

August 18, 1997

P.S. Protest No. 97-17

PATRICIA GAMBLE

Solicitation No. 800-39-97

DIGEST

Protest against award to low offeror is denied; premise that low bidder, an owner/operator, must receive wages in accordance with Service Contract Act wage determination is incorrect.

DECISION

Ms. Patricia Gamble protests the award of a contract for the highway transportation of mail.

Solicitation No. 800-39-97 was issued April 25, 1997, by the Western DNO, seeking bids for highway transportation contract for box delivery service out of Thoreau, New Mexico, for a term which was to begin on July 1, 1997, and end June 30, 2000. A corrected abstract dated June 2 indicated that six offers were received. Mr. Carlos J. Gallegos proposed the lowest annual rate, \$12,619, while Ms. Gamble's \$20,882.28 annual rate ranked fifth.

In her protest, received in this office on June 11,¹ Ms. Gamble said that she was protesting because the award to the low bidder is below the minimum hourly wage for a

¹ The protest was addressed "to whom it may concern," and was sent both to the contracting officer and to this office. When a protest is sent both to the contracting officer and to the General Counsel, and the intended primary addressee of the protest cannot be determined, "the protest will be considered to be intended for the General Counsel." Purchasing Manual (PM) 3.6.3.b.

driver employed on a contract for rural route delivery as recited in the Service Contract Act wage determination incorporated in the solicitation and that Mr. Gallegos will not be able to cover the required wage and fringe benefit expenses as well as the other expenses such as fuel and insurance that will accrue for the route.

The contracting officer wrote to Ms. Gamble on June 16 pointing out that the awardee will operate the route as an owner-operator and that the hourly wage provisions apply only to employees of a mail transportation contractor, not to an owner-operator.

DISCUSSION

Initially, the protest presents a question of Ms. Gamble's standing to challenge the award to Mr. Gallegos. Her protest as the fifth-ranked offeror raises no direct challenge to the evaluation of the second-, third-, and fourth-ranked offerors. Accordingly, under the previous decisions of this office, Ms. Gamble may not be an "interested party" in the terms of the protest regulation "whose direct economic interest would be affected by the award of a contract or by the failure to award a contract" (PM 3.6.2.a) because she would not be eligible to receive the award if the protest were upheld. *Rickenbacker Port Authority and The Turner Corporation*, P.S. Protest No. 91-78, February 10, 1992.

In this case, however, all the bids lower than Ms. Gamble's may suffer from the same defect asserted for the low bid. The wage determination in the solicitation required an hourly wage of \$10.21 per hour, plus \$.90 per hour for health and welfare, at least one week's paid vacation, and ten paid holidays. Given the 1,187 annual hours estimated for this route, we approximate the annual cost for wages under the wage determination as in excess of \$14,400. This is more than the two lowest bids, and the third and fourth bids (\$14,949 and \$16,483, respectively) are close enough to that amount to raise a similar question about the bidder's ability to cover the wage cost and meet his or her other expenses. (The file does not reflect whether any of the intervening bidders bid as owner/operator.)

We need not resolve the matter, however, since the contracting officer has indicated that Mr. Gallegos bid as an owner/operator. As the contracting officer has correctly pointed out, an owner/operator is not subject to the requirement that he receive wages and benefits in accordance with the Service Contract Act wage determination. Procurement Manual (Pub. 41) recites at 10.2.10.b the exception from the Act for "[c]ontracts for mail service with an individual owner/operator, when it is not believed that the contractor will hire service employees under the contract except for short vacations or unexpected contingencies or emergencies." *Cf. Carol Johnson*, P.S. Protest No. 92-46, August 3, 1992.

The protest is denied.

William J. Jones
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Contract Protests and Policies