

Protest of ) Date: March 31, 1988  
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VNP VENDING CORPORATION )  
 ) P.S. Protest No. 87-107  
Solicitation Nos. 489990-87-A-0622, )  
 )  
-0624, -Z625, -0626, -0627, )  
 )  
-0633, -0634, -0635 )

### ON RECONSIDERATION

VNP Vending Corporation (VNP) has timely requested reconsideration of our decision in VNP Vending Corporation, P.S. Protest No. 87-107, February 4, 1988, in which we upheld the contracting officer's cancellation of eight solicitations for the installation of coin-operated photocopy machines in particular postal facilities in Texas and Oklahoma.

VNP asserts that this office made an error of fact in that it did not consider that commissions are calculated based upon monthly usage at numerous postal installations. According to VNP, the large number of "discrete commission calculations" ensures an accurate prediction about the total number of units likely to be above or below the estimated copier volumes. In addition, VNP claims that this office made errors of law in (1) importing principles of mistakes in bid into unbalanced bidding analysis; (2) basing the award decision upon speculation as to business performance and profitability; (3) allowing the contracting officer to remove the 60-day termination provision, while changing the evaluation criteria; and (4) requiring the protester to prove prejudice to its economic position when the contracting officer cancels the solicitation.<sup>1/</sup>

Section 2-407.8(1) of the Postal Contracting Manual requires that a request for reconsideration of a protest decision set forth a detailed statement of the factual and legal grounds upon which reversal or modification is sought. The request must specify "any errors of law made or information not previously considered." Id. Information not previously considered refers to that which a party believes may have been overlooked by this office or to information which a party did not have access during the pendency of the original protest. Spaw-Glass Construction, Inc., On Reconsideration, P.S. Protest 87-46, September 18, 1987; Fort Lincoln New Town Corporation, On Reconsideration, P.S. Protest 83-53, November 21, 1983. Reconsideration is not appropriate where the protester simply wishes us to draw from the arguments and facts considered in the original protest conclusions different from those reached in that

<sup>1/</sup>The counsel for the protester requested time in which to file an additional brief. No further submission has been received by our office.

decision. Reassertion of arguments previously considered and rejected by this office does not constitute a ground for reconsideration. Spaw-Glass Construction, Inc., On Reconsideration, supra; Fort Lincoln New Town Corporation, On Reconsideration, supra. Similarly, where information and arguments were known or available to the protester at the time of its initial protest but were not presented, such information and arguments may not be considered in a request for reconsideration. Id.; Logan Co., On Reconsideration, P.S. Protest No. 82-65. February 9, 1983. These legal tenets guide this office's review of VNP's request for reconsideration.

VNP's allegations that this office made an error of fact by not considering the factual basis for the commission structure cannot be the basis for reversal of the initial protest decision. First, the decision did discuss VNP's calculations at several points. VNP's assertion to the contrary is simply wrong. Second, insofar as VNP's numerical exercise conflicts with our calculations, it is clear that our calculations supported our conclusion that VNP's bid was materially unbalanced. Despite VNP's protestations to the contrary, the evidence is quite clear that, faced with not only the possibility, but the probability that the contracts would result in substantial losses, VNP would be forced to terminate the contracts.

No errors of law were made in reaching the initial protest decision. VNP asserts that this office reached its decision by "importing into the principles of law which govern unbalanced bidding, those principles found only in the law of mistake of bid". That assertion is manifestly incorrect; this office did not adopt mistake-in-bid principles in its unbalanced bidding analysis. This office used mistake-in-bid principles only as an analogous example, and, further, specifically stated that this is not a case in which VNP has asserted that it made a mistake in its bid, as follows:

Although this is not a case in which VNP, the apparently successful bidder, has asserted that it made a mistake in its bids, the regulations on mistakes-in-bid, by analogy, offer some support for the contracting officer's action here. PCM 2-406.3 (c)(ii) allows a contracting officer to reject a bid as mistaken, even if the bidder verifies

it, if:

there are other indications of error so clear, as reasonably to justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide bidders. Incompetence, carelessness, or over-optimism of management may cause or permit the making of bids or proposal for work involving techniques, processes, or "know-how" on which the contractor has not significant experience. In such case, the contractor's proposed price, or cost estimates, whether or not comparable to those of contractors of demonstrated competence, may be unrealistic and may seriously endanger performance.

Decision, pg. 7; emphasis provided.

These principles were properly analogous for the reason they were cited: the Postal Service is justified in rejecting a bid if it believes that acceptance of the bid would seriously endanger performance. This is so even in the face of the bidder's willingness to perform the contract. The contracting officer need not award a contract to a bidder when its bid meets the above standard. Cf. Howard Electric Company of Concord, Inc., P.S. Mistake Claim No. 82-8, December 6, 1982; R.C. Tool & Machinery Sales, P.S. Mistake Claim No. 80-9, November 28, 1980. Based on the calculations performed at page 6 of the decision, VNP's bids met the above standard and was materially unbalanced.

VNP mistakenly alleges that this office based its decision upon speculation. The decision was based on reasoning and simple mathematics (as evidenced by the calculations at page 6 of the decision). Indeed, this office did not engage in any "speculation" concerning business performance and profitability, basing its decision on calculations on figures provided by VNP in its offer. We have not made any determination of nonresponsibility, as charged by VNP. The decision merely holds that, when a bid can be calculated to result in substantial, ongoing losses to the bidder under a realistic set of factual assumptions, the contracting officer is justified in rejecting that bid.

VNP's argument that the contracting officer changed the evaluation criteria to preclude smaller businesses from aggressively bidding against bigger businesses was not raised in its protest. It became aware of the change in evaluation criteria by letter dated September 28, 1987. Throughout its protest, VNP only alleged that a change in evaluation criteria does not constitute a compelling reason to justify cancellation of the solicitations, not that the change discriminated against smaller businesses in favor of large businesses. This new allegation is, therefore, untimely raised under PCM 2-407.8 d.(3) and this office will not consider that argument.

VNP's assertion that the decision required it to prove prejudice to its economic position when the solicitation on which it bid is canceled is incorrect. The only mention of prejudice is in footnote 9, which deals with prejudice to Pitney-Bowes, not VNP. Therefore, since the protester's reading of the decision is mistaken, it cannot form the basis for a request for reconsideration.

VNP has not presented factual or legal grounds warranting reversal or modification of our original decision. Therefore, on reconsideration, we adhere to our decision denying the protest.

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**[checked against original 3/12/93 JLS]**