

**July 31, 2002**

**P.S. Protest No. 00-19**

**DRAFTWORLDWIDE, INC.**

**Solicitation No. 102590-00-A-0098**

**DIGEST**

Protest of failure to be prequalified for participation in module of solicitation for advertising services is dismissed in part and denied in part. Protester's contention that its failure to be prequalified resulted from the animus of a postal manager is not established; protest of the extension of the prequalification process was untimely raised after additional submissions were due; contention that other offerors were improperly rewarded for breach of their customers' confidentiality is not established; prequalification of only two sources for the module was permissible; and complaint that orders were improperly placed under prior contracts is for resolution as contract dispute.

**DECISION**

DraftWorldwide, Inc., (Draft) protests its failure to be included among the firms prequalified<sup>1</sup> for competition for the direct marketing specialty<sup>2</sup> of the Postal Service's Advertising Solicitation 102590-00-A-0098.

By letters dated January 3, 2000, Printing Purchasing at postal headquarters provided prospective suppliers with a document entitled "Prequalification of Potential Offerors for the U.S. Postal Service Advertising Solicitation." Prequalification was to "limit the list of prequalified suppliers to a reasonable number in order to ensure a competitive pro-

---

<sup>1</sup> Prequalification is the identification, for inclusion in a subsequent competition for a particular purchase or series of purchases, of "firms or individuals whose record of performance in the marketplace . . . has demonstrated their ability to perform to consistently high standards of quality and reliability." Purchasing Manual (PM) 3.5.2, which spells the term "prequalify" and its variants without a hyphen throughout. Although many of the documents in this protest hyphenate these terms, the PM's forms are used in direct quotations throughout this decision without editorial identification.

<sup>2</sup> There were five specialties (also called modules): I, Strategy and Creative (sometimes referred to in the course of prequalification as "Lead"); II, General Media Planning and Buying; III, Direct Marketing and Sales Materials (at issue here); IV, In-Store, Point of Purchase Promotions; and V, Multicultural Marketing. Prospective offerors could propose for one or more of three markets identified as to Specialty V: African American, Hispanic, and Asian American.

curement. All vendors' qualifications will receive a fair and objective review." The document provided an "overview" of general requirements ("Financial Management," "Digital Asset Management," and "Internet," and a description of the "scope" of each specialty.<sup>3</sup> It also provided "Assessment Criteria" for Past Performance (five numbered items) and Supplier's Capability (13 numbered items, of which items 1 (Resources) and 13 (Internet Resources) had 13 and 8 bulleted sub-items, respectively) which were common to every specialty as well as criteria specific to each specialty.<sup>4</sup> Prequalification statements (also called "capability statements") consisting of no more than ten pages per specialty module were to be submitted by January 28, and the document advised that notifications of supplier status would be provided by February 28.

Prospective suppliers submitted fifty questions concerning the prequalification document and the prequalification process which were answered on February 1, and the date for the submission of prequalification responses was extended to February 4.

Thirty-five prospective suppliers submitted a total of 84 prequalification statements covering the five specialty modules. Draft proposed with respect to all five modules. The statements were reviewed by panels of evaluators, who made "recommendation[s] for conditional prequalification" of suppliers for each module, subject to "clarification of the offeror's intent to meet the requirements and the relationships of some offerors."<sup>5</sup>

The clarifications were sought in telephone discussions and e-mail messages of February 15. Draft submitted its responses by e-mail on that date, providing information responding to nine questions. Only one question related directly to specialty III. In response to another question, Draft provided "a full client list" for the agencies it proposed to partner with for specialty III.

---

<sup>3</sup> Specialty III was discussed in terms of Advertising Scope, divided into Direct Marketing and Sales Support, and Collateral Scope, divided into Relation Building/Customer Management and Event/ Marketing/Tradeshows and Conferences.

<sup>4</sup> The specific criteria for module III were stated as follows:

Ability to provide direct marketing campaign(s) resulting in superior performance in:

1. Response rates
2. Cost per response
3. Conversion rate of respondents to qualified leads
4. Cost per qualified lead
5. Conversion rate of qualified leads to orders
6. Cost per order
7. Provide and maintain extranet site showing client access to media and creative.
8. Ability to establish Return on Investment (ROI)

<sup>5</sup> Quotations in this recitation of facts not otherwise attributed are from the contracting officer's statement.

On February 16, the contracting officer met the evaluators. One topic discussed “was the quality of information received from the potential offerors.” The contracting officer, “with agreement from the purchasing program management team, decided to accept the recommendation of the evaluation committees to eliminate some of the potential offerors based on their responses . . . [and] to continue the prequalification process by obtaining more in-depth information about the remaining companies’ capabilities.” The Manager, Advertising and Promotion Group, (the Group Manager) who was the client for and sponsor of the solicitation, “was advised of the decision to continue the prequalification process that day,” although she “was not involved in the decision.” On February 28, at a status meeting, the contracting officer’s superiors as well as the Group Manager and the Chief Marketing Officer were advised “of the [purchasing] team’s decision to eliminate some of the prospective suppliers . . . and to continue the prequalification process for the remaining suppliers.”

By letters dated March 2, some suppliers were advised of their elimination from the prequalification competition, and others were told of their conditional prequalification for one or more of the specialties. Draft was the third ranked of four suppliers conditionally prequalified for specialty III.<sup>6</sup> The March 2 letters were accompanied by a 42-page “Agency Briefing Document and Request for Information” (RFI). The letter stated that the briefing document “provides an overall view of the USPS organization as well as a general description of the advertising and promotion requirements,” and that the RFI required the supplier’s response by March 23. The RFI sought submissions (not more than 40 pages per specialty) responding to specific inquires. All suppliers were to respond to four “General Section” items, of which the first was:

**Current Clients:** Provide a complete list of your agency lineup’s current clients . . . by product/service category and specify agency services provided. . . . If there are any current client company names you are blocked from disclosing due to confidentiality agreement, please define each of those companies by product/service category instead.

With respect to specialty III, the RFI sought the supplier’s demonstration of its recent experience with respect to each of the component elements of the requirement (e.g., targeted responses (leads), direct responses (orders)), by furnishing “one recent client case history” which “best demonstrates” the agency’s ability to perform the tasks. Specific quantified results such as order rates, cost per order, and return on investment per order and per new customer were to be provided. Questions or comments on the RFI were due by March 8; responses were due by March 23, later extended to March 31.

On March 16, the contracting officer responded to 29 questions raised about the RFI, including the following:

---

<sup>6</sup> Fewer suppliers were conditionally prequalified for specialty III than for the other specialties, for each of which five or six firms were listed.

2. [Q.] What are the next steps in the USPS Advertising Solicitation Process? We were under the impression that the Statement of Work was to follow the original prequalification submission. However, that appears to have changed and therefore, we are curious if anything else in the process has changed?

[A.] The USPS Advertising Solicitation process will continue as originally planned. The solicitation, which includes the statement of work, will be issued after the prequalification phase. The second phase of the prequalifications will allow the USPS evaluators to accomplish a more in-depth review of the capabilities of the prospective vendors. During the solicitation phase, the concentration will be on original creative work and a pricing structure for the contract. Following this format will allow both parties (agency and client) to remain focused on the ultimate goals of efficiency and effectiveness during the contract performance period.

\* \* \*

4. [Q.] Specific production costs and timing for advertising that we have produced for our Clients are requested in detail. This is very unusual. Typically most clients, like the USPS, do not want their agency to release production expenses on the advertising that we produce on their behalf. We regard production expense for USPS advertising to be confidential -- why would you require this information from our other clients?

[A.] Agency creative production cost data will be more meaningful if it is related to specific executions, however, we would not ask your agency to violate client confidentiality. If you cannot answer this question directly, without truly violating client confidentiality, please answer by providing data in terms of Client A, Client B, etc.

Scoring of the submissions in response to the RFI were accomplished on March 30, when the evaluators met at the Postal Service's Management Academy. As the result of that evaluation, Draft was ranked fourth of the four firms participating for specialty III. The evaluators prequalified the top two firms for specialty III; two firms for one market of specialty V and three firms for another market, and four firms for specialties I and IV and the third market of specialty V. Draft was prequalified for specialties I and IV.

The successful and unsuccessful suppliers were notified of their status on April 10.<sup>7</sup> The prequalified vendors were furnished the solicitation and scheduled for oral presentations. Hardcopy responses to the solicitation were due May 11.

Draft's USPS Account Director<sup>8</sup> requested reconsideration of the decision to exclude it from specialty III in a letter that the contracting officer received April 12. Replying on April 15, the contracting officer advised Draft "that other potential suppliers were deemed more qualified and that two agencies would provide adequate competition. [Draft] was consider less qualified because, unlike other offerors, [it] failed to provide detailed results from its work with other clients." The contracting officer reiterated that view in telephone conversations with the contracting officer in early May which included the offer of a debriefing. On May 23, Draft's managing director wrote the Vice President, Purchasing and Materials, "expressing its concern about the solicitation process and its perception that the current performance of their agency was being manipulated. Draft also questioned the necessity of a second prequalification stage." It requested a meeting with the Vice President and the contracting officer. In a letter dated June 16, the Vice President advised Draft to express its concerns to the contracting officer, "to provide specific information regarding the concerns of manipulation," and again suggested a debriefing.

Draft requested a debriefing by letter dated June 23; the debriefing was held on July 6. The Postal Service was represented by the contracting officer, the program manager, and the direct marketing and sales support team leaders. Draft was represented by its account director, the USPS account manager, and an account representative. "The debriefing was general in nature and noted the fact that Draft's proposal was not complete since it did not provide information such as return on investment and cost per order generation to support their statements of success with other clients."

---

<sup>7</sup> Draft's letter identified the specialties for which it had been prequalified, discussed various documents enclosed regarding its further participation, and described the process for agency visits. It concluded by describing the specialties for which Draft had not been prequalified:

The USPS Module Teams also evaluated your response to the following modules and deemed you a qualified supplier:

\* \* \*

III. Direct Marketing and Sales Support

\* \* \*

However, when compared to other potential vendors seeking prequalification, it is our judgment that other suppliers have demonstrated a higher level of qualification for the USPS assignment. The number of potential vendors deemed highly qualified will provide adequate competition for the upcoming solicitation. Accordingly, your firm will not be invited into the Solicitation Stage for the above referenced modules.

<sup>8</sup> Draft was an incumbent contractor with the Postal Service.

Draft's account director met the contracting officer on July 12 and presented him with extensive "documentation and information regarding [Draft's] detailed concerns about the [prequalification process,] . . . [and] the manipulation of the process by [the Group] to the detriment of [Draft]." Central to the concerns expressed in the documents was the belief that members of the Advertising and Promotion Group were upset with Draft's favorable ranking in the first stage of the prequalification and that the Group's management "did everything it could to denigrate our performance, question the truthfulness of our response and generally cause confusion about who was soliciting for the Postal Service contract."

Draft documented those concerns with extracts from its internal correspondence logs, e-mail messages, and other documentation which recited, *inter alia*, that on February 8 Draft learned that the Group Manager was upset with its high scoring in the first round of the prequalification; the questions asked in discussions on February 10 "challenged" information contained in Draft's submission; February 11 e-mail messages from the Group had raised concerns about Draft's relationships with postal competitors; a March 3 e-mail questioning some Draft invoices was copied to a person on the evaluation team; and a March 3 inquiry again reflects the Group's confusion about Draft's organization in the context of the RFI. Further, subsequent to the exclusion of Draft from the specialty III competition, on May 16 in a conversation with Draft's agency director an unidentified postal employee "expressed . . . frustration with the way that [the Group Manager] had been handling many aspects of the agency relationship including the agency resolicitation [and i]ndicated that selection process for [Specialty III] was not being handled fairly"; on May 23 the Group continued to misunderstand Draft's organization; also on May 23, after Draft had raised its concerns about Specialty III, the Group pulled \$1.5 million of direct marketing business from Draft and assigned it to its competitor, FCB Worldwide (FCB), which remained in contention for Specialty III; on June 5, another \$.5 million of direct marketing business was put on hold.

The July 12 document objected to the mid-stream addition of the second stage of prequalification, noting that another offeror had objected to it, as reflected by question 2 in the March 16 responses, and asserting that Draft had "reason to believe that a second round of prequalification was added because the A&P Group was not pleased with the results of Phase I." With regard to specific issues discussed in Draft's debriefing, the document discusses the assertion that its submission contained insufficient data and lacked specific client information in its case studies, asserting, as it had noted in its phase two response, it was "legally precluded from releasing [elements of data] deemed sensitive by our clients," in some cases they did not have the client's sensitive information, and because "the case studies . . . include [such] well known national advertisers in specific categories [that they] cannot be adequately blinded . . . when our client list and creative samples have been included" in its submission. Draft also objected that only two, rather than three, offerors were prequalified for specialty III, although Draft's postal contract required it to obtain three prices for its subcontracts above specified dollar limits, and that "foreign ownership of an advertising agency does not pose a problem for

the Postal Service” although “the ‘Buy American’ policy is in effect for materials we may subcontract for retail sales.”<sup>9</sup> The July 12 document concluded with an objection to a portion of Scope of Work for the Digital Asset Management program, which Draft contends are “lifted word-for-word from [a particular vendor’s] documents” which are part of that vendor’s “patented system.”<sup>10</sup>

Draft’s September 1 protest, which was received on that date, refers to its “requests . . . asking USPS to reconsider and reverse” the decision not to prequalify it, and recites that on August 25 the contracting officer advised that it would receive a letter response to those requests on August 28. It had received no response by the date of its protest. The protest contends that the prequalification “evaluation was not conducted in a fair and objective manner . . .”:

Instead, the [Group Manager] that had a hostile and biased attitude toward DraftWorldwide objected to the high ratings of its qualifications that resulted from the first phase of the prequalification process.<sup>11</sup> Someone within or acting on behalf of USPS then persuaded the contracting officer to initiate a second phase of prequalification activity and then influenced the Module Team member to evaluate DraftWorldwide’s qualifications in a manner than resulted in its being deemed unworthy of receiving a solicitation and being given the opportunity to compete for the award of the direct marketing and sales support module.

The protest notes that since no award had yet been made for specialty III, the award should be withheld until the protest was resolved, as the protest regulation provided at

---

<sup>9</sup> It is not clear at what firm this objection was directed. FCB, formerly known as Foote, Cone, and Belding, the eventual awardee, was, at the time of award, owned by True North Communications, a Delaware-incorporated, Chicago-based global advertising and communications holding company.

The Postal Service’s Buy American policy (PM 1.7.12) involves distinctions between end products which are “mined[,] . . . produced [or] manufactured in the United States” (PM 1.7.12.b.2.(c)) and “foreign end products” (PM 1.7.12.b.2.). “The Buy American policy relates to the evaluation of offers proposing the furnishing of supplies of foreign origin; it does not relate to the nationality of the owners of the company proposing to provide the supplies.” *Service Assurance Corporation*, P.S. Protest No. 92-16, May 1, 1992.

<sup>10</sup> The July 12 submission was not by its own terms, a request for Draft’s reinstatement into the solicitation process. Rather, it was a request to be “treated fairly and [to be] given the opportunity to continue working for the Postal Service at the same level over the next five years as [it had] in the past.” The copy of the July 12 submission in the protest file contains an August 9, 2000, “Proposal to USPS from DraftWorldwide” that recited its assertions that it had been damaged by the manipulation of the contracting process and proposing, *inter alia*, that its existing contract be continued “for 5 years, with 1 year renewals,” funded for the first year at the average of its last three years.

<sup>11</sup> The protest reflects Draft’s understanding that its initial submission “received one of the top scores, in the aggregate, of all the competing agencies across all the modules.” The contracting officer rebuts this understanding, asserting that Draft’s highest ranking was second, as to specialty I, that it was ranked third as to specialty III, and that he “never ranked the potential suppliers across all modules.”

PM 3.6.5.a. On September 20, Draft's counsel wrote to complain that the spirit of that section was being violated because the Postal Service was placing orders for work relating to direct marketing, of a type previously performed by Draft, with FCB. Anticipating that the contracting officer might contend that the orders were being placed under an existing FCB contract, rather than the new contract being solicited, Draft contended that such work was "such a major alteration of" the scope of FCB's existing contract as to violate both 3.6.5.a. and "the competition requirements of the Purchasing Manual." This office advised counsel that inquiry to the contracting officer had disclosed that award of the specialty III contract had been made to FCB on September 13, following the execution of a determination by the Vice President, Purchasing and Materials, that urgent and compelling circumstances necessitated the award, but that the notice to the General Counsel and protester which 3.6.5.a. required be made "at the time of or before the award" had not been provided due to oversight.<sup>12</sup> The reply noted, however, that no orders under the awarded contract had yet been placed, and that the contracting officer advised that the orders had been placed with FCB prior to the receipt of Draft's protest and that FCB's prior contract, unlike its new contract, allowed it to perform in all modules. Counsel submitted further comments on the issue of the orders placed with FCB, and this office directed the contracting officer to address that issue in responding to Draft's protest.

After summarizing the circumstances of the prequalification process, the contracting officer's statement first replies to the protest by noting that a protester charging that postal officials have acted with impermissible bias "must show . . . virtually irrefutable proof that the officials had a specific and malicious intent to harm the protester" (*quoting Good & Good Contractor*, P.S. Protest No. 81-61, August 27, 1981, internal quotation omitted) and that "a protester must offer specific proof of allegation of bad faith, bias, or unfairness; prejudicial motives will not be attributed to individuals on the basis of inference or supposition." (*Federal Properties Of R.I., Inc.* P.S. Protest No. 93-02 May 20, 1993.)

The statement then advises that when Draft first made its allegations and provided its documentation, the contracting officer, in consultation with the Postal Service's Law Department, inquired of the "entire evaluation team . . . whether they were influenced by anyone outside the evaluation committee." Each member replied in the negative by executing a statement.<sup>13</sup>

---

<sup>12</sup> Counsel was further advised of our understanding that PM 3.6 does not afford this office "any jurisdiction as to such a determination, just as the General Accounting Office lacks jurisdiction over similar determinations pursuant to 31 USC § 3553(c)(2). See, e.g., *Hung Myung (USA) Ltd., Inc.; Containertechnik Hamburg GmbH & Co.*, 71 Comp. Gen. 64."

<sup>13</sup> Each evaluator signed a copy of this statement:

(Footnote continued on next page.)



The contracting officer recites that he “decided, with agreement from the purchasing/program management team, to continue the prequalification process” by conducting the second phase; the Group Manager was not involved in that decision; to his knowledge, “no one . . . not a part of the evaluation team entered into the areas used for evaluation in either phase” and “no one outside of the evaluation team influenced the scoring of the proposals in any way.” Accordingly, the contracting officer concludes that “Draft’s allegations of improper influence are completely unfounded.”

The statement further advises that at the request of the Postmaster General, the Postal Service’s General Counsel interviewed a postal employee whom Draft’s president had advised the Postmaster General “will substantiate our claim”<sup>14</sup> and that “[t]he General Counsel’s interview with the whistleblower did not reveal any improprieties in the procurement process for advertising services . . . [or] in the prequalification process.”<sup>15</sup>

The statement then turns to the evaluation of Draft’s response to the RFI, explaining that the evaluators’ comments show that Draft received the lowest score among the of-

---

(Continued from previous page.)

This is to confirm that during the course of [solicitation 102590-00-A-0098], including the prequalification phase of the solicitation process, there were no attempts from outside the qualification team itself to influence my judgment with respect to the selection of prequalified offerors nor with respect to my scoring and evaluation under the solicitation itself. In particular, as an evaluation team member, I was not influenced in any way by persons not on the evaluation team concerning whether or not to favor or disfavor any particular offeror in my evaluation and scoring. In addition, I have acted to the best of my ability and pursuant to my duties as an evaluation team member to evaluate and score the various offers, both in the prequalification phase and the solicitation phase, in accordance with the evaluation criteria and not pursuant to any direction from persons outside the process.

There are thirty such statements; twenty-two were dated in July, seven were dated in August, and one was dated in October.

<sup>14</sup> Draft did not identify that person in its Postmaster General correspondence and neither Draft nor the contracting officer have identified him or her in the course of the protest. The contracting officer refers to that person as “the whistleblower.”

<sup>15</sup> A September 19 letter from the General Counsel to Draft’s president included the following:

After receipt of your most recent . . . letter, . . . further questioning [of the whistleblower] was conducted by a member of my staff. Based on that inquiry and the earlier inquiry that I personally conducted, I am aware of no impropriety which occurred within the purchasing process of the Direct Marketing module of the advertising module.

The contracting officer’s statement notes that the Postmaster General testified concerning Draft’s allegations and the resulting inquiry in the course of a September 19 hearing of the Subcommittee on the Postal Service of the House Committee on Government Reform. With respect to the whistleblower, he stated: “[W]e interviewed that person and there was just nothing there.” He also indicated that the Postal Service’s Inspector General was investigating the matter as the result of a congressional request.

ferors in the second phase because of specific deficiencies identified in its submissions. Evaluators identified turnovers in its staffing, failures to provide specific results of identified campaigns, deficiencies perceived in its video ads, a lack of a measurement method for its sales support and relationship building activities, and other failings. The contracting officer noted that different evaluators scored Draft as more or less satisfactory, and that the scores given by the evaluators who were the Group Manager's direct reports gave Draft scores above the consensus score, a result inconsistent with the premise that the Group Manager had influenced the process.

The statement also address various of the contentions set out in Draft's July 12 documentation, making the following points:

- The discussion with Draft in the first phase of the prequalification (the contracting officer gives the date as February 15, but appears to refer to the questions asked on February 10) were consistent with the procedures for discussions addressed at PM 4.2.5.c, and "demonstrate[d the team's] effort to insure that its decision-making process was as fair and accurate as possible."
- Selecting fewer than all the qualified offerors for prequalification was consistent with PM 3.5.2.e.3(a), which allows that when "the purchase team determines (1) that a smaller group will provide adequate competition or (2) that some suppliers are considerably more qualified than others." Here, the two firms not selected had scores (65.5., 59.2) "well below" the scores (84.5, 72.5) of the selected firms.
- There was an adequate business explanation why a member of the team was copied on the e-mail message concerning Draft's billing; at the time she was the acting supervisor of employees responsible for processing invoices. In any event, the team member was not involved in evaluating the suppliers.
- The Group Manager was not involved in the decision to conduct the second phase of prequalification; the contracting officer made that decision at a meeting on February 16 which the Group Manager did not attend. Further, that phase "was merely a continuation of the prequalification process" in which suppliers were asked to "expand upon the information they had already provided" in order to "obtain more in-depth information regarding [their] capabilities." "The Postal Service would have no reason to add an extensive second round of evaluations during the prequalification process and delay award of the contract simply to avoid permitting Draft to submit an offer."

The statement concludes with a discussion of Draft's and FCB's prior contracts. Draft held a 1995 contract for sales promotion services; FCB held a 1995 contracts for direct mail services. In May, 1998, each contract had been modified to allow each vendor "to perform in all areas of advertising and collateral services." "The modifications do not define how the work will be issued (i.e., competitively, noncompetitive[ly]). The USPS

did not identify an agency of record by contract modification for a specific marketing communications channel after May 1998[,] therefore there is no agency of record for direct marketing and sales support. Therefore, work orders for direct marketing and sales support issued under FCB's prior contract are proper."

Draft responded to the contracting officer's report. Its submission included the following:

- The contracting officer has engaged in "wholesale withholding of information" including evaluation materials, and has provided only "conclusions about the results of his 'investigation'" of Draft's allegations. Because of the inadequacy of the record presented by the contracting officer, the resolution of the protest should await the completion of the Inspector General's inquiry.
- There are additional asserted instances of adverse comments by and actions of the Group Manager prior to the solicitation, in the course of the design of the procurement, and, as previously alleged, following the scoring in the first prequalification round.
- The contention that the establishment of a second round of prequalification violated PM 3.5.2.e's requirement that in prequalification, "the inclusion or exclusion of a particular supplier . . . [be] judged solely on the predetermined prequalification method" because "the prequalification method was altered in midstream, apparently due in part to displeasure by the [Group Manager] concerning the results of the originally planned prequalification process." Draft notes that the contracting officer does not rebut its contentions that the Group Manager expressed displeasure with the first-round results or communicated a desire that there be a second round.
- That offerors could not provide information about Postal Service case histories "had the purpose and effect of removing the advantages of USPS experience for DraftWorldwide, and perhaps other disfavored offerors." The excluded case histories were the only ones "which presented no client confidentiality concerns."
- The Group Manager, "motivated by bias, influenced the appointment of her subordinates to key positions on each of the evaluating teams, and through [them] exerted improper influence on scoring decisions."<sup>16</sup> Whereas the first round of prequalification was the product of individual scores, the second round was scored by "'consensus' [which was] the product of negotiation among the module committee members[, and] not an arithmetic average of the individual evaluators' scores." In that case, it was not relevant that the Group Manager's direct reports

---

<sup>16</sup> Draft here identifies an instance of an individual evaluator's reaction to that improper influence and another instance of the Group Manager's purported improper action, asserting a proprietary interest as to the details of those instances.

scored Draft higher than the consensus; “such negotiations allowed the views of a dominant clique to become adopted as the score of the whole evaluation team” which the Group Manager’s subordinates “could have dominated.”

- Draft “was improperly disqualified for being unable as a legal and ethical matter to betray the confidential business secrets of its clients.” That disqualification was contrary to the advice given in response to question 4 of March 16, and the Postal Service acted improperly in failing to hold discussions with Draft concerning its stated inability to provide that information. The contracting officer has noted the use of discussions in the first round of the prequalification; the failure to conduct discussions in the second round was inconsistent with PM 4.2.5.c. (describing discussions in the context of the evaluation of proposals).

The contracting officer responded to Draft’s submission, including the following points:

- It is not the usual practice for individual proposal evaluations to be released to protesters; they are subject to *in camera* review by the General Counsel in the course of the consideration of the protest.
- The contracting officer asserts that he does not believe that the Group Manager’s actions constitute bias, but contends that any action she took to “favor FCB” (or, it may be assumed, to disfavor Draft) are “completely irrelevant” because the Group Manager “was not involved in the scoring of the proposals in either . . . phase”; “did not influence the evaluation teams” as evidenced by their declarations;<sup>17</sup> and “did not have anything to do with [the] decision” to extend the prequalification process.
- The prequalification “was extended because . . . the teams needed more information from the agencies to accurately assess their ability to perform.” The information furnished in the second phase was not “materially different” from that previously sought, it was only “more complete.”
- Regarding the evaluator Draft contends reacted to the Group Manager’s improper influence (footnote 13, *supra*), the contracting officer attributes the individual’s action, instead, to Draft’s exclusion from the prequalification, noting that the individual never contended that the Group Manager improperly influenced the decision to exclude Draft, signed the evaluators’ declaration, and had ranked Draft consistently with other evaluators.

---

<sup>17</sup> Further, he notes, it is not significant that the evaluators signed a pre-printed declaration, because, had they wished, they could have altered the forms; none did.

- Draft’s score was appropriate given its failure to provide information requested by the solicitation. Discussions are not required to solicit such omitted information (citing cases). Draft did not raise the matter in questions during the prequalification process; included one sentence about it in the second prequalification response; and discussed it in its July 12 submission, but did not raise it in its September 1 protest except to the extent that the July submission was attached to the protest.
- Other agencies responding to the second phase included proprietary legends on their proposals, or used ranges, rather than precise amounts, for confidential figures. Client names, slogans, and all identifying information could have been redacted so that “no one should be able to determine [the client’s] identity.” Draft failed to take advantage of any of these alternatives.
- In any event, Draft’s lack of specificity was only one of several grounds for its failure to be prequalified for specialty III; it was prequalified for other specialties where it similarly provided only general information.

Draft requested and received a conference concerning the protest. At the conference, the protester was asked to address the issue of the timeliness of its objections to the content of the prequalification process. Its post-conference submission included the following:

- A restatement of the instances throughout the stages of the purchase which demonstrated the Group Manager’s bias in the contracting process. Among those events was the reaction of the evaluator previously discussed by Draft. Draft contends that the contracting officer’s explanation to the contrary is incomplete because it is not based on “any direct interview of the evaluator,” but on information provided by an intermediary, and that further investigation would establish the evaluator’s “displeasure with the pressure applied by the members of the Advertising and Promotion Group.”
- It is significant that the Postal Service adopted a “‘consensus’ or ‘negotiated’ scoring method” in the second round of the prequalification. “[I]n combination with the improper influence . . . [believed to have been] exerted . . . , it meant that individual evaluators’ scores were not averaged, but rather the views of a dominant clique were adopted as the score . . . .” Consequently, the evaluators’ scores prior to the consensus were “immaterial,” and “it proves nothing” that the Group Manager’s direct subordinates gave Draft “relatively high ‘individual’ evaluation scores” before the consensus negotiations began.
- Draft was improperly penalized for respecting its clients’ confidences. Draft’s clients were sufficiently well known that information concerning them could not be masked or “blinded” in Draft’s submissions. The Postal Service recognized the potential problem in responding to question 4, and Draft explained in its submission why it could not provide the information.

- The contracting officer’s response, *supra*, discloses, for the first time, that other offerors “violated their clients’ confidentiality clauses by providing detailing information of the very type that clients would be the most displeased to have revealed.” (Emphasis omitted.) That the information was submitted as proprietary information “offered [the] clients no protection at all.” A client which learned of such disclosure would terminate its agency. Draft refers to a standard promulgated by “the principle advertising agency trade group” that “[p]roprietary information should not be released to any other party or used for any purpose other than the project for which it was collected without the written permission of the information’s source.”<sup>18</sup>
- Responding to an inquiry about why its discussion of the confidentiality issue was timely, Draft contends that it is not protesting an impropriety in the solicitation, but rather that the Postal Service’s conduct subsequent to the receipt of the phase two submissions was inconsistent with its earlier advice that agencies were not required to violate their clients’ confidentiality. What Draft is protesting is that the Postal Service “acted improperly . . . by rewarding offerors who acted contrary to the ethical norms and confidentiality requirements of the advertising industry.”
- Draft “submits that the USPS abused its discretion by deciding not to hold discussions to inform DraftWorldwide of the USPS’ desire for client-confidential information to explore whether there was any alternative information . . . that would have established [its] qualifications . . . given the fact that [Draft] had offered compelling reasons for its inability to provide the very information that stood between it and a chance to compete.”

On August 14, 2001, the Inspector General issued a “Management Advisory Report — Review of Purchasing Process for Advertising Contracts (Report Number CA-MA-01-03) which was “initiated . . . in response to a congressional request to review alleged improprieties in the selection process [for advertising contracts].” The report, which is marked “Restricted Information” and is not included on list of reports on the Inspector General’s website, [www.uspsoig.gov/foia/reports.asp](http://www.uspsoig.gov/foia/reports.asp), was obtained by this office only

---

<sup>18</sup> “ANA/AAAA Jointly Endorse ‘Rules of the Road’ for Agency Search Consultants,” New York, December 15, 2000. “ANA” is the Association of National Advertisers; “AAAA” is the American Association of Advertising Agencies. The quoted language is one of the seven “rules of the road” for agency search consultants. It reads, in its entirety:

Confidentiality of Material and Data Submitted

All parties in the search process — advertiser, agency, and search consultant — should be asked to sign off on the confidentiality of information provided by any of the parties. Proprietary information should not be released to any other party or used for any purpose other than the project for which it was collected without the written permission of the information’s source.

indirectly. Because of the restricted legend, we quote only from the report's initial summary of the points investigated and the report's "Results in Brief":

[A] bidder [*sic*] alleged the Postal Service (1) conducted an unplanned and unfair second phase of prequalifications; (2) unfairly eliminated the bidder from the solicitation phase because he did not provide detailed results and confidential financial information about other clients; (3) made inaccurate statements and disregarded Purchasing Manual procedures; (4) adopted a "consensus" or "negotiated" scoring method, in which individual evaluator's scores were not averaged, and (5) the Advertising and Promotions Manager exerted improper influence to exclude this bidder from competing for Postal Service business. . . .

Our review revealed that a second phase of prequalifications was not planned, however, we determined the prequalifications were conducted in a fair and objective manner. We also concluded the Postal Service was within its rights to continue the prequalification process, including requesting additional information from bidders, and narrowing the list of prequalified vendors. In addition, we do not believe a bidder was unfairly eliminated because the bidder's proposal was disapproved for reasons beyond the bidder not providing detailed confidential information about other clients.

We could not determine whether the Postal Service made inaccurate statements. However, the review also disclosed that the Postal Service did not adhere to time limits required by the Purchasing Manual in notifying parties of award and protest decisions<sup>[19]</sup> and that a definitive process was not in place to guide evaluation teams in reaching consensus. Finally, we were unable to substantiate allegations of impropriety made by one of the bidders, including undue influence on employees by the Advertising and Promotions Manager.

## **DISCUSSION**

Draft's protest raises two sets of issues. Its primary contention is that the Postal Service improperly excluded it from the prequalification for Module III because of the animosity of the Manager, Advertising and Promotions Group, toward it. Its secondary contention is that specific actions taken in the course of the prequalification process which were detrimental to it were otherwise improper.

Most protests in which charges of bad faith arise challenge the bad faith of the contracting officer. Here, it is not the contracting officer's, but the Group Manager's animus

---

<sup>19</sup> The violations involved the September 20, 2000, letter to Draft which did not identify the seven contracts which had been awarded on September 11 through 18; a letter of October 19 announcing the September 18 award of the specialty IV contract; the delay to November 1 in debriefing Draft of the specialty I award following its September 25 request, and delay in submission of the protest report.

which has been challenged, and the contracting officer has not undertaken to rebut the opinions which Draft has attributed to the Group Manager, claiming that whatever those opinions were, they played no role in the source selection process, in which the Group Manager was not an immediate participant.

The protester has not adequately established that the Group Manager had the specified animus or that the animus was transmitted to the purchasing process. "The protester bears a heavy burden of proof when alleging bad faith on the part of Government officials; it must show by virtually irrefutable proof that these officials had a specific malicious intent to injure the protester." *Irwin I. Grossman, On Reconsideration*, P.S. Protest No. 84-55, December 7, 1984, quoting *Kalvar Corporation, Inc. v. United States*, 543 F.2d 1285, 1301 (Ct.Cl. 1976).

As recited above, the protester's evidence has been the subject of investigation outside the protest process by the General Counsel on behalf of the Postmaster General and by the Inspector General, neither of whom substantiated the protester's contentions. The conclusions of these investigations provide support for the contracting officer's position here. Accordingly, we conclude that the protester has failed to meet its burden of establishing that the processes of which it complains were the result of improper motive.

Accordingly, we turn to the question whether the actions taken in the course of the prequalification were improper *per se*. In doing so, we note that to the extent that the protest challenges the actions of the contracting officer to extent the prequalification process by establishing a second round for some of the firms to be prequalified, its protest is untimely. "Our decisions have consistently treated the prequalification statement as a solicitation for purposes of determining the timeliness of a protest of the terms of the statement." *WorldPak, Inc.*, P.S. Protest No. 98-05, July 1, 1998. In that context, objections to the revision of the prequalification scheme by the March 2 letter and RFI were "[p]rotests of alleged improprieties which d[id] not exist in the initial solicitation but which [were] subsequently incorporated into the solicitation [which] must be protested not later than the next closing time for receipt of following the incorporation. proposals." PM 3.6.4.c. Here, that would have been March 23, when responses to the RFI were due. A protester "may not postpone its protest with regard to . . . errors [in a prequalification statement] until it perceives that it has been harmed by them. *WorldPak, supra, citing Sunbelt Properties, Inc. — On Reconsideration*, Comp. Gen. Dec. B-245729.5, 92-1 CPD ¶ 528, June 18, 1992.<sup>20</sup>

---

<sup>20</sup> Draft's suggestion (*supra*, page 15), that it is not protesting the terms of the RFI, but rather the Postal Service's subsequent rewarding of firms which violated client confidentiality is unpersuasive. And, of course, Draft's objections to the RFI's terms extended beyond that concern, for example, its objection to the RFI's limitation on the use of Postal Service case histories.

(Footnote continued on next page.)



Although the protester contends that the Postal Service improperly rewarded other offerors who breached their clients' confidentiality by providing information about specific campaigns and the like, the record reflects not that other firms violated client confidentiality but that those firms differed from Draft as to what could be disclosed within the bounds of that confidentiality. There is nothing on the record to suggest that the other prequalification candidates breached their clients' confidentiality; Draft's conclusions to that effect are "mere speculation . . . insufficient to support the protester's claim." *L & J Transportation Inc.*, P.S. Protest No. 91-42, August 29, 1991.

Contrary to the protester's suggestion, there is no inherent objection to the prequalification of only two sources for the direct marketing specialty. As the contracting officer notes, PM 3.5.2.e provides, in pertinent part: "All qualified suppliers need not be placed on the prequalified list if the purchase team determines . . . that some suppliers are considerably more qualified than others, thereby precluding purchase opportunities for the less qualified." That more than two firms were prequalified for some of the other specialties and markets does not preclude the selection of only two firms here, and that Draft's contract required the solicitation of three sources in some subcontracting instances is wholly irrelevant here.<sup>21</sup>

Finally, Draft's complaint that orders were placed with FCB, rather than with it, under the two firms' previous contracts, presents a question of contract administration under its prior contract which is subject to resolution under its contract's Claims and Disputes provision. *Stamp Venturers*, P.S. Protest No. 93-06, April 22, 1993.

The protest is dismissed in part and denied in part.

William J. Jones  
Senior Counsel  
Contract Protests and Policies

---

(Continued from previous page.)

Draft's July 12 objection to the terms of the Scope of Work's description of the Digital Asset Management Program, which has not been pursued in the course of this protest, is also clearly untimely under PM 3.6.4.c.

<sup>21</sup> Further, of course, as the fourth-ranked firm, Draft could not benefit here solely from a presumed requirement that three sources be prequalified.