

June 25, 1997

P.S. Protest No. 97-08

JACK-MAR, INC.

Solicitation No. 475630-97-A-B090

DIGEST

Protest from offeror on solicitation mailing list of failure to receive solicitation is sustained in part. Offeror holding local interim vehicle washing agreement was not incumbent contractor entitled to receive solicitation, but to the extent that it was denied solicitation for subjective reasons unrelated to equitable rotation of mailing list, failure to solicit was inappropriate.

DECISION

Jack-Mar Inc. protests the failure of the contracting officer to provide it a copy of Solicitation No. 475630-97-A-B090 for vehicle dry washing services at New Port Richey, FL, depriving it of an opportunity to submit an offer, and requests that it be "reinstated" at New Port Richey, FL with a new two-year contract.¹

Solicitation -B090² was issued by the Purchasing and Materials Service Center, Memphis, TN, on January 12. The solicitation sought offers for vehicle dry washing

¹ While the protest also sought the cancellation of Solicitation No. 475630-97-A-B130 for vehicle cleaning services at St. Petersburg, FL, we are informed that Jack-Mar had, in fact, submitted an offer in response to that solicitation and was awarded a contract on April 25, 1997, mooting that part of the protest.

² The record also includes references to this solicitation as -0090.

services³ to be performed at a number of locations in the Tampa, FL, area including New Port Richey. Section M of the solicitation stated, in part, "[t]he Postal Service may enter into one or more vehicle washing/cleaning agreements. The Postal Service intends to award a contract to the responsible offeror(s) whose proposal(s) offers the lowest cost or price to the Postal Service." Under the solicitation as amended by amendment A02, offers were to be received by February 3.

In a letter to the contracting officer dated March 12, Jack-Mar stated that its 1 washing contract at New Port Richey was terminated on March 12 because a new vendor (the successful offeror under solicitation -B090) received an award to serve New Port Richey, FL, and complained that Jack-Mar had not been given the "courtesy to make an make an offer on New Port Richey." Citing the Freedom of Information Act (FOIA), Jack-Mar requested the list of offices in the solicitation; the list of vendors that received the solicitation, the name of the successful offeror for New Port Richey; and the unit price agreed upon. Jack-Mar also stated that it expected to be included "in any vehicle cleaning solicitations within one hundred miles of Tampa, FL."

On March 18, the contracting officer responded by providing the name of the awardee, Budget Mobile Washing;⁴ the total contract price, a list of the vendors solicited and the list of the offices included in the solicitation. The request for the awardee's unit pricing was denied, and Jack-Mar was advised of its FOIA appeal rights with respect to the information withheld.

On March 24 Jack-Mar wrote to the General Counsel outlining its history as a vehicle cleaning vendor for the Postal Service, and stated that it was "positive that the Postal Service made an error by not including [it] in solicitation no. 475630-97-A-0090 and not giving [it] an opportunity to re-negotiate to dry wash and roll over an existing agreement." Jack-Mar sought reinstatement at New Port Richey with a new two year contract to dry wash vehicles at its "old price of \$9.00 per vehicle." Jack-Mar stated that some wet wash firms (not identified) had been able to re-negotiate prices and roll over their contracts to dry wash.

Jack-Mar also pointed out that though it was underbid for a vehicle cleaning contract for St. Petersburg in August/September 1996, it was asked by St. Petersburg VMF to resume cleaning vehicles, beginning on February 23, after the termination of the successful offeror's contract.

Although it appeared that Jack-Mar's letter may have been intended as a FOIA appeal, it made no request for the information previously withheld, while seeking, instead, to

³ Dry washing is a waterless cleaning technique which employs cloth impregnated with a cleaning substance that captures the dirt.

⁴ The contracting officer's statement reflects that oral notice of award was given to Budget on February 21. However, Agreement No. 475630-97-R-0505, which included the New Port Richey office, was not executed until March 17.

challenge the propriety of the solicitation process for the New Port Richey contract. Such a matter is cognizable by this office, if at all, as a protest under the procedures at Purchasing Manual 3.6., and has been handled accordingly.⁵

In his statement responding to the protest, the contracting officer stated that vehicle washing requirements are "bundled" whenever possible to include many offices in one contract in order to minimize administration, help small, remote, offices obtain service, and get more competitive pricing.

In September, 1996, three solicitations were issued by the Memphis PMSC for three of the four VMF offices in the Tampa district. Washing services for New Port Richey were included in the solicitation. Jack-Mar submitted partial proposals on two of the three solicitations, stating that no offers were being made for certain facilities because they were too far away. After the evaluations were completed, it was concluded that a sufficient number of proposals offering to perform all of the services sought had been received at competitive prices so as not to require the further consideration of partial proposals, including Jack-Mar's. Innovative Dry Wash Systems was awarded a vehicle cleaning contract which included the New Port Richey office on October 21, but that contract was terminated on November 29 because of unsatisfactory performance. Because it would have taken about 60 days to award another contract, local offices were instructed to obtain interim cleaning services themselves. Jack-Mar had been dry washing vehicles for the New Port Richey office on the basis of an interim agreement. However, information about that agreement was not given to the Memphis PMSC.

On January 12, solicitation -B090 was issued. Eight qualified vendors from a list of 28 were given copies of the solicitation. Jack-Mar, which was on the longer list was not given a copy "for some of the following reason": the vendor list was being rotated; Jack-Mar was believed not to be interested in all locations included in the bundle package based on its prior submissions; and there were reports of Jack-Mar's unsatisfactory performance from offices encompassed by the Tampa District VMF.⁶

With respect to Jack-Mar's remark that it was not given an opportunity to re-negotiate to dry wash and roll over an existing agreement, the contracting officer states that Contract No. 475630-95-R-0467 with Jack-Mar had been terminated effective August 11, 1996, and any work it was doing was under a local interim agreement. As to Jack-Mar's claim that some wet wash firms had been able to re-negotiate prices and roll over their contracts to dry wash, but that it was not given that opportunity, the contracting

⁵ 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. These washing services were solicited pursuant to the Procurement Manual's procedures.

⁶ The contracting officer's records indicate that Contract Nos. 475639-95-R-1519, 475630-95-R- 0467 and -1482 with Jack-Mar were terminated for unsatisfactory performance.

officer said that every attempt is made to ensure that minority vendors are included in source lists, but that Postal Service policy does not allow for special considerations.

DISCUSSION

Since the requirement that a protest must be timely filed is jurisdictional, we first determine whether Jack-Mar's protest before this office is timely. See, e.g., *Federal Systems Group, Inc.*, P.S. Protest No. 88-12, April 26, 1988. Under Purchasing Manual 3.6.4.d., a protest must be received not later than ten days after the basis of the protest is known or should have been known.

Jack-Mar was advised on March 12 that another company had received a vehicle dry wash contract that included the New Port Richey office. The letter that Jack-Mar sent to the contracting officer on the same day, though it did not use the word "protest", did complain that it had not been given an opportunity to make an offer on New Port Richey (solicitation -B090). Jack-Mar's letter of March 24 to the General Counsel seeking "reinstatement" of a vehicle washing contract at New Port Richey, repeated its complaint about its failure to receive a copy of solicitation -B090.

Jack-Mar's March 12 complaint addressed to the contracting officer constitutes a protest which was timely filed. *Amos L. Griffin, Sr.*, P.S. Protest No. 87-61, July 30, 1987.

As to the substance of Jack-Mar's protest, we have said:

The usual context in which the question of the failure to solicit arises is with respect to the failure to provide an incumbent contractor with the solicitation for the successor contract. In such cases, we review the matter from the standpoint of the following factors:

- (1) Whether adequate competition was obtained;
- (2) Whether the offers received were at a reasonable price;
- (3) Whether the failure to comply with requirements intended to secure competition was inadvertent.

In our review, we look at the matter from the perspective of the Postal Service, rather than that of the omitted bidder.

Earth Management Inc., P.S. Protest No. 95-45, December 22, 1995 (Citations and internal quotations omitted).

The contracting officer solicited eight of the twenty-eight firms on the mailing list and received seven offers, of which the low offer was found to be fair and reasonable. The first two factors set out above were thus met.

In the context of this protest, the third factor was also met, in the sense that the failure to solicit Jack-Mar was not the failure to solicit an incumbent contractor in the context of the requirement at Procurement Manual 4.2.2.d that the incumbent contractor be solicited for a follow-on procurement. This solicitation was not a follow-on to Jack-Mar's contract; it was, if anything, a follow-on to the contract with Innovative Dry Wash Systems which the Memphis office had awarded in October.

To the extent that the contracting officer's statement suggests that Jack-Mar might not have received a copy of the solicitation for subjective reasons (such as concerns its about past performance, or the nature of its response to the prior solicitation, its exclusion from the mailing list was not part of an equitable rotation of the mailing list, and was inappropriate. *Melvin R. Kessler*, P.S. Protest No. 90-36, October 23, 1990; *Richard C. Gentry, Inc.*, P.S. Protest No. 94-33, October 31, 1994. Accordingly, to the extent that Jack-Mar was excluded on that basis its exclusion was inappropriate, and the protest is sustained to that extent.

As to relief, whether termination for convenience of the Postal Service is an appropriate remedy depends on the best interests of the Postal Service. [W]hether to require termination action in a given case depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the requirement, and the impact of termination on the accomplishment of the agency's mission.

CFI, P.S. Protest No. 88-82, February 17, 1989 (citations and internal quotations omitted).

While neither the extent of performance, cost, urgency, or impact on mission preclude a remedy, we conclude that no remedy is appropriate. Since a concern's presence on a mailing list does not mean that it will receive every solicitation, and the regulation provides that an overly long mailing list may be reduced by any

equitable method, Jack-Mar's presence on the mailing list did not assure it of receiving every solicitation.⁷ Procurement Manual A.3.3.a; *Earth Management, supra*. Accordingly, Jack-Mar was not seriously injured by the contracting officer's error, and its receipt of solicitation -B130 and a resultant contract suggests the contracting office's lack of bad faith with respect to it.⁸

The protest is sustained to the extent indicated.

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⁷ Since eight offerors were selected out of twenty-eight, Jack-Mar had one chance in 3.5 of receiving a solicitation if the list were rotated randomly.

⁸ We have no authority to order reinstatement of Jack-Mar's prior New Port Richey contract. *American Bank Note Company*, P.S. Protest No. 94-02, May 11, 1994.