

Protest of ) Date: June 22, 1990  
COR, INC. )  
Solicitation No. 104230-89-A-0153 )  
Contract No. 104230-86-D-1724 ) P.S. Protest No. 90-16

### DECISION

COR, Inc. protests the diversion of work from its Contract No. 104230-86-D-1724 to VSE Corp., the successful offeror on Solicitation No. 104230-89-A-0153.

In December, 1985, the Office of Procurement, Headquarters issued Solicitation No. 104230-85-B-0024, a minority-reserved, indefinite-quantity solicitation for technical support services. COR received award of Contract No. 104230-86-D-1724 on April 22, 1986, with a contract term of one year with three one-year options. According to COR, the services it has provided under this contract have consisted primarily of computer assisted design and drafting (CADD). All three options were exercised and the contract was scheduled to expire on April 21, 1990.

Solicitation No. 104230-89-A-0153 was issued on March 9, 1989 with an offer due date, as amended, of May 11. This solicitation sought offers on technical support services for product enhancement, design optimization, preparation, maintenance and review of technical data packages,<sup>1/</sup> and was a recompetition of a contract on which VSE had performed for the previous five years. COR and VSE both submitted offers. After evaluation of the offers received, VSE was awarded the contract on January 2, 1990, and COR was notified of the award on January 12.

On March 27, 1990, COR was informed by the contracting officer that its contract would not be the subject of a new competition, but that these services would be assumed either by postal employees or by other current contractors in order to avoid "duplication of effort" and save money.<sup>1/</sup> The parties bilaterally agreed to extend COR's contract

<sup>1/</sup>The Statement of Work stated, at paragraph 1.1, that the purpose of the procurement "is to secure the technical services necessary to support the USPS Technical Support Center in equipment design and the preparation and review of new engineering documentation ... [and] the maintenance, verification and management of existing equipment Technical Data Packages."

<sup>2/</sup>It subsequently became clear that the contract under which these services would be obtained was the new VSE contract.

until July 21 to complete transition activities.

COR has three grounds for its protest. First, it alleges that the failure to recompile the services it rendered under its contract violates Procurement Manual (PM) 4.1.1 a., which states that "Postal Service policy . . . is that purchases must be made on the basis of adequate competition whenever feasible." COR states that the transfer of work that it was performing on its contract to VSE is an unjustified noncompetitive purchase and that it has been unfairly deprived of an opportunity to compete for these services.

Second, COR complains that, as a small, minority-owned business, the transfer of the CADD services to VSE violates postal socioeconomic policies. COR cites two sections of the PM, 10.1.1 a. and 10.1.4 c., to support this argument.<sup>1/</sup> COR contends that given the previous successful competition for this effort among minority firms, the recompensation should have been among small, minority-owned firms and that the Postal Service's failure to hold such a competition violates the spirit as well as the letter of the socioeconomic policies.

Finally, COR alleges that the course of events indicates that it was affirmatively misled by postal employees at several stages. It argues that the contract specialist and the contracting officer's technical representative told it in January and March 1990, that there would be an competition for the services being performed under COR's contract. COR also alleges that it had received "unofficial communications" in November, 1989, which had indicated that the CADD work would be turned over to VSE, but that postal employees assured it that this was incorrect. COR disputes that the transfer of its work to VSE would be cost-effective or reduce duplicative effort, as VSE was not performing CADD services under its prior contract and VSE will not be able to hire CADD specialists at its extremely low contract prices. COR also notes that VSE had originally been a subcontractor to it on its contract, but that VSE was unable to meet the personnel requirements of the subcontract, which was, therefore, terminated. COR requests that the CADD services be deleted from VSE's contract and be the subject of a separate, minority-reserved competitive solicitation.

In reports on the protest, the contracting officer raises two jurisdictional defenses to COR's allegations. He states that any questions COR raises about the solicitation and award of the contract for technical services to VSE are untimely pursuant to Procurement Manual (PM) 4.5.4 d., as they were filed more than 15 working days after contract award. The contracting officer also notes that, insofar as COR questions the propriety of transferring the CADD services to VSE's contract, it is challenging a matter

<sup>3/</sup>PM 10.1.1 a. states:

It is Postal Service policy to encourage the participation of small, minority-owned and woman-owned businesses in the USPS purchasing program.

PM 10.1.4 c. provides, in pertinent part:

Contracting officers must solicit proposals from all minority-owned . . . businesses found to be capable of performing the contract . . . .

of contract administration not within the scope of our bid protest function.

The contracting officer notes that the decision not to recompetete the services COR provides under its existing contract was based on the availability of those services under the new VSE contract, which resulted from a competition in which COR participated. He further states that Section 10 of the PM, dealing with socioeconomic policies, does not require the Postal Service to take any particular action with regards to small or minority businesses. Finally, he states that "[r]eview of the contract file and this office's records shows no evidence of any representation, by any postal personnel, concerning recompetition" of the services performed by COR under its contract.

VSE has submitted comments on the protest which describe, at length, its CADD capabilities, covering the last 15 years and, at present, 20 customers. VSE details its experience in this area and asserts that it designed the current Postal Service CADD system in 1986. It claims to have 40 current employees with CADD experience, and states that its transition to the methods of operation currently employed by COR would be minimal. VSE also disputes COR's description of VSE's performance as a subcontractor for COR, alleging that the subcontract agreement was mutually terminated because COR failed to consult with VSE during COR's negotiation with the Postal Service.

In lengthy rebuttal remarks, COR states that its protest is primarily based on the Postal Service's unfairness, in contravention of postal policy ensuring "fair treatment to firms and individuals." PM 4.5.4 a. It alleges that it was misled during the competition for the technical services solicitation because the Postal Service may have known that it was going to transition the CADD services to the VSE contract and intentionally did not tell any of the offerors of this plan. COR further notes that the Assistant Postmaster General, Engineering Technical Support Department wrote on March 26, 1990, to the Assistant Postmaster General, Procurement and Supply Department to request that COR's contract be extended for 90 days while the CADD services were moved to the VSE contract, contemporaneous with assertions by the contracting officer's technical representative that the work would not be transferred. It accuses the contracting officer of intentionally misleading COR and trying to hide from it the real reasons for the actions the Postal Service were taking.

COR concludes that "certain interests" in the Postal Service wanted to keep the transfer of the CADD services work secret from COR, which it perceives as unfair treatment and failure to achieve adequate competition. COR cites several Comptroller General cases to the effect that a protest should be sustained when an offeror has been treated unfairly, and that neither intentional nor inadvertent misleading of an offeror is permissible. COR also requests that this office initiate an investigation into the current VSE contract, which it contends may have been modified to add higher rate labor categories to perform the CADD services.

As to its socioeconomic concerns, it states that the contracting officer has acted improperly by transferring the work to VSE. COR reads Section 10 of the PM as creating an imperative requirement for contracting officers to encourage small and minority-owned business competition and to establish procedures to identify such concerns. By choosing to transfer the work to a large, non-minority company, the

contracting officer is alleged to have abused his discretion in violation of these policies.

## DISCUSSION

We cannot resolve COR's challenge to the evaluation of its proposal or the award to VSE under Solicitation No. 104230-89-A-0153, as its protest is untimely, given the 97 days which have elapsed between the date of contract award and the date that the protest was filed. PM 4.5.4 d.<sup>4/</sup> USA 800, Inc., P.S. Protest No. 89-90, February 15, 1990. Since we have no jurisdiction over protest issues which have been untimely filed, Coopers & Lybrand, P.S. Protest No. 89-91, March 21, 1990, the events surrounding the solicitation, evaluation and award of VSE's contract do not come within the scope of our review.

The propriety of transferring the CADD services to VSE's contract is a matter of contract administration which is outside the scope of our bid protest jurisdiction. See Air Transport Association of America, P.S. Protest No. 90-02, March 23, 1990. While there is an exception when a modification is challenged as outside the scope of the existing contract, M.L. Hatcher Pickup and Delivery Service, Inc., P.S. Protest No. 77-25, July 29, 1977, this exception does not apply here because there is no evidence in the protest file that the statement of work for the VSE contract was not broad enough to include CADD services. To the contrary, in its protest conference, COR admitted that the statement of work for the VSE contract was broad enough to include CADD services within its scope. Our office does not conduct independent investigations; rather, we resolve protests based upon the written record supplied by the contracting officer, interested parties and protester. See Haselrig Construction, On Reconsideration, P.S. Protest No. 76-2, March 22, 1976. Therefore, there is no evidence in the record to indicate that the transfer of work is within the ambit of our jurisdiction.

In citing regulatory provisions concerning the adequacy of competition in Postal Services procurements, COR assumes that the Postal Service was under an obligation to conduct a new competition for the services previously supplied under its contract. This assumption is incorrect. Upon the expiration of a contract, there is nothing improper if the services required are subsumed into an existing contract rather than procured by means of a competitive solicitation; such a decision is within the discretion of the contracting officer. See, e.g., Mildred Brown, P.S. Protest No. 76-52, September 22, 1976 (protest against decision not to amend previous contract outside bid protest jurisdiction); Shirley J. Slusher, P.S. Protest No. 84-60, July 30, 1984 (decision to procure through competitive solicitation rather than continuing with incumbent contractor is a matter of contract administration not within bid protest jurisdiction).

COR's concern appears to arise from its belief that it has been misled by postal personnel throughout the solicitation and award of the VSE contract and afterwards. These concerns are also outside the scope of our protest jurisdiction. There is no allegation or indication of any breach of COR's existing contract, which was due to

<sup>4/</sup>PM 4.5.4 d. provides, in pertinent part, that "no protest will be considered if received more than 15 working days after award of the contract in question."

expire in April 1990 under its own terms.<sup>4/</sup> The Postal Service was under no contractual obligation to compete the services which had been procured under COR's contract by means of a new procurement, so there can be no implied contract which might have been breached.<sup>1/</sup> There was, quite simply, no solicitation or award to which the allegations COR makes can be linked, therefore, such allegations are outside our protest jurisdiction.<sup>1/</sup>

The alleged violations of postal socioeconomic policies do not suffice to sustain the protest. The policies set out in Section 10.1 of the PM are meant to encourage the participation of small and minority-owned businesses, but they do not set forth enforceable requirements which compel postal procurement employees to take any particular procurement action. See, e.g., Cimpi Express Lines, Inc., P.S. Protest No. 88-57, December 15, 1988; Gil Trucking, P.S. Protest No. 84-87, February 11, 1985; Mr. Cool's Refrigeration & Air Conditioning, P.S. Protest No. 84-53, October 10, 1984. Therefore, alleged violations of Section 10 of the PM are not grounds upon which COR's protest can be sustained.

Finally, COR has implied that certain postal employees have acted in a biased manner towards COR, primarily by hiding from it the real reasons and rationale for the actions of the Postal Service and by dissembling or stating half-truths to cover-up the truth. In this regard, we note that "[p]rejudicial motives will not be attributed to individuals on the basis of inferences or supposition." Luther Benjamin and Associates, P.S. Protest No. 87-99, December 31, 1987. We fail to find in the record, viewed as a whole, evidence of prejudice against COR.

The protest is dismissed in part and denied in part.

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**[checked against original JLS 6/2/93]**

<sup>5/</sup>If, in fact, COR's contract had been breached, its remedy would lie under the Contract Disputes Act and the Claims and Disputes clause of its contract, rather than the protest process. M.L. Halle Oil Service, Inc., P.S. Protest No. 85-76, November 26, 1985.

<sup>6/</sup>Since the Postal Service was under no requirement to compete these services by means of a procurement, the cases cited by COR are inapposite.

<sup>7/</sup>In response to COR's declaration that it has not been treated fairly we must note that considerations of equity and justice are insufficient to overcome jurisdictional barriers to our review of an issue. Omicopy, Inc., P.S. Protest No. 84-24, June 25, 1984. Arguments concerning the fairness of our procurement procedures are, likewise, beyond the scope of our bid protest jurisdiction. See TLT Construction Corp., Inc., P.S. Protest No. 89-75, January 18, 1990. "Since we do not possess independent judicial powers we may not arrogate to ourselves broad equity process such as are wielded by courts of law." Intech, Inc., P.S. Protest No. 74-1, February 20, 1974.