

Protest of )  
 ) Date: August 5, 1988  
 DENIS COPY COMPANY )  
 )  
 Solicitation Nos. 389990-88-A-0277--0279, ) P.S. Protest No. 88-43  
 -0281, -0283--0290, -0292 )

### DECISION

In a protest dated July 7, 1988, Denis Copy Company protests the award of the above solicitations for coin-operated photocopying services to Pitney Bowes, Inc. Denis alleges that these solicitations are structured in such a manner that they violate postal policy regarding anticompetitive practices as stated in Procurement Manual (PM) 1.8.1 et seq.<sup>1/</sup>

The solicitations were issued by the Columbus Procurement and Materiel Management Service Office on March 14, 1988 with an offer due date of April 14. Each requested bids based on service plan option 3, which requires the contractor to maintain and repair the copiers and the Postal Service to provide space and power, load the copiers, clear jams and collect and account for coins.<sup>1/</sup>

Denis protests these solicitations as anticompetitive and anti-small business. It alleges that large corporations, such as Pitney Bowes, another bidder on these solicitations, are given a competitive advantage because they already have an installation and maintenance organization in place while a small company must recruit its maintenance force. Denis states that service option 1 would result in a more equal competition, because both large and small businesses would have to have their maintenance people account for the revenue. Then, large businesses would be unable to use their present maintenance organization without further training and expense, as they can do under service option 3. Denis concludes that the solicitations must be canceled and the requirements resolicited. The contracting

<sup>1/</sup>The Procurement Manual was not applicable to the subject procurements. See PM TL-2, June 1, 1988. The similar provisions of the Postal Contracting Manual (PCM) found at 1-323 were applicable to these procurements.

<sup>2/</sup>The solicitation forms contemplate two other service options. Service option 1 requires the bidder to provide the loading, clearing, collecting, and accounting functions. Service option 2 requires the bidder to provide the collecting and accounting functions.

officer replies that the Postal Service acted within its rights in choosing service option 3 as appropriate.<sup>1/</sup>

Denis' protest is clearly untimely. PCM 2-407.8 d. (1) requires all protests against alleged deficiencies in a solicitation to be filed before the offer due date. We reemphasize the fact that untimely protests cannot be considered on their merits:

The requirement that a protest be timely filed is jurisdictional; we cannot proceed to a discussion of merits of any issue which has been untimely raised. See Omnicon, Inc., P.S. Protest No. 84-24, June 25, 1984; Southern California Copico, Inc., P.S. Protest No. 83-2, August 31, 1983. Unlike the Comptroller General, we have no authority to waive or disregard the timeliness issue in a particular case. Cf. Air Transport Association of America, P.S. Protest No. 84-29, May 17, 1984, aff'd on reconsideration, June 1, 1984; James W. and Joan C. Carroll, P.S. Protest No. 82-13, August 27, 1982.

CF Air Freight, Inc., P.S. Protest No. 87-43, August 7, 1987. The alleged deficiency here is that the service option plan unduly prejudiced the competition in favor of large businesses and against any small business competitor. However, even though Denis states that the "effect of this structuring was not apparent" until after contract award, it is clear beyond cavil that the service plan chosen was apparent on the face of the solicitation. Since this issue was not protested prior to the bid opening date of April 14, it is untimely. See Artech Corporation, P.S. Protest No. 84-58, October 5, 1984; EIS Division/Parker Hannifin Corporation, P.S. Protest No. 84-76, November 16, 1984.

Assuming the Pitney Bowes' "predatory pricing technique" is the subject of the protest, that technique was known or knowable when the bids were opened on April 14. The protester offers no explanation for the delay in its protest between this date and July 7. Protests other than those against the terms of a solicitation must be received within 10 working days after the basis for the protest was available to the protester. PCM 2-407.8 d. (3), see VNP Vending Corporation, P.S. Protest No. 87-107, February 4, 1988; Southern California Copico, P.S. Protest No. 83-2, August 31, 1983. Denis' protest is thus untimely under this standard as well.<sup>1/</sup>

<sup>3/</sup>Denis has filed comments on the contracting officer's report. These comments state that its protest was based not on the use of service option 3 alone, but on the anticompetitive effect of this option when joined with the predatory pricing tactics employed by Pitney Bowes. It states that this anticompetitive activity was not apparent on the face of the solicitations, but could "only be determined by a review of the pricing structure of the individual bids," and that it is the actual anticompetitive effect of the awards here that it is protesting.

<sup>4/</sup>We note that the anticompetitive activities that Denis appears to be alleging are not for consideration in a bid protest. Liberty Carton Company, P.S. Protest No. 85-35, July 30, 1985; Western Publishing Company, Inc., P.S. Protest No. 84-23, April 10, 1984.

The protest is dismissed as untimely.

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**[checked against original JLS 3/2/93]**