

Protest of	)	Date: April 9, 1992
	)	
MORSE DIESEL	)	
INTERNATIONAL, INC.	)	
	)	
Solicitation No. 169982-91-A-0044	)	P.S. Protest No. 91-94

DECISION

Morse Diesel International, Inc. ("Morse"), protests against two amendments of a solicitation for offers to construct a General Mail Facility ("GMF") in Chicago which were issued after the solicitation's closing date for the receipt of proposals. Morse asks that the contract be awarded to it on the basis of its proposal in response to the solicitation before it was changed by the protested amendments.

Background

On July 15, 1991, the Chicago Facilities Service Center ("FSC") issued Solicitation No. 169982-91-A-0044 to seven pre-qualified contractors including Morse. Solicitation subsection M.1 a. stated, among other things, that the contract would be awarded to "the responsible offeror whose proposal conforming to the solicitation will be most advantageous to the Postal Service, cost or price and other factors specified elsewhere in this solicitation considered."

As amended, the solicitation requested that offers be submitted by September 5, 1991. Morse and five of the six other pre-qualified offerors submitted timely proposals in response to the solicitation, as amended.

The solicitation sought proposals based on "scope" documents rather than "100% design" documents, reflecting the FSC's plan to accelerate completion of the project by soliciting and awarding a construction contract before the project had been completely designed. Accordingly, the solicitation instructed offerors to include "allowances" in their price proposals, estimated to total about \$13.6 million, to cover those parts of the project for which the solicitation's design specifications did not provide sufficiently specific information to enable offerors to estimate costs and formulate competitive proposals.

All the price proposals submitted by September 5, although considered reasonable by the FSC, would have resulted in a construction contract for an amount which would

cause the project to exceed a funding limit, previously approved by the Postal Service's Board of Governors ("Board"), which could be increased only by the Board. When the FSC learned that the Board would not be able to consider an increase in the project funding limit until its public meeting on December 3, the FSC asked the offerors who had submitted proposals to keep them open until December 17. Each, including Morse, agreed to do so.

On December 3, the Board approved a request to increase project funding. By the time of that approval, however, nearly half a year had passed since the issuance of the original solicitation. Design had progressed as planned. The FSC prepared solicitation amendments which would provide additional detailed design specifications, clarify certain of the original specifications, and reduce the allowances from about \$13.6 million to about \$4.6 million.

On December 10, a representative of Morse telephoned the USPS project manager to inquire about the status of the procurement. The project manager orally advised Morse's representative that the FSC would issue an amendment to the solicitation later that week which would include revised drawings and a date for the submission of revised proposals. Morse's representative questioned whether the Postal Service could issue any amendments after proposals had been submitted.

On December 12, Morse received Amendment No. A-04, which provided new detailed specifications and reduced the allowance items by about \$9 million. On December 23, the FSC forwarded Amendment No. A-05, which contained solicitation amendments which clarified certain previously issued specifications. Offerors were given until January 15 to change their previously submitted offers to reflect the amendments. On January 6, the FSC issued Amendment No. A-06 which, among other things, extended to January 30 the due date for the submission of proposal revisions.

Morse protested amendments A-04 and A-05 on December 27, within ten working days after having received written notice of the first protested amendment, but twelve working days after having received oral information that the solicitation would be amended to include revised drawings.

The basis for Morse's protest is that the contracting officer's decision to amend the solicitation after proposals had been received, so as to call for new proposals, was improper. Morse characterizes both protested amendments as "minor." Morse states that it believes that its own September price proposal is the lowest submitted. Morse understands such amendments to be proper only if circumstances exist which would justify the rejection of all proposals and cancellation of the solicitation. Morse contends the contract must be awarded on the basis of the September proposals because the contracting officer could not have made any of the determinations required under the Procurement Manual ("PM")<sup>10/</sup> for rejection of all proposals.<sup>11/</sup> Morse argues that to allow

<sup>10/</sup> All references herein to the "PM" are to the Procurement Manual, Postal Service Publication No. 41, Transmittal Letter No. 4, effective January 1, 1991.

<sup>11/</sup> PM 4.1.5 e., which discusses the rejection of all proposals in the course of a negotiated procurement, requires the contracting officer to reject all proposals received if he determines that:

the amendments to be issued would be injurious to the integrity of the procurement process because of the possibility that Morse's competitors might learn the amount of Morse's price proposal. Morse contends, moreover, that its protest is timely because it had been "filed within 10 working days after Morse received information that the Postal Service intends to request new proposals ...."

The contracting officer's report, dated January 13, contended that the protest was untimely because Morse received informal notice of the amendment two days before it was officer issued; that in soliciting revised proposals the contracting officer had not rejected all proposals and canceled the solicitation; and that the decision to amend the solicitation was reasonable and authorized by applicable regulations, specifically PM 4.1.2 i.<sup>11/</sup> In support of his position that the protest is untimely, the contracting officer

1. Prices proposed are unreasonable and discussions have not resulted in a reasonable price or prices;
2. All proposals are technically unacceptable;
3. Proposals were not independently arrived at in open competition, were collusive, or were submitted in bad faith...; or
4. The solicitation must be canceled as provided in 4.1.2j.

PM 4.1.2 j. provides that "[s]olicitations may not be canceled unless circumstances make cancellation essential, such as when there is no longer a requirement for the supplies or services, or the solicitation requires amendments of such magnitude that a new solicitation is needed."

<sup>12/</sup> PM 4.1.2 i provides:

1. If it becomes necessary to make changes in a solicitation in matters such as quantity, specifications, delivery schedule, or date for receipt of proposals, or to clarify or correct ambiguities or defects, a solicitation amendment must be issued.
2. An amendment must be issued in sufficient time to permit affected offerors to consider it in submitting or modifying their proposals. When it is necessary to give notification of a change by telephone or telegram, confirmation by written amendment must follow.
3. In deciding which offerors are affected by a change, the contracting officer must consider the stage of the procurement, as follows:
  - (a) If proposals are not yet due, the amendment must be sent to all prospective offerors that received the solicitation, and posted in the same place as the solicitation.
  - (b) If the time for receipt of proposals has passed but proposals have not yet been evaluated, the amendment must be sent to the responding offerors.
  - (c) If the competitive range (see 4.1.5.g.2) has been established, and the amendment would have no effect on the basis for establishing the competitive range, only those offerors within the competitive range must be sent the amendment.

cites four of our decisions<sup>13/</sup> which he contends stand for the proposition that a protestor who receives oral notice of an unfavorable procurement action must protest within ten working days of that notice, rather than within ten working days of the later formal written notice.

Comments supporting the propriety of the protested amendments were filed by three competing offerors: George Hyman Construction Co., PCL Construction Services, Inc., and Newberg/Walsh. The offerors contend, among other things, that the protested amendments had permitted more than \$9 million in allowance items to be incorporated into the plans and specifications, thus enlarging the scope of competition; that solicitation paragraph M.1 b gave the Postal Service the right to reject any and all offers; that Morse's contention that its proposal was low is based on speculation because the proposals have been kept secret by the Postal Service; that cost was only one factor in determining contract award; and that the construction marketplace had become more favorable since September "thus resulting in savings to the Owner [the Postal Service]" in calling for revised proposals.

Morse submitted additional comments, dated January 24, which acknowledged that the protested amendments had permitted more than \$9 million in allowance items to be incorporated into the plans and specifications. Although Morse acknowledged receipt of telephone notice of the impending amendment two days before it received it in writing, Morse contended that telephone notice was insufficient because the amendment then being prepared could have been changed after that informal notice. Morse cites one of our decisions<sup>14/</sup> holding that the time to protest against an amendment of a solicitation began to run when the protester received a copy of the amendment, not when it received informal telephone notice that it would be issued, because the contracting officer could have changed the text of the amendment or withdrawn it before formal notice was given, and because the informal notice in that instance was casual and lacked deliberateness and finality.<sup>15/</sup>

<sup>13/</sup> Evans Suppliers Co., Inc., P.S. Protest No. 84-42, June 21, 1984 (telephone notice of rejection of bids and cancellation of a solicitation); Risi Industries, Dynamech Contractors, Mesa Constructors and Selco Steel Erectors, P.S. Protests Nos. 84-38, 84-44, 84-46, and 84-51, July 31, 1984 (telephone advice of determination not to allow submission of offer); Federal Systems Group, Inc., P.S. Protest No. 88-12, April 26, 1988 (telephone notice of adverse action on a protest to contracting officer); and Plymouth Mobile Washing, Inc., P.S. Protest No. 91-15, May 10, 1991 (telephone notice of contract award to another firm).

<sup>14/</sup> Recognition Equipment, Inc. ("REI"), P.S. Protest No. 81-52, December 17, 1981.

<sup>15/</sup> Morse's January 24 comments also included a new allegation that the amount of each offeror's September proposal had been publicly displayed during the open public meeting of the Board when increased project funding was considered. Morse subsequently obtained the Board's minutes for its December 3 meeting; a copy of the prepared management presentation on the project's funding, including copies of the slides projected during the presentation; and a copy of the Board's official transcript of the meeting. Morse's allegation finds no support in these materials, which show that the only information provided to the Board about the September proposals was the management evaluation that all six proposals, although greater than project funding limits would permit, were considered "competitive."

The contracting officer's comments of February 6, which were submitted after receipt of the revised proposals that Amendment A-06 had extended to January 30, stated that the effect of the December and January amendments was to cause both increased and decreased proposal amounts, depending upon the offeror:

In comparison to their original proposals ... offerors' prices changed in both directions, with changes as much as seven percent (7%). Further, the lowest offered price is now higher than the lowest offered price in initial proposals.

Although Morse's protest and its later comments both requested a protest conference, Morse's counsel withdrew this request during a telephone call February 20. We therefore proceed, in line with Morse's February 18 request, to the decision of Morse's protest on the basis of its December 27 protest letter.

## **Discussion**

Since the applicable time limit for filing a protest is ten working days after the information on which the protest is based becomes known or should have become known, PM 4.5.4 d., the timeliness of Morse's protest turns on whether the time for its filing began to run when Morse received oral notice of the amendment as the contracting officer contends or when Morse received written notice as Morse contends.

Our decisions generally hold that "oral notification of the basis for a protest is sufficient to start the time period running and that a protester may not delay filing its protest until receipt of a written notification."<sup>16/</sup> This general holding, however, does not extend as far as the contracting officer contends. As Morse points out, our REI decision<sup>17/</sup> held that, under the facts there presented, the time for protesting began to run only upon the protester's receipt of a written solicitation amendment, not the protester's earlier receipt of oral notice of the impending issuance of the amendment.

Our decisions may be best understood by reference to the rule they construe which makes the time for protesting run from the date on which information on which the

The contracting officer's second report stated that the amounts of the September proposals were not publicly displayed or disclosed at the Board meeting, and that Morse's allegations about the meeting are untimely because Morse either acquired or should have acquired its purported information about the public meeting at the time it occurred. The report was supported by an affidavit from one of the managers who had briefed the Board.

On February 18, Morse asked that its protest be considered "on the basis of its initial protest dated December 27, 1991," apparently abandoning its January 24 comments about alleged disclosures of the amount of its September proposal at the Board's December 3 meeting.

<sup>16/</sup> Evans Suppliers Inc., supra note 13.

<sup>17/</sup> Supra note 14.

protest is based becomes known or should have become known. PM4.5.4 d. In this instance, as in REI, the telephonic or informal notice did not provide sufficient information on which to base the protest. Both instances involve oral notice of a forthcoming solicitation amendment which the contracting officer planned, but was not required, to issue. As already indicated,<sup>17</sup> the cases cited by the contracting officer involve oral notice of actions already decided upon and taken.

Thus, as in REI, the time for filing Morse's protest began to run upon receipt of the amendment. The protest was therefore timely ten working days later.

PM 4.1.2 i.<sup>17</sup> expressly requires solicitations to be amended in writing, without any exception for amendments which become necessary after the deadline for the submission of proposals and after such proposals have been received. PM 4.1.2i. additionally requires that amendments be issued "in sufficient time to permit affected offerors to consider it in submitting or modifying their proposals." PM 4.1.2 i. thus implicitly authorizes and requires the types of solicitation amendments against which Morse protests here, whenever they become "necessary," even at the very stage of the procurement process at which Morse contends that the protested amendments become objectionable.

The validity of the protested amendments is governed by PM 4.2.1 i., which Morse does not contend to have been violated, rather than the requirements for rejection of all proposals and cancellation of a solicitation. The protested amendments did not cancel the solicitation. The solicitation remained open and continued to progress toward contract award, albeit with changes in the specifications and with an extended date for the submission of proposals.

Morse's contention that PM 4.1.2 j. and 4.1.5 e., dealing with rejection of all proposals and cancellation of a solicitation, control the circumstances in which negotiated solicitations may be amended is inconsistent with the regulations and contrary to relevant decisions construing them.

The decisions cited by Morse involve auctions or actions in procurements which are distinguishable. Several involve the cancellation of invitations for bids and the resolicitation of their requirements after bids had been publicly opened.<sup>17</sup> As Spickard notes,

To have a set of bids discarded after they are opened and each bidder has learned his competitor's price is a serious matter, and it should not be permitted

<sup>18/</sup> Supra note 13.

<sup>19/</sup> Set out at note 12, supra.

<sup>20/</sup> Arthur Forman Enterprises, Inc. v. United States 22 Cl. Ct. 816 (1991); Prineville Sawmill Co., Inc. v. United States, 859 F.2d 905 (Fed. Cir. 1988); Energy Main, Corp., Comp. Gen. Dec. No. B-215281.3, .4, March 25, 1985, 85-1 CPD & 341; Browning Ferris Industries Comp. Gen. Dec. Nos. B-217073, B-218131, April 9, 1985, 85-1 CPD & 406 ; and Spickard Enterprises, Inc., Comp. Gen. Dec. No. B-181414, August 26, 1974, 74-2 CPD & 121.

except for cogent reasons. [Citing Massman Construction Co. v. United States 102 Ct. Cl. 699, 719 (1945).]

The rejection of all bids after they have been opened tends to discourage competition because it results in making all bids public without award, which is contrary to the interests of the low bidder, and because the rejection of all bids means that bidders have expended manpower and money in preparation of their bids without the possibility of acceptance.<sup>1/</sup>

In the case of negotiated procurements, concerns of public exposure of bids are inapplicable. Indeed, where procurement regulations contemplate the alternatives of public bid opening and the nonpublic receipt of proposals, different standards apply to the cancellation of the two types of solicitations.<sup>1/</sup>

Another of the decisions which Morse cites<sup>1/</sup> involves the cancellation of a negotiated procurement because of a slight reduction in the agency's requirement for services. The Comptroller General concluded that the cancellation lacked a reasonable basis. In that case, however, the contracting officer conceded that the reduction was not "a significant difference." Here, the contracting officer asserts that the changes required by the amendments are significant.

The protester characterizes a group of related decisions<sup>1/</sup> as sustaining protests against amendments of solicitations instead of awarding to the best evaluated final

<sup>21/</sup> Spickard, *supra* note 20, 74-2 CPD & 121 at 3-4.

<sup>22/</sup> Compare PM 12.7.7 e.1. ("To preserve the integrity of the advertised sealed bidding system, award must be made to the responsible bidder submitting the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the solicitation. Every effort must be made to ensure that changes in requirements so significant as to require cancellation of a solicitation are identified in advance of the bid opening, so that the solicitation may be canceled before the bidders' rates are disclosed.") with PM 4.1.2 i. (*supra* note 12).

A similar distinction is set out in the Federal Acquisition Regulation, ("FAR") applicable to other government agencies. Compare FAR 14.404 (a)(1) ("Preservation of the integrity of the competitive bid system dictates that, after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid unless there is a compelling reason to reject all bids and cancel the invitation.") with FAR 15.606 ("(a) When either before or after receipt of [nonpublicly opened negotiated] proposals, the Government changes, relaxes, increases, or otherwise modifies its requirements, the contracting officer shall issue a written amendment to the solicitation....(b).... (4) If a change is so substantial that it warrants complete revision of a solicitation, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the acquisition. The new solicitation shall be issued to all firms originally solicited and to any firms added to the list.")

<sup>23/</sup> Alternative House, Comp. Gen. Dec. No. B-216331, December 7, 1984, 84-2 CPD & 640 Alternative House - Reconsideration, Comp. Gen. Dec. No. B-216331.2, February 7, 1985, 85-1 CPD & 154.

<sup>24/</sup> Integrated Systems Group, Inc., GSBCA Nos. 10985-P-R, 10989-P-R, 10991-P-R, January 29, 1991, unpub. slip op., reconsideration denied, February 13, 1991, 91-2 BCA & 23,793, and Federal Computer Corporation, GSBCA No. 11113-P, 92-1 BCA & 24,644.

offer. However, the January 29 decision which contained the substantive holding of the Board is unpublished and unavailable, and the published decisions do not discuss the holding in sufficient detail to allow its accurate characterization.<sup>17</sup> The decision appears to suggest that the amendment made no substantive changes to the solicitation, a different situation than is presented here.

Morse does not cite any authority for extending the rules on rejection of all proposals and cancellation of a solicitation to solicitation amendments of the type protested here, which extend the time and amend the solicitation's requirements to make them more precise, after proposals have been received and have not been disclosed. Nor does Morse allege that this solicitation has been amended in any way that reopened the competition to permit the submission of proposals by parties who have not previously submitted proposals within the original time allowed or who were excluded from the competition at an earlier stage of the procurement in accordance with the original solicitation. The exclusion from the competition of non-pre-qualified offerors, and the exclusion of the seventh pre-qualified offeror who failed to submit a timely proposal in September, both continued unchanged.

Morse's interpretation of postal procurement regulations would defeat one of their basic purposes, to promote adequate competition whenever feasible, PM 1.7.1. a. and 4.1.1 a.<sup>17</sup> Allowing amendments of solicitations as necessary, to reflect changed requirements or more articulately specified requirements, even after the submission of proposals which have not been publicly opened or disclosed, furthers that policy. Morse's interpretation, by requiring the procurement of construction services by means of negotiated noncompetitive change orders or litigation over equitable adjustments rather than through competitive negotiation, would also stand in the way of the statutory goal that the Postal Service be operated economically and efficiently.<sup>17</sup>

Morse's protest contends that the solicitation amendments undermine the integrity of the procurement process because of the possibility that the amounts of the proposals

<sup>25/</sup> For example, the March 21, 1991, decision in Federal Computer Corporation describes the previous decision only as follows:

In an opinion dated January 29, 1991, the Board resolved the protests of GTSI, FCC and ISG by concluding that the agency should have made an award to GTSI and that it was improper for the agency to issue an amendment requesting a new round of best and final offers. The Board granted the protest of GTSI, and denied those of FCC and ISG.

<sup>26/</sup> **1.7.1. Competition**

a. Purchases must be made on the basis of adequate competition whenever feasible....

**4.1.1 ...**

a. **Policy.** Postal Service policy (see 1.7.1) is that purchases must be made on the basis of adequate competition whenever feasible.

<sup>27/</sup> 39 U.S.C. " 101, 403, 3661.

submitted in September might become known, thus placing Morse at a disadvantage. The proposal amounts were in fact required to be kept secret prior to contract award. No available evidence indicates that these amounts have been disclosed.

Even if disclosure had occurred, moreover, it would not necessarily have been prejudicial to any competitor because of the substantial amount -- about \$9 million -- of noncompetitive "allowance" items. Although Morse could not have known when it filed its protest, the contracting officer's second report reveals that competing offerors revised their proposals in the light of the amendments which Morse protested so as both to increase as well as decrease the amounts of their price proposals. There is no reason now to conclude that the amendments impaired the integrity of the procurement process. The amendments instead gave all offerors a better understanding of the Postal Service's needs, expanded the scope of competition, and enhanced the procurement process, to the mutual advantage of both the Postal Service and all competing offerors.<sup>1/</sup>

The protest is denied.

**[Signed]**

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

**[Compared to original 5/18/95 WJJ]**

<sup>28/</sup> The propriety and necessity of amending a solicitation and requesting new proposals, even after proposals have been received, when the solicitation does not accurately specify government requirements, is illustrated by the Federal Circuit's recent decision of SMS Data Products Group, Inc. v. Austin, 940 F. 2d 1514 (Fed.Cir. 1991). The court held that applicable regulations require solicitations to be amended to reflect changed requirements, even after proposals have been received:

The regulations governing negotiated procurements also authorize Treasury's action .... For example, [FAR] 15.606(a) ... provides: "When, either before or after receipt of proposals, the Government changes, relaxes, increases, or otherwise modifies its requirements, the contracting officer shall issue a written amendment to the solicitation." Subsection (b)(4) requires cancellation of the original solicitation and issuance of a new one only where the "change is so substantial that it warrants complete revision of a solicitation." ... However, section 15.611(c) specifically authorizes the contracting officer to reopen discussions after receipt of best and final offers when "it is clearly in the Government's interest to do so"; if she does, she "shall issue an additional request for best and final offers to all offerors still within the competitive range." [FAR] 15.611(c) .... Once Treasury determined that its bona fide needs in fact had changed, we think it was "clearly in the Government's interest" to reopen discussions- that is, to "permit further competition," ....

940 F.2d at 1518.