

Protest of	)	Date: January 22, 1993
	)	
CORDOVA AIR SERVICE, INC.	)	
	)	
Solicitation Nos. D5A-05-92;	)	
D5A-06-92	)	P.S. Protest No. 92-86

**DECISION**

Cordova Air Service, Inc. (Cordova), protests the award of two air taxi contracts to Fishing and Flying. Solicitations D5A-05-92 and D5A-06-92 were issued by the Seattle Transportation Management Services Center (TMSC) on June 17, 1992, seeking bids for domestic air taxi service between Cordova, AK, and San Juan, AK, and Icy Bay, AK, respectively. The solicitations sought bids on a cost-per-mile basis; each contemplated that the bidders would submit various forms with their bids.<sup>1/</sup>

Bids were publicly opened July 22. Fishing and Flying (a partnership whose partners are Gayle Ranney and Steve Ranney) was the low bidder on each solicitation. Cordova was the second low bidder in each case.

The contracting officer's statement on the protest advises that the responsibility of the low bidder was the subject of inquiry, a process which was concluded on September 2. The contracts were awarded to Fishing and Flying on September 15, with the contract term to begin October 17.<sup>1/</sup>

<sup>1/</sup> Each solicitation provided, in part, as follows:

All bids must be submitted on a Form 7405ATX with the following forms attached:

- Form 7452, Air Taxi Service - Aircraft Description
- Form 7453, Air Taxi Service - Aircraft Modifications
- Form 7454, Air Taxi Service - Route Operational Profile
- Form 7456, Air Taxi Service - Cost Worksheet
- Fuel Purchase Plan
- Copy of ACC Certificate
- Copy of Operations Specifications (Form 8400-8)
- Insurance Certification, Copy of Registration, under
- One certified copy that the official executing the bid

Part 298 (Subpart D)

<sup>2/</sup> The contract term was set to begin on Saturday, October 17, because it was the start of a postal accounting period, although the first day of service in accordance with the contract schedule was to be

By letter dated September 28, a paralegal in the office of counsel for Cordova wrote the contracting officer protesting the award to Fishing and Flying. The stated grounds for the protest were as follows:

(a) noncompliance with bid submission requirements, (b) failure to observe bid solicitation regulations or requirements, and (c) lack of adequate equipment to fulfill contract requirements.

The letter went on to request "all documents submitted by Fishing and Flying in connection with its bid[s]," except for proprietary documents.

This office requested that the contracting officer provide a report on the protest, but noted in a letter to the protester that our protest regulations "do not contemplate proceeding in the manner suggested in your protest, which seems to contemplate a 'fishing expedition' into a number of as yet unspecified failings in the award decision which you challenge. Rather, it is the responsibility of the protesting party to identify, with specificity, the basis for its protest ([Procurement Manual (PM)] 4.5.3 a.)."

The contracting officer submitted his statement on the protest by memorandum dated October 26, and furnished a copy of it to the protester's counsel on October 27. On October 28, we wrote the protester summarily dismissing the protest under PM 4.5.7 p. as "without legal merit or . . . not reviewable by the General Counsel" under the protest procedures. The dismissal noted that the first two grounds alleged in the protest failed to set out "a complete statement of the grounds . . . that make the award . . . defective," as PM 4.5.3 a. required, and that the third ground of the protest was a challenge to the contracting officer's affirmative determination of Fishing and Flying's responsibility, a matter not subject to our review absent allegations of fraud or bad faith on the part of the contracting official. Our October 28 summary denial crossed in the mail with further correspondence from the protester dated October 27. In view of the additional contentions raised in that letter, we have substituted this formal decision for our summary denial.

The protester's October 27 letter took exception to our comments about the nature of the original protest, contending that it was as specific as the information which was available to the protester allowed. The October 27 letter goes on to note that as the result of review of documentation furnished by the contracting officer in response to a Freedom of Information Act (FOIA) request, the protester had identified various specific deficiencies in the bid submission requirements, as follows:

1. Fishing and Flying did not submit Form ATX 109 with its bid, and no such form was signed until August 30.
2. Fishing and Fling did not submit operations specifications (Form 8400-A) for the Icy Bay contract with its bid, and none was signed until September 17, after the contract award.

Monday, October 19.

3. The documentation did not indicate that Fishing and Flying had submitted an insurance certification.
4. No aircraft description (Form 7452) was provided by Fishing and Flying. For the San Juan bid, it included a generic Cessna equipment list, but it did not provide even a generic list for the DeHavilland Beaver it proposed for the Icy Bay route. The protester speculates that this was because Fishing and Flying's Beaver was "literally in pieces" until late September or early October.
5. The aircraft modification and operational data (Form 7453) submitted is suspect. In the absence of Form 7452, there is no way to substantiate the aircrafts' weight and balance figures.

The letter further notes that the contracting officer had attributed the delay in the award to Fishing and Flying to the Postal Service's unfamiliarity with the firm, but recites the protester's understanding that in 1988 Fishing and Flying had held a previous postal contract which had been terminated because the same Cessna aircraft now proposed did not meet that contract's weight requirements. The protester also questions the availability to Fishing and Flying of appropriate backup equipment.

This office requested the contracting officer's comments on the various points which the protester's October 27 letter raised, but advised the protester that "there still may be questions about their timeliness."

The contracting officer replied to the protester's further points, as follows:

1. Although no fuel purchase plan was supplied, Fishing and Flying did submit a fuel statement from which the type of fuel and its method of purchase could be determined. The omission of the plan was a minor informality which could be corrected after bid opening.
2. The bidder did submit a Form 8400-8, but it did not include "the required aircraft." A letter indicated that the aircraft was newly acquired, and that its certification would be forthcoming. It would be unreasonable to require bidders to acquire aircraft prior to bid opening, and all the bidder must do is to demonstrate the ability to acquire the aircraft before the contract term.
3. Fishing and Flying's insurance coverage was demonstrated by its submission of its "State of Alaska Air Carriers Certificate of Compliance," which is issued only when coverage is demonstrated. The contractor provided further evidence of coverage after award. All that is required before award is evidence that the bidder is able to obtain insurance.
4. Fishing and Flying submitted Form 7452 on both solicitations. While the contracting office "was aware that there was some problem with the DeHavilland . . . the FAA had issued an airworthiness certificate on the aircraft and the aircraft passed the Administrative Official[]s inspection prior to the start of service."
5. The information provided on Form 7253 was sufficient to allow the contracting

officer to determine the bidder's ability to provide an adequate aircraft and to perform the contract service.

Further, the contracting officer contends that appropriate procedures were followed in determining the bidder's responsiveness and responsibility. While he indicates that Fishing and Flying may have been nonresponsible in 1988, it was determined to be currently responsible. The Cessna aircraft was shown to meet both the FAA's airworthiness requirements and the Postal Service's needs.

Finally, the contracting officer notes that the contractor is not required to have backup equipment, but to be able to obtain such equipment, and that in this case such equipment should be available from Anchorage, which is only 160 air miles away.

### **Discussion**

PM 4.5.4 d. requires that "protests [other than protests based upon alleged deficiencies in a solicitation] 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." In determining the timeliness of a protest, newly raised grounds for protest are measured from the date they are presented; they do not "relate back" to the initial protest. See Barber-Coleman Company, P.S. Protest No. 90-34, December 5, 1990.

The instant case is similar to that which we considered in CACI Systems Integration, Inc., P.S. Protest No. 87-79, August 27, 1987. There, CACI filed an initial protest challenging "the conduct of proposal evaluation and application of the life cycle cost model used to determine award" but failed to include any details of its claim of misconduct, noting that it had submitted Freedom of Information Act requests to gather additional information upon which to base its protest. The decision noted that as to those issues:

CACI has done no more than state a claim of error without any support or elaboration. Such a "protective protest" cannot furnish adequate grounds for protest. See Concepts Office Furnishings, Inc., P.S. Protest No. 85-59, November 18, 1985; Roller Bearing Company of America, Comp. Gen. Dec. B-218414.2, May 14, 1985, 85-1 CPD & 542. Although CACI has alleged that the information it requires to expand upon these points is the subject of an active FOIA appeal, it has been the consistent practice of this office not to suspend our decision based on a pending FOIA request. Garden State Copy Company, P.S. Protest No. 84-31, July 5, 1984; Edward B. Friel, Inc., P.S. Protest No. 82-8, May 4, 1982. [Footnote omitted.]

The decision noted that were CACI to receive the information it seeks in its FOIA request, any protest based on that information would be untimely under the provision which required protests to be filed within 15 working days of contract award.

In this case, the additional grounds for protest which Cordova presented in its letter of October 27 were similarly untimely as presented more than fifteen working days after the contract award of September 15.

The timeliness requirements imposed by our regulations are jurisdictional, and we cannot consider the merits of any issue which has been untimely raised. Omicopy, Inc., P.S. Protest No. 84-24, June 25, 1984; Southern California Cop-ico, Inc., supra. We have no authority to waive or disregard the timeliness issue in a particular case. POVECO, Inc. et al., P.S. Protest No. 85-43, October 30, 1985.

Barber-Coleman, supra.

The initial protest is dismissed for failure to set out a complete statement of the grounds that make the award defective and for challenging an affirmative determination of responsibility. The subsequent raised grounds for protest are dismissed as untimely.<sup>1/</sup>

For the General Counsel:

William J. Jones  
Senior Counsel  
Contract Protests and Policies

<sup>3/</sup> The protester contends that Fishing and Flying's bids should not have been considered because they failed to include information necessary to demonstrate the bidder's ability to perform the required service. Such a challenge goes to the bidder's responsibility.

Where . . . information . . . relates . . . to the ability of a bidder to perform any resultant contract, then the matter is properly classified as on concerning the responsibility of the bidder. Whether a bidder is to be considered responsible or not is for determination after the bid opening.

Microfilm Communications Ssystems, Inc., Comp. Gen. Dec. B-185268, February 10, 1976, 76-1 CPD & 85. Omissions which do not affect responsiveness may be cured after bid opening, and this is the case even if the solicitation appears to indicate otherwise. Fisher Berkeley Corporation: International Medical Industries, Comp. Gen. Dec. B-196432, B196432.2, January 9, 1980, 80-1 CPD& 26.

To the extent that the protester challenges the adequacy of the after-supplied information to demonstrate the bidder's responsibility, it is a challenge to the contracting officer's affirmative determination of responsibility, and, as previously noted, is not for our review, as noted above, absent contentions of fraud or bad faith. EDI Corporation, P.S. Protest No. 83-51, January 26, 1984.