

May 13, 1999

P.S. Protest No. 99-07

STEVE KUNTZ

Solicitation No. 752-53-99

DIGEST

Protest of determination of box delivery route offeror's ineligibility is denied. Protester was not entitled to rely on contract specialist's oral advice inconsistent with solicitation's express terms; requirement for adequate competition did not preclude protester's disqualification, and award to remaining offeror was not invalid as excessive in price.

DECISION

Mr. Steve Kuntz protests the determination that he is ineligible to perform a contract for the box delivery of mail.

Distribution Networks, Southwest Area, issued solicitation 752-53-99 for the delivery of mail to 129 rural boxes between Huntsville, AR, and Pettigrew, AR. The solicitation contained the following provision:

Supplier must meet the following residency requirements . . . :

- (1) An individual supplier must reside in a county traversed by the route or an adjoining county on the date set for the receipt of proposals, and must continue so to reside during the term of the contract.

* * *

Mr. Kuntz, whose mailing address was in Park, KS, requested a copy of the solicitation. Before offers were due on December 4, 1998, he contacted the Distribution Networks office about the residence requirement.

A letter accompanying Mr. Kuntz' offer, the lower of the two offers received, stated that he "would meet the residency requirement within thirty days," and that he had "talked

to [the contract specialist] about this on the phone”; and other notes included with the offer were to similar effect.

Mr. Kuntz was determined to be ineligible for award because he had not met the residency requirement as of the date offers were due. By letter dated January 23, he protested that determination to the contracting officer. On February 8, not having received a reply to his protest, he submitted the protest to this office, where it was received on February 16. In the meantime, by letter dated February 8, the contracting officer had denied the initial protest as obviously without merit.

The protest contends that Mr. Kuntz had two telephone conversations with the contract specialist “about November 23” in which he was advised that “if [he] was living in Huntsville or a surrounding county before the start of the contract, [he] would be eligible.” Although Mr. Kuntz was later advised that the contract specialist denied making that statement,¹ and he acknowledges that he should have sought written confirmation of the advice he says he received,² he contends that because he was misadvised, and was, accordingly, put to the trouble of investigating the route, his offer should be considered. Mr. Kuntz’ protest to this office raises additional grounds not contained in his protest to the contracting officer that the rejection of his offer “eliminated the competitive bidding process,” and that the remaining offer should have been rejected as excessive in price because it was double the amount under the previous emergency contract for the route.

As discussed above, the contracting officer’s statement recites the denial that the contract specialist incorrectly advised Mr. Kuntz. However, assuming that he was so advised, she notes that Mr. Kuntz was not entitled to rely on that information, citing *Kathleen Roberts*, P.S. Protest No. 92-57, August 12, 1998.³ Further, the contracting

¹ The contracting officer’s statement has a different view of the conversations. It recounts an initial conversation of November 16 in which the contract specialist said she had to inquire of the senior specialist, and a November 23 conversation with both specialists as to which the statement asserts: “Mr. Kuntz was trying to get a confirmation that he could relocate within thirty days if he was awarded the route He was told that he must reside in a county traversed by the route or adjoining counties on the bid closing date.”

² The solicitation included, at paragraph K.5, the text of Provision A-6, Explanation to Prospective Offerors:

Any prospective offeror desiring an explanation . . . of the solicitation . . . must request it in writing Oral explanations or instructions will not be binding. Any information given to a prospective offeror concerning a solicitation will be furnished promptly to all other prospective offerors as an amendment of the solicitation, if that information is necessary in submitting offers or the lack of it would be prejudicial to any other prospective offeror.

³ *Roberts* involved a bid on a box delivery route by a part-time postal employee who served occasionally as a postmaster relief. Because of that employment, she was ineligible for the award, although she had been orally misadvised otherwise by a member of the contracting officer’s staff. The solicitation there, as here, provided that “oral explanations or instructions given before award will not

(Footnote continued on next page.)

officer notes that the solicitation clearly established that the residency requirement was effective “on the date set for the receipt of proposals,” and that Mr. Kuntz, as a former box delivery contractor on a route in Kansas, should have been familiar with the requirement, and was not entitled to rely on the postal employee’s erroneous advice.

With respect to the adequacy of the competition, the contracting officer notes that solicitation packages were provided to thirteen prospective offerors who requested them, of whom five appeared from their mailing addresses to meet the residency requirements, that the Postal Service made no effort to limit the competition, and that the competition was adequate. Further, the contracting officer rebuts the protester’s contention that the successful offer was in excess of the emergency contract price,⁴ and states that the amount was within the range expected and was not excessive.

DISCUSSION

The protester and the contracting officer differ in their versions of the facts. The protester asserts that he was informed that the residency requirement could be met after award; the contracting officer contends that he was advised otherwise. “[I]n disputes of fact, we adopt the contracting officer’s version of the facts absent sufficient evidence to overcome the presumption of correctness which attaches to that position.” *QMC Inc.*, P.S. Protest No. 91-52, December 27, 1991. In this case, however, the contracting officer’s version is accompanied by no supporting evidence,⁵ while Mr. Kuntz’ version is supported by the recitals accompanying his offer. That is, his statement that he had discussed with the contract specialist his intent to meet the residency requirement sometime after submitting his proposal is consistent with an understanding that he could proceed in that manner, and is not consistent with his having been advised that the residency requirement had to be met as of the date offers were due.

Even if Mr. Kuntz was so advised, however, his reliance on that advice is not a basis on which his offer can be considered. *Kathleen Roberts, supra*. As the solicitation provided (see footnote 2, above), oral advice was not to be binding. Further, the advice Mr. Kuntz says he was given was wholly and obviously inconsistent with the terms of

(Continued from previous page.)

be binding.” The decision denied the protest, stating, in part: “Ms. Roberts’ reliance on the erroneous assurances of an unauthorized Postal Service employee, even to the extent of placing an order for a vehicle, while unfortunate, does not repair her eligibility for award.”

⁴ The awardee, who had held the previous emergency contract, proposed the same annual rate she had received for that contract.

⁵ While the contracting officer’s report includes telephone record slips documenting Mr. Kuntz’ calls on two November dates, and the topic of the calls as “residency,” they provide no details of the information conveyed.

the provision setting out the residency requirement; such a change, which would affect the potential eligibility to propose of many of the prospective offerors, could have been accomplished only by amendment to the solicitation.

There is no merit to the protester's contention that the rejection of his offer inappropriately limited competition. Its rejection was a necessary consequence of his failure to meet the residency requirement, and had to be taken without regard to its effect on competition.

Finally, we concur with the contracting officer's conclusion that the single offer received was not excessive in price. "The authority vested in the contracting officer to decide whether or not to cancel an invitation and readvertise is extremely broad. . . . This office has stated that a determination concerning price reasonableness is a matter of administrative discretion which our office will not question unless the determination is unreasonable or there is a showing of bad faith or fraud. *Fowler's Refrigeration and Appliance, Inc. – Reconsideration*, Comp. Gen. Dec. B-201389.2, 1981 U.S. Comp. Gen. LEXIS 1465, May 11, 1981. The protester's contentions are premised on an erroneous understanding of the relationship of the offered price to the previous contract price, and do not establish the unreasonableness of the decision to award.

The protest is denied.

William J. Jones
Senior Counsel
Contract Protests and Policies