

Protest of ) Date: July 7, 1992  
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 EBONY EXPRESS, INC. )  
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 Solicitation No. 948-058-92 ) P.S. Protest No. 92-27

### DECISION

Ebony Express, Inc. ("Ebony Express"), timely protests the decision of the Manager, San Francisco Transportation Management Service Center ("TMSC"), to cancel a solicitation for highway transportation service after bid opening and to repro cure the service. Ebony Express, which is the incumbent contractor on the route, argues that the contracting officer's action unfairly impacted the procurement since the bids under the canceled solicitation were disclosed to those who attended the bid opening.

Solicitation No. 948-058-92 for service between a mailer's plant in Merced, CA and the San Francisco Bulk Mail Center ("BMC") was issued on March 26, 1992, with a deadline for bid submission of 3:00 p.m., April 29, 1992. The solicitation was on a standard form which required the TMSC to complete it by, among other things, marking certain boxes on the form. Thus, the solicitation included the following paragraph:

**ALL BIDS MUST BE EXPRESSED AS AN // ANNUAL /X/ PER ROUND TRIP RATE -- NOT AS A LUMP SUM**the bid must include all elements of cost the contractor expects to incur in performing service. Annual rate bids must be expressed in whole dollar amounts.

The solicitation provided a schedule for one round trip daily except Saturdays, Sundays and holidays, and another for "as required" trips. We understand the combination of requirements for both scheduled service and "as required" service in a single solicitation is unusual.

The contracting officer canceled the solicitation on May 4 because it was "ambiguous." In his report on the protest the contracting officer explained that only five of 31 bids received were expressed on a per round trip basis as required in the solicitation. The

rest were stated as annual rates. The contracting officer therefore concluded that most of the bidders had been misled by ambiguity in the instructions regarding bidding. He also cited as a second defect the failure of the solicitation to include a Minimum Guarantee clause applicable to the "as required" service.

The replacement solicitation required that bids be expressed on an annual rate basis with a guaranteed total number of annual trips, with the intention of avoiding the ambiguity of the earlier solicitation while obviating the felt need for a Minimum Guarantee clause.<sup>1/</sup>

Procurement Manual ("PM") 12.7.7 e.1 provides the following regarding cancellation of transportation solicitations after bid opening:

To preserve the integrity of the advertised sealed bidding system, award must be made to the responsible bidder submitting the lowest responsive bid unless there is a compelling reason to reject all bids and cancel the solicitation. Every effort must be made to ensure that changes in requirements so significant as to require cancellation of a solicitation are identified in advance of the bid opening, so that the solicitation may be canceled before the bidders' rates are disclosed. Consistent with this, a solicitation may be canceled after opening of bids only when the contracting officer determines in writing that:

(a) Inadequate or ambiguous specifications were cited in the solicitation;

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(f) For other reasons, cancellation is clearly in the interest of the Postal Service.

As the regulation makes plain, cancellation of a solicitation after bid opening is to be avoided if possible because it harms the competitive bidding process through public disclosure of the bids. Cancellation in such circumstances is nevertheless allowed under regulation when the specifications are ambiguous. Here, the contracting officer concluded from the fact that 26 of 31 bidders made the same mistake of submitting bids on the "wrong" basis that the solicitation was misleading. We have held that a contracting officer's determination to reject all bids will not be disturbed by this office unless it is shown to be arbitrary or capricious. Jones E. Davis, P.S. Protest No. 81-57, March 23, 1982; Grant Rental, Inc., P.S. Protest No. 79-29, August 1, 1979. We have

<sup>1/</sup> The contracting officer does not explain why he believed that a Minimum Guarantee clause was required in the first solicitation, and we are skeptical that such a clause would be necessary in a solicitation which provides both for scheduled (i.e. guaranteed) service and "as required" service. Resolution of that issue is, however, unnecessary to a decision here.

also said that a misleading solicitation calls for cancellation because the requirement for full and fair competition is not satisfied. Bob Sullivan Chevrolet-Cadillac Company, P.S. Protest No. 76-30, August 13, 1976. We find the contracting officer's determination here to have been neither arbitrary nor capricious. Rather, from the evidence the contracting officer could reasonably have concluded that the solicitation was misleading because of ambiguity.<sup>1/</sup>

The protest is denied.

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

<sup>2/</sup> The protester's concern that bidders present at the bid opening were favored by the disclosure of the bids to the disadvantage of bidders who did not attend should be redressed by the contracting officer's willingness to make that information available upon written request.