

September 24, 1993

P.S. Protest No. 93-18

M & S QUALITY SERVICE

Solicitation No. 920-126-93 Et Al.

DIGEST

Protest alleging various improprieties in series of advertised and emergency solicitations for highway service is dismissed in part and denied in part. Protest against timing of emergency solicitation is untimely when not made prior to receipt of offers; protester lacks standing to protest on behalf of others; and complaint that notation on worksheet was not considered in evaluation of second-low bid on advertised solicitation is without merit.

DECISION

M & S Quality Service, a partnership, ("M & S") protests various aspects of the procurement of permanent and emergency mail transportation service for a highway box delivery route between Sedro Woolley and Marblemount, WA.¹

¹ The service under the previous contract had originated at the Mount Vernon, WA, post office. As discussed below, the final emergency solicitation returned the headout point to Mount Vernon from Sedro Woolley.

The contracting officer uses solicitation numbers and contract numbers to identify the various solicitations involved in these procurements. This decision uses the solicitation numbers, and abbreviates subsequent references by the use of the middle digits of the solicitation numbers in the form "-87," etc.

When the incumbent contractor decided not to renew the previous contract on the route, the Western Distribution Network Office, Seattle Branch, solicited new permanent service to begin July 1, 1993, under advertised solicitation 980-87-93, which was issued April 7 with bids due May 7. An error in transcription caused solicitation -87 to misstate the arrival time of the second trip and as a result to overstate the total annual hours necessary for the route. Accordingly, a new solicitation 980-106-93 for permanent service for the route was issued on May 18, with bids due June 25 and service to start August 21.

On May 21, emergency solicitation 418-105-93 was issued to provide service for the period July 1 - August 20. The solicitation asked for prices on an annual rate, but the offerors who responded to the solicitation all proposed trip rates. As a result, the offers were considered to be nonresponsive, and a second emergency solicitation, 418-141-93, was issued on June 18. It solicited offers for the service for the July 1 -August 20 term at a daily rate. On June 29 an emergency contract under solicitation -141 was awarded to Mr. Richard Church.

Meanwhile, problems continued with the acquisition of permanent service. It was discovered that while solicitation -106 had corrected the error concerning the timing of the second trip, it did not reflect that correction in its statement of estimated annual hours. Accordingly, solicitation -106 was withdrawn before bids were to be opened, and the service was resolicited under solicitation 920-126-93, issued June 23, with bids due August 18 and service to begin October 16. When bids were opened, Mr. Church was the low bidder and M & S was second low. Award was made to Mr. Church.

The postponement of the start of permanent service to October 16 created a gap in service for the August 21 - October 15 period. Telephonic offers were solicited on August 20 on a new emergency solicitation 418-178-93 for service during this period.² Award of the contract was again made to Mr. Church. M & S had submitted an offer on solicitation -178 at a lower price than Mr. Church, but the contracting officer determined not to award to M & S because M & S "was arranging for the procurement of a vehicle and . . . had no experience in any type of delivery."³

M & S's protest, dated August 20 but transmitted to the Seattle Branch by facsimile on August 23, raises various concerns. Initially, it complains that solicitation -178 for the

² This is the solicitation in which Mount Vernon replaced Sedro Woolley as the headout point.

³ Although the contracting officer justifies this determination on the basis of "the Postal Service's best interest, in order to protect service, to have the best qualified bidder [sic] perform," it appears that M & S was not found to be responsible. Procurement Manual (PM) 3.3.1 a. provides that contracts may be awarded only to responsible contractors, and PM 3.3.1 e.1. provides that "In the absence of information clearly showing that a prospective contractor meets applicable standards of responsibility, the contracting officer must make a written determination of nonresponsibility." While the record here contains no such written determination, it does suggest that M & S was found nonresponsible when contracting personnel were unable to verify, in the limited time available before service was to begin, that M & S met the general standards of responsibility.

second emergency term was issued too late to allow prospective offerors to propose.⁴ The protest then recounts the details of a series of telephone calls on August 20. M & S states that in the first telephone call it was advised of the new emergency procurement and of the results of the recently concluded bid opening on advertised solicitation -126. It then made an offer on the emergency solicitation. M & S asserts that only in a subsequent conversation, in which it was asked to restate its offer before a postal witness, was it told that the headout office would be Mount Vernon, rather than Sedro Woolley, and that a similar change would be made to the contract for permanent service awarded under solicitation -126. M & S decided not to revise its offer after being advised of this change. M & S was subsequently contacted concerning the availability of its vehicle and its taxpayer identification number, and a final call advised it that despite its lower offer, award was to be made to Mr. Church, but that, in the protester's words, "if there had been two weeks to make the determination for the emergency contract the decision may have been different."

Secondly, the protest contends that advertised solicitation -126 should have been canceled before bid opening to reflect the change in the headout office from Sedro Woolley to Mount Vernon. The protester's representative asserts that on August 10 she had talked to the Sedro Woolley postmaster, who indicated that he had advised "postal officials" of problems arising out of the need for additional dock sortation and limited loading dock space, and that service out of Mount Vernon would be preferable. In an addendum to the its protest dated August 30, M & S suggests that the incumbent emergency contractor "may have been aware of the almost certain possibility" of the change to Mount Vernon, and that that knowledge may have given him an advantage in bidding which further justified the resolicitation of the permanent service.

The protester also contends that the contracting officer erred in failing to consider information contained on its worksheet submitted with respect to solicitation -126. The worksheet noted that discussions with the Sedro Woolley postmaster suggested that some twenty to twenty-five additional minutes of dock time were needed at Sedro Woolley, and that "to remain competitive," that additional time was not included in M & S's bid. The protester's August 30 addendum asserts that this concession makes M & S's bid competitive with a lower bid.

The contracting officer's statement sets out the history of the several solicitations summarized above. With respect to the points raised by the protest, it asserts that oversight led to the need for the short-timed emergency solicitation -178 for the extension of the service, that there were no indications prior to opening of the bids for solicitation -126 that it would be necessary to change the headout point, and that it would have been inappropriate to cancel that solicitation after bids had been exposed merely to change the headout point.⁵ The contracting officer asserts that because the change occurred after bid opening, no bidder had an opportunity to benefit from it. The contracting officer notes that the protester's worksheet was not considered because M & S was the second low bidder,

⁴ The protester also inquires how the incumbent contractor could have been contacted to propose on August 20, at a time when he should have been driving the route.

⁵ The contracting officer attaches the statement of the Sedro Woolley postmaster to the effect that when M & S contacted him for information, he advised that inquiry be made to the contracting officer.

and its bid would not be eligible for consideration unless the low bidder were found nonresponsible or its bid nonresponsive. He also asserts that that notation may have qualified M & S's bid, rendering it nonresponsive.

Commenting on the contracting officer's statement, M & S raises a number of questions concerning the conduct of the whole series of solicitations for the service at issue here, and criticizes the statement for confusion in the designation of the several solicitations. The protester complains that M & S had made arrangements to secure a vehicle to perform the service effective August 21, and that it was inappropriate to deny it the route on the basis that a vehicle was not available.

DISCUSSION

The repeated issuance of solicitations for the service at issue here does not reflect well on the contracting office, which apparently did not carefully consider various aspects of the multiple solicitations which eventually had to be issued to obtain the service. However, that lack of attention fails to rise to a level of error which requires our correction.

The protester's challenge to the timing of emergency solicitation -178 is untimely. The lack of time available to respond to a solicitation or the lack of time between the solicitation and the start of contract performance are "deficiencies in a solicitation that are apparent before the date set for the receipt of proposals," and thus to be timely must be the subject of a protest received "by the date and time set for the receipt of proposals."⁶ Procurement Manual (PM) 4.5.4 b. While it may be more difficult to protest in the case of solicitations like this which are issued on tight schedules,⁷ we are bound by this limitation to our jurisdiction.⁸

⁶ Thus, for example, in *Paragon Dynamics, Incorporated*, P.S. Protest No. 92-58, September 10, 1992, a complaint that an amendment to a solicitation was received too close to the due date for proposals for its requirements to be addressed was a protest against the solicitation terms which was untimely when not received before proposals were due.

⁷ As was stated in *Sodrel Truck Lines, Inc. and Dennis Truck Line Co. of Ohio*, P.S. Protest Nos. 92-01, 92-03, February 16, 1992, which also involved the telephonic solicitation of offers for emergency mail transportation service:

Although an oral emergency procurement requires quick action by an interested party it does not create an exception to our jurisdictional timeliness standards.

⁸ In any event, the protester's complaint concerning the tightness of the schedule is, except in one aspect, phrased in terms of possible limitations of competition with respect to others, rather than as a limitation on its ability to compete. It is clear that M & S was given a full opportunity to propose on the emergency solicitation, and did so successfully, offering a lower price than the incumbent contractor. To the extent that M & S is complaining that other offerors may not have had such an opportunity, it is raising an issue as to which it is not an interested party, and thus lacks standing. See *Galaxy Custodial Services, Inc., et al.*, 64 Comp. Gen. 593, 85-1 CPD 658.

M & S was affected by the tightness of the schedule when the schedule precluded contracting personnel from conducting a fuller review of the new offeror's responsibility (or perhaps prevented the offeror from

The contracting officer asserts, and the protester offers nothing other than speculation to contradict, that the decision to change the headout office from Sedro Woolley to Mount Vernon did not occur until after the bids on solicitation -126 were opened. That left the contracting officer in a position where it was necessary to take seemingly inconsistent actions with respect to the emergency and permanent service. Under the applicable regulations, a change in a terminus is a "minor service change" (PM 12.4.12 c.1.(b)(1)); such changes may be made in advertised contracts by contract modification. PM 12.4.12 c.1.(c)(1). However, service changes may not be made to emergency contracts "unless specifically authorized in the contract or by the next-higher level of contracting authority." PM 12.4.12 f. Accordingly, it would have been difficult to make the change to the existing emergency solicitation, while it was easy to make the change to the awarded advertised service. We perceive no error in the contracting officer's making the one change and not the other.

The principle of fairness to the bidders whose bids would have been exposed cited by the contracting officer also worked against the cancellation of solicitation -126 after the bids were opened. While revisions in specifications is a basis for such cancellation, PM 12.7.7 e.1.(b), the regulation requires "a compelling reason" to cancel the solicitation as well as the approval of the next higher level of contracting authority. It was well within the contracting officer's discretion to conclude that the change of the headout point did not warrant cancellation of solicitation -126.

Finally, the protester's objection to the contracting officer's failure to consider the comment on its worksheet with respect to advertised solicitation -126 is without merit. Under the terms of the advertised solicitation, award was to be made solely on the basis of the annual rates bid. As PM 12.7.7 a. provides, "award must be made . . . to the responsible bidder whose bid, conforming to the solicitation, provides the lowest rate to the Postal Service." Since M & S's bid, which reflected the bidder's forbearance to include the costs of the sorting time at Sedro Woolley, did not offer the lowest rate, the failure to consider the note on its worksheet did not injure M & S.

The protest is dismissed in part and denied in part.

demonstrating it). However, M & S raised its concern along these lines only belatedly in its reply comments, when it complained about the contracting officer's assertion that its vehicle would not be available.

Issues not raised in an initial protest but presented thereafter in the course of a protest may be considered only if they are themselves timely; their timeliness does not relate back to the initial protest. To be timely, an issue must be presented within ten working days of the time when it was known or should have been known, but in no event more than fifteen working days after the date of contract award. PM 4.5.4 d.

Jack L. Vandergriff, P.S. Protest No. 90-37, August 10, 1990, (citation omitted).

William J. Jones
Senior Counsel
Contract Protests and Policies