

**June 29, 1994**

**P.S. Protest No. 94-13**

## **IMPCO TECHNOLOGIES, INC.**

**Solicitation No. 102590-93-A-0116**

### **DIGEST**

Protest against contracting officer's failure to consider protester's proposal for regional contract is dismissed when it was first made more than fifteen days after contract award and the contracting officer did not make it impossible for the protester to file in a timely manner.

### **DECISION**

IMPCO Technologies, Inc., (IMPCO) protests the award to Beacon Power Systems (Beacon) of a contract for the conversion of postal vehicles for use with compressed natural gas.

Solicitation 102590-93-A-0116 was issued on August 18, 1993, by the Office of Procurement at Postal Service Headquarters. It requested proposals for the conversion of 1,463 Long Life Vehicles (LLVs) in three regions of the country -- western, eastern, and southeastern. The cover page of the solicitation stated:

As a result of this solicitation, the USPS plans to award separate contracts for each of the three regions to three different offerors, or a single contract for all three regions to a single offeror.

Offerors may submit a separate proposal for each region and/or a single proposal for all three regions. Any other combinations will not be considered.

Section A.1 instructed offerors to "[f]ill in the Unit and Extended Prices requested below for the one specific region you are proposing or for all three regions, if applicable. Do not provide prices for a combination of two regions."

Section J.1 stated that the cost/price proposal was to be separate from the technical proposal, which was not to refer to cost. Section M, Evaluation Criteria, Basis for Award, stated that the Postal Service "plans to award a single contract to an offeror or separate contracts for each of the regions to three different offerors who demonstrate(s) the financial,

managerial, and technical capabilities to convert the LLVs to [compressed natural gas]." Award was to be made to the "responsible offeror(s) whose proposal, conforming to the solicitation, offers the best value to the Postal Service. . . . The technical and cost/price proposals will be evaluated independently." The solicitation also stated that the Postal Service "is more concerned with obtaining superior technical or management features than with making an award at the lowest overall cost to the USPS."

Two amendments were issued and the initial offer due date was extended from October 2 to October 12. Fourteen offerors responded to the solicitation. Beacon submitted separate technical and price proposals for each region, while IMPCO submitted only one technical proposal and one price proposal. As a result, IMPCO was deemed to be proposing for all three regions and not for any individual region. On December 3, IMPCO was notified that it was in the competitive range for "all regions combined," and was requested to submit written responses to questions accompanying the letter by December 10. On December 15, the pricing and technical evaluation teams together conducted telephone discussions with those offerors who were found to be within the competitive range for a region or all regions, and best and final offers (BAFOs) were requested by January 12, 1994. An evaluation memorandum dated February 10 stated the evaluators' conclusion that award should be made by region because "none of the proposals submitted for All Regions offers the best value to the USPS," and "there is significant risk to the USPS to award all the regions to one offeror." On February 14, award was made to MESA Environmental for the western region, and to Beacon for the eastern and southeastern regions.<sup>1</sup>

On March 1, IMPCO sent a protest to the General Accounting Office (GAO).<sup>2</sup> In a March 3 debriefing, the contracting officer informed IMPCO that the GAO did not have protest jurisdiction over the Postal Service, and provided IMPCO's representatives with a copy of Procurement Manual (PM) 4.5, the applicable protest regulation. The March 1 letter asserted three bases for the protest: that the Postal Service awarded the three contracts to only two different offerors, which it alleged was contrary to the solicitation; that the "best value" analysis was flawed because the Postal Service, contrary to the solicitation, did not award to three different offerors providing three different technologies, which it could have done by awarding the southeastern region contract to IMPCO; and that the Postal Service did not award the contract to the lowest priced offeror, which IMPCO contends is the "intent of Congress."

On March 22, the contracting officer denied the protest pursuant to PM 4.5.6 c.2.<sup>3</sup> The denial stated that only two offers were received for the southeastern region, Beacon's and

<sup>1</sup> MESA Environmental had the only other proposal in the competitive range for the southeastern region.

<sup>2</sup> IMPCO's initial protest dated March 1 was received by the GAO on March 4, and IMPCO indicated on it that a copy had been sent to the postal contracting officer. It is unclear when the copy addressed to the contracting officer was mailed or when it reached her office; however, it is undisputed that the contracting officer received the initial protest no later than March 7, when IMPCO sent a copy via facsimile.

<sup>3</sup> PM 4.5.6 c.2. states that the contracting officer, "if unable to conclude that a protest is obviously meritorious, may, within the time allowed for a decision . . . [w]ith the concurrence of assigned counsel, determine that the protest is obviously without merit and advise the protester in writing accordingly."

Mesa's, and that the Postal Service's "*plan* to award contracts to three different offerors or to one single offeror became an impossibility as a result of the evaluation . . . . [I]t was in the best interest of the USPS to award the Southeastern Region to Beacon Power." (Emphasis in original.) The contracting officer further stated that IMPCO was "confusing best value and alternative technologies;" and that "[s]ince there was not a requirement in the solicitation mandating three different technologies, this contention has no merit." The contracting officer went on to state:

As discussed in the debriefing on March 3, 1994, IMPCO's proposal was only considered as one proposal for all the regions and was not included in the competitive range for the Southeastern Region; therefore, [it] was not eligible for consideration.

On IMPCO's third contention, the contracting officer pointed out that the solicitation clearly favored technical merit over price. After receiving the contracting officer's denial, IMPCO filed a subsequent protest with this office, which was dated and received via facsimile on March 30.<sup>4</sup>

The March 30 protest restates IMPCO's allegation from its original protest that the Postal Service failed to comply with the solicitation because award was not made to three different offerors. IMPCO complains that the contracting officer never addressed IMPCO's "key allegation," that IMPCO's proposal was improperly not considered for a regional award. The protester contends that its proposal clearly stated that it was intended for both the nationwide award if one was made and the regional awards.<sup>5</sup> "Furthermore, during the proposal debrief[ing] conducted on 3 March 1994 the USPS said that they wished they had more proposals for the Southeastern Region, yet failed to consider the IMPCO proposal. . . . Never during the entire proposal evaluation process, or during the BAFO did the USPS give IMPCO any indication that the USPS was not evaluating IMPCO for a regional award."

IMPCO challenges the contracting officer's determination that Beacon offered the best value because IMPCO's proposal was "technically acceptable, 23% lower in cost, and, if awarded to IMPCO, would have achieved the stated USPS objective of awards to three different offerors."

Finally, the protester alleges that the Postal Service did not award the contract to the lowest cost offeror "in accordance with the intent of Congress."<sup>6</sup> The protester states its belief that

<sup>4</sup> PM 4.5.4 e. states:

If a protest has been filed initially with the contracting officer, any subsequent protest to the General Counsel received within ten working days of the protester's formal notification of, actual knowledge of, or constructive knowledge of initial adverse action by the contracting officer will be considered . . . .

<sup>5</sup> IMPCO's price proposal and its BAFO letter contained the statement that it was "prepared to participate on a regionalized basis."

<sup>6</sup> This element of IMPCO's protest warrants summary dismissal. It has not identified any statutory enactment expressing congressional intent that Postal Service contracts be awarded solely on the basis of price. We note, to the contrary, that Congress has given the Postal Service broad general authority

although the solicitation states that award would not necessarily be made to the lowest priced offeror, lowest cost must be the award criterion in the southeastern region because IMPCO is the lowest cost offeror, is a "different" offeror, and is a "responsive" and responsible offeror.

The contracting officer has replied to the protest, stating that IMPCO's "key allegation" was raised for the first time in its protest to the General Counsel, which is why it was not addressed in her decision of March 22. The contracting officer asserts that the allegation is untimely under PM 4.5.4 d.<sup>7</sup> because it was received by the General Counsel more than 15 working days after the February 14 award of the southeastern region contract. Further, the contracting officer asserts that IMPCO learned that its proposal had not been considered for the southeastern regional award at the latest at "its three and a half hour debriefing on March 3 . . . since the matter was discussed by the parties."<sup>8</sup>

The contracting officer asserts that even if it were timely, the allegation has no merit because IMPCO "did not submit a firm offer for [the southeast] region." Pointing out that the solicitation asked offerors to submit proposals for each region and/or one for all regions combined, the contracting officer states that IMPCO filled in the unit and extended prices for all three regions combined and "did not submit separate signed offer and award sheets for each individual region as required. . . . IMPCO did not submit a separate price proposal for each region and therefore did not price an offer for each region." Since IMPCO submitted only one signed technical and price offer, and filled in unit prices with identical figures for all regions, the contracting officer considered IMPCO's proposal not to be "adequate for evaluation" for the regional award, and only to be considered for all three

"to enter into and perform contracts . . . and determine the character of . . . its expenditures," 39 U.S.C. 401 (3), and that with certain exceptions not relevant here, "no Federal Law dealing with public or Federal contracts . . . shall apply to the exercise of the powers of the Postal Service," 39 U.S.C. 410 (a).

<sup>7</sup> That section states:

Protests 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.

<sup>8</sup> The debriefers' memorandum of the March 3 debriefing indicates that IMPCO asked why it had not been considered for a regional contract and the parties present at the debriefing went on to discuss the matter. The memorandum indicates that IMPCO was told that the Postal Service did not accept IMPCO's claim that its one proposal could be used as three separate proposals for two reasons: "IMPCO did not submit three separate technical and cost proposals as required by the solicitation" (emphasis in original); and "[i]f it was IMPCO's intent to submit three separate proposals, IMPCO should have clearly separated the proposals and not present a vague statement to that fact, buried in the cost proposal."

The contracting officer asserts that IMPCO should have realized sooner that it was not being considered for a regional award, because on December 3, "the USPS clearly notified IMPCO by letter that they were in the competitive range for 'ALL REGIONS COMBINED.' . . . IMPCO arguably should have known they were not in the competitive range for each individual region at that time . . . [and] all discussion questions related to their proposal for all regions combined, not for individual regions."

regions combined.<sup>9</sup> According to the contracting officer, IMPCO would have had to "substantially revise" its proposal in order for the Postal Service to evaluate it on a regional basis. She alleges that if she had communicated with IMPCO about its proposal prior to the establishment of the competitive range it would have been improper discussions constituting "leveling" as defined by PM 4.1.5 g.3.(b)(1).<sup>10</sup>

On IMPCO's complaint that the Postal Service failed to comply with the solicitation by making award to three different offerors, the contracting officer asserts the solicitation stated only that the Postal Service plans to award separate contracts for each region to three different offerors, not that the Postal Service was prohibited from awarding the three contracts to two offerors.

The contracting officer states that since IMPCO did not submit "a firm offer" for the southeastern region, it lacks standing to challenge any aspect of the award decision, including the best value determination, because it is not an "interested party" which would be eligible for award if its protest were upheld, citing *Central Air Southwest*, P.S. Protest No. 93-15, September 29, 1993.

In reply to the contracting officer's statement, IMPCO reiterates its previous points, including that it was unaware that it had not been considered for a regional contract at the time it protested initially to the contracting officer, and that "[t]his information was not disclosed to IMPCO until its hearing with the CO on March 3, 1994[,] which was after IMPCO submitted its original letter of formal protest." The protester claims that the period for timely filing of this protest should run from the date of the contracting officer's adverse decision, dated March 22. Since IMPCO's protest to the General Counsel was received March 30, the protester claims that it was timely filed. IMPCO also makes the following points:

-- Award to Beacon for the southeast region should be "rescinded" because Beacon already had been awarded a contract for the eastern region and therefore award was not made to three separate offerors as required by the solicitation.

-- IMPCO clearly stated in its business proposal, in a letter requesting additional information dated December 10, and in its BAFO letter that it was "prepared to participate on a regionalized basis." This is "as clear and unequivocal as an offer can be expressed. . . . The IMPCO proposal clearly stated the price for each quantity and for each option for each region and for all regions combined." IMPCO

<sup>9</sup> According to the contracting officer, IMPCO's technical proposal "included a different technical approach for performing the conversions in the different areas of the country," each of which has "unique costs associated with it" due to factors such as differences in labor rates in different geographic areas and whether the vehicle conversions would take place at a subcontractor's facility or a postal facility. The contracting officer asserts that it "stands to reason, therefore, that if IMPCO were intending to propose by region, the prices would have reflected the differences inherent to the technical approaches proposed for each region. . . . This conclusion is reasonable considering that the other offerors who submitted separate proposals for each region and for all regions together proposed different prices."

<sup>10</sup> That section defines "leveling" as "helping an offeror bring its proposal up to the level of other proposals by coaching or providing solutions or approaches described by the Postal Service."

"satisfied all of the solicitation requirements of a valid offer."

-- "The fact that IMPCO offered the same price for each region somehow caused the CO to consider IMPCO's offer to be less than a firm and equivocal offer. . . ." Such an assumption was unwarranted. "The IMPCO offer stands on its own merit. . . . The fact that other offerors had different prices for each region should not have any impact on the validity of the IMPCO) offer."

-- The contracting officer should have asked IMPCO whether its proposal was "both [a] national as well as a regional offer." That question would not have constituted leveling.

-- A diligent best value analysis would have lead to the conclusion that IMPCO would have superior and proven management skills as compared to the offerors awarded the contract." Also, IMPCO believes that the intent of the solicitation was for the Postal Service to test alternate fuel technologies. The two awardees in this case "have offered similar technology." Therefore, the Postal Service "is simply evaluating the different implementation of the same technology while ignoring the IMPCO technology."

In rebuttal, the contracting officer points out that IMPCO has stated that it learned that it had not been considered for a regional award during its March 3 debriefing. She asserts that "IMPCO was fully aware of [its] non-consideration for the Southeastern Region when [it filed its] protest to the C.O." by facsimile March 7. (See footnote 2.) Since IMPCO's protest that it was wrongfully not considered for a regional award first was made 31 working days after contract award, the contracting officer reiterates that it is untimely under PM 4.5.4 d.

On IMPCO's other allegations, the contracting officer restates her view that additional discussions with IMPCO would have been improper, and makes the following points:

-- She disagrees with IMPCO's statement that its offer for the southeast region was clear and unequivocal, and stands by her opinion that IMPCO did not make a firm offer and did not specify a "stand alone price for each region."

-- The solicitation did not require the Postal Service to contract for alternative technologies. The solicitation did state that technical factors were more important than cost.

Beacon has commented on IMPCO's protest, stating that it was clear that the solicitation required offerors to "submit proposals for each Region separately and for All Regions separately. We complied with this requirement with our price and Technical Proposals. . . . Complying with the requirement meant to us that documents should each stand on their own merits for each Region, not that each Region could be assumed to be taken out of an All Region bid [sic]."

In a protest conference and a subsequent submission, IMPCO emphasized that its proposal contained a firm offer for the southeast region and that if "there was any confusion, the CO merely had to ask" whether IMPCO intended for its offer to be for both

the nationwide and regional awards. IMPCO also made the following additional comments:

- IMPCO's protest against its non-consideration for a regional award is timely because it was not aware that it was not considered until it received the contracting officer's March 22 decision.
- The contracting officer caused IMPCO to "do nothing" until after March 22. "At the end of the debriefing, the CO indicated to IMPCO that since it had already mailed its protest [to the contracting officer, on March 1] IMPCO should do nothing until the CO issued an official response to IMPCO's protest letter. IMPCO was only following the CO's advice."
- It was arbitrary for the contracting officer to decide that IMPCO's proposal belonged with the national offers rather than the regional ones; and the solicitation did not contain the language "all regions combined."
- IMPCO thought that the request for BAFO which it received applied to both the nationwide and regional offers.

## **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. *Cordova Air Service*, 92-86, January 22, 1993; see also, *Barber-Coleman Company*, P.S. Protest No. 90-34, December 5, 1990.

The timeliness requirements imposed by our regulations are jurisdictional, and we cannot consider the merits of any issue which has been untimely raised. *Id.*; see also, *POVECO, Inc. et al.*, P.S. Protest No. 85-43, October 30, 1985; *Omnicon, Inc.*, P.S. Protest No. 84-24, June 25, 1984. We have no authority to waive or disregard the timeliness issue in a particular case. *Id.* The only generally recognized exception to the 15-day timeliness rule applies when the contracting officer makes the filing of a timely protest impossible, by, for instance, failing to timely notify a protester of the award, thereby making it impossible for the protester to request a timely debriefing. See *Government Contract Advisory Services, Inc.*; *B & B General Contracting, Inc.*, P.S. Protest Nos. 93-21; 93-25, December 16, 1993; *Flamenco Airways, Inc.*, P.S. Protest No. 91-21, May 21, 1991.

The thrust of IMPCO's protest to this office is that the contracting officer improperly denied it the opportunity to compete for award on a regional basis, and, as a result, it was improperly excluded from the competitive range for the southeastern region award. Even if the protester failed to realize from the December 3 letter's explicit reference to "all regions combined" and lack of reference to an individual region or regions that it had made the

competitive range only for "all regions combined," it certainly was so advised in its debriefing on March 3, 12 working days after the southeastern contract award. In its initial submissions on this protest, IMPCO admitted that it learned that its proposal was not considered for award on a regional basis, and, specifically, was not considered for the southeast region, during that March 3 debriefing.<sup>11</sup> By March 7, the 14th working day after contract award, the contracting officer had received IMPCO's protest, which merely restated what had been submitted erroneously to the GAO and which did not raise the issue of its non-consideration for the southeast region.<sup>12</sup> There is no evidence to support any claim that the contracting officer made it impossible for IMPCO to raise this issue between March 3 and March 8, when our jurisdiction to review IMPCO's protest became limited to the issues raised originally to the contracting officer. After IMPCO realized the basis of its protest on March 3, it had three more working days to file an amended or additional protest.

Even if IMPCO's assertion that the contracting officer advised it on March 3 to "do nothing" (since it already had filed a protest) is accurate, the contracting officer did not then know the contents of the protest or that IMPCO had omitted what it would later contend was a "key allegation" from its protest. In any event, nothing prevented IMPCO from adding the omitted issue to the copy of its protest which it faxed to the contracting officer on March 7. IMPCO's untimely protest against the award in the southeastern region therefore does not fall into the exception to the rule discussed above. *Id.*

Further, the contracting officer is correct that because it has raised the issue of its own exclusion from the southeastern competition in an untimely manner, IMPCO lacks standing to challenge the "best value" analysis performed for that region, including the contracting officer's interpretation of the solicitation as not requiring that three different technologies be tested.<sup>13</sup> To attempt to address this allegation would require us to review a best value analysis which -- with respect to the protester's proposal -- never was made.

The protest is dismissed.

<sup>11</sup> During its protest conference IMPCO claimed, for the first time, not to have learned of its exclusion from the southeast competition until it received the contracting officer's March 22 decision. In light of the contemporaneous memorandum of the March 3 debriefing (footnote 6), the contracting officer's assertions in this protest, and IMPCO's prior admissions on this record that it learned of the basis for its protest on March 3, that claim is not persuasive.

<sup>12</sup> It makes no difference whether the timeliness of IMPCO's initial protest to the contracting officer is measured from March 1 or March 7 since the significant point is that it never mentioned IMPCO's exclusion from consideration for the southeastern contract.

<sup>13</sup> Under PM 4.5.2, this office has jurisdiction to decide protests where the protester is an "interested party." Generally, an "interested party" is a party which would be eligible for award if its protest were upheld. See *Central Air Southwest, supra*; *Canteen Corporation*, P.S. Protest No. 92-37, October 20, 1992.

Because it is not an interested party, the protester also lacks standing to protest the contracting officer's interpretation of the solicitation as allowing award of the southeastern contract to Beacon (when the latter already had been selected for the eastern contract). *Id.*

William J. Jones  
Senior Counsel  
Contract Protests and Policies