

February 22, 1999

P.S. Protest No. 98-31

RITUCCI & ASSOCIATES, INC.

Solicitation No. 072368-98-A-0197

DIGEST

Protest of award of a contract for fraud analyst services is denied. Award to lower-priced, but lesser-qualified offeror who met solicitation's mandatory requirements was proper; delay in award, award on the basis of original offer after initial award was cancelled despite statement of intent to resolicit, and failure to notify other offerors of award do not invalidate award.

DECISION

Ritucci & Associates, Inc., protests its failure to receive award of a contract for the services of a fraud analyst. The Purchasing and Materials Service Center, Denver, CO, issued Solicitation 072368-98-A-0197 for the services of a contract fraud analyst on April 15, 1998. The "Specifications for Contract Fraud Analysts" contained in a four page "Operating Guideline Procedures for Contract Fraud Analysts" set out the requirements for the analyst, including the following:

Contract Fraud Analysts must have:

* * *

- Must have [sic] at least five years['] prior law enforcement/investigative experience investigating complex criminal cases, preferably involving injury compensation matters.

Section M.4. of the solicitation provided in part as follows:

- a. Award will be made to the responsible offeror whose proposal offers the best value to the Postal Service (i.e., a combination of price, price-related

factors, and/or other factors). The primary areas to be used in determining which proposal offers the best value to the Postal Service are listed below in descending order of importance:

[No factors were listed.]

b. Cost/price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price.

Four offers were received and evaluated, and the contracting officer proposed to make award to Judith Hicks, the low offeror. By letter dated August 5, however, Ritucci protested the proposed award on the basis that Ms. Hicks lacked five years of investigative experience. Based on that protest, upon further inquiry, “the proposed award [to Ms. Hicks] and contract number assignment were cancelled.”¹ The contracting officer wrote to Ritucci on August 14, stating that the contract with Ms. Hicks had been cancelled. The letter stated:

The requiring office will also be notified of this action, upon which they will review if the requirements are still needed. A new solicitation may be issued in the near future at which time you would [sic] be provided a copy.

By memorandum dated August 12, Salt Lake City Customer Services and Sales had recommended that award be made to Minichino Investigative Services, LLC. An undated evaluation memo concurred in the award to Minichino as “the lowest [priced] qualified offeror representing best value to the U.S. Postal Service.” Contract award to Minichino occurred on August 31. No notice of the award was provided to any of the other offerors.

Ritucci’s protest dated October 14, and received in this office October 15, recites that it learned of the award on October 7 in a telephone conversation with a postal workers compensation supervisor in Salt Lake City, and confirmed the award with the P&MSC the next day.

The protest contends that the qualifications of the several offerors were not established before their price proposals were opened, (in its terms, a failure “to pre-qualif[y] each bidder”) and that if they had been, award would not have been made to Minichino because its investigator “does not have a background in injury compensation surveillance/investigations.”

The protest also complains of the time it took for the offers to be evaluated, contending that “it . . . does not seem that there are any controls over the contract bidding process

¹ According to the contracting officer, the “contract number was assigned, but never issued,” because the protest was received before it could be issued.

. . . caus[ing] us, as taxpayers, tremendous concern in the integrity of the U.S. Postal Service contract bidding system”; of its failure to be notified of the contract award; and of award to Minichino on the basis of the initial offers in light of the contracting officer’s advice that a resolicitation would occur. The protest seeks the re-evaluation of the proposals received and award “to the bidder with the best experience, equipment, and track record”

The Postal Service uses the term “prequalification” to describe a process in which suppliers are evaluated on the basis of their qualifications before they are asked to submit price proposals (see, generally, Purchasing Manual (PM) 3.5.2). Based on its use of that term, the contracting officer’s statement views the protest as object to the form of the solicitation (that is, its failure to provide for qualification before price proposals were submitted), and thus to be untimely.

The contracting officer’s statement also contends that although the award was delayed beyond the sixty day period contemplated by the solicitation, award was proper because the awardee was afforded the opportunity to verify its offer and pricing. While the contracting officer concedes the failure to notify the other offerors of the award, he concludes that Ritucci was not harmed by the omission, since the contracting officer concedes the timeliness of the protest against the award.

According to the contracting officer, the advice provided Ritucci concerning the course to be taken following the resolution of its initial protest of the Hicks award was not misleading because it was conditional (“a new solicitation *may* be issued” (contracting officer’s emphasis)); no new solicitation was needed “because there were qualified offerors remaining”; and the protester has not identified any harm or prejudice to it from the failure to resolicit.

Finally, with respect to the issue of Minichino’s experience, he notes that it fully meets the mandatory requirement for five year’s investigative experience, and that while its proposal was silent with respect to injury compensation investigative experience, such experience was stated only as a preference, not as a mandatory requirement. Award was properly made to Minichino since it met the solicitation’s mandatory requirements and its price was lower than Ritucci’s.

Responding to the contracting officer’s statement, the protester notes that its earlier protest of the award to Ms. Hicks had requested that “the contract be re-bid and that all individuals bidding . . . be pre-qualified before their bids are opened,” and had requested an explanation why “a prequalification evaluation was not conducted prior to the awarding of this contract.” It contends that the solicitation misled it to believe “that all bidders had at least five years of criminal experience plus experience investigating injury compensation claims,” and that had it known otherwise “we would have prepared our bid differently.”

The protester contends that the contracting officer has not answered to its complaint that contract award did not occur in a timely fashion, and asserts that the contracting officer's acknowledgement that the award to Minichino was not announced "supports our concern that the bid award was improperly handled."

The protester complains about the selection of Minichino for award on the basis of price, asserting that it is "inconceivable that the U.S. Postal Service . . . would chose an agency that had *never* done injury compensation investigations over a company who has done hundreds of them for the sake of [a lower price per hour]." The protester hopes that "value for money would be an important consideration," as it would be for a private enterprise. The protester concludes by reasserting that it was injured "inasmuch as we believed we were bidding against companies with the same background," when in fact because those companies had "less[er] backgrounds," they offered "bids . . . lower than ours."

DISCUSSION

Although the contracting officer has not challenged the timeliness of Ritucci's protest, we must consider the matter independently:

The timeliness requirements imposed by our regulations are jurisdictional, and we cannot consider the merits of any issue which has been untimely raised. We have no authority to waive or disregard the timeliness issue in a particular case. The only generally recognized exception to the [requirement that a protest by a protester who has not requested a debriefing be received within 15 days after contract award (PM 3.6.4.d.)] applies when the contracting officer makes the filing of a timely protest impossible, by, for instance, failing to timely notify a protester of the award

Impco Technologies, Inc, P.S. Protest No. 94-13, June 29, 1994 (citations omitted). This is such a case. In the absence of notice of the award,² the protester was hindered in filing a timely protest.

Central to the protest is the protester's belief either that Minichino failed to meet the solicitation's requirements because its investigator lacked injury compensation claim experience, or that it should not have received the award because although it offered the lower price, it was less qualified. Unfortunately for the protester, both contentions are precluded by the terms of the solicitation itself.

² PM 4.2.7.a provides: "Within three days after award, the contracting officer must send all suppliers that submitted proposals a written notice [of the award]."

As the contracting officer notes, injury compensation experience was expressed in the solicitation as a preference, rather than as a mandatory requirement. As the solicitation was written, however, the evaluation criteria afforded that preference no weight. Where a solicitation indicates that award will be made on the basis of price and other stated factors, but included no factors other than price, award is to be made to the lowest-priced offeror meeting the solicitation's requirements. *Bell & Howell Federal Government Sales*, P.S. Protest No. 91-24, April 15, 1991. Accordingly, award on the basis of price was appropriate. The protester's argument to the contrary takes exception to the solicitation's terms, a matter which should have been raised prior to the time set for the receipt of offers (PM 3.6.4.b.) and is now untimely.³

Neither the delay in the contract award nor the failure to notify the unsuccessful offerors of the award provide bases to overturn the award. Although the file does not explain the cause of the delay between the receipt of offers in April and the eventual August award, the delay did not affect the result, since no offeror withdrew because of the delay and the protester has not identified any prejudice to it from the delay.⁴ The failure to notify the offerors of the award, although a violation of the purchasing regulations, does not affect the validity of the award. *Artech Corporation*, P.S. Protest No. 84-58, October 5, 1984.

We do not accept the contracting officer's view that the award to Minichino on the basis of its initial offer was consistent his advice to Ritucci in response to its initial protest. The protester's understanding of that advice to mean that any continuing requirement for a fraud analyst would be the subject of a new solicitation was entirely reasonable, and the contracting officer's suggestion to the contrary is not. However, the protester has not identified any prejudice to it arising out of the decision to award on the basis of the existing offers, instead of resoliciting, and the record fails to reflect any.⁵ As a result, the inconsistency does not affect the validity of the award.

The protest is denied.

³ Although this concern was first mentioned in Ritucci's protest of the award to Ms. Hicks, that protest was similarly late as a protest against the solicitation terms.

⁴ Any prejudice resulting from the delay would ordinarily be expected to fall on the prospective awardee, which, as the contracting officer notes, was afforded the opportunity to confirm its offer before the award. Any offeror adversely affected by the delay could have withdrawn or revised its offer at any time before contract award. PM 4.2.3 b.

⁵ The protester's contention that it was prejudiced because it understood that it was competing with other offerors who had injury compensation experience, or that such experience would be afforded weight in relation to price reflects its misunderstanding of the solicitation's basis of award and would not necessarily have been cured by a new solicitation.

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