

August 2, 1993

P.S. Protest No. 93-09

SANIMASTERS, INC.

Solicitation No. 089990-93-A-0165

DIGEST

Protest alleging false certification of independent price determination is dismissed where it depends on an alleged breach of a private agreement and concerns a responsibility determination not reviewable in the protest forum.

DECISION

Sanimasters, Inc., timely protests the award of a contract for cleaning services to Mr. Gregg G. Rekczis under solicitation 089990-93-A-0165, contending that the award results in a conflict of interest proscribed by postal regulations.

The solicitation was issued by the Purchasing Service Center, Windsor, CT, seeking offers for the provision of cleaning services at the Montour Falls, NY, post office. The solicitation included at section L. 7 a provision entitled "Persons Performing the Work (Provision OA-503)," which asked the offeror to identify any persons (including employees, individuals with whom the offeror has tentative agreements, and family members), other than the offeror, who will be performing the cleaning services. Offers were due March 30, 1993.¹

Sanimasters submitted an offer which identified Mr. Gregg Rekczis as the person who

¹ At Section M.1., the solicitation stated: "The Postal Service intends to award a contract to the responsible offeror whose proposal conforming to the solicitation offers the best value to the Postal Service, considering price, price-related factors, and/or other evaluation factors specified elsewhere in this solicitation."

would be performing the work. Mr. Rekczi submitted his own offer indicating that he would perform as a self-employed contractor. Because the two offerors initially submitted offers which were equal in price, each was asked to submit a best and final offer. Mr. Rekczi then lowered his price; Sanimasters did not. The Purchasing Service Center awarded the contract to Mr. Rekczi on April 14.

By letter of April 21, Sanimasters protested the award to the contracting officer, stating that Mr. undertaken Rekczi had been its subcontractor on the previous contract for cleaning the Montour Falls post office and that it had a tentative agreement with him with respect to the solicited service. Quoting Procurement Manual (PM) sections 1.7.6 a.1 and a.3, the protester contended that Mr. Rekczi had an unfair advantage over Sanimasters because he knew "how much we intended to pay for his services."

By letter dated May 5, the contracting officer denied the protest as obviously without merit. The denial asserted that the conflict of interest which Sanimasters had alleged was not of the type which the Procurement Manual prohibited, and "[t]he fact that the successful offeror was Sanimasters' former employee/subcontractor [sic] does not diminish his capacity to perform the work satisfactorily." Concerning the protester's contention that Mr. Rekczi had an unfair advantage over Sanimasters, the denial noted that Mr. Rekczi had certified that he had arrived at his prices independently, without consultation, communication, or agreement with any other offeror or competitor.² The denial went on to explain that if Sanimasters had communicated its intended offer to Mr. Rekczi, then Sanimasters would have violated its certification.

By letter dated May 18, Sanimasters requested that the contracting officer reconsider his denial of the protest. The letter contends that Sanimasters was disadvantaged because the solicitation required it to identify the individual doing the cleaning, in this case, Mr. Rekczi. Therefore, the protester contends it was required to tell him how much Sanimasters was willing to pay him. The protester notes that subcontractors realize that Sanimasters must propose a price higher than the amount offered to them in order not to operate at a loss; thus they are in a position to offer a more attractive price. Sanimasters asserts that while it previously had to obtain agreements not to compete from its subcontractors, a practice assertedly common in its industry, it had ceased to do so because it understood that such agreements were inconsistent with PM 1.8, Anti-Competitive Practices. In these circumstances, the protester views Mr. Rekczi's submission of an offer as inconsistent with the independent price certification and PM 1.7.6 a.1 and a.3's prohibition of organizational

² This was an apparent reference to the provision at L.3 of the solicitation, Certificate of Independent Price Determination (Provision 1-1) (October 1987), which provides that by submitting a proposal, the offeror so certifies. The provision also requires the offeror to certify that:

[u]nless otherwise required by law, the prices proposed have not been and will not be knowingly disclosed by the offeror before award of a contract, directly or indirectly to any other offeror or to any competitor; and

. . . [n]o attempt has been made or will be made by the offeror to induce any other person or firm to submit or not submit a proposal for the purpose of restricting competition.

conflicts of interest. Further, the protester contends that it is Mr. Rekczis, not Sanimasters, who is in violation of the certification of independent price determination.

The protest concludes by asserting that the contracting officer appears to be selectively using the Procurement Manual when he contends that the organizational conflict of interest provision does not apply to Mr. Rekczis but the certification of independent price determination does apply to Sanimasters.

The contracting officer forwarded the May 18 protest to this office for resolution under PM 4.5.7 as a protest to the General Counsel following adverse action by the contracting officer on an initial protest.³

The contracting officer's statement on the protest contends that PM 1.7.6 a. does not apply to this situation because "the nature of the work does not provide an unfair competitive advantage to [Mr. Rekczis]." The contracting officer restates his understanding that Mr. Rekczis did not violate his certificate of independent price determination, noting that even if a potential subcontractor provides to Sanimasters a price for which he is willing to work for Sanimasters, that does not mean that he knows what Sanimasters' final offer will be. Further, he notes that Mr. Rekczis' final offer was the same as the previous contract rate, which was on the public record.

DISCUSSION

The thrust of Sanimasters' protest is that Mr. Rekczis gained an unfair advantage because he knew what Sanimasters' price offer would be since he had agreed to be the protester's subcontractor or employee. The protester asserts that Mr. Rekczis' certification of independent price determination was, therefore, false.

There are several jurisdictional reasons to dismiss this protest. First, Sanimasters' complaint that the awardee breached an agreement and thereafter improperly used proprietary information is not for consideration by our office. *Complete Mobile Wash U.S.A., Inc., supra*. As the Comptroller General has stated:

The allegation of conflict of interest which concerns the actions of a former employee of the incumbent contractor is beyond the scope of our bid protest function as it involves a dispute between private parties concerning business practices and relationships which is properly for resolution by the private parties through the courts, if necessary.

Creative Medical Management, Inc., Comp. Gen. Dec. B-236266.2, August 15, 1989, 89-2

³ Notice of the contracting officer's denial of Sanimasters' initial protest was mailed May 5. The contracting officer received the request for reconsideration May 20 and subsequently forwarded it to this office. Since the record does not indicate the exact date on which the protester received the May 5 denial letter and the contracting officer has made no allegations of untimeliness, we will consider the protest to be timely pursuant to PM 4.5.4 e. *Complete Mobile Wash U.S.A., Inc.*, P.S. Protest No. 90-64, November 15, 1990.

Further, Sanimasters' allegation that Mr. Rekczis used price information learned from Sanimasters to undercut the protester's bid, thereby violating his certification of independent price determination, challenges the contracting officer's determination of Mr. Rekczis' responsibility. In general, an affirmative finding of responsibility will not be disturbed in the absence of fraud, bad faith, or failure to apply definitive responsibility criteria. See, e.g., *Dataware Systems Lease, Inc.*, P.S. Protest No. 91-41, October 10, 1991. The contracting officer found that Mr. Rekczis did not certify falsely and was otherwise responsible, and there is no basis on this record to disturb that finding. In this case, however, if there were evidence that Mr. Rekczis was non-responsible specifically because he fraudulently certified that he arrived at his price independently, it would be a criminal matter not appropriate for review in this protest forum.⁵

On the merits, we note briefly that this record does not support the protester's claim that it was unfairly disadvantaged. That Mr. Rekczis might have had an employment relationship with Sanimasters at one time "will not constitute a violation of the certification absent collusion between offerors or an indication that a firm was prevented from submitting an offer." *Secure Engineering Services, Inc.*, Comp. Gen. Dec. B-252270, B-252271, B-252271.2, B-252270.2, 1993 WL 212629 (C.G.), June 11, 1993. (See also footnote 4.) Originally, Sanimasters and Mr. Rekczis submitted identically priced offers, after which both were asked to submit best and final offers. Only Mr. Rekczis lowered his price. Since Sanimasters was provided with the same opportunity to revise its offer but chose not to do so, there was no unfair advantage. *Id.* Also, there was no way for Mr. Rekczis to know what Sanimasters' final response to the Postal Service would be unless Sanimasters told him, a scenario that would doom Sanimasters' claim that it was unfairly disadvantaged. As it happened, Mr. Rekczis' price offer was identical to that of the previous contract's price, an amount which could have been offered by anyone since it was on the public record.

⁴ The contracting officer is correct that PM 1.7.6's proscription of "organizational conflicts of interest" does not apply to this situation. PM 1.7.6 contemplates situations in which the "nature of the work" would give a specific offeror a competitive advantage, and lists as examples contracts involving professional services, consultant services or performance of technical evaluations. Here, the Postal Service gave the same opportunities to compete to both the protester and the awardee, neither of whom had a competitive advantage because of the nature of the work. As discussed above, Sanimasters' claim of a "conflict" actually refers to the incompatibility it perceives between Mr. Rekczis' individual offer and his employment agreement with Sanimasters, the specifics of which were irrelevant to the contracting officer, who awarded the contract correctly under the terms of the solicitation.

⁵ The purpose of the certification is to prevent collusive bidding, not to prevent competition, as the protester seems to believe. See *Complete Mobile Wash U.S.A. Inc.*, *supra*. Were there to be evidence of collusion, it would be referred to the U.S. Department of Justice, not to this office. *U-Liners Contracting Co., Inc.*, Comp. Gen. Dec. B-245179.2, 91-2 CPD 370; *Seyforth Roofing Company, Inc.*, Comp. Gen. Dec. B-241719.2, March 11, 1991, 91-1 CPD 268.

The protest is dismissed.

William J. Jones
Senior Counsel
Contract Protests and Policies