

April 4, 2001

P.S. Protest No. 00-25

JOB FILES, INC.

Solicitation No. 162745-00-A-0221

DIGEST

Protest of award of a contract for interactive voice response services is dismissed as untimely; timeliness is measured from date protester learned of contract award, not from date it received information concerning the award in response to a Freedom of Information Act inquiry.

DECISION

Job Files, Inc., of Aurora, CO, protests the award of a contract to Wonderlic, Inc., under solicitation 162745-00-A-0221.

The Chicago, IL, Purchasing and Materials Service Center (P&MSC) issued a commercial solicitation for telephone automated job application/scheduling services (described in the statement of work as "application acceptance using interactive voice response" (IVR)) for the Northern Illinois District for a one-year term. The statement of work explained that when the Postal Service has employment needs for craft employees, the contractor was to receive telephone calls from applicants, capture information from those calls using interactive voice response, schedule applicants to take examinations,¹ mail diversity information survey forms to applicants, and provide summary information to requesting postal organizations. Offerors were required to demonstrate that they could handle at least 2,000 postal calls per day.

As amended by amendment A01, the solicitation requested that offers provide a "price for basic service per minute," a setup fee for each call, and a cost for the mailing of survey forms. According to paragraph 3.3, award was to be based on price and proposal-specific and supplier-specific evaluation factors; price and the evaluation factors were to be of equal weight.

Wonderlic, a small business, proposed a price per minute of \$.35, and no cost for call setup or survey mailings. While Wonderlic had no previous postal contracts, its proposal claimed a 38,000 organization client base, and that it was providing services of this type "for hundreds of companies every week." Job Files, a small, woman- and minority-owned

¹ There were three options regarding scheduling. At the Postal Service's direction, the contractor would either provide mailing labels with applicant information to personnel offices which would schedule testing and mail the notices, prepared the schedule notices for applicants but provide the notices to the personnel office for mailing, or prepare the notice and mail it itself.

business, which had previously provided such services to the Postal Service, proposed a price per minute of \$.36, no cost for the setup fee, and a mailing cost of from \$.02 to \$.08 depending on the package contents. Two other offerors proposed at prices higher than Job Files.

The offers of Job Files and Wonderlic were evaluated as essentially equal.² According to the contracting officer's statement, Wonderlic was awarded the contract "because it was deemed to be in the best interest of the Postal Service to award to the lowest priced proposal." That conclusion was consistent with the solicitation's discussion of the relative weight of price factors to the performance evaluation factors.

Job Files was advised of the award by an August 21 letter which identified Wonderlic as the awardee and set out its \$.35 per minute price. The contracting officer states that on August 30, Job Files' president, Ms. Morris, sought further information about the award including a copy of Wonderlic's contract. She was told to submit her request under the Freedom of Information Act (FOIA)., Job Files' FOIA request was received on September 1.³ On September 5 or 6, Ms. Morris asked the contracting officer about the time period for filing a protest; the contracting officer states that she was advised that "she had 10 calendar days to file a protest from the time she knew the basis of the protest."⁴ The P&MSC re-

² The offers were scored in five categories:

- Price
- Past Performance
- Work Experience
- Postal Contracts
- Supplier Capabilities/References

Each category was assigned a maximum of 20 points. Wonderlic received 20 points in all categories except Postal Contracts, where it received 19; Job Files received 20 points in all categories except price, where it received 19.

The contracting officer's statement asserts that because the solicitation did not describe their relative weight, each was given equal weight. That analysis overlooks the solicitation's discussion of the relative weight of the price and performance evaluation factors, which stated, in part: "Proposal specific and supplier specific performance evaluation factors, [*i.e.*, the last four categories] when combined, are as important as price and price related factors. Price will not be the determining factor in choosing among all offer which meet the minimum acceptable performance evaluation factors." (These two sentences used in conjunction are confusing. Guidance at Purchasing Manual (PM) 2.1.7.f (" . . . The relationship of cost/price factors should be stated in general terms (for example, that cost/price will be considered to be more important, less important, or as important as the performance evaluation factors, or that cost/price will be the determining factor in choosing among all offers which meet the minimum acceptable performance evaluation factors) . . .") contemplates the use of something along the lines of the first sentence to indicate the relative weight of the price and performance factors or a sentence indicating that price will be determinative as among all acceptable offers.)

³ The request, dated August 29, was on a pre-printed form. It did not request a copy of the Wonderlic contract, but did ask for the contractor's name, the annual value of the current contract, the bidders list, the "abstract of bidders" for the current contract, and the current contract's "Schedule 'B' pricing."

⁴ The timeliness of protests is discussed at PM 3.6.4. PM 3.6.4.d provides (as to protests other than protests based upon improprieties in the solicitation evident before proposals are due) that "protests by a

(Footnote continued on next page.)

plied to the FOIA request on September 12, including Wonderlic's full address, a copy of the list to whom solicitations were sent, an abstract of the offers received, and a copy of Wonderlic's proposed pricing as set out in response to amendment A01.

Job Files' protest was received by the P&MSC on September 26; a copy was received in this office on September 29.⁵ The 50-paragraph protest begins with a description of the features of Job File's EZscreen™ IVR system for job applications, which uses Job File's "proprietary software and design" on which a patent application is pending; the process which the Postal Service used prior to contracting with Job Files for these services; Job Files' efforts beginning in 1994 to create "a customized IVR job application " for the Postal Service known as "P.S. ZAP APP"; and the numerous contracts which the Postal Service awarded Job Files for these services from 1994 onward.

The protest next discusses and objects to the award of a contract to HR Services, Inc., in response to solicitation 182745-99-A-0220 for IVR services for two areas within the Central Illinois District. Because the protest recites that the solicitation was issued in July, 1999, and a copy of the offer and award sheet included with the protest discloses that the award occurred in October, 1999, Job Files was advised when its protest was received that its challenge to this award was clearly untimely, and was for that reason, summarily dismissed.

With respect to solicitation 00-A-0221, the protest contend that Wonderlic appears to have been "tipped off" regarding Job Files' proposed price since it underbid it by one cent when it "usually charges \$.85 per minute"; Wonderlic's "core business is personality profile testing"; the August 10, 1999, bankruptcy of Eagle Finance Corp., formerly Wonderlic and Associates,⁶ is relevant to Wonderlic Inc.'s current capability; Wonderlic's "winning bid . . . depended on using the very system custom designed by Job Files for the Postal Service" and "would be impossible" "[b]ut for the use of Job Files' work product"; and on September 4 or 5, Job Files was contacted by the P&MSC "stating that they were adding the Royal Oak[, MI] District to the solicited contract," and asking if "Job Files wished to lower its bid," to which it responded in a September 7 facsimile message proposing to perform at a price of \$.28 per minute, making it "the lowest bidder" on the solicitation.

The protest also recites that Job Files "has . . . been informed that the Postal Service intends to have the Office of Personnel Management (OPM) manage the electronic interac-

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protester that has received a debriefing shall be received not later than 10 days after the debriefing. In all other cases, the protest received not later than 10 days after the basis of the protest is known or should have been known, whichever is earlier. No protest other than one by a protester that has received a timely requested debriefing (see 4.2.8.a) will be considered if received more than 15 days after award of the contract in question." PM 4.2.8.a. state that "[a]n offeror may be debriefed upon written request received by the contracting officer within three days following the offeror's receipt of notice of award."

⁵The protest, which was structured as a legal complaint, did not specifically identify either the contracting officer or the General Counsel as its intended primary addressee. Under PM 3.6.3.a, the protest was considered to have been intended for consideration by the General Counsel.

⁶Information supplied both to the Postal Service and to the protester by Dun & Bradstreet identifies Wonderlic Inc.'s chief executive as an employee of Eagle Finance until its bankruptcy.

tive voice response job application system in-house using the system custom designed and installed by Job Files without compensating Job Files for same.” It asserts that Job Files has filed notices with contracting officers in the Chicago P&MSC and with postal “Legal Counsel” objecting to the Postal Service’s “unauthorized use or disclosure . . . of Job Files’ proprietary rights and information.” The protest concludes with a favorable recitation of Job Files’ capabilities related to the criteria for supplier capability at PM 2.1.7 and an assertion of the protest’s timeliness, measured from its receipt of the contracting officer’s response to its FOIA inquiry.

The contracting officer’s statement responds to the protest, contending initially that the protest is not timely. The contracting officer contends that Job Files failed to request a timely debriefing in several conversations with P&MSC individuals, and that its protest did not depend on any of the information which was disclosed in response to its FOIA request. Accordingly, the contracting officer views the protest as untimely measured from Job Files’ receipt of the notice of award. He notes that the protest procedures do not address circumstances in which information is disclosed as the result of a FOIA request, and contends that allowing protests in such cases would result in unnecessary delay.

With respect to the merits of the protest, the contracting officer asserts that Job Files’ claim that Wonderlic was “tipped off” is unsupported and no one in the P&MSC did so; Wonderlic’s rates for personality profile testing are not relevant here; the firm which declared bankruptcy was separate from Wonderlic, Inc.; and Wonderlic uses its own IVR system, not Job Files’ system. The Royal Oak District requirement was the subject of an oral solicitation of the offerors who had proposed on the Northern Illinois District. Offers were received from Job Files, Wonderlic, and HR Services; Job Files was second lowest among those offers. On September 8, a telephone message was left advising Job Files that award had been made to the low offeror, HR Services, at \$.29 per minute; Job Files’ faxed offer at \$.28, although dated September 7, was received by the P&MSC at 1:10 p.m. on September 8, after the award had occurred and Job Files had been notified of the award and its price.

With respect to the Office of Personnel Management, the contracting officer understands that negotiations to the effect alleged are underway, but lacks knowledge that OPM’s system is related to Job File’s system. He notes, however, that that matter has nothing to do with Wonderlic’s contract.

The contracting officer contends that no “unauthorized use or disclosure of Job Files’ proprietary rights information” has occurred, noting that the Postal Service has contracted for the use of various vendor’s IVRs, such as those of HR Services and Wonderlic, which “do not infringe on Job Files['] proprietary rights.”

The protester did not comment on the contracting officer’s statement. Wonderlic submitted comments which denied any undertaking to obtain information about other competitors bids, noted its customary practice of offering “significant price reductions” based on volume over time, and asserted the separate organizations of Wonderlic and Eagle Finance and the independence of PhoneApp®, its IVR software program and technology from any other outside vendors’ products.

DISCUSSION

We begin with a discussion of the timeliness of Job Files’ protest, as we must since “[w]e lack jurisdiction to adjudicate protests that are untimely filed and have no authority to waive timeliness requirements.” *Ancra International Corporation*, P.S. Protest No. 95-06, March

21, 1995. As noted above, the contracting officer contends that the protest is untimely measured from the date Job Files learned of the award (a date not established by this record, but no sooner than August 21 and no later than August 30, the date of its telephone inquiry to the P&MSC); Job Files, on the other hand, contends that the protest is timely as measured from its receipt of the response to its September 1 FOIA request.

Our decisions have established that delay arising from the acquisition of information pursuant to FOIA requests does not toll the timeliness requirements set out in the protest regulations. *Ashaway Village Associates*, P.S. Protest No. 88-8, March 9, 1988. Further, as the contracting officer suggests, what was provided in reply to the FOIA was not material to the protest; the bases for Job Files' protest were known or should have been known when it learned the identity of the awardee. Accordingly, the protest is untimely and must be dismissed.

We will, however, comment briefly on the issues which the protest raises. The protester's suggestion that Wonderlic was somehow "tipped off" concerning Job Files' offered price lacks any factual support in the protest and is refuted both by the contracting officer and the awardee. Such speculation is insufficient to support the protester's claim. *L & J Transportation, Inc.*, P.S. Protest No. 91-42, August 29, 1991. The contention that the bankruptcy of Eagle Finance was relevant to the evaluation of Wonderlic's qualifications relates to the affirmative determination of Wonderlic's capability, a matter not for our review "absent fraud, abuse of discretion, or failure to apply definitive responsibility criteria," none of which are evidenced here. *W.W. Fry and Son, Inc.*, P.S. Protest No. 99-28, February 1, 2000. The record provided by the contracting officer establishes that the Royal Oak oral solicitation was not related to the Northern Illinois solicitation, and that Job Files was not the successful offeror with respect to Royal Oak.

The protester's contention that the awardee's performance will depend on the use of Job Files' work product is also unsupported on the record and disclaimed by the contracting officer and the awardee. Nothing in the solicitation points to any element of the incumbent contractor's prior performance, and the protest lacks clarity in its claims of proprietary rights. In any event, such claims are not for consideration under our protest procedures. *Facet Transportation*, P.S. Protest No. 86-75, October 7, 1986 ("[o]ur bid protest function does not include jurisdiction over patent infringement issues"); *Bell & Howell Company*, P.S. Protest No. 90-3, February 1, 1990 ("the allegation that a firm's proprietary data rights have been violated is not cognizable under our bid protest regulations.") The same limitation applies with respect to Job Files' objections to OMB's management of an IVR system for the Postal Service.

The protest is dismissed as untimely.

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