

Protest of ) Date: August 4, 1992  
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MIDWEST TRANSIT, INC. )  
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Solicitation No. 800-012-92 ) P.S. Protest No. 92-34

### DECISION

Midwest Transit, Inc. (Midwest) protests the contracting officer's determination that it is a nonresponsible bidder under solicitation no. 800-012-92, issued by the Denver Transportation Management Service Center (TMSC) for the highway transportation of mail from the Denver, CO, Bulk Mail Center to Missoula, MT. When bids were opened on April 22, 1992, Midwest's bid of \$469,414 per year was the second low. After the low bidder was determined nonresponsible, Midwest was considered for award. Paragraph 11 on page 3 of the solicitation provided that service was to start on June 6, 1992, or a date subsequent to June 6 determined by the contracting officer, and that the contract would be awarded at least 30 days before was to start.

The solicitation included in Clause 18, Additional Information, the following subsection:

G. In order to be awarded a contract a bidder may not be rated unsatisfactory on the Department of Transportation Unsatisfactory Safety Rating Report from the date of bid closing to the date of award.<sup>1/</sup>

Finding from a review of the published Department of Transportation Unsatisfactory Safety Rating Report that Midwest was rated unsatisfactory, the TMSC contacted the

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<sup>1/</sup> Section 15 of the Motor Carrier Safety Act of 1984, codified at 49 U.S.C. '2512, directs the Secretary of Transportation to establish with the cooperation of the Interstate Commerce Commission a procedure to determine the safety fitness of the owners and operators of commercial motor vehicles. This responsibility has been delegated to the Federal Highway Administration which has promulgated federal motor carrier safety regulations (FMCSRs) at Title 49 of the Code of Federal Regulations. Part 385 of the FMCSRs addresses safety ratings.

Department of Transportation (DOT) to determine if Midwest had been removed from the Report. DOT advised that Midwest was still on the Report and that it was not known when, or if, it would be removed. Based on that advice, the contracting officer determined Midwest nonresponsible. On April 24, the contracting officer awarded the service to the third low bidder at an annual rate of \$477,990, and by letter of April 27 informed Midwest of the nonresponsibility determination.

By a letter dated April 25 which was received at the TMSC on April 27, Midwest protested the award of the contract to the third low bidder.<sup>1/</sup> Midwest stated that it had had new equipment ready to begin the service as required and that its appearance on the Report was based entirely on record-keeping violations. Midwest further stated that DOT had begun a re-evaluation of its status and that a new rating was to be issued by May 5, 1992. The contracting officer denied Midwest's April 25 protest as obviously without merit on May 4, 1992.

By letter dated May 12 which the TMSC received on May 18, Midwest's counsel advised the contracting officer that Midwest was appealing the contracting officer's May 4 decision and requesting that the appeal be forwarded to the Postal Service Board of Contract Appeals. On May 28, the contracting officer forwarded Midwest's appeal to the Board, which received it May 29. On June 2, the Board docketing the appeal, but also referred the matter to this office where it was docketed as a protest against the contracting officer's determination that Midwest's April 25 protest was obviously without merit.<sup>1/</sup>

In its protest, Midwest reiterates that its unsatisfactory rating was under review at the time of the contracting officer's determination and states that its rating was upgraded by DOT on May 8. Midwest alleges that the contracting officer precluded the operation of the provision of the solicitation which allowed a safety rating to be upgraded between bid closing and award by awarding the contract so soon after bid opening. Midwest maintains that the solicitation did not require the contracting officer to award the service so quickly and that the only reason he did so was in order to award to the third low bidder. Midwest states that the award was not in the best interest of the Postal Service since it will cost the Postal Service more money over the term of the contract.

In his report to this office, the contacting officer confirms that his nonresponsibility determination was based on Midwest's status on the Report. The contracting officer states that it is the policy of the TMSC to give as much notice as possible before the commencement of service. The contracting officer maintains that he was not obligated to delay the award to allow Midwest time to cure its safety record, noting it is not TMSC policy to hold up award of a contract, especially when many solicitations are on the

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<sup>2/</sup> It is unclear from the record how Midwest learned of the award to the third low bidder.

<sup>3/</sup> The Board eventually dismissed Midwest's appeal for lack of jurisdiction on July 14, 1992.

street.

Midwest submitted comments on the contracting officer's statement. First Midwest notes that the solicitation allows the contracting officer to award with thirty days' notice or on a subsequent date he might order.<sup>4/</sup> Midwest states that the contracting officer was familiar with Midwest's capabilities and should have known it could begin service on less than thirty days' notice. Midwest further states that the contracting officer was aware of Midwest's efforts to have its rating upgraded and that Midwest had sought and received approval from the next higher level of contracting authority to have the rating upgraded by May 15.<sup>4/</sup>

Midwest further alleges that the contracting officer's timing of the award to the third low bidder was "highly unusual and at worse case, extremely suspicious," listing three recent awards in which the awardee received less than thirty days' notice before service began.<sup>4/</sup> Midwest concludes from this that the contracting officer should have further investigated Midwest's circumstances before awarding to the third low bidder and that the contracting officer's choice in this case was made so that he could award to the third low bidder. Midwest suggests that investigation would reveal that little to no lead time was necessary for the third low bidder to begin the service since it was the contractor on the emergency service that the solicited service was replacing. Finally, Midwest reiterates its allegation that the rapidity of award in this case reflects "the special relationship between [the third low bidder] and either the Postal Service or this particular Contracting Officer."

### Discussion

Although no party has addressed the issue of timeliness, we may do sosua sponte because it affects the jurisdiction of our office to adjudicate this protest. Coopers & Lybrand, P.S. Protest No. 89-91, March 21, 1990. Our protest regulation, PM 4.5.4 e., provides that

[i]f a protest has been filed initially with the contracting officer, any

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<sup>4/</sup> Midwest's reading of the solicitation is inconsistent with our understanding. As noted supra, paragraph 11 of the solicitation allowed the contracting officer to establish the start of the term of service on or after June 6, but required the service start date to be at least 30 days subsequent to the date of contract award.

<sup>5/</sup> The significance of any approval from the next higher level contracting officer is not clear from the record. We note that the Postal Service would not be able to remove an individual from the Report, nor could the terms of the solicitation be waived.

<sup>6/</sup> The contracts were awarded under solicitation numbers 800-044-92, 800-011-92 and 800-092-91. All were issued by the TMSO. The record does not contain copies of the solicitations which could verify whether the same solicitation provisions were contained in each.

subsequent protest to the General Counsel received within ten working days of the protester's formal notification of, actual knowledge of, or constructive knowledge of initial adverse action by the contracting officer will be considered, provided the initial protest was received in accordance with the time limits in paragraphs b through d above.

Our regulations require that protests be filed with either the contracting officer or the General Counsel. PM 4.5.3 a. In past instances in which protests have been submitted to the Board, we have measured timeliness from the date we received the Board's subsequent transmittal to this office. Five Star Catering, P.S. Protest No. 88-68, January 31, 1989 (protest timely as so measured); Thomas J. Seitz Co., Inc., P.S. Protest No. 88-49, September 8, 1988 (untimely). See also EDAIR, Inc., P.S. Protest No. 88-33, May 31, 1988 (summary dismissal) (request for reconsideration of protest decision untimely as received). In other cases, initial protests styled as appeals but directed to the contracting officer have had their timeliness measured from the date of the contracting officer's receipt. Edwin T. Noyes III and Donald M. Oakes, P. S. Protests 79-22, 79-23, June 7, 1979; L. P. Fleming Jr. Hauling Inc., P. S. Protest No. 83-64, December 19, 1983.

Neither of these situations is directly analogous to the situation presented here. Here the subsequent protest (which was against the contracting officer's determination service that the initial protest was obviously without merit) was received by the contracting officer in the guise of an appeal which he had to forward to the Board of Contract Appeals under applicable regulations. See 39 CFR '955.4.<sup>1/</sup> Under our regulations the contracting officer does not have authority to consider a protest against his obviously without merit determination; such a protest may only be resolved by the General Counsel. See PM 4.5.4 e. Therefore, the timeliness of any such protest must be measured by the date of receipt by the General Counsel which in this instance was not until June 2 - well outside the 10 working day limit of PM 4.5.4 e.<sup>1/</sup> Midwest's subsequent protest is therefore untimely.

We will, discuss the protester's contentions briefly for the benefit of the parties. The requirement that the bidder not be rated unsatisfactory on the DOT Report is a special standard of responsibility (PM 3.3.1 c.), sometimes known as a definitive responsibility criterion. Definitive responsibility criteria are

specific and objective standards established for measuring an offeror's ability to

<sup>1/</sup> The cited section states in pertinent part:

When a notice of appeal in any form has been received by the contracting officer, he shall ... within 10 days ... forward said notice of appeal to the Board.

<sup>2/</sup> As noted supra, the contracting officer's initial decision was dated May 4 and Midwest had knowledge of it by at least May 12 since Midwest dated its subsequent protest that day.

perform the contract. These criteria cannot be waived, since to do so would prejudice other offerors who had fashioned their proposals around the criteria.

If a protestor alleges misapplication of definitive responsibility criteria, our review is limited to determining whether the contracting officer had before him information from which he reasonably could have determined that the criteria were or were not met.

TLT Construction Corp, P.S. protest No. 89-75, January 18, 1990 (citations omitted).

Here, the information before the contracting officer indicated that Midwest was rated unsatisfactory on the Department of Transportation Unsatisfactory Safety Rating Report. That information fully supported his conclusion that Midwest was nonresponsible. That the solicitation reflected that the criterion could be met after bid opening but before award reflects nothing more than the fact that evidence of a firm's responsibility may be furnished at any time prior to award, see AHJ Transportation, Inc., P.S. Protest No. 88-76, January 12, 1989, and does not require that the contracting officer allow any particular time between the acceptance of bids and award.

Similarly, Midwest is incorrect in its assertion that the contracting officer need not have allowed either it or the awardee the full 30 days between contract award to begin service. While a bidder may waive that requirement, it is under no obligation to do so, and the contracting officer has no right to impose a shorter startup period on the awardee. Award would have had to have been made by May 7 to allow service to begin on June 6.

Midwest's allegation that the award to the third low bidder was the product of favoritism is not supported by the record. It is the protestor's responsibility to establish such a position affirmatively. Hunter L. Todd, d/b/a Courier Express Mail & Package Delivery Service, P.S. Protest No. 85-78, October 18, 1985. No factual substantiation of this allegation was supplied by the protestor, and we may not make such a finding based on speculation. Id. The protestor's allegations consist merely of its own views; unsupported by evidence, which cannot provide a basis to overturn the award. BWN Contracting Co., Inc., P.S. Protest Nos. 89-38, 89-50 & 89-57, August 31, 1989.

The protest is dismissed as untimely.

William J. Jones  
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Office of Contracts and Property Law