

Protest of)
) Date: May 11, 1987
DARS PUBLISHERS AND)
MANUFACTURERS REPRESENTATIVES)
)
Solicitation No. 104230-86-A-0146) P.S. Protest No. 87-06

DECISION

Dars Publishers and Manufacturers Representatives (Dars) protests the rejection of its bid as nonresponsive under Invitation for Bids (IFB) No. 104230-86-A-0146 for 1,000,000 Audio Cassette Mailing Containers.

The IFB was issued by the Office of Contracts, Headquarters, on June 11, 1986, with an offer due date of July 11. Amendment A01, which made additions and clarifications to the original specifications, was issued June 30. Bids were opened on July 11, and Dars' bid was third low of eleven bids received. The apparent low bidder was allowed to withdraw its bid because of a mistake found before award. The initial bids were to expire on September 11, so the bidders were requested to extend their bids. Dars did so in two steps, first to October 9, and then to November 8. The second and fifth low bidders' offers expired when they failed to extend their bid acceptance periods upon request. By letter of November 11, 1987, the contracting officer informed Dars that its bid had been rejected because of its failure to acknowledge Amendment A01. The fourth low bid was also rejected on that ground. The contract was awarded to the sixth low bidder, Liberty Carton Company (Liberty) on November 26.

On December 4, the contracting officer received a letter from Dars, dated December 1, which explained that Dars had acknowledged the amendment in a July 7 letter. After an extensive search, the contracting officer discovered that Dars' acknowledgment had been received prior to bid opening, but had been mishandled and never recorded. Upon discovery of this error, the contracting officer suspended Liberty's performance under its contract.

By letter dated December 10, Dars was informed that it was now the apparent low bidder, and was requested to confirm its bid and to supply pre-award and financial information. The letter also stated that it was necessary for Dars to extend its bid acceptance period through January 30, 1987. Dars replied in a December 19 letter that its supplier had announced a price increase effective January 1, 1987, and that since contract award could not be confirmed prior to that date, a price increase of \$5,355 would become effective.^{1/}

The contracting officer states that her representative spoke to Dars' owner on December 23 and December 29, informing him that an attempt to increase Dars' bid price would result in the bid being rejected. Dars indicated on December 29 that it would not withdraw its raised offer. The contracting officer rejected Dars' bid as nonresponsive on January 7. Dars protested to the contracting officer in a letter received January 16. The protest was referred to this office pursuant to Postal Contracting Manual (PCM) 2-407.8 e.

Dars argues that in originally calculating its bid in June it had every right to expect that the contract would be awarded in 1986, but that through fault of the Postal Service, contract award was delayed six months with no reason given for the delay.^{1/} Dars contends that but for the mishandling by Postal Service employees of its acknowledgment of Amendment A01, it would have received award of the contract before the price increase took effect on January 1, 1987. Dars asserts that it informed the contracting officer's representative as late as December 19 that it would honor its original bid if the contract was confirmed prior to the end of 1986. However, because it was asked to extend its bid beyond December, it was unable to assure that it could get its orders in before the end of the year, and was therefore forced to raise its price. Finally, Dars argues that even with the increase its bid is still low and Dars therefore deserves the contract based on price.^{1/}

In her statement to this office, the contracting officer first contends that the protest should be considered untimely under PCM 2-407.8 d. which requires a protest to be

^{1/} Dars' letter contended that the contracting officer had issued an amendment promising contract award by November 8, 1986. No such amendment had been issued. Dars appears to be referring to the contracting officer's October 3 request asking bidders to extend their bid acceptance periods until November 8.

^{2/} The protest refers to the repeated delay of "bid opening." Bids were opened on July 11, 1986. It appears that the protester is referring to the delay in contract award.

^{3/} The protester also asserts that the contracting officer "refused to award the contract to [Dars] as per [her] last amendment." The protester may be referring to the contracting officer's letter of December 10, 1986, which indicated that Dars was at that time the apparent low bidder. This letter did not promise Dars contract award, but only initiated a pre-award approval process as required by PCM 1-905.

Additionally, the protester argues that the contracting officer never issued an amendment requesting a further extension of acceptance periods to January 13, 1987. No amendment for such a request is necessary. PCM 2-407.1 b.

received within ten working days of the date the protester knew or should have known of the grounds of his protest. She argues that the protester was or should have been aware of the reasons for the rejection of its bid after Mr. Dar spoke with the contracting officer's representative on December 23 and December 29. She states that "[a]s a result of each of these phone conversations, Mr. Dar had a very clear understanding that an attempt to increase Dars Publishers' bid would render the bid nonresponsive Mr. Dar was put on notice ... that his increased bid was ... subject to rejection." Since the protest was not received within ten working days of December 29, the contracting officer submits that it is untimely.

Alternatively, the contracting officer asserts that the increased bid was properly found nonresponsive. She takes issue with the protester's contention that had its acknowledgment not been lost, Dars would have been awarded the contract in 1986. The contracting officer notes that no pre-award investigation of Dars' responsibility had been conducted, and there was therefore no assurance that Dars would have been found eligible for award. She also asserts that the issue is irrelevant, since award cannot be made to Dars at an increased bid price. Furthermore, the contracting officer states that the Postal Service is not required to inform bidders of the reasons for requests of extensions of bid acceptance periods. She notes that administrative problems, including slow responses from bidders, led to the delay in contract award.

The contracting officer also asserts that the protester's letter of December 19 did not offer to honor Dars' bid if the contract was awarded prior to the end of the year, but rather stated "as a foregone conclusion that the bid increase was in effect." She contends that Dars' increase in its bid rendered the bid non-responsive pursuant to PCM 2-404.2(d), and that rejection was required by that section.

Finally, the contracting officer argues that the fact that even with the price increase Dars' bid is still low is irrelevant because "Postal Service procurement regulations ... do not allow an increased bid to be accepted for award in [a formally advertised procurement]."

Our bid protest regulations provide, at PCM 2-407.8 d.(3), that protests other than those 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" The contracting officer claims that Dars received oral notice of the reasons for the rejection of its bid by December 29. Oral notification of bid rejection would be sufficient to begin the time period running for timeliness purposes. Evans Suppliers Co., Inc., P.S. Protest No. 84-42, June 21, 1984; Pacific Fabrication, Request for Reconsideration, Comp. Gen. Dec. B-224065.2, September 9, 1986, CPD 86-2 &277. Here, however, the contracting officer has not indicated that Dars was informed during the phone conversations that its bid had been rejected, but only that the price increase rendered the bid subject to rejection. The statement of the contracting officer indicates that Dars was not notified of the actual rejection of its bid until it received the letter sent by the contracting officer on January 7, 1987. Since Dars' letter of protest was received on January 16, we find the protest

timely. Cf. Recognition Equipment Incorporated, P.S. Protest No. 81-52, December 17, 1981 (contracting officer's actions lacked the deliberateness and finality necessary to begin the running of the protest time limit).

Dars initially argues that because the solicitation was issued in June of 1986, the contract should have been awarded in 1986. However, a basis for protest does not arise merely because contract award was delayed. See, e.g., MEMM General, Inc., Comp. Gen. Dec. B-210939, May 31, 1983, 83-1 CPD &579. If administrative difficulties delay award beyond the bidders' initial acceptance periods, the contracting officer is permitted to request, but not to require, bidders to extend their acceptance periods in order to avoid the need for readvertisement. PCM 2-407.1 b. It is for each bidder to decide whether it wishes to continue to have its bid considered by extending its bid. Maceto, Inc., Comp. Gen. Dec. B-216166, September 10, 1984, 84-2 CPD &277; Boyd-Ferm, Inc., Comp. Gen. Dec. B-218081, February 21, 1985, 85-1 CPD &222. If a bidder feels it will be prejudiced by the delay, it is free to refuse to extend its bid acceptance period. Additionally, the contracting officer is under no obligation to inform bidders of the reasons for the delay in contract award. Cf. MEMM General, Inc., supra.

Dars states that it was willing to honor its original bid until the end of 1986. Dars' December 19 letter was not clearly worded conditionally, however, and the contracting officer was justified in taking the letter as increasing the bid. Moreover, Dars' bid was not rejected until after the end of the year when the condition would have taken effect.

Dars' main contention is that if not for the Postal Service's fault in mishandling its acknowledgment, the contract would have been awarded to it before the end of 1986. Dars does not argue that the failure to process its acknowledgement was intentional or an attempt deliberately to exclude Dars from the competition. There is no evidence that any of the delay was intended to pre- judge Dars' bid. The contracting officer states, without con-tradiction, that the bulk of the delay was caused by administra-tive problems, including slow responses from bidders, and that the mishandling was purely unintentional. Furthermore, upon realization of this mistake, the contracting officer took steps to rectify the error.^{4/} However, it was necessary for the contracting officer, before making an award to Dars, to make an affirmative determination of Dars' responsibility. PCM 1-904. This made it necessary for the contracting officer to request a further extension of Dars' bid. If Dars felt it could not accept the effects of the additional delay in award, it was free to re-fuse to grant the extension. Dars was thus adequately protected from unexpected delays by the limited nature of the bid accep-tance period. Cf. Space Services International Corporation, Comp. Gen. Dec. B-207888.4, et al., December 13, 1982, 82-2 CPD &525.

^{4/} The contracting officer's consideration of Dars' bid was proper because the acknowledgment was received at the depository specified in the solicitation prior to the closing date for receipt of offers, and was mishandled after receipt. See, Cassidy Cleaning, Inc., Comp. Gen. Dec. B-212196, November 22, 1983, 83-2 CPD &608.

Finally, Dars argues that it should receive award despite the fact that it raised its bid, because even with the price increase its bid is still low. However, in a formally advertised procure-ment, Postal Service regulations do not permit the acceptance of a bid raised after bid opening. To do so would give a bidder "two bites at the apple." See, Logan Company, P.S. Protest No. 82-65, December 22, 1982. That is, after having seen the other bids, a bidder could raise its price to just below the next low bid and still receive award. Even if Dars' request is a legitimate one based on actual cost increases, acceptance of its new price would put other bidders at a competitive disadvantage and undermine the integrity of the procurement process. See, Government Contract Services, Inc.; Daly Construction, Inc., P.S. Protest No. 85-95, January 21, 1986.

The protest is denied.

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

[Checked against original 2/22/93 WJJ]