Protest of	)	Date: August 5, 1991
	)	
DONALD W. WADE	)	
	)	
Under Solicitation No. 840-23-91	)	P.S. Protest Nos. 91-40

DECISION

Mr. Donald W. Wade timely protests the contracting officer's determination that he is an ineligible bidder on Solicitation no. 840-23-91, issued by the Salt Lake City Transportation Management Service Center (TMSC) for the highway transportation of mail between Moccasin and Benchland, MT. The solicitation was issued on April 15, 1991 with bid closing on May 20. Mr. Wade's bid was the lowest received.

The record reflects that Mr. Wade was informed by TMSC personnel on May 30 that he would be determined ineligible for contract award because his wife is a Postal Service employee. On June 3, the contracting officer advised Mr. Wade by telephone of his determination that Mr. Wade was an ineligible contractor because his wife is a Postal Service employee.

By letter of June 3, Mr. Wade protested his ineligibility. In his letter Mr. Wade states that his wife is employed as a postmaster leave relief replacement in Hobson, MT.[1/] Mr. Wade indicates that, before responding to the solicitation, he and his wife consulted with local postal officials, specifically the Hobson, MT, postmaster and the Moccasin, MT, postmaster, concerning the proper procedure for Mrs. Wade to resign her position so that Mr. Wade would be eligible for award. Mr. Wade states that they were told the same thing by both postmasters - that Mrs. Wade should write a letter of resignation stating that she would give "proper two weeks notification upon awarding of the contract."[1/] Mr. Wade states that he is protesting his exclusion from award because he

[1/] Although postmaster replacements are not accorded all the perquisites of postal employees, they are employees for purposes of the application of conflict of interest regulations and solicitation provisions. See generally, Duwane R. Engler, P.S. Protest No. 86-52, September 26, 1986.

[2/] The record contains a letter from the Hobson postmaster which indicates that he told Mrs. Wade that she could resign if her husband received contract award. The record also contains a letter from the Moccasin postmaster regarding her advice to another bidder on the contract who was a Postal Service employee at the time of bid closing. In the latter case, the Moccasin postmaster indicated that the

was given wrong information concerning the proper procedure for his wife to follow so that he might be eligible for award.[1/]

After receiving required concurrence, the contracting officer determined Mr. Wade's protest to be obviously without merit. In his letter of June 12 conveying this determination, the contracting officer states that applicable sections of the PM and solicitation provisions preclude award to Postal Service employees and their immediate families, noting that the latter term includes spouses.[1/] Additionally, the contracting officer states that contractor eligibility is determined at the time of bid submission. Finally, the contracting officer expresses his concern over the misinformation that Mr. Wade may have received but points out that such a result can follow when a bidder seeks information from an individual not authorized to speak for the Postal Service on a matter regarding a solicitation.

On June 20, the TMSC received further correspondence from Mr. Wade concerning his

employee could resign if she were low bidder. Mrs. Wade, in fact, sent a letter to the Hobson postmaster on May 23 in which she gave "two weeks notice of [her] intention to resign [her] position...as of June 6, 1991." The basis for her decision was that her husband had received notice that he was low bidder on the solicitation.

[3/] Mr. Wade also sent a June 10 letter to the TMSC in which he requested a statement in writing of the reason why he was not awarded a contract. By letter of June 12, the contracting officer responded that his ineligibility was based on his wife's status as a Postal Service employee.

[4/] PM 1.7.2 a. states:

> Except as provided [not relevant exceptions], contracts may not be awarded to Postal service employees [or] their immediate families,..."Immediate family" means spouse....

PM 12.5.1 specifically makes the limitations of PM 1.7.2 applicable to mail transportation contracting.

P.S. Form 7469, Highway or Domestic Water Transportation Contract Information and Instructions, included with the solicitation, provides at Section II, A. 1. as follows:

A. Eligibility of Bidder and Offerors

1. Persons ineligible to become Contractors:

a. Employees of the U. S. Postal service or members of their immediate families. "Immediate family" means spouse, minor child or children, and other individuals related to the employee by blood who are residents of the employee's household.

b. Business organizations substantially owned or controlled by Postal Service employees or their immediate families.

c. Any individual or firm not meeting the minimum standards for responsible prospective contractors in accordance with the Procurement Manual.

ineligibility and which Mr. Wade requested be sent to U.S. Postal Service headquarters. In this letter, Mr. Wade cites two instances within 30 miles of Hobson in which a married couple violates the restriction against spouses of Postal Service employees contracting with the Postal Service. After receiving Mr. Wade's correspondence, the contracting officer forwarded the whole matter to this office for resolution as a protest against his determination that Mr. Wade's protest is obviously without merit.[1/]

In his report to this office, the contracting officer notes that Mr. Wade had inquired of local postmasters whether his wife's employment would affect his eligibility to bid and that Mr. Wade apparently received erroneous information regarding this matter. Concerning this issue, the contracting officer reiterates his view that this information did not come from an individual authorized to speak for the Postal Service and that the solicitation was sufficiently clear concerning eligibility, in any case. As to the other spouses with postal contracts in the area, the contracting officer points out that each of these cases involves a renewal of a contract when the spouse had become a Postal Service employee after the contract had originally been awarded and that renewal in such instances is allowed by applicable regulations.[1/] In conclusion, the contracting officer reiterates his view that exclusion of Mr. Wade in this case based on his ineligibility due to his wife's employment was appropriate. Mr. Wade has not submitted comments on the contracting officer's statement.

Discussion

This protest raises the question of when a prospective awardee's ineligible status should be determined. Previous decisions of this office have established that when that status is based on a conflict with our regulations concerning award to employees and immediate family members, eligibility must be determined at the time of bid opening. See James D. Sandberg, P.S. Protest No. 80-77, January 8, 1981; Duwane

[5/] PM 4.5.4 e. states:

> If a protest has been timely filed initially with the contracting officer, any subsequent protest to the General Counsel received with ten working days of the protester's formal notification of, actual knowledge of, or constructive knowledge of initial adverse action by the contracting officer will be considered, provided the initial protest [was timely].

[6/] PM 1.7.2 states in pertinent part:

> b. The prohibition against contracting with Postal Service employees may be waived...for:
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> ***
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> 3. Renewal of existing highway contract routes with immediate members of a postal employee, subject to review and concurrence by the Associate Ethical Conduct Officer, and the APMG, Delivery, Distribution and Transportation Department....

R. Engler, On Reconsideration, P.S. Protest No. 86-52, November 7, 1986. As we have stated regarding bidder/employees,

> If the bidder were permitted to determine his employment status after bid opening he would have complete discretion -- after all bids have been publicly exposed -- to take action which would either qualify him for award or disqualify him, depending upon which action appeared most to his advantage in light of the other bids and other information that was not available at the time of bid opening. In other words the bidder/employee would have an unfair "two bites at the apple" since he, unlike other bidders, would have a second chance to decide whether he wanted the contract. (citation omitted).
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> Under the "firm bid rule" a bid for a formally advertised contract is generally irrevocable during the time provided in the invitation for bids for the acceptance of the bid or for a reasonable time after bid opening. See International Graphics et. al. v. United States, 4 Cl. Ct. 515 (1984); Refining Associates, Inc. v. United States, 124 Ct. Cl. 115 (1953); 53 Comp. Gen. 157 (1973); 49 Comp. Gen. 395 (1969). The rule ensures that the system of competitive bidding works without undue delays and prevents the opening of bids from being used unfairly to obtain disclosure of competitors' offers. International Graphics et. al. v. United States, supra.

Duwane R. Engler, On Reconsideration, supra. The above analysis is equally applicable here.

Allowing Mrs. Wade to decide after bid opening whether to qualify or disqualify her husband from eligibility for contract award would violate the "firm bid rule" by allowing her the option, in effect, to revoke her husband's offer after bid opening. Such a situation is unfair to other bidders since it allows Mr. Wade the potential of "a second bite at the apple" through his wife either resigning and therefore making him eligible for award or refusing to resign and making Mr. Wade ineligible for award.

Concerning Mr. Wade's allegation that other married couples in which a spouse is a Postal Service employee have postal contracts in the Hobson area, the record reflects that the contracts in question are transportation contracts which were renewed with individuals who were awarded the contracts when there was no conflict of interest impediment and whose spouses became postal employees later. Such circumstances differ from those at issue in this protest and therefore cannot affect its outcome. As noted above, under appropriate circumstances, contract renewals with spouses of postal employees are allowed by our regulations. See PM 1.7.2.

The protest is denied.

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

[compared to original JLS 8/16/93]