

Protest of) Date: April 8, 1987
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 FREDERICK MANUFACTURING)
 COMPANY)
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 Solicitation No. 104230-86-B-0199) P.S. Protest No. 87-13

DECISION

Frederick Manufacturing Company (FMC) timely protests the change in evaluation criteria made by Amendments A04 and A05 to Solicitation No. 104230-86-B-0199 for safety report analysis, corrective recommendations, and specification and drawing preparation. FMC asserts that the amendments are flawed and that award should be made under the initial evaluation scheme.

Request for Proposals (RFP) No. 104230-86-B-0199 was issued on September 4, 1986, with an offer due date, as amended, of October 15, 1986. The technical score comprised 60 percent of the total evaluated score and price 40 percent. The solicitation set forth fourteen labor categories and provided a space for the hourly rate to be offered for each labor category. The offeror's price would be evaluated by adding all fourteen labor category rates and dividing the sum by fourteen to arrive at the average loaded hourly rate. The lowest average hourly rate would receive 40 points and the other offeror's price scores would be determined as a ratio of their average loaded hourly rate to the lowest average loaded hourly rate, multiplied by 40.

Proposals were received and several were found to be technically acceptable. Upon the opening of price proposals, it was discovered that FMC submitted a price of "\$0.00" for five of the fourteen labor categories and included a notation in their price proposal which indicated that these labor categories were included in overhead. The contracting officer requested FMC to price all fourteen labor categories, which FMC refused to do.^{1/}

The contracting officer was uncertain as to how FMC's price proposal should be evaluated, and initiated a review of the evaluation criteria. This review concluded that the price evaluation scheme was fundamentally flawed because it gave each labor category equal weight. Practice under the prior contract for these services (for which FMC was the incumbent) indicated that the five labor categories on which FMC had submitted a price of zero had been used very infrequently. Thus, award under the

^{1/}The protest file indicates that, by letter dated January 6, 1987, this request was "rescinded" by the contracting officer, but does not indicate why such action was taken.

initial evaluation scheme might not result in a proposal whose cost was actually the lowest, because the evaluation would use as five-fourteenths of the price evaluation score labor categories which had only a very slight effect on the total contract cost.

FMC and the contracting officer discussed the issue further. FMC asserts that the contracting officer referred to a Comptroller General case (Computer Data Systems, Inc., Comp. Gen. Dec. B-223921, December 9, 1986, 86-2 CPD & 659) to the effect that zero-cost pricing of some labor categories represented an unacceptable cost risk in certain circumstances. FMC responded by letter dated January 29, distinguishing that case from what it believed were the relevant facts here. The contracting officer responded on February 3, setting forth her determination that the evaluation scheme contained in the RFP was flawed and would be amended to correct those flaws.

The contracting officer also issued Amendment A04, dated February 3, 1987, which assigned specified weights to each of the labor categories.^{1/} The five labor categories on which FMC bid \$0.00 were given zero weight in the new evaluation scheme. Amendment A05, undated, was subsequently issued to insert a labor category which had been inadvertently omitted and to redistribute the weights of the fourteen labor categories.^{1/} Amendment A05 requested revised proposals by February 20, 1987. FMC's timely protest followed.

FMC's protest involves three basic issues. First, FMC claims that the original RFP was not flawed. FMC notes that two years ago a contract was awarded to another company on a different RFP which also did not have weights for the particular labor categories and that there has been no indication at that time or

^{2/}The combined weights totaled 100 points. These points were divided among the categories as follows: one 23 points; one 20 points; one 18 points; one 14 points; one 13 points; one five points; one four points; one three points; and five zero points.

^{3/}The revised evaluation scheme contained only three labor categories with a zero weight. The other changes were minor, increasing or decreasing specific labor categories by one or two points.

thereafter that this procedure was defective. It indicates that the RFP was fair to all offerors, in that they were given an equal opportunity to receive award. FMC indicates that, based on the initial RFP evaluation scheme, it "is the apparent winner of this competition,"^{4/} and, as incumbent, it is the best qualified to perform the work at the lowest price and in the shortest time.

Second, FMC attacks Amendments A04 and A05 as defective. It states that these amendments, which incorporate utilization rates based on the various labor categories of FMC's prior contract, may not reflect the manner in which other offerors will utilize their personnel to accomplish assigned tasks. Because these weights may not correspond to the other offerors' use of staff and work flow, they should not be used to evaluate the offerors' proposals. Further, the use of weighted evaluation criteria as proposed in Amendment A05 may not lead to the lowest cost to the Postal Service if the labor categories on which FMC had bid \$0.00 and which will be evaluated with zero weight are, in fact, used in future task orders. At that point, the Postal Service will be paying for the use of labor which it would have gotten free from FMC, an outcome clearly not in the Postal Service's best interest. FMC also states that the alteration of evaluation criteria after receipt and opening of proposals is "unusual and improper," and may well lead to inadvertent disclosure of the elements of some proposals to other offerors.

Finally, FMC believes that "[c]ertain persons within the USPS" have acted in a biased manner toward it and have "gone through a series of maneuvers designed to assure that [it] will not be awarded the contract resulting from this RFP." FMC points to the contracting officer's initial position that FMC had to bid a price on all fourteen labor categories and the citation to the decision in Computer Data Systems, Inc., as indications that postal personnel were searching for a rationale to prevent award from being made to FMC. FMC views the weighting of the evaluation criteria as, similarly, a means to prevent award to it. It cites the "unexplained weight differences" as between Amendments A04 and A05 as indicative of the Postal Service's intent to prevent award from being made to FMC. Given the prior background in the FMC-Postal Service relationships, FMC sees these actions as part of an ongoing operation to deny FMC any Postal Service contracts.

The contracting officer's report maintains that the RFP, as issued, was defective, in that five-sixteenths of the evaluated price score were for labor categories which, historically, have seldom been used. Therefore, the pricing formula failed to indicate which pricing proposal would be the most favorable to the Postal Service. While this price evaluation scheme treated all offerors equally, it was not in the best interest of the Postal Service, since the contracting officer could not determine which offer was most likely to result in the lowest actual cost to the Postal Service.

She states that Amendments A04 and A05 are necessary to make the evaluation criteria accurately reflect the lowest overall prices. The contracting officer maintains

^{4/}There is no indication on what information FMC bases this assumption. Postal Contracting Manual (PCM) 3-805.1(b) mandates that, once proposals are received, the identity and number of offerors, as well as all information about their proposals, is to be kept confidential. There is no indication in the file before us that this provision has been violated.

that the historical skill mix taken from FMC's contract is a good indicator of probable future usages of the various labor categories. Use of the weighted labor categories may not guarantee the lowest actual contract price, because the actual use of particular labor categories will not be determined until the task orders are actually issued. However, the amended evaluation criteria are much more likely to result in the lowest actual price than the initial evaluation scheme, as the amended price evaluation tracks past usage rather than simply using equal weights been for each labor category. She indicates that there is no reason to suspect that another contractor would have a labor category usage substantially different from FMC's.^{1/}

The contracting officer denies any allegation of prejudice or bias in this procurement. She maintains that the amendments do not prejudice FMC, because FMC will get an equal chance to propose based on the revised evaluation criteria and, if FMC's proposal really is the most advantageous, it will receive award after revision of the offerors' proposals. The contracting officer indicates that no action has taken to disadvantage FMC, but only to ensure equality of competition among the offerors.^{1/} Another offeror has submitted comments on FMC's protest. This offeror states that the initial RFP was flawed. It cites Temps & Co., Comp. Gen. Dec. B-221846, June 9, 1986, 86-1 CPD & 535, for the proposition that the Postal Service must weight individual labor categories to determine the lowest evaluated price. The offeror claims that FMC's zero pricing of certain labor categories is improper and would allow FMC to gain a competitive advantage over other offerors, who it claims must price all labor categories. The offeror concurs in the contracting officer's determination as supported by the regulations and necessary for the fair and equal evaluation of which offer is the most advantageous to the Postal Service.

FMC's main contention is that the RFP as originally issued was fair and that the amendments were not unnecessary but positively harmful to the evaluation of its offer.^{1/}

^{5/}The contracting officer has not mentioned the decision of Computer Data Systems, Inc., supra, and does not now contest FMC's right to zero-price any of the labor categories. Since the contracting officer does not now rely upon this decision in support of her position, we do not find it necessary to discuss its applicability.

^{6/}In response to the contracting officer's report, FMC reiterates that unweighted evaluation criteria have been used in past postal procurements, and that, since this method was deemed satisfactory for these procurements, the change to weighted evaluation criteria treats FMC inequitably as regards to these other procurements. FMC further asserts that its statements that it was the successful offeror were logical assumptions derived from the advantages to FMC of its zero pricing strategy and not based on any actual knowledge of the technical or pricing scores. FMC claims that it has, indeed, been prejudiced, because it assumedly is the clear winner of the solicitation, whereas, under the weighted evaluation criteria it may lose.

^{7/}FMC's allegation that prior solicitations may have used unweighted evaluations of labor categories which sanctioned the present use does not help its case. The asserted "past practices" of postal procurement personnel do not stop them from correcting incorrect methods of evaluation. De Santis Industries, Inc., On Reconsideration, P.S. Protest No. 84-27, June 11, 1984; The Goodyear Tire and Rubber Company, P.S. Protest No. 83-80, February 24, 1984. Even if an earlier contract was awarded under a defective evaluation scheme, that does not affect the propriety of the contracting officer's determination in the present case.

FMC's point that all offerors were treated equally under the initial evaluation scheme is correct but irrelevant; insofar as the evaluation criteria did not correspond to the Postal Service's actual minimum needs, they were defective because award under the criteria would not be to the most advantageous offeror. The contracting officer has broad discretion in the selection and weighting of evaluation criteria to determine which offers will best meet the Postal Service's actual needs. See Augmentation, Inc., Comp. Gen. Dec. B-186614, September 10, 1976, 76-2 CPD & 235; BDM Services Company, Comp. Gen. Dec. B-180245, May 9, 1974, 74-1 CPD & 237. While the procurement process involved here has only been marked with some inefficiencies, it is too far a leap to claim that the contracting officer's determination to change the

evaluation criteria by amending the solicitation was improper; "an agency may depart from the announced evaluation plan if it informs all offerors of the change and provides them an opportunity to restructure their proposals in light of the new evaluation scheme." Galler Associates, Inc., Comp. Gen. Dec. B-210204, May 16, 1983, 83-1 CPD & 515; see also Columbia Research Corp., Comp. Gen. Dec. B-202762, January 5, 1982, 82-1 CPD & 8. Once the contracting officer realized that the evaluation scheme would result in an evaluation which, based on historical usages of the various labor categories, was likely not to result in the lowest cost (or be the most advantageous) to the Postal Service, she acted within her discretion in revising the evaluation scheme and requesting revised proposals from all offerors. FMC's claim of necessary prejudice is inaccurate; it will be fully able to revise and resubmit its proposal and may well emerge victorious from the competition. Cf. Systems Groups Associates, Inc., Comp. Gen. Dec. B-198889, May 6, 1981, 81-1 CPD & 349.^{8/} FMC's assertion that it is presently in line for award is not supported in the record before this office. In addition, FMC could not have had a reasoned expectation of award based on its initial proposal, as the contracting officer always could have negotiated and requested best and final offers. Therefore, there is no reason before us to overturn the contracting officer's determination to amend the evaluation criteria.

FMC's allegation of bias on the part of the contracting officer is also unavailing. Public officials act in their official capacities under a "presumption of regularity," whereby they are assumed to "act conscientiously in the discharge of their duties." Garden State Copy Company, P.S. Protest No. 84-31, July 5, 1984, quoting Kalvar Corp., Inc. v. United States, 211 Ct. Cl. 192, 198 (1976). FMC's allegations of bias are vague, unspecific, and unsupported by the evidence in the record before this office. Since FMC has not proffered evidence sufficient to overcome the presumption of regularity, its allegations of bias fail.

The protest is denied.

William J. Jones
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Office of Contracts and Property Law

[Compared to original 2/23/93 WJJ]

^{8/} As indicated at footnote 5, supra, FMC (and any other offeror) will be able to price any of the weighted categories at zero. Thus, the issue of zero pricing unfairly skewing the evaluation is not raised in this decision.