

September 9, 1994

P.S. Protest No. 94-32

ANTHONY OWENS

Solicitation No. 151-386-94

DIGEST

Protest against award of emergency highway contract is denied where protester submitted no evidence supporting his claim that the postmaster improperly coached the low offeror.

DECISION

Mr. Anthony Owens timely protests the award of an emergency contract for the transportation of mail from Wellsville to Summitville, OH, to Mr. Richard Arnette.

Solicitation 151-386-94 for Emergency Transportation Services was issued June 23, 1994, by the Allegheny Area Distribution Network (DN) office, Pittsburgh, PA, seeking telephone proposals by 2 p.m. on June 24. The contracting officer states that an emergency solicitation was necessary because Mr. Owens' prior contract was not renewed. The file provides no explanation why the contract was not renewed or the timeframe in which the determination not to renew was made. The term of the emergency contract was to be from July 1 to December 17, and award was to be based on price, which was to be expressed as a per annum rate.¹ Of three telephone offers received, Mr. Arnette's was the lowest at \$17,094.00. Mr. Owens submitted the second lowest offer.²

In his protest Mr. Owens claims that he had advised the DN office that he would perform the service at his current rate, and that he subsequently similarly advised the postmaster of

¹ Mail Transportation Procurement Handbook (MTPH) 6.6.2 A. states, with regard to emergency contracts, that "[t]he contracting officer must base the contract award on the evaluation criteria specified in the solicitation." Since only price was specified, it was the only evaluation factor for award. *Patriot Airlines, Inc.*, P.S. Protest No. 93-27, January 5, 1994.

² Both the contracting officer and the protester use terms such as "bids," and "bidders" instead of "offers" and "offerors" in their descriptions of the solicitation process. Since emergency contracts are awarded by negotiation, *Patriot Airlines, supra*, those terms are inappropriate.

Salineville, OH, a point served by the route. He further contends that the postmaster told him that he (the postmaster) had had a conversation with Mr. Arnette in which Mr. Arnette said that he "could not take the route for less than one dollar and fifty cents a mile. . ." to which the postmaster replied that "he did not think he would get it for that because [Mr. Owens] was only getting about one dollar and thirty cents a mile." Mr. Owens claims that the postmaster told Mr. Arnette "to bid fifty dollars a day or one dollar a mile."

In reply, the contracting officer has submitted an affidavit from the postmaster of Salineville, in which the postmaster asserts:

-- Mr. Owens told him that his "bid had been rejected and he would be finished July 1, 1994. I had no prior knowledge of Mr. Owens bidding on this route until he informed me that he had been contacted by [the] Allegheny Area Office to extend his contract for six more months."

-- He had "no knowledge" of how much either Mr. Owens or Mr. Arnett[e] bid per mile, and "at no time did I advise Mr. Arnett[e] of Mr. Owens' bid, or of how much to bid per mile."

The postmaster asserts that he could not have told Mr. Arnette anything about Mr. Owens' bid because he had no knowledge either of Mr. Owens' interest in bidding or of how much his bid would be. The postmaster also asserts his belief that Mr. Owens had been receiving \$1.18 per mile.³

The contracting officer concludes by stating that he "has no other knowledge or information on this [p]rotest other than the correspondence submitted by Mr. Owens and the response submitted by [the postmaster]."

The protester did not reply to the contracting officer's statement.

³ The record provides no information concerning the rate of Mr. Owens' previous contract.

DISCUSSION

The thrust of Mr. Owens' protest is that the postmaster improperly gave his competitor information about Mr. Owens' offer, thereby ensuring that Mr. Arnette won the contract. The contracting officer, through an affidavit from the postmaster, has denied the allegations. In a factual dispute such as this one, a presumption of correctness attaches to the contracting officer's statements that the protester bears the burden of overcoming with concrete evidence. Mr. Owens has failed to offer such evidence; therefore, we must accept the statements of the contracting officer as true. *A-1 Transmission*, P.S. Protest No. 93-14, October 29, 1993; *Rickenbacker Port Authority and The Turner Corporation*, P.S. Protest No. 91-78, February 10, 1992; *Cohlma Airline, Inc.*, P.S. Protest No. 87-118, April 13, 1988.

Further, when allegations of impropriety are made against government officials, courts have long held that a protester bears an extremely heavy burden of proof:

In the absence of clear evidence to the contrary, . . . it must be presumed that the government acted in good faith Since good faith is presumed, the plaintiff bears an extremely heavy burden of proving the contrary, and the government is prevented only from engaging in actions motivated by a specific intent to harm the plaintiff. The difficult burden of proof for a plaintiff attempting to show "government bad faith" has been outlined as follows:

[i]t requires "well-nigh irrefragable proof" to induce the court to abandon the presumption of good faith dealing. In the cases where the court has considered allegations of bad faith, the necessary "irrefragable proof" has been equated with evidence of some *specific intent to injure the plaintiff*. Thus, in *Gadsden v. United States*, 78 F.Supp. 126, 127, 111 Ct.Cl. 487, 489-90 (1948), the court compared bad faith to actions which are "motivated alone by malice." . . . Similarly, the court in *Struck Constr. Co. v. United States*, 96 Ct.Cl. 186, 222 (1942) found bad faith when confronted by a course of Governmental conduct which was "designedly oppressive."

A-Transport Northwest Co., Inc., 27 Fed.Cl. 206, 220 (November 25, 1992), quoting *Kalvar Corp. v. United States*, 211 Ct.Cl. 192, 198-99, 543 F.2d 1298, 1301-02 (1976), *cert. denied*, 434 U.S. 830 (1977)(some citations omitted; emphasis in original).

Mr. Owens has simply made unsupported allegations, falling far short of meeting his burden

of proof.⁴

The protest is denied.

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⁴ While we agree with the protester that it would be inappropriate for a postal employee to advise a prospective offeror what price the offeror should propose, PM 4.1.5 g.3.(b)(3)., it would not be inappropriate for a postal employee to disclose the price being paid to an incumbent or previous contractor, since those prices are a matter of public record. See, e.g., *Sanimasters, Inc.*, P.S. Protest No. 93-09, August 2, 1993. Again, however, the record here does not support the contention that either type of disclosure occurred.