

Protest of )  
AMERICAN TELEPHONE ) Date: February 23, 1988  
DISTRIBUTORS, INC. )  
Solicitation No. 169990-87-B-0042 ) P.S. Protest No. 87-117

### DECISION

American Telephone Distributors, Inc. (ATD), protests the evaluation of its proposal on Solicitation No. 169990-87-B-0042 for an electronic private automatic branch exchange (EPABX) telephone system for the Omaha, NE division office. ATD asserts that its proposal was improperly eliminated from competition.

Request for Proposals (RFP) No. 169990-87-B-0042 was issued on June 18, 1987, by the Chicago Procurement & Materiel Management Service Center with an offer due date of July 31, 1987. Several proposals were received and evaluated.<sup>1/</sup> On August 24, the evaluation committee recommended rejection of ATD's proposal:

Vendor response requires clarification and/or additional information to Paragraphs 1.3, 2.2, 2.4, 2.11, 2.13, 3.4, 3.11, 3.21, 3.27, 4.4, 4.7 and 5.0.D. The vendor also responded to Paragraphs 2.7 and 2.8 with information which is

<sup>1/</sup>Procurement of telephone systems is governed by Management Instruction AS 710-85-7, dated August 5, 1985. Section C.3.b of the Instruction provides that, for telephone systems of over 40 phones (as at issue here):

Approved requests are filled by a competitive procurement under applicable USPS procurement regulations and procedures. The Telecommunications Division develops specifications to support each procurement on an individual location basis. The specifications become a part of the solicitation. The technical review of vendor responses to the solicitation will be performed by the Telecommunications Division.

The Telecommunications Division is an element of the Information Resource Management Department at USPS Headquarters. The Telecommunications Division prepared the specification for the Omaha facility, which was dated May 13, 1987. The evaluations were actually performed by personnel of the Network Communications Division of the National Information Systems Development Center, Raleigh, NC.

Section C.3.c of the Instruction provides that regional procurement personnel will be responsible for cost evaluation of vendor responses.

not in compliance with our specifications, and did not supply documentation indicating a contract with a service organization has been negotiated to service the system. These reasons were used by the committee in concluding that this vendor be removed from further consideration.

The contracting officer removed ATD from further consideration, on August 24, 1987, but did not notify ATD of the rejection of its proposal. Clarifications were requested of and received from the two technically acceptable offerors. Award was made to Norstan Communications Systems, Inc., on September 24. ATD first learned of the rejection of its proposal and the award to Norstan by a letter from the contracting officer dated October 16, received October 21. After learning of award to Norstan, ATD inquired why its proposal had been rejected. On October 26, the contracting officer furnished the evaluation team's review of ATD's proposal to it. This protest followed.

ATD acknowledges that, on its face, its protest is untimely pursuant to Postal Contracting Manual (PCM) 2-407.8 d. (3), which requires that all protests, except those apparent on the face of the solicitation, must be filed within 15 working days after contract award. However, ATD states that PCM 3-103 (d) and 2-408.<sup>1/</sup> require the contracting officer to notify all unsuccessful offerors of the rejection of their proposals on the day of the award. ATD argues that the contracting officer's violation of these provisions severely prejudiced it by making a timely protest impossible. ATD asserts that, given these facts, the timeliness standard should be waived, citing Hydralifts, Inc., P.S. Protest No. 75-41, November 3, 1975 and North American Automated Systems Co., Inc., GSBCA No. 8681-P, 87-1 BCA & 19,434. Alternatively, ATD suggests at least that we comment on the merits because such comments may serve a useful purpose, citing Trailmark Enterprises, Inc., P.S. Protest No. 78-48, November 13, 1978, in which the protester's concerns regarding collusion, withdrawal of offers, evaluation of offers and responsibility were addressed despite the protest's untimeliness.

On the merits, ATD claims that it has been subjected to unfair, disparate treatment, in that successful offerors on similar EPABX systems, proposing on essentially similar specifications in procurements in Miami and Philadelphia have received awards using proposals almost identical to ATD's proposal. ATD claims that the rejection of its proposal cannot be squared with these awards and is, therefore, arbitrary and capricious. ATD asserts that it has, in the past, been found to be technically unacceptable only when it was in line for award because of its low price, implying that technical unacceptability is being used arbitrarily to prevent award to it.

ATD also states that any defects which its proposal contained were informational deficiencies which could easily have been remedied through a request for clarification.

<sup>2/</sup>PCM 3-103 (d) states that "[t]he procuring office shall notify the unsuccessful offerors in any procurement in excess of \$25,000, on the same day of award and in accordance with the procedures of 2-408.1, of the fact that their offers were not accepted." PCM 2-408.1 provides that the contracting officer should state in general terms the reason for the rejection, should extend appreciation to the company for showing interest in postal procurements and, if requested by the company, should furnish it with the name and address of the awardee, the contract price and the location of a copy of the bid abstract. Notification may be made orally or in writing. PCM 2-408.1 (b).

ATD points out that a proposal must be technically unacceptable and incapable of being made acceptable through negotiations in order to be excluded from the competitive range. See Falcon Systems, Inc., Comp. Gen. Dec. B-213661, June 22, 1984, 84-1 CPD & 658. ATD notes that its proposal included a signed maintenance agreement with HunTel Systems for the Omaha EPABX system. Since the remaining deficiencies cited by the evaluation committee were insufficient to exclude ATD from the competitive range, ATD views the contracting officer's decision to exclude ATD from further consideration as improper. Since ATD alleges that its price was over \$42,000 less than that of Norstan,<sup>1/</sup> it asks that the contract award be set aside.

The contracting officer states that ATD was removed from consideration based on the technical evaluation of their proposal. Since adequate competition was received from the two technically acceptable offers, the contracting officer did not deem it necessary to give ATD the opportunity for discussions or submission of a revised proposal. The contracting officer explains the failure to comply with the PCM provisions concerning notice of award as due to "a mixup in the distribution of letters to Norstan and the unsuccessful offerors."

Pursuant to PCM 2-407.8 f. (5), we requested additional information from the contracting officer concerning the evaluation of ATD's proposal. Without comment, he forwarded our request to the evaluation team chairman. The chairman states that the evaluation in question was the first one conducted by the members of this evaluation team, who were not aware of prior offers proposed on previous procurements. In addition, he states that the team performed its technical evaluation without any knowledge of the pricing proposals, becoming aware of pricing only when such information is requested from procurement personnel after the completion of the technical evaluation.<sup>1/</sup> The team chairman emphasizes that the major weaknesses in ATD's proposal were the omission of a contractual agreement between ATD and its maintenance subcontractor and the manufacturer's support agreement.<sup>1/</sup> In the team's view, these omissions made ATD's offer technically unacceptable because maintenance is a critical component of the EPABX system. The paragraphs cited as requiring clarifications or additional information were described as indicative of variations from necessary requirements which reflected unfavorably on ATD's capability and professionalism. Finally, the chairman reports that the contract with Norstan is approximately 40 percent complete.

ATD has submitted supplemental comments after its bid protest conference. As to the timeliness of its protest, ATD reiterates that Hydralifts, Inc., supra, is "on all fours" the present case. It argues that subsequent cases which state that neither the contracting

<sup>3/</sup> There is no indication in the protest file, other than ATD's assertion of its offer price, that its proposal was, in fact, substantially lower in price than Norstan's.

<sup>4/</sup> The team chairman does not indicate whether the team ever learned of ATD's pricing in this procurement.

<sup>5/</sup> This was the first mention in the protest proceeding that an omission of the manufacturer's support agreement was a factor in the rejection of ATD's proposal.

officer nor our office can waive or disregard the timeliness provisions do not apply to the specific fact pattern found in Hydralifts: delay by the contracting officer in notification of award which makes a timely protest impossible. ATD argues that it would be totally unfair "if the contracting officer could insulate himself from bid protest review by violating postal procurement regulations." ATD also analogizes to decisions of the General Services Board of Contract Appeals pursuant to the Competition in Contracting Act of 1984 which have waived the statutory timeliness standards upon a showing that the procuring agency violated relevant notice procedures. North American Automated Systems Co., Inc., supra; American Service Corp., GSBCA No. 8224-P, 85-3 BCA & 18,517.

As to the merits of its position, ATD states that, while the

evaluation team may well have been unaware of the results of other EPABX procurements, the contracting officer certainly was not. ATD asserts that the contracting officer's knowledge of inconsistent positions taken by the Postal Service in prior procurements and his failure to act to resolve such inconsistencies amount to an arbitrary and unreasonable exclusion of ATD from the competitive range, citing, inter alia, Laser Photonics, Inc., Comp. Gen. Dec. B-214356, October 29, 1984, 84-2 CPD & 470 and Falcon Systems, Inc., supra. ATD also criticizes the inexperience of the evaluation team, and claims that it was or should have been aware of prior procurements in this area. In addition to reiterating claims previously asserted, ATD states that the delay in the adjudication of its protest is the contracting officer's fault and that relief can be given at little harm and expense to the parties involved.

ATD's protest raises a serious timeliness issue. We are without authority to consider a protest which is untimely. See, e.g. International Jet Aviation Services, P.S. Protest No. 87-36, September 1, 1987; Southern California Copico, Inc., P.S. Protest No. 83-2, August 31, 1983 (citing cases). Unlike the Comptroller General, we have no regulatory authority to waive or disregard an issue of timeliness in a particular case. See, e.g., Amerijet International, Inc., P.S. Protest No. 87-45, September 2, 1987; Wilton Corporation, P.S. Protest No. 83-45, September 9, 1983. Even where actions of the contracting officer have contributed to the untimeliness of a protest, our past decisions have been to the effect that the timeliness standard cannot be ignored. See Amerijet International, Inc., supra (delayed receipt of notice of award does not waive timeliness period when the protester knew of exclusion of its proposal from the competitive range prior to the issuance of the notice); CACI Systems Integration, Inc., P.S. Protest No. 87-79, August 29, 1987 (failure by contracting officer to disclose information pursuant to a Freedom of Information Act request does not waive the running of the timeliness period); Cincom Systems, Inc., P.S. Protest No. 76-80, April 25, 1977 (delay of several months in debriefing and disclosure of information does not waive the timeliness period).

A few cases, however, can be read as exceptions to this general rule. In Hydralifts, Inc., supra, we held that the failure to notify the protester of the contract award in accordance with the PCM procedures tolled the timeliness period from running and allowed consideration of a protest filed more than 15 days after award. In H.L. Yoh Company, P.S. Protest No. 73-6, July 6, 1973, the contracting officer's advice to the protester to submit the details of its protest by a specified time was found sufficient to make timely a protest submitted within the time prescribed, but otherwise untimely. In Recognition Equipment Incorporated, P.S. Protest No. 81-52, December 17, 1981, the "casual, nonfinal, nondeliberate" actions of the contracting officer were insufficient to start the running of the protest timeliness periods. Cf. Mancone Trucking, Inc., P.S. Protest No. 80-61, January 21, 1981 (representation by the contracting officer "created an obligation which he breached by his unannounced decision to proceed with the bid opening;" thus failing to meet the standard of PCM 1-111 that his actions be "above reproach in every respect").

Additionally, in other cases, our office has briefly given its views on the merits of an untimely filed protest. See, e.g., Juanita Protz, P.S. Protest No. 80-73, April 14, 1981; Parrino Enterprises, P.S. Protest No. 80-34, August 5, 1980; Trailmark Enterprises, Inc., supra. While our views on the merits are not dispositive in these cases, they thus become known for future consideration.

We resolve the conflict between these two lines of decisions by upholding the narrow principle on which Hydralifts, Inc. is based; when the contracting officer, in violation of the regulatory provisions governing notice of award, makes the filing of a timely protest impossible, the running of the timeliness period is tolled until the protester knows or should have known of the award. This is not inconsistent with our other statements that neither the contracting officer nor our office can waive the timeliness standard, but provides a remedy for a protester who, with due diligence and through no fault of its own, is rendered completely unable to file a timely protest by the improper actions or omissions of the contracting officer.<sup>1/</sup>

We think that ATD's proposal was unfairly found to be technically unacceptable.<sup>1/</sup> A contracting officer may make award without negotiations or discussions PCM 3-805.1(b), and there is no requirement for discussions to be held with an offeror whose proposal is technically unacceptable. Neodata Services Group, P.S. Protest No. 86-64, December 30, 1986; Management Concepts, Inc., P.S. Protest No. 86-29, July 10, 1986. However, discussions are required with those offerors whose proposals are reasonably susceptible of being made technically acceptable. PCM 3-805.1(a), Neodata Services Group, *supra*; Computer Systems and Resources, Inc., P.S. Protest No. 86-4, March 27, 1986. When discussions would have involved only brief oral or written questions, and other offerors were afforded an opportunity to clarify their proposals, we have held that the exclusion of an offeror whose proposal could have been made technically acceptable was erroneous. Neodata Services Group, *on reconsideration*, P.S. Protest No. 86-64, March 6, 1987. *Cf.* POVECO, Inc., P.S. Protest No. 85-9, May with 21, 1985.

<sup>6/</sup>We reach this decision without reliance on the GSBCA protest decisions cited by ATD. The Competition in Contracting Act, which gives the GSBCA jurisdiction to decide ADP bid protests is not applicable to the Postal Service. Falcon Systems, Inc., Comp. Gen. Dec. B-222549, May 14, 1986, 86-1 CPD & 462, *aff'd on recon.*, June 5, 1986, 86-1 CPD & 526. The GSBCA is interpreting a different statute from that of our office (which derives its bid protest authority from the Postal Reorganization Act of 1970 (39 U.S.C. ' 101 *et seq.*)), which entails a different standard or review. *See* 40 U.S.C. ' 759 (f) (Supp. 1987).

<sup>7/</sup>Because we sustain ATD's protest on this ground, we do not reach the other issue it raises concerning the impropriety of the rejection of its proposal because of awards made to other offerors on other solicitations based on the same proposal. We note that ATD's allegation that the contracting officer and technical representatives acted in concert to exclude ATD from contract award is rebutted by the statements of the technical personnel that they had not evaluated any previous EPABX procurements and had no access to pricing information. These statements, which carry the presumption of regularity which actions of government officials are given (*see Kalvar Corp. v. United States*, 211 Ct. Cl. 192, 198 (1976); Librach v. United States, 147 Ct. Cl. 605, 612 (1959)), would overcome ATD's allegations on this issue. Further, there is no evidence in the file that the contracting officer or the technical evaluation team knew of ATD's price. Usual procurement procedure is that, if an offer is found to be technically unacceptable, the price proposal is not opened. We conclude that ATD's allegedly lower price was never addressed by the contracting officer or the evaluators, and that ATD's speculation to the contrary is insufficient to carry its burden of proof.

As we read the evaluation team's analysis, as supplemented in the course of this protest, it had three reasons for rejecting ATD's proposal: omission of a contractual agreement between ATD and its maintenance subcontractor; omission of the manufacturer's support agreement, and a number of areas in ATD's proposal which were in need of clarification. ATD's proposal was furnished as part of the contracting officer's report in this protest. As furnished, it contained the manufacturer's support agreement and the contractual agreement with its maintenance subcontractor. These items, therefore, cannot form a basis for rejection of its proposal. As to the areas which were said to require clarification, the two offerors who were found to be within the competitive range were requested to provide clarification of particular areas of their proposals. We are unable to conclude, on the record before us, that the clarifications required of ATD's proposal were sufficiently greater in number or scope than those required of the offerors who were found to be technically acceptable to require the rejection of ATD's proposal. The contracting officer's determination to reject ATD's proposal under the above facts was without basis, and arbitrary and capricious.<sup>17</sup> ATD's protest is sustained.

Although we sustain the protest, we are unable to grant any relief. TPI International Airways, Inc., P.S. Protest No. 87-40, October 30, 1987, restated the guidelines for granting relief when a contract has been improperly awarded:

The test for whether termination for convenience of the Postal Service is an appropriate remedy is the best interests of the Postal Service. See Dwight Foote, Inc., P.S. Protest No. 87-80, September 28, 1987; Rentco Division, Freuhauf Rental Equipment, Inc., P.S. Protest No. 75-74, December 19, 1975; Hydralifts, Inc., P.S. Protest No. 75-41, November 3, 1975. As we stated in Inforex Corporation, et. al., P.S. Protest No. 78-12, June 26, 1978:

Whether to require termination action in a given case depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the requirement, and the impact of termination on the accomplishment of the agency's mission. Honeywell Information Systems, Inc., Comp. Gen. Dec. B-186313 (April 13, 1977), 77-1 CPD & 256, p. 7.

Ordering termination for convenience of Norstan's contract and resolicitation of the requirement appears inappropriate. The procurement deficiency cited here was

<sup>17</sup>The procedures used to procure telephone systems use centralized technical evaluation in order to take advantage of the resident expertise and knowledge in the Telecommunications Division. It is not surprising, and not incorrect, that contracting officers place a high degree of reliance on such technical evaluations. However, contracting officers must understand that the evaluation remains their responsibility. The contracting officer here did not assume adequate responsibility for the decision to reject the proposal. The contracting officer had ATD's proposal, and could have checked the evaluation teams' statement that it lacked the maintenance agreement, which was, in fact, included in the proposal.

serious and ATD has been prejudiced by being improperly eliminated from a competition it might have won. However, since this office does not make determinations of responsibility, we are unable to state that ATD

would be entitled to the contract. See TPI International Airways, Inc., on reconsideration, P.S. Protest No. 87-40, January 29, 1988; L.P. Fleming, Jr. Hauling, Inc., P.S. Protest No. 83-64, December 19, 1983. The delay in providing the service which this procurement was to obtain which would occur if the existing contract was terminated argues against termination of the presently ongoing contractual performance, (see Rentco Division, Freuhauf Rental Equipment, Inc., supra), as does the cost of the termination, which despite ATD's sanguine estimate, is likely to be substantial. See FWH Motor Transit, Inc., P.S. Protest No. 84-30, May 21, 1984; Acco Industries, Inc., P.S. Protest No. 79-49, January 30, 1980. Finally, although we recognize ATD's argument that the delay in the issuance of this decision and the ongoing contractual performance are attributable to the actions of the contracting officer, the substantial performance of Norstan under its contract militates against ordering relief. See, e.g., General Telephone Company of Indiana, P.S. Protest No. 79-55, February 4, 1980; Acco Industries, Inc., supra; Hydralifts, Inc., supra. We therefore decline to order relief in this case.<sup>17</sup>

The protest is sustained to the extent indicated.

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Office of Contracts and Property Law

**[checked against original JLS 3/22/93]**

<sup>17</sup> That ATD would be prepared to accept this outcome is suggested by its alternative request for an advisory discussion of these issues for future consideration in the event its protest was determined to be untimely filed.