

April 22, 1993

P.S. Protest No. 93-06

STAMP VENTURERS

Solicitation No. 104230-91-A-0016

DIGEST

Contractor's protest against the placement of orders under an indefinite delivery contract with another supplier dismissed where filed well after the date of contract award; protester's complaint that it was entitled to produce the quantity ordered is for consideration under the Claims and Disputes clause of its contract.

DECISION

Stamp Venturers protests the issuance of delivery orders to Minnesota Mining and Manufacturing Company ("3M") under a contract awarded under solicitation 104230-91-A-0016 ("solicitation -16"). Stamp Venturers, which also received a contract under that solicitation, contends that it is entitled to receive the orders placed with 3M.

Solicitation -16, issued December 14, 1990, by the Office of Procurement, Postal Service headquarters, sought offers for the production of pressure sensitive adhesive based stamp sheetlets and coils on an indefinite quantity basis. The solicitation contemplated the award of multiple contracts calling for the delivery of a minimum quantity of 10 million sheetlets and a maximum of 250 million sheetlets, asserts and from 1.5 to 2 million coil stamps in each year of the three-year contract term.¹

¹ Section M.1 a. of the solicitation stated:

On October 16, 1991, contracts were awarded under solicitation -16 to Stamp Venturers, Banknote Corporation of America, and Dittler Brothers ("the original contractors"). 3M, which also had proposed on the solicitation, filed a protest against the awards, contending that the awards were inconsistent with the Postal Service's procurement regulations. The protest was docketed by this office as P. S. Protest No. 91-92. Stamp Venturers participated as an interested party in the protest.

3M's protest was never the subject of a decision. While it was pending, the contracting officer awarded 3M a contract,² and 3M subsequently withdrew its protest. At about the time of 3M's award, the contracting officer also awarded a contract for pressure sensitive stamps to Avery Dennison under solicitation -16. No delivery orders were issued to 3M until January 11, 1993.

Stamp Venturers' protest, which was received March 16, contends that 3M's contract is a "back up" contract to the contracts initially awarded under solicitation -16 as indicated by the use of that term both on the cover sheet of the contract and in the notice of the award published in the Commerce Business Daily, and that orders cannot be placed under the 3M contract until the original contractors "are at capacity production." Stamp Venturers represents that it is not at capacity production.

The protester also asserts that it is aggrieved by the settlement of the 3M protest, and that that settlement was outside "the official bid protest procedure established by the Postal Service Procurement Manual" (PM) and therefore was illegal and void.

The contracting officer's statement notes that while the cover sheet of the 3M contract describes it as "Backup Vendor Contract," that term is not defined or discussed elsewhere in the contract, and that the Avery Dennison contract was not so described. The contracting officer, who is the successor to the contracting officer who made the awards under solicitation -16, also notes that various postal documents characterize the awards in terms of "backup."³ The contracting officer concludes that Stamp Venturers was not harmed by the award, noting that to date it has received delivery orders for 50 million sheetlets of stamps for each of the first two years of the contract, more than the guaranteed minimum established by its contract.

Offerors are advised that the USPS intends to expand the contractor base for stamp production. Accordingly, multiple awards are anticipated from this solicitation.

² The successor contracting officer refers to the date of the award as April 17, 1992, the date the Postal Service issued the contract to 3M. Earlier correspondence from the original contracting officer gives May 2, the date 3M signed the contract, as the date of award.

³ The documents, which include correspondence to 3M and Avery Dennison predating the awards, assert that the backup contracts will contain no minimum guarantees, and that delivery orders will be issued to the contractors "only when it is determined that the prime vendors cannot satisfy the requirements for pressure sensitive stamps." In fact, however, the 3M and Avery Dennison contracts do contain minimum guarantees no different from those in the original contracts.

The contracting officer also notes his understanding that nothing precludes the Postal Service from resolving a protest by a settlement outside the protest procedure, citing the general settlement authority conferred on the Postal Service by 39 U.S.C. 401(8).

Finally, the contracting officer raises two procedural objections to the protest. First, he that the protest is untimely under PM 4.5.4 d., which states that no protest will be considered which is received more than fifteen working days after the challenged contract is awarded. Second, he asserts that if Stamp Venturers is aggrieved by the issuance of orders to 3M, its remedy lies under the Claims and Disputes clause of its contract. Comments were received from 3M which support the contracting officer's position with respect to the untimeliness of the protest and the lack of injury to the protester. 3M also notes that when it withdrew its protest, it did so for reasons other than the "representation or understanding of any 'settlement.'"⁴

The protester has responded to the contracting officer's statement, asserting that the protest is timely because it was made within ten working days after Stamp Venturers learned of the issuance of the 3M delivery orders. It contends that the view of PM 4.5.4 d. offered by the contracting officer is unnecessarily narrow and invites misconduct as long as the Postal Service can conceal that misconduct for fifteen working days. Noting that the General Accounting Office's bid protest regulations provide for an exception to its timeliness requirements for good cause or where the protest raises a significant issue, the protester urges that a similar approach be adopted here.

Commenting on the merits, the protester restates the previously communicated understanding of the backup nature of the 3M contract, and reasserts that Stamp Venturers has been harmed by the placement of these orders with 3M.

Finally, the protester restates its objections to the settlement of the earlier 3M protest, contending that award should have been approved pursuant to PM "4.5.A."⁵ The protester

⁴ The file includes the contracting officer's memorandum of June 4, 1992, to this office which asserts the understanding that the award to 3M mooted its protest because it granted 3M the relief which it sought. Based on that understanding, by letter dated June 8, this office advised 3M and the interested parties that the file on the matter would be closed. Subsequently, by letter dated July 23, 3M withdrew its protest. Its letter stated, in part:

The withdrawal reflects 3M's understanding that the USPS is cognizant of the underlying issues and concerns raised in the protest, and will address those concerns in future procurement actions.

The effort by USPS to broaden its supplier base is a welcome initiative. We trust that withdrawal of the protest will serve to establish a more open and mutually beneficial rapport between 3M and USPS personnel.

⁵ Reference to PM 4.5.5 a. apparently was intended:

When [a] timely protest has been filed with either the contracting officer or the General Counsel before contract award, award may not be made until the matter has been resolved, unless the responsible APMG, after consulting with counsel, determines that

views the settlement as inconsistent with internal postal comments that the protest was without merit, and as establishing an unfortunate precedent with respect to fair competition.

DISCUSSION

The contracting officer is correct in asserting the untimeliness of the protest and the availability of the protester's remedy, if any, in another forum.

To the extent that Stamp Venturers challenges the fact of the award to 3M in the context of the resolution of its earlier protest, its protest is clearly untimely. Stamp Venturers was aware of the award and its relationship to the closing of the file on the protest no later than its receipt of copies of the contracting officer's memorandum of June 4 and this office's June 8 letter closing the file on the protest. Its failure to object "within ten working days after the information on which [its protest is] based," PM 4.5.4 d., precludes it from raising the issue now. Its complaint against the issuance of the delivery order is untimely under the fifteen days after contract award rule of that PM section whether the date of award is the 1992 date of the award to 3M or the 1993 date of the delivery order.⁶

Further, it seems clear that Stamp Venturers' concerns arise under a theory of breach of contract, not as a protest against the award. The Claims and Disputes clause of the protester's contract allows such claims to be presented to the contracting officer for a final decision, and for an adverse decision on the claim to be appealed to the Postal Service Board of Contract Appeals or to the Court of Federal Claims. *E.H.O. Trucking*, P.S. Protest No. 91-28, June 24, 1991. Complaints resolvable under that procedure are not amenable to resolution under the bid protest procedure. *Ric Marinkovich*, P.S. Protest No. 87-63, August 6, 1987; *Hunter L. Todd, d/b/a Courier Express Mail & Package Delivery Service*, P.S. Protest No. 86-30, May 28, 1986; *Jack Yanks Construction Co.*, P.S. Protest No. 75-

the Postal Service will be seriously injured, financially or otherwise, by delaying award until the protest has been resolved, and that the award should be made without awaiting the decision.

⁶ It is the date of the initial award, not the date of subsequent activity undertaken within the awarded contract, which controls. *M. Ross Masson Company*, P.S. Protest No 92-14, April 23, 1992. The limitation on protests more than fifteen working days after contract award applies even when the protest would be timely under the ten-day rule. *GF Office Furniture, Ltd.*, P.S. Protest No 92-07, March 19, 1992.

While the GAO has a procedure (4 CFR 21.2(c)) by which it may consider an untimely protest if good cause for the untimeliness is shown or the protest raises a significant issue, no similar procedure is available in postal protests:

[W]e 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.

Paragon Dynamics, Inc., P.S. Protest No. 92-58, September 10, 1992 (citations omitted). *Accord, Automated Conversion Technologies Inc.*, P.S. Protest No. 92-63, September 25, 1992.

56, August 13, 1975; *J&J Maintenance*, Comp. Gen. Dec. B-208966, 82-2 CPD 313, October 6, 1982.

The protest is dismissed.

For the General Counsel:

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