

**November 14, 2002**

**P.S. Protest No. 02-17**

**UNITED AIRLINES, INC.**

**Solicitation No. IAT 2002-01**

**DIGEST**

Protest of solicitation terms is summarily dismissed. Allegation that eight days was an inadequate time to respond to the solicitation mooted by amendment allowing 24 days after receipt of this decision to respond. Allegation requesting preproposal conference is untimely raised and had also already been discussed in the first protest of this solicitation. Allegations that scope of solicitation was unclear and that the minimum guarantee was inadequate are also untimely raised as they were issues present in the original solicitation.

**DECISION**

United Airlines, Inc. has protested the amended Solicitation No. IAT 2002-01 for air transportation of mail from San Francisco, California to Tokyo, Japan. The original solicitation was issued on February 8, 2002, with proposals originally due on February 21, 2002. By a series of amendments, the time for proposal submission was extended, first to February 28 and then indefinitely to accommodate discussions between the Postal Service, the airlines and the Department of Transportation ("DOT"). Between February 28 and March 1, 2002, four other airlines<sup>1</sup> protested certain terms of the initial solicitation. Those protests were denied in P.S. Protest Nos. 02-01, 02-02, 02-03, 02-04, dated September 27, 2002.

Amendment 5 to the solicitation, issued October 3, 2002, informed offerors that these protests had been denied and amended the final date for receipt of proposals as Friday, October 11, 2002, at or before 2:00 PM EST. United's protest was received, via facsimile, on October 11, 2002 at 12:48 PM EST.

The solicitation was for a negotiated purchase and called for the submission of fixed price proposals for the transport of mail by air between San Francisco and Tokyo on specific flights to be proposed by the airlines and on particular dates and at specified

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<sup>1</sup> Those airline companies were American, Northwest, Delta and Continental. All prospective offerors, including United, were notified of these protests, and allowed to comment, if interested. United did not comment on these protests.

times. The solicitation, at sections G.5 and J.1, called for the award of one or more indefinite delivery, indefinite quantity contracts (“IDIQ”) supported by a minimum order of \$500 worth of mail transportation. The original period of contract performance was to have been May 28, 2002 through November 29, 2002 (six months).

The protester has protested on four separate grounds. First, it argues that the amended solicitation provided inadequate time for the preparation of responsive offers since it was issued on October 3 and made the response time October 11 at 2:00 PM EST, which was only eight business days. Second, it argues that a preproposal conference is needed since it alleges this solicitation is a departure from established Postal Service procurement policy, which requires an explanation to offerors of the need for this change and the requirement of the solicitation. Third, it states that the scope of the solicitation is uncertain because while it requires transportation between San Francisco and Tokoyo, it is unclear if the solicitation covers markets beyond Tokoyo. The protester argues that if the solicitation does not cover markets beyond Tokoyo, the end result would be discrimination against U.S. carriers in favor of foreign carriers serving that market for the Postal Service. It alleges discrimination because it argues that the market rate would have to be higher for the foreign carriers being charged DOT-established rates. Lastly, it disagrees with the minimum order amount of \$500 as being “an inadequate incentive to require carriers to adhere to a certified Duty to Carry requirement.”<sup>2</sup>

The contracting officer’s responded, in her statement, to each allegation. Concerning the protester’s complaint about the short time for submission of proposals, she responded that she would amend the solicitation to now allow not less than 24 calendar days following the issuance of a decision on this protest for offerors to respond to this solicitation.

Concerning the remaining three issues, the contracting officer states that they are all untimely raised since they all could and should have been raised by United before February 28, which was one of the extended dates for receipt of proposals. The contracting officer reports that United was notified of the prior protests and chose not to participate as an interested party. The contracting officer also states that even if found to be timely, United’s remaining allegations are clearly without legal merit. She points out that the preproposal conference issue was fully aired and resolved in the prior protests. She also points out that United formally asked nine specific questions concerning the legality and philosophy behind the solicitation, by letter dated February 14, 2002. She states that United’s questions were all answered, via Amendment 3.

The contracting officer disputed that the scope of the solicitation was unclear, pointing to section A.1 of the solicitation which spells out its exact purpose. As for the argument that \$500 is an inadequate monetary incentive to the offerors, the contracting officer

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<sup>2</sup> United requested a protest conference, pursuant to Purchasing Manual (“PM”) 3.6.7.j., but because this protest was summarily dismissed, no conference was granted.

points out that in at least three other transportation solicitations with this minimum amount, we have not suffered from lack of competition or carrier interest, nor have we had a claim for failure to tender the minimum revenue.

United responded to the contracting officer's statement by asserting that although they received Amendment 6 to the solicitation, dated October 30, 2002, giving offerors not later than 24 calendar days following the issuance of the protest decision to submit their proposals, that was still an insufficient time. United requested 30 days, for the first time, in its response.

United argues that its protest was filed in a timely manner since it was filed before the extended due date for receipt of proposals on October 11 at 2:00 PM EST. United writes that it believes PM 3.6.4.c allows the filing of protests up to the extended and last revised time period.

The protester disagrees that its protest is without legal merit. United continues to point out that it believes the Postal Service has made an abrupt change in its historical procurement practice with the issuance of this solicitation. United, in these comments, raises a new allegation – that the solicitation is vague concerning guaranteed space and whether a carrier will be compensated for it. United again requests a preproposal conference be scheduled and held to address its requirements and ensure all offerors understand the solicitation requirements.

United discusses that it still doesn't understand what the solicitation is requesting concerning the exact volumes of mail expected to be transported between San Francisco and Tokyo and beyond. Finally, the protester continues to assert that the \$500 minimum guarantee listed in the solicitation is inadequate considering the true possible volume of \$10 million to \$500 million dollars for this six month's worth of business.

## **DISCUSSION**

We first address the issue of the timeliness of United's various allegations because "the requirement that a protest be timely filed is jurisdictional; we cannot proceed to a discussion of the merits of any issue which has been untimely raised." POVECO, Inc., et. al., P.S. Protest No. 85-43, October 30, 1985. "To be considered on its merits, each separate ground for protest must independently meet the timeliness requirement of the [Purchasing Manual]." Id. While it is true that United filed its protest before the extended due date and time for receipt of proposals outlined in Amendment 5, we do not agree that United timely filed all the allegations contained within its protest.

Since this protest concerns a solicitation and not an award, either Purchasing Manual 3.6.4. b. or PM 3.6.4. c. would apply. PM 3.6.4. b. states:

Protests based upon alleged improprieties in a solicitation that are apparent before the date set for the receipt of initial proposals must be received before the time set for the receipt of proposals.

PM 3.6.4.c. states:

Protests of alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation.

In order to determine which items that United is protesting here are timely and which are not, we first have to determine whether the alleged improprieties existed in the initial solicitation or were subsequently incorporated into the solicitation.

The first of United's four protest grounds concerns the amount of time available to offerors to respond to the last extended date for receipt of proposals. We need not express any opinion about the timeliness of this allegation since it was mooted by the recent extension given by the contracting officer in Amendment 6, which gave offerors not later than 24 days after this decision is issued to submit offers on this solicitation. We note that 24 days is three times more days than the eight days complained of by the protester here.<sup>3</sup> This ground is summarily dismissed as moot.<sup>4</sup>

United's second allegation was that a preproposal conference was needed since the solicitation was a departure from established Postal Service policy. This allegation is clearly untimely. Since United knew when it received the original solicitation, issued February 8, 2002, that no preproposal conference would be held, under PM 3.6.4.b., it should have protested this alleged omission no later than the original proposal due date of February 21. An allegation that a preproposal conference should have been held constitutes a protest against alleged deficiencies in the solicitation. Canteen Corporation, P. S. Protest No. 92-37, October 20, 1992.

In addition, this exact issue about the lack of a preproposal conference was already raised by the protesters in the first protests about this solicitation. United was notified of these protests and given an opportunity to comment on them as an interested party. It

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<sup>3</sup> We also note that it would appear to make good business sense for the protester and any interested parties to at least begin putting together its proposal for this solicitation in anticipation of the new submission due date.

<sup>4</sup> Furthermore, United's request for 30 days is untimely because it was raised for the first time in its response filed November 4, 2002. Even agreeing with United's timetable and arguments, this request should have been made no later than October 11, 2002, when it filed its protest on this matter. It could have given the contracting officer its suggested amount of time, at that time, but it did not.

chose not to do so and so forever waived its ability to do so under the Purchasing Manual protest regulations.<sup>5</sup> This ground is summarily dismissed.

United's third protest ground was that the scope of the solicitation was unclear about the extent of how far carriers were expecting to carry mail – from San Francisco to Tokyo only or beyond. This ground is also untimely raised. This particular ambiguity in United's understanding of the solicitation requirements was apparent within the original solicitation, issued February 8, 2002. United does not point to any of the five subsequent amendments as adding to its confusion on this issue. It also does not point to anything in the five amendments that changed a requirement, thereby adding to its confusion on this issue

Since this issue concerning the scope of the solicitation was apparent before the date set for receipt of the initial proposals, on February 21, 2002, it is untimely raised in this protest, filed October 11, 2002. This allegation is dismissed.

The protester's last allegation is that the \$500 minimum guarantee is too low for the actual, expected dollar value of this six month contract, which the protester estimated to be really worth between \$10 million and \$500 million dollars. This last allegation is also untimely raised. Once again, the amount of the minimum guarantee was present in the original solicitation, at Section G.5, which was issued February 8. This amount did not change over the five amendments. Therefore, PM 3.6.4.b applies. That section requires that "alleged improprieties apparent before the date set for the receipt of initial proposals *must be received before the time set for the receipt of proposals.*" In this case, that original receipt date was February 21, 2002. United did not protest this issue until October 11, 2002 and so it is untimely raised now.

This protest is summarily dismissed.

FOR THE GENERAL COUNSEL:

Deborah A. Davis  
Acting Managing Counsel  
Purchasing and Commercial Protection Law

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<sup>5</sup> Even if this allegation were timely, as stated in the original protests on this issue, whether to hold a preproposal conference or not is solely within the discretion of the contracting officer. "Preproposal conferences are never mandatory." Abso-Clean Portawash, P.S. Protest No. 92-06, March 30, 1992. PM 4.2.2. h. states that such a conference *may be held* "whenever circumstances suggest that it would add to the success of the purchase, such as when a solicitation contains complicated specifications or statements of work . . . ." See American Airlines, Inc., et. al., P.S. Protests Nos. 02-01, 02-02, 02-03, 02-04. United makes no allegations that the statement of work in this solicitation was complicated and we believe it is not.

