

Protest of)
) Date: September 28, 1992
 GTEL GTE)
) P.S. Protest No. 92-60
 Solicitation No. 059991-91-A-0135)

DECISION

GTEL GTE ("GTEL") protests the cancellation of Solicitation No. 059991-91-A-0135 for an EPABX telephone system to be installed at the Oxnard, CA, Mail Handling Annex. The solicitation was issued on September 30, 1991, by the & Materiel Management Service Office in Bell, CA, with an offer due date, as amended, of November 13.

The solicitation cover page, Item 7., stated:

In compliance with this solicitation the undersigned offers and agrees, if this offer is accepted within . . . 90 calendar days . . . from the solicitation return date, to furnish any or all items upon which prices are offered at the same price set opposite each item, delivered at the designated point(s), within the time(s) specified in the solicitation.

Award was not made within ninety days after November 13. Prior to the expiration of the time for acceptance, the contracting officer requested time extensions from all offerors, receiving extensions which ranged from March 12 to March 31, 1992. A contract was awarded to Comcraft, Inc., on March 13. On March 16, GTEL filed a protest with the contracting officer, claiming that Comcraft's proposed EPABX did not meet the required specifications. After consulting the evaluation committee, the contracting officer agreed with GTEL and, on March 27, terminated Comcraft's contract. At that time, she informed the other offerors of her action and stated that "[t]he solicitation will be reinstated and contract award will be made to the vendor meeting the requirements . . . of this solicitation."

Comcraft filed a protest against the contracting officer's action on March 31. Upon notification of Comcraft's protest, the contracting officer requested additional time extensions from the offerors, receiving extensions varying from April 13 to May 20.

GTEL offered to extend its price to May 20. On May 28, this office denied in part and dismissed in part Comcraft's protest. See Comcraft, Inc., P.S. Protest No. 92-20, May 28, 1992.

Meanwhile, on March 27, the Office of Procurement at Postal Service headquarters competitively awarded to two contractors mandatory ordering agreements for the procurement of telecommunications systems consisting of two or more instruments.^{1/} On June 12, the Postal Service issued Management Instruction ("MI") AS-710-92-4, effective immediately, directing that all covered requirements be procured using the Telephone Cost and Evaluation Model ("TCEM"), a computer model that calculates the technical and price solutions submitted by the Ordering Agreement vendor and the Local Exchange Carrier ("LEC").^{2/} The TCEM provides that all covered telephone systems will be procured either by purchasing the system from one of the Ordering Agreement vendors, or leasing it from the LEC. The Oxnard EPABX is a telephone system of a size within the scope of the TSNAP contracts.

Neither before nor after May 20 did the contracting officer request any additional time extensions from the offerors on the Oxnard solicitation. On July 22, the contracting officer forwarded the requirement to the Regional Telecommunications Specialist for handling pursuant to MI-AS-710-92-4 and the TSNAP contracts. To date, the requirement has not been filled.

In its protest dated July 29, GTEL objects to the Postal Service's failure to request additional time/price extensions and its allowing the solicitation to expire.^{1/} GTEL further complains that it did not receive a copy of the decision in Comcraft's protest, contrary to Postal Service Procurement Manual ("PM") ' 4.5.7 m.^{4/} Finally, it requests

^{1/} These awards were the result of the Telephone System National Aggregated Procurement ("TSNAP").

^{2/} The LEC is the local franchised telephone company, such as Pacific Bell Telephone Company, that offers Centrex and serves a specific geographic area.

^{3/} Alternatively, it contends that the proposals under the solicitation have not expired, arguing that the solicitation contains no proposal expiration date. GTEL, apparently ignoring the several extensions requested by the contracting officer, contends that the 90 day proposal acceptance time set out on the solicitation's cover page cannot be binding, because if it was, the original offers would have expired in February, 90 days after the proposal due date.

^{4/} PM 4.5.7 m. states in pertinent part:

The General Counsel's decision on a protest disposes of the matter. Copies of the General Counsel's decision must be furnished to the contracting officer, the responsible APMG, the protester, and any other participant in the protest.

We do not find a violation of PM 4.5.7 m., as GTEL suggests. Our regulations state that a copy of the decision should be sent to the protester and "any other participant in the protest." PM 4.5.7 c. allows potential interested parties to notify this office of their intent to submit comments on a protest within five working days of their receipt of the notice that a protest was filed. When asked, the contracting officer stated that all offerors were informed of the Comcraft protest. The record of that protest contains no notification by GTEL of its intent to participate in the protest, and thus no obligation to furnish it a copy of

that award be made under the initial solicitation and states that its proposal met all the requirements of the solicitation.

The contracting officer's statement^{4/} reiterates the history of the procurement and states that in a telephone conference on July 22, the contracting officer informed GTEL that Comcraft's protest had been denied, that the prior time extensions had expired, that a decision had been made to request no further extensions, and that no award would be made based on the original offers.^{1/} The report offers two reasons for the decision to request no further extensions. Based on information received from one of the offerors, proposing to lower its price, the contracting officer determined that the existing prices were becoming stale. Also, she knew that the Office of Procurement at Postal Service Headquarters had awarded the TSNAP contract and in June would be issuing new mandatory procurement procedures pursuant to its terms.

The contracting officer disagrees with GTEL's conclusions regarding the expiration of proposals, stating that Item 7 on the cover page clearly refers to a proposal expiration date. She states that if the deadline is extended by mutual agreement, the extended deadline is final if no award is made by that date.^{1/} Finally, the contracting officer states that she assumed that a copy of the Comcraft decision had been forwarded to GTEL by this office.

In its comments to the contracting officer's statement, GTEL alleges that it contacted the contracting officer several times prior to July 22 to ascertain the status of the procurement, but did not find out that no further time extensions would be requested until that date. It claims not to have received written notification that the contracting officer intended to let the solicitation expire until August 17, when it received the contracting officer's report in this protest.

GTEL claims that if the contracting officer was concerned about the prices becoming stale, she should have requested Best and Final Offers, instead of allowing the proposals to expire. It concedes that it was aware of the possibility that if award was not made in a reasonable time, it might be procured under the TSNAP contract, but

the protest decision arose.

^{5/} Because the contracting officer who was assigned to the procurement was unavailable, the report was drafted and submitted by her superior.

^{6/} According to the contracting officer, GTEL suggested at that time that the solicitation had expired because the contracting officer had not requested that anyone follow up on the price extensions while she was out of the office on leave in late May. The contracting officer informed GTEL that, to the contrary, the proposals had expired prior to her taking leave on May 29, and her subsequent absence from the office for training.

^{7/} In any event, the contracting officer states that GTEL's complaint about the meaning of Item 7 is untimely, as it should have raised the issue prior to the offer due date.

complains that it was never informed of the decision to do so. GTEL believes that it should have been awarded the contract, based on its technical compliance and price, and objects to the procurement practices that prolonged the solicitation beyond a reasonable time for award.

Discussion

As an initial matter, we must decide if GTEL's protest is timely filed. The PM states that protests must be received "not later than ten working days after the information on which they are based is known or should have been known, whichever is earlier. . . ." PM 4.5.4 d.

We are without authority to consider a protest which is untimely. Unlike the Comptroller General, we have no regulatory authority to waive or disregard an issue of timeliness in a particular case. 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.

American Procurement Telephone Distributors, Inc., P.S. Protest No. 87-117, February 23, 1988 (citations omitted.)

On March 27, 1992, the contracting officer informed GTEL that the award to Comcraft had been canceled and that the solicitation would be reinstated. Upon notification that Comcraft had filed a protest against the cancellation of its contract, she requested a time extension from the various offerors, but requested no further extensions after May 20. GTEL alleges that it made several requests regarding the status of the solicitation, but was not told of the decision to let the time for acceptance expire until July 22, over two months after its offer had, in fact, expired. Expiration of the time for acceptance, and thus the offer, is automatic, CDA Inc., Comp. Gen. Dec. B-224971, 87-1 CPD & 163, February 13, 1987, fn. 1., notwithstanding the fact that a contracting officer may have the discretion to revive an expired proposal. See, e.g., Rubbermaid, Inc., Comp. Gen. Dec. B-238631, 90-1 CPD & 444, May 2, 1990. However, an expired offer can only be revived with the consent of the offeror. JDR Systems Corporation, Comp. Gen. Dec. B-214639, 84-2 CPD & 325, September 19, 1984. Therefore, when the contracting officer did not request further extensions, GTEL was on notice that the solicitation was canceled as of May 20.

The "grounds for protest arise when the protester has learned of an agency's action or intended action which is inconsistent with what the protester believes to be correct." Coopers & Lybrand, P.S. Protest No. 89-91, March 21, 1990. Although it would have been far better for the offerors to have been notified of the decision not to further extend the solicitation, GTEL knew, or should have known, the basis for its protest on

May 20, when the contracting officer failed to request further price extensions.^{1/}

As such, its protest is untimely. "The timeliness requirements imposed by our regulations are jurisdictional and we cannot consider the merits of any protest that has been untimely raised." GF Office Furniture, Ltd., P.S. Protest No. 92-07, March 19, 1992.

The protest is dismissed.

For the General Counsel:

William J. Jones

^{3/} GTEL incorrectly concludes that there is no proposal expiration date stated in the solicitation. There was such a date, and the contracting officer's actions in soliciting extensions to the offers was consistent with it. "Where a contracting officer deliberately allows the bid acceptance period to expire without making any award . . . we view this as a constructive cancellation. . . ." Adrian Supply Co., Comp. Gen. Dec. Nos. B-240871, B-240872, 90-2 CPD & 515, December 21, 1990. In any event, GTEL's complaint about a suspected ambiguity in the terms of the solicitation is untimely. "Protests based on alleged deficiencies in a solicitation that are apparent before the date set for the receipt of proposals must be received by the date and time set for the receipt of proposals." PM 4.5.4 b. Neil Gardis & Associates, Inc., P.S. Protest No. 92-08, March 13, 1992.