

March 12, 2003

P.S. Protest No. 02-14

CLEGG'S CAR CARE

Solicitation No. 072368-02-A-0232

DIGEST

Protest of failure to receive a vehicle service agreement is sustained in part. Evaluation of proposals was tainted by favors provided to postal evaluator by protester's employee who later established his own firm which received the agreement on basis of unsupported evaluation. In resolicitation, fact of improper dealings should be considered with respect to both protester and employee's subsequent firm.

DECISION

Cleggs Car Care (Cleggs) protests its failure to receive a vehicle maintenance service agreement for 61 vehicles at the Orem, Utah, Postal Center.

Solicitation 072368-02-A-0232 for this service was issued by the Denver Purchasing and Materials Management Center.¹ The solicitation sought offers for various repair services, for which estimated quantities were provided, although the cover sheet of the contract provided:

The Postal Service is not obligated to issue orders under this agreement, nor does the Postal Service guarantee any minimum dollar amount during the term of the agreement. . . . A binding contract will come into effect only upon placement of an order. Therefore, the terms "contract" and "supplier as used in this section as well as other sections should be read as "agreement" and "prospective supplier," respectively, except in the context of a Postal Service order.

Offers were submitted by Cleggs, Mahedy Automotive Inc. (Mahedy), and a third supplier not involved in this protest. Cleggs had been the incumbent supplier under a pre-

¹ Just before the protest was received, responsibility for the contract awarded pursuant to Solicitation A-02321 was transferred to the Philadelphia, PA, Purchasing Service Center, which has participated in the protest.

vious agreement. Until he started his own firm in June, 2002, Mr. Mahedy, Mahedy's proprietor, had worked for Cleggs.

The offers were evaluated by a team consisting of the manager of the Orem Vehicle Maintenance Facility (VMF), the Orem postmaster, and a Supervisor of Customer Service. According to the award memorandum, the evaluators scored Cleggs as "poor to good," noting, in a brief narrative, "deficient knowledge of USPS vehicles by servicing mechanics and inefficient business operations." Cleggs' past performance was characterized as "seriously deficient." Mahedy, on the other hand, was scored as "good to excellent," based on its good interim service, and cites Mr. Mahedy's previous experience at Cleggs as providing "extensive knowledge of USPS vehicles."

Mahedy's offer was evaluated as \$95,684; Cleggs' offer was evaluated as \$87,510. The evaluators' recommendation to issue the agreement to Mahedy at its higher price was adopted by the contracting officer, and an agreement was entered into with Mahedy.

Advised of the agreement with Mahedy, Cleggs wrote the Denver contracting officer seeking a debriefing and attempting to protest. The protest was ineffectual because, in the words of the protest regulation, Purchasing Manual (PM) 3.6.3. a., it was a "[m]ere statement of intent to protest [,]. . . not a protest" and failed to "set forth a detailed statement of its legal and factual grounds." It was, however, a timely request for a debriefing (PM 4.2.8. a.), which the Denver contracting officer forwarded to the successor contracting officer in Philadelphia. That office subsequently debriefed Cleggs, providing it with the evaluators' justifications for their selection.

Cleggs' subsequent protest was addressed to this office. It set out a detailed response to the points noted by evaluators, including specifics on the extent of employee turnover (Mr. Mahedy, Mr. Mahedy's daughter, and Mr. Mahedy's assistant); its remaining employees (24); and their experience (substantial). The protest disputes the factual basis of the other evaluation criteria on which Cleggs was found lacking, and notes the lack of any previously expressed dissatisfaction with its performance.

The protest also asserts a "conflict of interest" concerning Mr. Mahedy and the Orem VMF manager. According to Cleggs, Mr. Mahedy was talking to the VMF manager about seeking the service agreement while still employed by Cleggs. Further, Cleggs provides copies of two repair orders which indicate that on two occasions in May and June, 2002, just prior to the issuance of the solicitation, Mr. Mahedy performed services on the VMF manager's personal vehicle at Cleggs' facility for which the VMF manager was charged substantially less than Cleggs' standard pricing.

The contracting officer's statement includes summaries of his inquiries which established that Orem personnel declined to exercise an option in Cleggs' prior agreement because of concerns about the quality of its service, but that it was not clear whether Cleggs was given notice of that dissatisfaction. The contracting officer concludes that it is "likely that [any discussions were] with Mr. Mahedy . . ." and that "[t]he owners . . .

may or may not have been aware of the extent of the problems in time to take corrective action.” The contracting officer concludes that “the evaluation of offers reflects . . . dissatisfaction with Cleggs’ service . . . [but that] Mr. Mahedy controlled to some degree [the] outcome of the service relationship.”

With respect to the evaluation of offers, the contracting officer “believe[s] there is some question . . . whether Mahedy should have been awarded the contract [*sic*]. He “question[s] the technical capabilities of the staff,” notes that there is “little past performance history” for Mahedy, and asserts “an appearance of improprieties on the part of some parties within and outside the Postal Service.” The report recommends that “the award to Mahedy be rescinded and award made to Cleggs.”

Mr. Mahedy submitted comments on the contracting officer’s statement which took exception to Cleggs’ claims with regard to its workforce and noted other areas in which he found fault with Cleggs’ operation.²

In light of Mr. Mahedy’s advice that Cleggs had been subcontracting work to Mahedy, the contracting officer advises that he “would agree that neither Clegg’s nor Mahedy should be eligible for award on a reprocurement.”

DISCUSSION

Where the contracting officer takes a position in the course of a protest which supercedes the determination on which the protest was based, it may make the protest academic and not for consideration. *Sun Chemical Corporation*, Comp. Gen. Dec B-288466; B-288466.2; B-288466.3, 2001 Comp. Gen. Proc. Dec. ¶ 185, October 17, 2001. That would have been the case had the contracting officer held to his original reaction to the protest, that is, to rescind agreement with Mahedy and enter into an agreement with Cleggs.³ Since, however, the contracting officer has subsequently concluded that neither Mahedy nor Cleggs should receive a new agreement, a position which does not moot Cleggs’ protest, we must address the correctness *vel non* of that position.

On the record before us, it appears that one member of the evaluation team had benefited from favorable pricing on auto repair services provided by Mr. Mahedy when he was working at Cleggs. That creates, at the very least, an appearance of impropriety on

² The comments question the qualifications of Clegg’s ASE certified master technicians and others on its staff; the quality of Cleggs’ equipment compared to Mahedy’s; the suitability of Clegg’s administration; and various instances of Cleggs’ lack of integrity. Mahedy notes various instances in which Cleggs’ “subcontracted out work to [Mahedy] because they could not perform the work.” With respect to Clegg’s objections to Mr. Mahedy’s provision of discounts, Mr. Mahedy asserts that “I did not give [the VMF manager] any special consideration because of his position. I do, however, know that a discount was give to [the VMF Manager] by [Cleggs’ proprietor] which is shown on the invoices referenced by Cleggs. . . .”

³ Given the nature of the agreement, such action could be taken at any time.

the evaluator's part,⁴ and raises doubt about selection of Mahedy over Cleggs on the basis of technical superiority. That doubt supports the termination of the agreement and the reprocurement of the requirement.

A prospective postal supplier must be found capable (PM 2.1.9.c.), a finding which includes consideration of the supplier's "sound record of integrity and business ethics" (PM 2.1.9.c.3(b)(3)). While the protester attributes the donation of the gift which occasioned the appearance of impropriety to Mr. Mahedy and thus to Mr. Mahedy's new company, doing so overlooks the fact that at the time of the gift Mr. Mahedy was in Cleggs' employ. The gift was reflected on Cleggs' invoices, known or knowable to Cleggs' management, and thus was as much attributable to Cleggs as to Mr. Mahedy. (While Mr. Mahedy seeks to distance himself from the gift, the invoices clearly reflect that he wrote them up, and thus may have been seen as the donor.) In any reprocurement of this requirement, the consequences of that impropriety should be considered both with respect to Cleggs and Mahedy.

The protest is sustained to the extent indicated.

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Contract Protests and Policies

⁴ See 5 CFR 2635.202(a), part of the Standards of Ethical Conduct for Employees of the Executive Branch, which are applicable to employees of the Postal Service (5CFR 2635.102):

General prohibitions. Except as provided in this subpart, an employee shall not, directly or indirectly, solicit or accept a gift: (1) From a prohibited source; or (2) Given because of the employee's official position.

"Gift" includes "any . . . favor [or] discount, . . . [and] includes services" and "[p]rohibited source means any person who: (1) Is seeking official action by the employee's agency; [or] (2) Does business or seeks to do business with the employee's agency" 5 CFR 2635.203 (b);(d).