

January 8, 2001

P.S. Protest No. 00-27

JODY WHILDEN BLUMENFELD

Solicitation No. 752-349-00

DIGEST

Protest of cancellation of solicitation without award is dismissed as untimely; misaddressed letter returned to protester without delivery is not effective protest.

DECISION

Ms. Jody Whilden Blumenfeld protests the cancellation without award of a solicitation for the box delivery of mail.

On August 7, 2000, Distribution Networks, Southwest Area, issued solicitation 752-349-00, for Highway Contract Route (HCR) 78869, mail delivery to 108 boxes served by the Sabinal, Vanderpool, and Utopia, TX, post offices. The solicitation provided that "[f]irst consideration will be given to proposals which meet all of the service requirements specified," and that among such proposals, "award will be made to the low, responsible offeror." Offers were due at 3 p.m., September 7.

The solicitation was provided to three prospective offerors. Two offerors, including Ms. Blumenfeld, submitted offers on September 5. Ms. Blumenfeld's offer was the lower, a fact of which she was advised by a representative of Distribution Networks in a September 6 telephone conversation. Ms. Blumenfeld contends that in that conversation the representative said she "would recommend [Ms. Blumenfeld] to the contracting officer and that [Ms. Blumenfeld], would be awarded the contract." The contracting officer contends that while Ms. Blumenfeld was told that she would be recommended to receive the award, the representative "was not awarding her the contract," a decision which could be made only by the contracting officer.

A third offer was received on September 7, lower than either of the offers received on September 5. The representative conferred with the senior contract specialist, and they concluded that all three offers were excessive in price. In a subsequent phone conversation,¹ the representative advised Ms. Blumenfeld that all offers were excessive, and that she could, if she wished, submit a lower offer. Ms. Blumenfeld submitted a lower offer by telephone on September 11. Because that offer was the same as another's low offer. Ms.

¹ Ms. Blumenfeld contends that this conversation occurred on September 7; the contracting officer's report places it on September 8.

Blumenfeld was given the opportunity to further revise her offer, and did so.² The other offerors had each revised their offers; as so revised, Ms. Blumenfeld's offer was the second low.

Following a review, the contracting officer concluded that all the offers remained excessive in price. By letters dated September 25, Ms. Blumenfeld and the other offerors were advised that no award would be made and that the requirement would be the subject of a new solicitation.

Ms. Blumenfeld expressed her dissatisfaction with that decision in two telephone conversations with Distribution Networks, and was advised about submitting a written protest. She did so in a letter dated October 5 and mailed, certified mail, return receipt requested, on October 6. That letter, however, included an incorrect ZIP+4 code, and was returned to Ms. Blumenfeld undelivered.³

On October 19, Ms. Blumenfeld mailed copies of her October 5 protest letter to Distributions Networks using various addresses; Distributions Networks received those letters on October 23 and 24. On October 19, she also sent her protest to this office, which received it on October 20.

The protest objects to the failure to award her the contract, contending that her offer was consistent with the price at which an earlier contractor "was offered the route"; that offeror declined the route because of other business. The protest objects to the subsequent solicitation of "verbal bids," and contends that "there may be some collusion and racial discrimination" within the contracting office which disadvantaged Ms. Blumenfeld because she is not of Hispanic origin. Finally, the protest objects to the fact that the protester was not provided a complete copy of a subsequent solicitation for emergency service on the Sabinal route.

² The contracting officer's statement recites that Ms. Blumenfeld and the other low offeror were afforded the opportunity to break the tie "because both [were] considered [to be] minorities." Commenting on that statement, the protester contends that the purchasing regulations do not provide for such treatment.

There is no regulatory provision requiring such a tie-breaking procedure for minority offerors or others. A former regulation, the Procurement Manual, Pub. 41, once provided at 12.7.7.b.1 a tie-breaking procedure for advertised mail transportation contracts which established a fourth precedence for the equal low bids of minority- and women-owned businesses, ahead of the bids of small-businesses, but which provided for the selection of offers of equal rank by lot. The current regulation, the Purchasing Manual (PM) provides neither for sealed bid formal advertising or for any preference among offerors in negotiated procurement.

³ Distribution Networks receives its mail at post office boxes at two different Dallas-area postal facilities. The solicitation provided for mailed offers to be sent to PO Box 561508, Dallas TX 75356-1508, which is physically located at the Brookhollow Station; the notice that no award would be made included a return address of PO Box 225428, Dallas TX 75222-5428, which is at the Dallas main post office. Ms. Blumenfeld's October 6 letter was addressed to the later PO box (225428) at the former ZIP+4 code (75356-1508).

The contracting officer's statement contends that the protest is untimely since no protest was received either by this office or Distributions Network until October 20, more than ten days after the protester knew that no award would be made on the solicitation.

With respect to the merits of the protest, while the contracting officer acknowledges that there was an oversight in communicating with Ms. Blumenfeld concerning her offer prior to the time set for the receipt of offers, he asserts that no harm was caused since no award resulted from the solicitation. The solicitation of revisions to the protester's offer was consistent with the flexibility afforded in negotiated contracting, which allows discussions with offerors and the revision of offers by offerors at any stage of discussions.

The contracting officer denies any discriminatory intent with respect to the protester, noting the postal policy of encouraging offers from small and minority- and woman-owned businesses. With respect to the issue of excessive price, the contracting officer appears to acknowledge that another offeror previously declined to perform the route at a rate comparable to the protester's offer.⁴

Finally, the contracting officer describes efforts taken to provide the protester with a copy of the new solicitation package which adequately resolve this element of the protest.

Replying to the contracting officer's statement, the protester contends that Distribution Networks may have declined to accept the October 6 mailing "to delay and nullify the protest." On the merits, she repeats her earlier objections to the process used.

DISCUSSION

Our protest regulations require that protests of this sort must "be received not later than 10 days after the basis of the protest is known or should have been known." PM 2.6.4.d. In this case, that basis was known when Ms. Blumenfeld received the contracting officer's letter of September 25, which she advises was September 28. Ms. Blumenfeld's October 5 letter, mailed October 6, thus would have been timely had it been received by the contracting officer by October 10 (the first work day subsequent to Sunday, October 8, the tenth day after September 28). However, as described above, that misaddressed letter was returned to the sender without delivery. The subsequent communications to this office and to Distribution Networks are untimely, and cannot be considered.

In any event, the protester was not the low offeror either initially (despite the representative's premature advice to that effect) or as the result of her offer in response to the invitation

⁴The protest file also contains a spreadsheet comparing the cost per box delivery of this route to the cost per delivery on seven other Sabinal routes; the analysis contends that the price here was almost twice the average price of those other routes. The contracting officer's statement does not discuss the significance of the analysis.

Because the analysis does not discuss any of the characteristics of the routes used for comparison other than their frequency and the number of boxes, such as their length, time needed to perform, and vehicle requirements, it provides little support for the conclusion that the low price offered on this route was excessive. See *Janice Reilly*, P.S. Protest No. 98-21, December 2, 1998 (discussing issues in comparing routes). Another potential issue: All the "comparable" routes involve more deliveries than this route (from 150 to 410), with the largest route having the lowest cost per delivery and the route with the fewest deliveries exceeding the price per delivery found excessive here.

to revise her offer. As a result, she would lack standing to object to the failure to award a contract under the solicitation, as she was not in line to receive that award. *AHJ Transportation Company, Inc.*, P.S. Protest No. 89-02, March 24, 1989.⁵

The protest is dismissed.

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⁵In addition, there is no merit to the protester's objections to the oral solicitation of a revised price (see, e.g., *Valerie Knox*, P.S. Protest No. 94-34, September 30, 1994) or to her unsupported contention that the cancellation may have been the result of discrimination (*Doric Noble, Inc.*, P.S. Protest No. 97-04, April 24, 1997).