised all attendees of the solicitation requirements. The contracting officer states that QMC's proposal lacked documentation in support of the evaluation criteria. He states that only one stapled copy of QMC's proposal was received on February 26 and that the proposed menu and serving times were not attached. QMC subsequently provided menu information on March 26.

He reports that the evaluation committee found several weaknesses in QMC's proposal, noting that it did not give a detailed outline of its implementation of the Van Nuys concept. The contracting officer states that although QMC indicated that it had a tentative agreement with another company to provide catering under the Van Nuys concept, it would not be able to finalize the agreement until after it received award. He states that QMC did not address its sanitation procedures, and that because it did not have a finalized agreement with its proposed caterer, the evaluation committee could not visit the caterer's facilities to view the caterer's sanitation practices. Also, the contracting officer states that information about QMC's personnel staffing and management was unclear, since, due to the lack of a final commitment with its proposed caterer, it could not provide staffing and management information. Finally, the menu information provided did not include the portion sizes or the six-day sample menu required by the solicitation.

The contracting officer states that the proposals were evaluated according to the criteria listed in the solicitation and that QMC received only 595 points out of a possible 1000. The contracting officer concluded that QMC's proposal would have required substantial reworking before it could be made acceptable. Therefore, he determined that QMC's proposal was not within the competitive range.

QMC responded to the contracting officer's report, stating that the evaluation procedures purported to have been applied here are designed to address a standard cafeteria operation and are insufficient to evaluate proposals based on the Van Nuys concept. It complains that it was treated differently from the other offerors in that the evaluation committee never requested to visit its proposed caterer's facility, and that

QMC was never invited to visit the postal facility at Gaithersburg, as the other offerors had been.

QMC contends that it initially sent two identical original proposals to the contracting officer at the Columbia P&MMSO. It claims that after the solicitation had been transferred to the Greensboro P&MMSO, it checked and discovered that its proposal had not been received in Greensboro. It then requested and was granted an extension so that it could resubmit its proposal to the Greensboro office. It contends that the Greensboro P&MMSO did not receive some of the pages of its original proposal and that the evaluation committee contacted QMC during the evaluation process to clear up these issues and allow QMC to submit replacement pages through the contracting officer.¹⁷ QMC concludes that the contracting officer's contention that its proposal lacked documentation is based on misinformation and notes that at no time did anyone give it any indication that its proposal was less than adequate.

With respect to personnel staffing and management, QMC claims that it named the principal employees involved in the day-to-day operations under the Van Nuys concept and indicated that it had a sufficient pool of available employees to draw upon as needed. QMC contends that it had a commitment from the caterer, and, in fact, had another caterer who would agree to provide the services if the first caterer decided not to participate. With respect to the sanitation requirements, QMC states that its employees had all necessary health certificates and that it had explained to the evaluation committee that its proposed caterer did also. The protester states that if the evaluation committee had asked to visit the caterer's facilities, QMC would have accommodated them. It states that the menu information, which spells out the variety of food proposed for a six day menu, was one of the pages lost in Greensboro. QMC maintains that as a result of the telephone call from the evaluation committee, the committee knew that the cafeteria portion of QMC's proposal was to be a buffet style service where portion size was not a factor.

QMC concludes that it should have received the maximum score on its proposal. It questions the validity of the evaluation of its proposal since the contracting officer did not participate in the evaluation, but rather relied on the findings of a group of individuals who seemed to have prejudged QMC's proposal.

The contracting officer replied to QMC's comments. He reiterates that only one copy of QMC's modified proposal was received in Greensboro on February 26, that no documents were lost or misplaced, and that the proposal was immediately forwarded to the evaluation committee. Each member of the evaluation committee assigned points to QMC based on its proposal and on the additional information provided to it. He explains that contracting officers are never members of evaluation committees, but use the committees' summary and worksheets to determine which offerors are in the competitive range and, ultimately, which offeror receives award.

QMC submitted further comments subsequent to a bid protest conference on October 7. With respect to the issue of the timeliness of its protest,¹⁷ QMC contends that as soon as it received the June 20 notification that its proposal was not in the competitive range, it contacted the contracting officer to ascertain the reason. According to QMC, the contracting officer explained that he could not provide any specifics until after award. QMC maintains that when it then asked the contracting officer what its options were with respect to filing a protest, the contracting officer indicated that one of QMC's options was to wait until after contract award. It states that it received the award notification on July 30.

QMC acknowledges that all parts of its proposal were provided to the evaluation committee, albeit perhaps belatedly. In particular, QMC states that the menu page was provided in advance of the evaluation committee's telephone call. QMC states that at the end of the conversation with the evaluation committee, it asked if it had answered all the committee's questions and that the committee members answered in the affirmative. Responding to the contracting officer's statement that he uses the summary and worksheets to determine the awardee, QMC concludes that all offers were unfairly compared and scored simultaneously.

Discussion

QMC's protest raises timeliness issues. Our timeliness standards are set forth in section 2-407.8 d of the Postal Contracting Manual (PCM).¹⁷

d. Timeliness. The Postal Service intends to complete its procurement actions in a timely fashion while insuring fair treatment to firms and individuals. A protester must furnish a written protest to the contracting officer or the General Counsel in a manner which will assure its timely receipt. Protests received by the contracting officer or the General Counsel after the time limits prescribed by this section will not be considered.

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(1) Written protests based upon alleged deficiencies in a solicitation which are apparent before the date set for the receipt of offers must be received by the date and time set for the receipt of offers.

(2) In the case of negotiated procurements, protests of alleged deficiencies incorporated in the solicitation after the receipt of initial proposals must be received not later than the next closing date for the receipt of proposals.

(3) In all other cases, protests must be received not later than 10 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.

As we have stated previously:

We are without authority to consider a protest which is untimely. Unlike the Comptroller General, we have no regulatory authority to waive or disregard an issue of timeliness in a particular case. Even where actions of the contracting officer have contributed to the untimeliness of a protest, our past decisions have been to the effect that the timeliness standard cannot be ignored.

American Telephone Distributors, Inc., P.S. Protest No. 87-117, February 23, 1988 (citations omitted). Applying the general timeliness standards to a protest which, in essence, challenges the elimination of a proposal from competition prior to award is difficult. In such a situation, we have adopted the test used by the Comptroller General:

Offerors who are rejected from the competitive range usually are not provided detailed reasons for that action at the time they are furnished notice of rejection; for that reason, we have long recognized that the basis for protest in such cases will arise through a debriefing. Where, however, an offeror is provided the detailed basis for proposal rejection, a protest of the rejection must be filed within 10 days thereof, rather than 10 days after any subsequent debriefing. (Citations omitted.)

Travelco, Inc., P.S. Protest No. 91-10, March 21, 1991, quoting ANEFCO, Inc., Comp. Gen. Dec. B-225502, 87-1 CPD & 304, March 18, 1987. Here, QMC was notified on June 20, 1991, that its proposal had been rejected because it was not within the competitive range. On July 30 QMC learned that award had been made the day before to ARA Services. The letter QMC received on June 20 was extremely brief and did not detail the reasons for the rejection of its proposal. In addition, when QMC called the contracting officer after its receipt of the June 20 letter to gather additional information concerning the evaluation of its proposal it was told that the evaluation could not be discussed until after award had been made. The record indicates that information upon which QMC based its protest was only disclosed to it after the award of the contract to ARA, and that QMC did not have sufficient information upon which to base a protest (and could not get such information) at the time its proposal was rejected. Therefore, QMC's protest against the adequacy of the evaluation of its proposal is timely pursuant to PCM 2-407.8 d (3).

QMC also stated in its initial protest letter that the evaluation process set forth in the solicitation was inadequate, prejudicial, and biased against small business. The evaluation process was clearly set forth in the solicitation; therefore, this element of QMC's protest is based upon alleged deficiencies in a solicitation apparent before the date set for the receipt of proposals, for which a protest must be filed by the date set for the receipt of proposals. PCM 2-407.8 d (1). QMC's post-award protest of this issue is untimely and cannot be considered. See Documail Systems Division, Bell & Howell Corporation, P.S. Protest No. 85-26, June 20, 1985.

QMC's complaint that it was excluded from the tour of the Gaithersburg post office is likewise untimely. The cover letter to the solicitation clearly stated the time that the tour would occur, and QMC's post-award protest of its exclusion, coming several months is untimely.

As to the merits of the evaluation of QMC's proposal, our standard of review is well settled. This office will not substitute its judgment for that of the evaluators unless that judgment is shown to be arbitrary or in violation of procurement regulations. Canteen Service, Inc., P.S. Protest No. 90-68, November 15, 1990. The protester bears the burden of proof of such a showing. Western Coach & Wheel Works, P.S. Protest No. 90-70, November 29, 1990. Procurement officials have a reasonable degree of discretion regarding the relative merits of proposals. Frederick Manufacturing Co., Inc., P.S. Protest No. 88-03, March 25, 1988. Finally, in disputes of fact, we adopt the contracting officer's version of the facts absent sufficient evidence to overcome the presumption of correctness which attaches to that position. Thermico, Inc., P.S. Protest No. 90-71, December 21, 1990.

We have reviewed the allegations made by QMC and find that they fall short of those required to sustain its protest. The facts set forth by the contracting officer clearly establish that all portions of QMC's proposal, as modified by the February 26 modification, were reviewed by the evaluation committee and taken into account in their evaluation. There thus is no issue of the mishandling of any portion of QMC's proposal after its receipt. Similarly, although the contracting officer noted the protester's failure to provide the requisite number of copies of its proposal, we see no evidence that this omission affected the evaluation of QMC's proposal.

We have reviewed the evaluations of QMC's proposal and find that the evaluations were neither arbitrary nor in violation of procurement regulations. Despite QMC's vigorous disagreement with the point scores that it received for the various evaluation criteria, the weaknesses in QMC's proposal identified by the evaluators and relied on by the contracting officer in finding QMC's proposal outside the competitive range are adequately supported in the record. There is no evidence that QMC was treated unfairly in the evaluation process.

The failure to attempt to visit QMC's planned caterer, however, was an error. That QMC did not have had a binding contractual commitment with its caterer was not a sufficient reason, by itself, to exclude the proposed catering facility from a series of planned visits of the offerors' catering facilities. Cf. Automated Business Products, Inc., P.S. Protest No. 91-16, June 12, 1991 (absence of a contractual relationship with a subcontractor insufficient, by itself, to find an offeror nonresponsible). The file provides no evidence that the failure to visit QMC's planned caterer resulted in prejudicial harm

to QMC,^{1/} therefore, we cannot reverse the contracting officer's determination based on an error which would not have affected the propriety of the award. See Chamberlain Manufacturing Corporation, P.S. Protest No. 85-83, February 14, 1986.

As to the information which the evaluation committee received from its oral discussion with QMC, there is no indication in the record that this information had an adverse impact upon QMC's numerical ranking; therefore, it is not an adequate grounds for protest. See Hill's Capitol Security, Inc., P.S. Protest No. 90-25, July 20, 1990. The contracting officer is also correct that he is not to be a member of the evaluation committee; rather, his role is to evaluate the findings of the committee and make a decision as to the most advantageous offer submitted by a responsible offeror based on that data.

We have reviewed the evaluation and award process in this solicitation and find nothing in the record that rises to the level of fatal flaws in the process.

The protest is dismissed in part and denied in part.

[Signed]

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

[Compared to original 5/17/95]

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