

**June 5, 1997**

**P.S. Protest No. 97-06**

## **CARL J. AND BETTY B. KOLLENBERG**

**Solicitation No. 483083-97-P-0773**

### **DIGEST**

Protest of the award of a contract postal unit contract is dismissed as untimely; purchasing specialist's initial oral advice of intent to award to another established basis for protest.

### **DECISION**

Carl J. and Betty B. Kollenberg (the Kollenbergs) protest their failure to receive award of a contract to operate a contract postal unit (CPU) in Schertz, TX.

Solicitation 483083-97-P-0773 was issued to four prospective offerors by the Dallas, TX, Purchasing and Materials Service Center on December 6, 1996, requesting offers for the CPU to be submitted December 27. The following recital of the events surrounding the solicitation is based on the contracting officer's report.

Under the solicitation's evaluation scheme, each offeror's business and price proposals were to be evaluated on a 100 point scale. The points awarded to each business proposal were divided by the highest number of points received to arrive at the offeror's business score, and each offeror's annual rate was divided by the lowest annual rate proposed to arrive at its price score. The final score of each offer consisted of 60% of its business score and 40% of its price score.<sup>1</sup>

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<sup>1</sup> Because all offerors were to perform at the same site, the Seguin State Bank and Trust in Schertz, two of the three criteria normally used to evaluate the offeror's business proposals, suitability of location and suitability of facility, were not applicable, leaving the third criterion, ability to provide service, as the sole business factor.

Three of the four offerors submitted offers by the date set for their receipt. The fourth, M & M Postal Services, Inc., (M&M) did not timely receive the solicitation, apparently because it had been sent to the wrong address. M&M eventually received a copy, and submitted its proposal, which was signed on January 3, 1997.<sup>2</sup>

The solicitation incorporated by reference Provision A-4, Late Submissions and Modifications of Proposals, October 1987, which provides in part:

Any proposal . . . received . . . after the exact time specified for receipt will not be considered unless it is received before award is made and:

\* \* \*

- b. Consideration of the proposal is determined by the contracting officer to be in the Postal Service's best interest.

Procurement Manual (PM) 4.2.3.d. 2. provides in part:

Late proposals . . . may be considered in accordance with Provision A-4 . . . . It is normally in the interest of the Postal Service to consider a late proposal when doing so would cause no delay in the evaluation process, . . . or the proposal offers a significant cost, quality, or technical benefit. It is not in the interest of the Postal Service to consider any proposal received so late that consideration of the proposal would jeopardize, or give the appearance of jeopardizing, the integrity of the competitive process.

The contracting officer states that consistent with this provision she "exercised [her] discretion in favor of considering the late proposal" because it would neither delay evaluation of offers or jeopardize or appear to jeopardize the integrity of the competitive process.

The offers were not opened on December 27, and the record does not reflect when they were opened, but on January 8 or 9, the four business proposals were sent to the technical evaluators in San Antonio. The evaluators were not provided with any offeror's price proposals.

By letter dated January 9, transmitted to the Postal Service by facsimile on that date, M&M submitted a downward revision to its price proposal. The letter asserted that in its haste to submit the proposal, "a clerical extension error was made in our price."

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<sup>2</sup> The contracting officer's statement and its supporting documentation are inconsistent both as to whether and when M&M belatedly received the original solicitation or a replacement, and when its late offer was received. The inconsistencies are not material.

The technical evaluations were received from San Antonio on February 10. That day, the purchasing specialist who was responsible for the solicitation prepared computations of each offeror's business and price scores, along with a computation of the final scores based on the 60/40% weighting. The purchasing specialist's computations of M&M's price and final scores, however, were based on its initially offered price, not its price as revised by its January 9 letter, because that letter had been misplaced.

According to the initial calculation, the Kollenbergs' offer had the highest score. That offer was the third-ranked as to its business proposal, receiving 86 out of 100 points, and thus a final score of 51.6 out of 60, and it was the lowest priced offer, receiving the full 40 points for price, and a total score of 91.6. M&M's offer, on the other hand, had the highest-ranked business proposal (60 points) but its unrevised price score, third highest over all, received 74 of 100 price points, and thus only 29.6 of the available 40 price points, a total score of 89.6.

On February 11, the purchasing specialist discussed the Kollenbergs' offer, including its low business score, with the Schertz postmaster and the San Antonio retail specialist who had been on the evaluation committee. In the course of that conversation, the prices of the other offerors were also discussed. The purchasing specialist prepared, signed and mailed to the Kollenbergs a "letter of intent," dated February 12 stating in part that "[y]our offer . . . has been accepted" but stating "[h]owever, before any additional consideration can be made, . . . it will be necessary for you" to submit a properly executed contract postal unit bond.<sup>3</sup>

On February 18, the San Antonio retail specialist telephoned the purchasing specialist to recount a conversation he had had with one of M&M's principals. Discussing the Schertz CPU solicitation, the retail specialist had "stated that [M&M's] offer was high" to which the principal responded that while the initial offer had been high, "the revised bid should have been 'OK.'" The retail specialist inquired of the purchasing specialist whether she had used M&M's revised price in her initial calculation, causing her to realize that she had not.

While M&M's price, as revised, was higher than the Kollenbergs' price, it was close enough to it to receive 95 price points and thus a final price score of 38. Its total combined score was thus 98, significantly higher than the Kollenbergs' score. The purchasing specialist called Mr. Kollenberg, and told him of the mistake and its circum-

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<sup>3</sup> Solicitation provision J.3, Contract Postal Unit Bond, provided that "[p]rior to award, the offeror selected for award must complete a contract postal unit bond in the amount specified in Attachment 1 [here, \$30,000] . . . executed by a surety acceptable to the Postal Service."

stances.<sup>4</sup> In that discussion, Mr. Kollenberg advised, *inter alia*, that he had not yet secured a bond.

On February 21, the purchasing specialist sent M&M a letter of intent requesting its bond. Its executed bond was returned on March 3. In the meantime, the purchasing specialist had had two further conversations with Mr. Kollenberg about the circumstances of the error. Contract award occurred on March 4, and the unsuccessful offerors were advised of the award and of the contract amount by letters of that date.

Counsel for the Kollenbergs submitted the protest on March 17. It raises two basic issues. First, it contends that the purchasing specialist's February 12 letter accepted the Kollenbergs' offer. Second, it contends that irregularities "in the bidding and award process, including an apparent violation of the U. S. Postal Service bidding procedures, resulted in unfair treatment of the Kollenbergs." The protest supports its contentions with the Kollenbergs' understanding of the circumstances of the award gleaned from Mr. Kollenbergs' conversation with the purchasing specialist. That understanding is inconsistent with the recital of the circumstances subsequently offered by the contracting officer. Specifically, the protest contends that the M&M price reduction "appeared" after the February 12 letter was sent, and that its consideration thus was precluded by Provision A-4's requirement that a late offer be received "before award."

The contracting officer's statement acknowledges that "this was not a model procurement" and she offers an apology to the Kollenbergs, but she denies that any of the actions taken in the course of the protest were intended to harm the Kollenbergs or to favor M&M improperly.

The contracting officer contends that the protest is untimely, asserting that the Kollenbergs had all the information necessary to their protest by February 18 or 19, and that, pursuant to Purchasing Manual 3.6.4.d., to be timely the protest must have been received within ten calendar days of that date, or no later than March 4.<sup>5</sup> The contracting officer also notes that the purchasing specialist is not a contracting officer and lacks the authority to award contracts, and that the February 12 letter was sent "for the sole purpose of requesting the surety bond."

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<sup>4</sup> According to the contracting officer, the purchasing specialist's notes state that the conversation occurred on February 18. The protester places the telephone conversation on February 19.

<sup>5</sup> The Purchasing Manual, issued January 30, 1997, is the successor to the Procurement Manual. During an initial transition period, purchasing organizations may continue to use the Procurement Manual's policies and procedures, but the Purchasing Manual's protest regulations will apply. Purchasing Manual Transmittal Letter Issue 1. The cited section provides, in pertinent part, that "the protest shall be received not later than ten days after the basis of protest is known or should have been known."

Replying to the contracting officer's statement, the Kollenbergs' counsel contends that in the absence of a disclosure of the limitations of the purchasing specialist's authority, the February 12 letter is binding by reason of the specialist's apparent authority; criticizes the contracting officer for contending that the protest is untimely while failing herself to submit her contracting officer's report within the 30 day time frame established by Purchasing Manual 3.6.7.e; asserts that the protest was timely submitted following the disclosure of "'bits and pieces' of inconsistent and incomplete information" in the several telephone conversations which Mr. Kollenberg had with the purchasing specialist; and closes with a request for justice and fair treatment. Counsel also encloses the comments of the Kollenbergs on other aspects of the contracting officer's report, which include the following:

- An assertion of M&M's lack of "actual postal service experience" and of the absence of information in its proposal of experience of its proposed personnel.
- Objections to one evaluator's evaluation based on his assertion of "problems" arising under a different Kollenberg contract and his downrating of their proposal for a "conflict of interest" arising out of their operation of a private mail center while M&M was not downrated for a similar conflict.
- Professed disbelief over the circumstances of the misdelivery of the M&M solicitation and of the error in M&M's proposal.
- The contention that their offer was the only offer received which was within "the budgeted amount for this station."<sup>6</sup>
- Assertions that their offer better met the business criteria of the solicitation at a lower price than M&M's offer.
- Objections that they should have been advised of the opportunity to revise their offer, since if M&M's revised offer could have been accepted, so should the Kollenberg's.

## **DISCUSSION**

We first address the issue of timeliness raised by the contracting officer. The contracting officer is correct that oral notification of action adverse to the protester is sufficient to begin the running of the time within which a protest must be filed. *Computer Systems and Resources*, P.S. Protest No. 87-38, June 24, 1987. Although elements of the circumstances surrounding the revision of M&M's evaluated price apparently were

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<sup>6</sup> The basis for this assertion is unclear; the protest file contains no such figure.

uncertain,<sup>7</sup> the initial telephone conversation between the purchasing specialist and Mr. Kollenberg conveyed the information which was central to the protest: Another offeror's late modification had not been used in the initial evaluation, and its offer as revised by that modification, displaced the Kollenbergs' offer. Because the timeliness standard is jurisdictional, *Domino Amjet, Inc.*, P.S. Protest No. 91-45, September 11, 1991, the protest must be dismissed.

We will, however, comment briefly on the issues which the initial protest presents.<sup>8</sup> Although the "letter of intent" was inartfully worded,<sup>9</sup> it could not, and did not, create a contractual relationship between the Postal Service and the Kollenbergs. The purchasing specialist lacked contracting authority, and thus could not bind the Postal Service to any agreement. Contrary to counsel's argument, principles of apparent authority are not applicable to agents of United States government entities, which may be bound only by agents with actual authority. See, e.g., *Kathleen Roberts*, P.S. Protest No. 92-57, August 12, 1992, (citing *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947)).

The protest's remaining issue is, as discussed above, based on factual assumptions not supported by the record. M&M's revised offer was received shortly after its initial offer and its consideration as a late modification was consistent with the requirements of the Late Offers and Modifications provision. *EnPro Corporation*, P.S. Protest No.

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<sup>7</sup> For example, the protesters and the contracting officer dispute whether the purchasing specialist incorrectly advised them that M&M's offer was \$1,500 lower than their offer (as the protester states), or only that there was a \$1,500 difference between the offers, without indicating whether M&M's price was higher or lower than the Kollenbergs (as the contracting officer asserts). While the difference might have been relevant to timeliness in another context (see, e.g., *AMR Distribution Systems*, P.S. Protest No. 95-41, December 5, 1995 (where protest complained that awardee's price was less than protesters (and thus unrealistically low), timeliness was measured from the date the protester learned of awardee's price, not the earlier date it learned of intent to give awardee the contract)), here the relative prices of the parties were not important to the protester's contentions that it had already received the award and accordingly that there was an impropriety in considering M&M's revised offer.

<sup>8</sup> The additional issues presented in the Kollenbergs' rebuttal comments are also untimely raised and, with one exception, do not require comment. The exception is the objection to one evaluator's view of the Kollenbergs' business proposal. Any error in that evaluation (a matter we need not reach) was harmless, since that evaluator's scores were consistent with those of the other two evaluators, and the elimination of the challenged evaluation would not have affected the standing of the Kollenbergs' offer.

<sup>9</sup> Handbook AS-707F, Contracting for Contract Postal Units, July 1, 1989, contains, at Exhibit B, Part 4, a form of letter of intent which is better stated than the letter used here. Its operative paragraph provides as follows:

After evaluating all proposals, yours was determined to be the most advantageous to the Postal Service. However, before the contract can be awarded, you must obtain a Contract Postal Unit bond in the amount of \$\_\_\_\_\_ from a bonding company approved by the Treasury Department.

91-48, October 9, 1991. The fact that the modification was subsequently misplaced and overlooked in the initial calculation of the offers' standing, while unfortunate, does not affect the propriety of its initial consideration, and affords no basis for relief.

The protest is dismissed.

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