

**August 28, 1998**

**P.S. Protest No. 98-13**

**JOHN AND JOYCE MACDONALD**

**Solicitation No. 020315-98-A-0010**

**DIGEST**

Protest of evaluation of offer for contract station is denied. Offer could be downrated for failing to offer storefront space and for problems of accessibility, and any overstatement of the extent of those deductions did not affect the conclusions of the evaluation.

**DECISION**

John and Joyce MacDonald protest their failure to receive award of a contract to operate a contract postal unit (CPU) in Sitka, Alaska.

The MacDonalds had held contracts for CPUs in Sitka since 1979 (Contract Station No 1 from 1979 to 1995, and Pioneer Station since 1987). According to a memorandum accompanying the contracting officer's report, Administrative Services, Alaska District, issued solicitation 020315-98-A-0010 in February, 1998, "to obtain more space and to [serve] the public better than . . . at the [current] Pioneer Station."

The solicitation described the area for the postal facility as follows:

Dock area boundaries. The USPS is looking for store front space. Attached is a map showing you where we would like to see the CPU.

The accompanying map depicted an area in the vicinity of Crescent Harbor.<sup>1</sup>

The solicitation described the desired facility by size:

Size: Floor Space: 1400 square feet  
Wall Space: 100 Sq. Feet for PO Boxes (if required)<sup>[2]</sup>

Amendment A02 add a requirement “that the proposed space have two entries, so we can move the mail into the building without hindering the customers.”

Section M of the solicitation provided that offers would be evaluated on the basis of specified factors, referred to as the business score,<sup>3</sup> and that award would be made on the basis of a weighted combination of the business score and the price score.<sup>4</sup>

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<sup>1</sup> Amendment A01 to the solicitation included the following: “On the MAP change [preferred] area to include Lincoln Street [past] Lake Street to Monastery Street.” The protester asserts that its location was not within the originally designated area, but is within the area as revised.

<sup>2</sup> 700 post office boxes were, in fact, required elsewhere in the solicitation. The previous Pioneer Station had not included post office boxes.

<sup>3</sup> The solicitation set out the three factors of the business score and their subfactors as follows:

	Maximum Points
1. Suitability of Location	70
Is the proposed facility--	
(a) Within the area designated by the solicitation?	
(b) Easily accessible to handicapped and other customers?	
(c) In a location likely to stimulate usage by customers?	
(d) An appropriate distance from the nearest Postal Service operated facility?	
2. Suitability of Facility	15
(a) Is the proposed facility attractive, well maintained, and in good repair?	
(b) Is parking sufficient?	
(c) Does the proposed facility have at least the square footage required by the solicitation?	
3. Ability to Provide Service	15
(a) Does the offeror have relevant experience?	

(Footnote continued on next page.)

Seven offers were received. The offers were reviewed by two evaluators, the postmaster from Ketchikan, AK, and the Anchorage manager of marketing, who visited each proposed location. The evaluators gave the MacDonalds' proposal a business score of 32 points, comprised of 16 points for location, 10 points for facility, and 6 points for service. A narrative statement explained the deductions:

#### Suitability of Location

[Not e]asily accessible to handicapped and other customers [because] customers have to come through two doors that are not handicapped accessible  
.....

[Not i]n a location likely to stimulate usage by customers. . . . This contractor did not provide store front space[,] they only provided a small window for advertising that was adjacent to the proposed space and was directly in front of another property's space. The space that was offered was in the rear of the business not clearly visible from the street and was located in the rear of the store. The proposed space was not easily visible from the vestibule inside the building.<sup>[5]</sup>

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(Continued from previous page.)

- (b) Does the offeror have personnel sufficient to operate the facility or means of obtaining them?
- (c) Does the offeror have a good business reputation and good standing in the community?
- (d) Are any nonpostal services to be provided at the facility compatible with the postal services to be provided?

This decision refers to these three factors as location, facility, and service, respectively.

<sup>4</sup> 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 75% of its business score and 25% of its price score.

<sup>5</sup> The offered site, the location of the previous Pioneer Station, is a portion of MacDonald's Bayview Trading Company, a two-level building comprising various shops and a restaurant. A drawing of the ground floor of the building included in an addendum to the MacDonalds' proposal shows a common hallway extending from the front entrance vestibule to the rear of the building. Three shops are accessed from the hallway. One occupies the left side of the ground floor, and another occupies the right front side. The CPU would occupy the right rear portion of the ground floor. A window adjacent to the front entrance of the building was to be made available for post office displays.

### Suitability of Facility

[T]he access to the building in the rear was not acceptable, too high to bring in mail from the street.

### Ability to Provide Service

[Under the item for sufficient personnel, the contractor was faulted for] several shortages in the past couple of years[, and because the previous] contract station [was] disorganized and represent[ed] the Post Office poorly.

The MacDonalds' price was \$111,110, the fourth lowest price received. Compared to the lowest price (\$80,000), the MacDonalds' price received a price score of 72. The MacDonalds' total weighted score was 42. Award was made to Ed Conway, whose proposal had received the highest business score (99 points), and whose total score was 90 points. His price was \$136,000.

The MacDonalds' counsel submitted a protest to the contracting officer, raising a variety of objections to the evaluation of their and Mr. Conway's proposals. Responding, the contracting officer undertook to re-evaluate the both proposals,<sup>6</sup> increasing the MacDonalds' location score to 35, and their service score to 11.25 so that their business score became 56.25.<sup>7</sup> He also re-evaluated Mr. Conway's business score, reducing it from 99 to 91.25.<sup>8</sup> As revised, Mr. Conway's proposal remained highest-ranked in total score at 89 points, and the MacDonalds' proposal became third best in

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<sup>6</sup> The protest regulation, Purchasing Manual (PM) 3.6, provides at 3.6.6 that a protest received by a contracting officer may be found obviously meritorious or may be denied as obviously without merit (with the concurrence of assigned counsel) by the contracting officer, or the contracting officer may refer the protest to the General Counsel. Some confusion has arisen in this case because the contracting officer did not find the protest obviously without merit, instead implicitly finding at least some merit in aspects of the protest because he rescored the proposals.

The question arises because a protest to the General Counsel subsequent to a contracting officer's denial of a protest as obviously without merit must be received within five days of the protester's knowledge of the contracting officer's action (PM 3.6.4.e), although a protest otherwise would be timely if received within ten days "after the basis of the protest is known or should have been known." (PM 3.6.4.d.) The protest to this office meets the latter requirement, but not the former. In view of the nature of the contracting officer's response to the initial protest, we conclude that it was not a determination that the protest was obviously without merit, and that the timeliness standard of PM 3.6.4.e. is not applicable in the circumstances of this case.

<sup>7</sup> Although the contracting officer reduced the severity of the deductions with respect to the location and service factors, he repeated the reasons which the evaluators cited with respect to their deductions for all three evaluation factors.

<sup>8</sup> The contracting officer deducted 5 points from Mr. Conway's facility score for parking, and 3.75 points from his service score for lack of prior post office experience.

total score at 64 points. Because their rescored proposal did not displace the highest-ranked proposal, the contracting officer denied the protest.

The MacDonalds filed a subsequent protest with this office restating their objections to the grounds asserted for downrating their proposal as follows:

- The MacDonalds' site is fully accessible to handicapped customers. The doors which were the subject of the evaluators' comments (but which was not discussed in the course of the site survey) are adjustable with respect to opening resistance, and can be so adjusted. Double sets of doors are common in Alaska, but if necessary, the inner doors can be removed.<sup>[9]</sup>
- The MacDonalds' location is more likely to stimulate customer usage than Mr. Conway's location. It is closer to the cruise ship lighter dock and closer and more visible from the available parking.
- The MacDonalds' location was a storefront. The solicitation did not define that terms, but in "modern usage" it is "any store which fronts on a common traffic area." The MacDonalds' location "offers the benefits of street front high visibility and a store front location in a warm sheltered mall."
- With regard to suitability of facility, the evaluators improperly deducted points for the unsuitability of the proposed loading dock. The solicitation included no specific requirements for the loading dock. During the site visit, it was indicated that changes in the CPU space could easily be made, and the MacDonalds are prepared to revise the dock if required.<sup>10</sup>

While the protest recognized that "contracting officers and [reviewing] counsel tend to uphold the decisions of evaluators who have [made] field inspections" which involve "matters of differing opinion," here the protester has shown "that it was arbitrary and unreasonable to down rate" the MacDonalds' proposal in comparison to the successful offer.

Replying to the protest, the contacting officer's statement adopts the evaluation contained in his response to the previous protest, and responds to the protester's additional contentions, asserting that the offered space is clearly not a store front, and noting that the protest does rebut the evaluation with respect to service. Further, it asserts

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<sup>9</sup> An architect's analysis, included in its submission, states that the distance between the two sets of doors "does not allow the doors to function without hitting [a] wheel chair."

<sup>10</sup> While the protest asserts that the revisions could extend to the provision of a hydraulic lift, the owners' representative who accompanied the evaluators states that he proposed, more generally, "stairs or a ramp or whatever would make it workable."

that the protester's offers to improve the vestibule and to improve the loading dock were not for consideration because they occurred subsequent to the submission of proposals.

Responding to the contracting officer's statement, the protester offers the following additional comments:

- Given that the front doors were readily adjustable to meet a lower resistance, and the offeror was not advised that the doors were unsatisfactory, it was unreasonable to deduct points for that item.
- With respect to the loading dock, the contractor has responsibility for mail handling within the facility, and has found the existing configuration fully satisfactory; the Postal Service need only deposit the mail at the dock.
- The MacDonalds' offered site fully meets the stated criteria for location. Their proposal is equal or superior to that of the successful offeror, and it was arbitrary to ignore this superiority "under the guise" that a storefront was not offered.
- The protest did not address any issues concerning the MacDonalds' score for service in light of the substantial revision of that score by the contracting officer. As a result, it was not appropriate for the contracting officer to comment on this issue, which was not a subject of their protest.

## DISCUSSION

In the negotiated acquisition of contract units, the successful contractor is to be selected in accordance with the evaluation formula set out in the RFP. The assignment of a numerical score by the evaluator is an attempt to quantify essentially subjective judgments. Our review of such an evaluation is limited to whether the evaluation was arbitrary or in violation of any applicable procurement regulations. We do not substitute our judgment for that of the evaluator or redo the evaluation.

*Neil Deterding*, P.S. Protest No. 94-53, February 21, 1995, citing *Ileane M. Pierluissi*, P.S. Protest No. 87-02, March 19, 1987.

The contracting officer deducted points from the MacDonalds' proposal under location for two failings; that it did not offer a storefront (and thus was not in a location simulative to customer usage), and that the site was not readily accessible to the handicapped. With respect to the first point, the contracting officer has offered a dictionary definition of "storefront" as a noun denoting "the front side of a store or store building facing a street," and as an adjective, describing "a room or suite of rooms in a store

building at street level *and immediately behind a storefront*" (emphasis added).<sup>11</sup> The space in the protesters' facility is neither on the front side of the building nor immediately behind the storefront. The MacDonalds' suggestion that the offered space should, nonetheless, be considered to meet the storefront requirement is not persuasive. Given the solicitation's specific requirement for storefront space, the proposal could be down-rated for failing to offer it.<sup>12</sup>

With respect to handicapped accessibility, while the protester has focused on the reduction in the force needed to open the vestibule doors, that reduction does not fully correct the problem, and an approach that does (removing the inner doors), was not inherent in the MacDonalds' proposal. Since the solicitation identified easy access by handicapped customers (among others) as an evaluation criterion, the proposal was not entitled to full points in that regard.<sup>13</sup>

Both the evaluators and the contracting officer reduced the MacDonalds' score for facility by one-third because of concerns about the configuration of the loading dock, the second access required by amendment 02.<sup>14</sup> The contracting officer does not fully address, however, the protester's contention that at the time of the evaluators' survey, the MacDonalds' representative offered to remedy those concerns by providing some form of amelioration. Neither the evaluators nor the contacting officer have adequately explained why no weight was given to the representative's offer. *Neil Deterding, supra*.<sup>15</sup>

An issue inherent in the protest is whether the size of the scoring deductions given to the MacDonalds' proposal were consistent with the reasons cited for the deductions. By allowing only half the available points for location to the MacDonald's proposal, the

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<sup>11</sup> The offered definitions are similar to those in *Webster's Third International Dictionary* (Merriam-Webster, 1981). Other dictionaries are to the same effect. See, e.g., *Random House Dictionary* (1967), *New Shorter Oxford English Dictionary* (1993).

<sup>12</sup> The protester's contentions that its facility is otherwise somehow more attractive than Mr. Conway's facility invokes subjective considerations of the sort we will not review. *Jalor Graphics*, P.S. Protest No. 91-95, February 19, 1992.

<sup>13</sup> Further, site inspectors are not required to solicit responses to issues which arise in the course of their inspection, although, as discussed below, if they do, the offeror's response requires consideration.

<sup>14</sup> While the protester asserts that this should be a matter of concern primarily to the contractor, the contracting officer's response to the initial protest appropriately discussed this issue in the context of how the Postal Service could transport mail to the location in light of the volume to be delivered to the newly required post office boxes. "Even if a [postal employee] were to deliver by hand-truck, the employee would have to piece load/unload each item. . . ."

<sup>15</sup> Comments made in the course of the evaluation of offers are not late modifications to proposals. In the context of the award of contract stations, they are in the nature of "normal revisions to proposals made during negotiations by the offerors selected for discussions," which are not late modifications. Procurement Manual 4.3.2.d.1.

contracting officer apparently gave it no credit for the accessibility and usage subfactors. While so great a deduction appears to be excessive, we need not determine with exactitude what deduction would be appropriate. Given its relative standing as to price, the MacDonald's proposal would prevail over Mr. Conway's proposal only if it were to receive 88 business points or more. The 11.25 point service score is not challenged here. Even if their facility score were increased to 15 to reflect full credit for the offered solution for the loading dock, the proposal would still have to receive 61.75 or more of the 70 points possible for location (*i.e.*, a deduction of no more than about 12 percent) to achieve a business score of 88. Given the proposal's weaknesses in two of the four location subfactors, a deduction of more than that amount would clearly be reasonable, and the protesters have not been harmed by any overstatement of the deduction beyond that amount. "Where errors in the evaluations, when corrected, would not change the award decision, there is no prejudice to the protester." *Standard Register; Moore Business Forms, Inc.*, P.S. Protest No. 92-68, November 23, 1992.

The protest is denied.

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Contract Protests and Policies