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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

Protest of Proposed Award of FAA Contract

FILE: B-197896
B-197896.2

DATE: June 5, 1980

MATTER OF: Page Airways, Incorporated and Omni Coast International, Inc.

DIGEST:

1. Protest filed after bid opening with respect to evaluation criteria set forth in step 2 of two-step formally advertised procurement and other alleged deficiencies is untimely under GAO Bid Protest Procedures, which require such protests to be filed prior to bid opening.

2. Protests that application of evaluation criteria was deficient because agency did not consider factors not included within such criteria are denied since evaluation must be consistent with criteria stated in solicitation.

3. Issues as to bidder's capacity to meet contract requirements are dismissed since issues relate to responsibility and GAO, in absence of circumstances not present here, does not review affirmative determinations of responsibility.

4. Protest raising issues which GAO does not consider or which parallel issues raised in another protest on same procurement may be decided without consideration of agency report or permitting specific response to report since protester, participating as interested party in parallel protest which was fully developed, had opportunity to make its views known and to respond to agency report on that protest.

Page Airways, Incorporated (Page) and Omni Coast International, Inc., (Omni) protest a pending award of a contract to Butler Aviation International, Inc.,

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(Butler) by the Federal Aviation Administration (FAA), Department of Transportation, under solicitation No. DOT-FA-NA-79-8 for operating a general aviation services concession at Washington National Airport where Page has been the incumbent contractor for a number of years. For reasons discussed below, both protests are dismissed in part and denied in part.

Both protesters object to the FAA's evaluation approach, contending that it may result in selection of a contractor which will not pay the highest amount to the Government, and question the ability of Butler, the apparent winner, to provide the same quality and quantity of commercial services as Page has provided. Page also contends the solicitation is defective because it made no provision for evaluating the relative adequacy of each bidder's ability to supply the required standard brand petroleum products and did not require bidders to have fuel allocations from suppliers or to provide certificates of voluntary compliance with wage and price controls. Page also asserts the solicitation imposes "almost no" controls over the contractor's pricing of fuel and that it is probable Butler's price increases will be inflationary.

The procurement was conducted under two-step formally advertised procedures. The step 1 request for technical proposals, as amended, included as an informational attachment a proposed step 2 invitation for bids. The work statement provided both for primary commercial support services which are mandatory and for secondary commercial support services, the performance of which is discretionary with the contractor. The primary services consist of flight line servicing, including the sale and into-plane delivery of fuel; ramp assistance, including loading and unloading, packing, storage and tie-down services; routine and special maintenance of aircraft and accessories; sale of parts and accessories; vehicular transportation of passengers and crews; collection of landing fees; and the removal of disabled aircraft. The secondary services include sale and rental of aircraft, aircraft charter and air taxi services, automotive maintenance for vehicles of other airport tenants and other generally offered airport services which are not in direct support of aircraft.

The solicitation specified the initial aircraft parking and storage fees and the hourly labor rates for maintenance, avionics, porter and line service and aircraft towing which could be charged by the contractor. It further provided that all other fees and prices for both primary and secondary services charged by the contractor must be established on the basis of similar fees and prices "assessed at other major United States airports and shall be fair and reasonable" and that all changes in fees and prices must be approved by the FAA which also may periodically review and reasonably change those it finds to be excessive, subject to the contractor's right to appeal under the disputes clause.

The solicitation also provided that the contractor must pay the FAA specified rentals for the space used at the airport as well as 8 percent of all gross receipts from its sale of aviation fuel and 1-1/2 percent of the gross receipts from the sale of aircraft. Both the step 1 and step 2 solicitations made it clear the competition would be restricted to those firms which had submitted acceptable step 1 proposal and that each would be required to quote a percentum to be paid to the Government on "other gross receipts", which was defined as receipts other than from sales of aviation fuels and aircraft and the collection of landing fees. The term includes receipts from primary as well as from secondary services. The solicitations also provided that for purposes of determining the highest revenue offer, the percentums quoted would be based on the Government's projections specified for the three base years and two option years. The competitors were informed that the current contractor's total "other gross receipts" for the previous year had been $1,903,100, of which 39 percent was attributable to Page's wholesale parts distributorship and its aircraft charter business. Neither of these activities was a required primary service. The solicitation also provided that the contractor must pay to the FAA a minimum guarantee or $136,800 with respect to other gross receipts for the first contract year and, thereafter, 80 percent of the actual payment to the FAA for the previous contract year.

The technical proposals of Butler, Omni and Page were found acceptable and each was sent the step 2 IFB which stated it was the intention of the Government to award the

contract to the responsive, responsible bidder offering the highest percentage fee.

As originally issued in September 1979, the step 1 request for technical proposals required each offeror to provide evidence that it had a fuel allocation at least equal to the amounts used in 1979. However, in November 1979, the FAA eliminated this requirement by an amendment to the step 1 solicitation, stating that it did "not intend to restrict competition with these requirements, and, therefore, encourages potential offerors to submit a technical proposal even though they are unable to obtain firm fuel commitments for the entire contract period, or are unable to obtain a commitment in the minimum amounts as stated." Instead, each offeror was to submit a statement of the manner in which it anticipated meeting the demand for aviation gas and kerosene in the required quantities. Each offeror was to supplement this statement with letters from one or more sources of supply of fuel detailing the conditions which might affect the availability of the supply, specific quantities of fuel to be made available by each supplier (if more than one) and the period of time during which the commitment would be effective. No one objected to this amendment prior to the closing date for receipt of step 1 proposals, November 28, 1979.

The step 2 bid opening on February 12, 1980, revealed that Butler, Omni and Page offered as percentages of other gross receipts 45.4, 18.9 and 39.5, respectively. Page protested to this Office on February 22, 1980, while Omni protested to the FAA on February 20, 1980. As an interested party to the Page protest, Omni was given the opportunity to comment on Page's protest, Butler's comments and the agency's report. It also attended the protest conference and was invited to submit comments on it. Omni eventually filed its own protest here after the FAA denied the protest filed with it.

To the extent Page's protest challenges the terms and conditions of the step 1 and step 2 solicitations, it is clearly untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2 (1980), and is dismissed. These procedures require that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals be

filed prior to bid opening or the closing date for receipt of such proposals. The purpose of these limitations is to enable this Office to decide an issue while it is still practicable to take effective action where the circumstances warrant. For example, in this case, a protest before the closing date for receipt of the technical proposals would have permitted review and if the protest were meritorious, amendment to the step 1 and proposed step 2 solicitations so that all bidders, prior to the exposure of prices, could respond to the revised specifications in a manner consistent with the requirements of both steps.

When these procedural requirements are applied to Page's protest, it is clear that Page's objections to the required scope, type and quality of services, the alleged lack of controls over the contractor's pricing, the absence of a provision for evaluating bidders' ability to furnish standard brand items, the failure to require bidders to have fuel allocations and the failure to require certifications of compliance with wage and price standards should have been protested at least prior to bid opening. McCarthy Manufacturing Co, Inc., B-194771, August 21, 1979, 79-2 CPD 141; Mobility Systems, Inc., B-191074, March 7, 1978, 78-1 CPD 179.

To the extent that Page challenges the evaluation as not being in accord with the criteria set forth in the IFB, we deny the protest. We find no basis to support Page's expectation that the FAA would make a separate estimate during the evaluation as to each bidder's potential for generating "other gross receipts." As the proposed step 2 IFB accompanied the step 1 request for technical proposals, it was clear from the beginning that the FAA intended to award the contract to the responsive, responsible bidder offering the highest percentage of such receipts to the Government. The step 2 IFB does not permit, let alone require, the FAA to base its evaluation upon other considerations such as which percentage offer might result in the highest dollar amount to the FAA or upon a standard of performance other than that specified in the step 2 IFB and the bidder's acceptable step 1 proposal. The FAA's evaluation was conducted strictly in accordance with the expressed evaluation criteria.

Page cites Crown Laundry and Cleaners, B-196118, January 30, 1980, 80-1 CPD 82, to support its contention that an agency should not slavishly adhere to an evaluation method stated in the solicitation when it becomes apparent that to do so would result in an award which is not in its best interests. In the Crown case, we held that a procurement should be canceled, revised and resolicited if the proper application of stated evaluation criteria would lead to an award against the best interests of the Government. We did not hold that an agency should apply the stated criteria inconsistently with their plain meaning in order to avoid such a result. Here, the FAA contends that an award resulting from the application of the specified criteria would be in the best interests of the Government. Aside from the speculation of Page and Omni, the record provides no basis for challenging this position.

Page and Omni contend that it is not reasonable to select the winning bidder solely upon the basis of the highest offered percentage of "other gross receipts," instead of projecting, for each bidder, the total amount of revenue which might be generated by that bidder's particular operation. Omni further asserts that the FAA should consider this total revenue approach under "the broad criteria of responsibility." Since the evaluation criteria spelled out the basis for award, the basic objection to the evaluation approach is untimely as it should have been raised prior to bid opening. Moreover, while there is no guarantee that in fact the FAA will ultimately receive the highest total revenue from the bidder offering the highest percentage, we think the FAA, based on its prior experience with the receipts generated at National Airport over the years and on the fact that more than half of "other gross receipts" have stemmed from mandatory services, cannot be said to have used an unreasonable evaluation approach. In other words, while we would view as speculative an evaluation based primarily on anticipated receipts to be generated from services which a contractor was free to discontinue, here the evaluation was based on anticipated revenues some 60 percent of which were to be derived from mandatory services. On the basis of the mandatory services required by the contract, Butler's bid was clearly most advantageous, and since any contractor could decline to provide the secondary services, we think the evaluation

approach suggested by the protesters, based on what each bidder might choose to do with respect to those services, would be inappropriate.

With respect to Omni's argument, we believe Omni reads too much into the IFB's "Notice to Bidders" which states that the highest bidder will not be automatically awarded the contract and that other factors such as responsiveness, responsibility and the Government's right to reject all bids will be considered. This notice states basic requirements for all awards and cannot reasonably be interpreted as authorizing consideration of evaluation factors which are inconsistent with those stated in the IFB. As indicated, the IFB clearly provided for competition among those bidders whose technical proposals have been found to meet the minimum needs of the agency with award going to that responsive bidder offering the highest percentage fee and who is determined to be responsible.

Omni also contends that in view of the currently prevailing profit margins in the industry, neither Butler nor Page can perform the required services at reasonable prices and therefore must eliminate or reduce to bare minimums discretionary secondary services or use the profits from the required primary services to offset losses from the secondary services. Omni asserts that the solicitation prohibits such a "cross subsidy" between primary and secondary services and that the bids of Butler and Page must be rejected as nonresponsive.

There is nothing in the IFB which can be interpreted as precluding such a "cross subsidy." Thus, Omni's contentions do not pertain to responsiveness, the test of which is whether a bid as submitted is an offer to perform in accordance with the material terms and conditions of the IFB. 49 Comp. Gen. 553 (1970). Rather, they pertain to Butler's capacity, financial and otherwise, to meet the demands of the contract, which is a matter to be considered in conjunction with the determination of Butler's responsibility. The FAA has made no formal determination of responsibility as yet with respect to Butler. We point out, however, that this Office does not review affirmative determinations of responsibility except where the protester alleges fraud on the part of the procuring officials or

where the solicitation contains definitive responsibility criteria which allegedly have not been applied. Contra Costa Electric, Inc., B-190916, April 5, 1978, 78-1 CPD 268; Central Metal Products, Inc., 54 Comp Gen. 66 (1974), 74-2 CPD 64. Neither exception applies here.

We also point out that whether Butler performs in accordance with the contract requirements is a matter of contract administration, which is the function and responsibility of the procuring agency and matters relating thereto are not for resolution under our Bid Protest Procedures, supra. SMI (Watertown), Inc., B-188174, February 8, 1977, 77-1 CPD 98; National Organization Service, Inc. - Reconsideration, B-196267, November 20, 1979, 79-2 CPD 369.

Because Omni's protest was filed well after Page filed its protest, we find it unnecessary to consider an agency report on the Omni protest or provide Omni an opportunity to receive and rebut the report. We frequently dismiss or summarily deny a protest on the basis of the protester's initial submittal and without further development if such submittal, when read in the light most favorable to the protester, affirmatively demonstrates the protest is untimely or provides no legal basis upon which it could be sustained. See, e.g., Murphy Anderson Visual Concepts-Reconsideration, B-191850, July 31, 1978, 78-2 CPD 79; Industrial Maintenance Services, Inc., B-195216, June 29, 1979, 79-1 CPD 476; James B. Nolan Company, Inc. - Reconsideration, B-192482, February 9, 1979, 79-1 CPD 89. Here, Omni raises issues which we either do not consider or which parallel the issues raised by Page. In fact, the one overall issue which Omni raises which we treat on the merits is the same as the issue raised by Page regarding bid evaluation. As Omni had every opportunity to fully participate in the Page protest, we perceive no prejudice flowing to Omni from this expedited approach, which we take particularly because the contract award has been held pending this decision and we see no useful purpose which would be served by permitting Omni to elaborate on allegations which we have found on their face to be without merit or not for our consideration.

Milton J. Socolar

For the Comptroller General
of the United States