Protest of	)	Date: February 25, 1992
	)	
HOLMES CONSTRUCTION CO., INC.	)	
	)	
Solicitation No. 396138-92-A-0019	)	P.S. Protest No. 92-02

DECISION

Holmes Construction Co., Inc. ("Holmes"), protests the contracting officer's refusal to consider its late proposal in response to a solicitation for parking lot repairs at the Amarillo, TX General Mail Facility. Holmes asserts that its proposal would have been submitted by the proposal due date, but for the fact that Holmes did not timely receive two amendments to the solicitation, one of which extended the due date for proposals from November 26, 1991, to December 6.

Solicitation No. 396138-92-A-0019 was issued by the Oklahoma City Division on October 24, with a proposal due date of November 26. Section J.9 of the solicitation, "Preproposal Conference," subsection e., provided:

> Offerors are cautioned that, notwithstanding any remarks or clarifications given at the conference, all terms and conditions of the solicitation remain unchanged unless changed by amendment.

A preproposal conference was held on November 21, with Holmes and two other contractors in attendance. In response to issues raised at the conference, the project manager advised those present that an amendment incorporating changes discussed at the conference would be forthcoming and that the proposal due date would be extended. Amendment two was issued the day after the preproposal conference, November 22, extending the proposal due date to December 6.[1/]

Two proposals were timely received. Lone Star Construction ("Lone Star") was notified on December 10 that it was the apparent low offeror and instructed to provide applicable bonding, credit and financial information.

On December 9, Holmes contacted the architect to inquire about the status of the solicitation and was told that the proposal due date had passed. The architect advised

[1/] Amendment one had been issued before the preproposal conference; amendment three was issued December 2.

Holmes to contact the project manager. When Holmes informed the project manager that it had not received amendments two or three, he instructed Holmes to speak with the Acting Procurement Specialist, Senior ("specialist"). On December 12, Holmes was informed by the specialist that the solicitation had closed on December 6 and that any proposal submitted by Holmes would be handled as a late proposal.[1/] According to a memorandum to the file by the specialist included in the record provided to this office, Holmes was informed "that late proposals would not be considered if the integrity of the award would be jeopardized." Explaining why it hadn't submitted a timely proposal, Holmes informed the specialist that it had not received amendments two and three and was, therefore, unaware of the new proposal due date. Holmes stated that the project manager had instructed those present at the preproposal conference to wait until receipt of forthcoming amendments before submitting a proposal. The specialist responded that Holmes should have submitted its proposal on November 26 as stated in the original solicitation when it did not receive an amendment extending the due date.

Holmes subsequently submitted a proposal, which was received on December 16 by the contracting office. Lone Star's bond and other required information were also received on December 16. Holmes was informed by the specialist on December 19 that its proposal would not be considered for award. Lone Star received award of and notice to proceed on the contract on December 31. Holmes was formally notified by letter dated January 8, 1992, that its proposal had been received too late to be considered without jeopardizing the integrity of the competitive process pursuant to PM 4.1.3 d.

Holmes' protest, dated January 6, was mistakenly addressed to Oklahoma City, OK, where it was received on January 8.[1/] It was forwarded to this office and received January 13. Holmes protests the award of the contract to Lone Star, whose price was approximately $16,000 higher than Holmes' price, contending that its proposal would have been timely submitted if it had received the amendments to the solicitation.[1/] Holmes contends that the Postal Service used poor business practice in its conduct of this solicitation.

Holmes states that it informed the project manager at the preproposal conference on November 21 that it apparently had not received amendment number one, which had already been issued. The project manager promised to correct the problem. The pro-

[2/] "Proposals and modifications of proposals are late if received after the date and time established in the solicitation for receipt of proposals." Procurement Manual ("PM") 4.1.3 d.1. Late proposals may be considered if it is determined by the contracting officer to be in the Postal Service's interest. Provision A-4, Late Submissions and Modifications of Proposals. "It is not in the interest of the Postal Service to consider any proposal received so late that consideration of the proposal would jeopardize, or give the appearance of jeopardizing, the integrity of the competitive process." PM 4.1.3 d.2.

[3/] Holmes' envelope was addressed as follows: "Attn: General Counsel, Assoc. General Counsel, Office of Contracts and Property Law, P.O. Box 25998, Oklahoma City, OK 73125." Box 25998 is the address for the General Mail Facility in Oklahoma City. The General Counsel's office is located in Washington, D.C.

[4/] Holmes appears to assume that it would have received award, had its proposal been considered.

tester asserts that it eventually received amendment number one, but did not receive amendments two or three until they were later sent by facsimile transmission, in response to Holmes' further inquiry, after the proposal due date had passed.

The protester claims that the contracting officer informed Holmes on December 31 that its proposal would not be considered because the contracting officer suspected Holmes of having obtained Lone Star's price prior to submitting its own proposal.

The contracting officer submitted a report responding to the protest. In response to the protester's contention that it was instructed to wait until amendments were made, the contracting officer states that both the architect/engineer and the project manager admit that they told the contractors that amendments would have to be made, but deny that they instructed any contractor to wait for amendments. The contracting officer states that the contract file did contain amendment numbers one and two previously sent to Holmes and marked "returned" by the Amarillo post office. He checked the bidders' list and found that the address for Holmes contains both a street address and a post office box number.[1/] He found that the original solicitation was mailed to the street address and was not returned by the post office. Amendment number three was sent to the post office box number on December 2 and was not returned by the post office. The contracting officer assumes that Holmes should have received amendment number three, which restated the extended proposal due date, in time to have submitted a proposal by December 6.

The contracting officer asserts that Holmes was asked in one of the December telephone conversations how it had obtained Lone Star's proposal price, since this information had not yet been publicized. Holmes responded that it had spoken with Lone Star, and had been so informed, after Holmes submitted its proposal. The contracting officer states that the president of Lone Star denies that he conveyed this information to Holmes. The contracting officer believes that Holmes may have known Lone Star's proposal price before submitting Holmes' proposal.

In response to Holmes' accusation that the Postal Service used poor business practice in this solicitation, the contracting officer states that the solicitation was conducted in full compliance with the Procurement Manual. He asserts further that Holmes is familiar with Postal Service contracting procedures, that Holmes was aware that the original proposal due date was November 26, and that Holmes should have submitted its proposal by that date if no amendments were received. Finally, the contracting officer denies that he said anything to Holmes to the effect that its proposal would not receive consideration because of dishonest business practices.

Holmes responded to the contracting officer's report. Holmes explains that it

[5/] The record submitted to this office by the contracting officer includes a copy of the proposal submitted by Holmes, which indicates that Holmes may be contacted either at its street address or its post office box number. The record also includes a copy of each of the two envelopes which were returned to the contracting office as undeliverable. The street name had been misspelled and the suite number omitted on both envelopes. The contracting officer has indicated that the addresses contained on the bidders' list were obtained by the project manager from the telephone directory, which listed no suite number for Holmes, but the street name is spelled correctly on the bidders' list.

understood the original proposal due date to be void once the project manager stated that the due date would be extended and thus did not submit a proposal by November 26. Holmes denies that it received amendment number three by mail, only receiving it by facsimile transmission after inquiring after amendments two and three. Holmes reaffirms that the president of Lone Star spoke with a representative of Holmes and disclosed Lone Star's proposal price, but denies that it knew Lone Star's price before submitting its own proposal. The protester states that the original solicitation was not mailed to the street address, but to the post office box number.

Holmes reiterates that it was the Postal Service's error that caused it not to receive the amendments to the solicitation. The protester complains that the project manager should not be sent to the preproposal conference if his word is not binding. Holmes insists that the contracting officer did accuse Holmes of dishonest business practices in the December 31 telephone conversation. Finally, the protester questions rhetorically, why would Holmes leave $16,000 on the table if it knew Lone Star's price before submitting its own proposal?

Discussion

At the outset, there is the question whether Holmes' protest has been timely filed.[1/] Protests filed with this office must be filed in a timely manner; failure to file a protest in accordance with our timeliness requirements constitutes a jurisdictional defect which requires that the protest be dismissed. Montgomery Elevator Co., P.S. Protest No. 90-5, March 9, 1990; BFI Waste Systems, Browning Ferris Industries, P.S. Protest No. 88-42, July 29, 1988.

The Procurement Manual provision relevant to this protest is PM 4.5.4 d., which requires that protests other than those against deficiencies in a solicitation apparent before the receipt of proposals be received by the contracting officer or the General Counsel not later than ten working days after the information on which they are based is known or should have been known.

"A protester is 'charged with knowledge of the basis for protest' when the contracting officer conveys to the protester a position adverse to the protester's interest." Coopers & Lybrand, supra, quoting Computer Systems & Resources, P.S. Protest No. 87-38, June 24, 1987. The "grounds for protest arise when the protester has learned of an agency's action or intended action which is inconsistent with what the protester believes to be correct." Coopers & Lybrand, supra, quoting ARA Services, Inc., P.S. Protest No. 81-48, November 17, 1981. Also, "written notification of the adverse action or the grounds of the protest is not required; oral notification of the basis of a protest is sufficient to start the time period running." Federal Systems Group, Inc., supra; Coopers & Lybrand, supra; Evans Suppliers Co., Inc., P.S. Protest No. 84-42, June 21,

[6/] Although no party to this proceeding has raised the issue of timeliness, we may do so sua sponte because it affects the jurisdiction of our office to adjudicate Holmes' claims. Coopers & Lybrand, P.S. Protest No. 89-91, March 21, 1990; see Pitney Bowes, Inc., On Reconsideration, P.S. Protest No. 89-86, January 30, 1990; Evergreen International Airlines, Inc., On Reconsideration, P.S. Protest No. 86-07, June 9, 1986.

1984.

The record shows that Holmes was informed by telephone on December 12, by the specialist, that any proposal submitted by Holmes would be a late proposal, even though it had not received the pertinent amendments, and would be considered for award only if it was in the interest of the Postal Service. As of December 12, Holmes was on notice that the Postal Service intended to treat its proposal as late and had full discretion either to consider or not to consider its proposal. This was information adverse to Holmes' interest and was not what Holmes believed to be the correct action.[1/]

To be timely, a protest based on this information would have had to have been received by December 27. Holmes' protest was received on January 8 by the Oklahoma City Division, and by this office on January 13. Holmes' protest is untimely and not for consideration. Thomas J. Seitz Co., Inc., P.S. Protest No. 88-49, September 8, 1988; Southern California Copico, Inc., P.S. Protest No. 83-2, August 31, 1983.[1/]
The protest is dismissed.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[7/] Our timeliness requirements mandate that the clock continues to run even while a potential protester attempts to resolve the matter outside a formal protest. See Coopers & Lybrand, supra, and cases cited therein; Strapex Corporation, P.S. Protest No. 85-33, July 11, 1985 ("[d]elay in seeking or obtaining information relevant to a protest does not extend the time in which a protest may be filed."); Donald Clark Associates, Inc., P.S. Protest No. 91-34, September 4, 1991 ("protest regulations require the prompt raising of protests and do not allow an offeror to sit quietly with a possible basis for protest to see how he fares in the competition, raising the protest only if he does not succeed.").

[8/] Had Holmes' protest been timely received, it would have been denied. While we do not sanction the failure of contracting personnel to correct the problem of amendment nonreceipt identified by Holmes and evident from the return of amendments one and two, we are not persuaded that the protester availed itself of every reasonable opportunity to obtain the amendments. Although it was on notice that there had been problems associated with its receipt of amendments, and it knew that additional amendments would be forthcoming, Holmes waited nearly two and a half weeks after the preproposal conference before telephoning contracting officials regarding the status of the solicitation. Had Holmes inquired sooner, it could have met the December 6 proposal due date. See North Santiam Paving Co., Comp. Gen. Dec. B-241062, January 8, 1991, 91-1 CPD | 18 ("could have telephoned the agency several days before bid opening to confirm that only one amendment had been issued"). Having delayed its inquiry, Holmes submitted its late proposal at a time when its consideration would have "jeopardize[d] or [would have given] the appearance of jeopardizing, the integrity of the competitive process."