

Regarding Contract and Project Specifications . . . and Attachments 3 and 4." A document on the letterhead of Versar Inc., which prepared the solicitation's specifications, formed the second and third pages of the amendment. The seventh, and final, enumerated item in the amendment reads as follows:

For air handling units located in the penthouse much of the ductwork in the AHU rooms are insulated. For those systems remove and replace with new the specified duct-work instead of cleaning them.

BMS asserts that its bid, submitted April 20, 1987, was predicated on three conclusions, which were based on the assertions of fact described above, namely that: 1) air handling systems would be decontaminated by means other than replacement of ductwork; 2) conveyor and monorail decontamination would not extend beyond "column line 13;" and 3) Service Contract Act wage rates would be applicable.

The bid submitted by BMS was the lowest received. BMS states that, in discussions following the Postal Service's request that it verify its bid, it discovered that the three conclusions described above were incorrect. BMS suggested that the Postal Service cancel the solicitation and re-advertise on the basis of more clearly defined specifications. It was informed that re-advertisement was not appropriate, but that it would be permitted to withdraw its bid on the basis of the mistakes that it had alleged.

The Protest

The protest filed by BMS is dated April 23, 1987, and was received by this office on April 24, 1987. The firm states three bases for its protest. First, it asserts that the specifications neither reflected the needs of the Postal Service nor accurately described the services to be provided. It argues that Amendment No. 2 to the solicitation could not have effected a change in the specifications requiring the replacement of ductwork in the pent-house air handler units, because the paragraph quoted above was part of an amendment labelled as "clarifications," which failed to give notice of changes in requirements, and because the extent of the ductwork requiring replacement could not be ascertained without an inspection of the facility. BMS states that, given its receipt of the amendment one business day before the bid-opening day, it would have been impossible to inspect the Tulsa, Oklahoma, facility, adjust its bid, and submit such bid in Dallas by 3:00 p.m. on April 20, 1987.

The second basis for the protest is BMS's argument that the contracting officer's failure to delay the scheduled bid opening violated Postal Contracting Manual (PCM) requirements that the time between issuance of an amendment and bid opening be considered, and that sufficient time be allowed to permit all prospective bidders to consider the amendment in preparing their bids. BMS asserts that it was denied time to estimate additional work. It also maintains that the short time allowed between issuance of the amendment and bid-opening deprived the Postal Service of the benefits of carefully computed bids; BMS cites large disparities among the bids received as evidence of a lack of sound estimating procedures.

The third basis for the protest is the Postal Service's requirement that the contractor comply with the Davis-Bacon Act, and that performance and payment bonds be

submitted. BMS contends that these requirements were improper, and that they added unnecessarily to the price of the project.

BMS requests that the invitation for bids be canceled, and that the requirement be resolicited in a manner that it contends would better serve the interests of the Postal Service and bidders alike.

The Contracting Officer's Report

The contracting officer submitted his report on May 1, 1987. In response to BMS's assertion that the second amendment to the solicitation, labeled "clarifications," could not properly change the solicitation requirement that certain air handling units be cleaned to a requirement that they be replaced, the contracting officer asserts that paragraph 7 of the second amendment clearly stated the requirement that the air handling units be replaced, arguing that amendments can take many forms. As to the alleged lack of time for investigation and modification of bids, the contracting officer asserts that the affected by the amendment was clearly described in the contract drawings, as amended in Amendment No. 1. Based on the Postal Service's delivery record for an Express Mail Service shipment to Blackmon Mooring Steamatic, the contracting officer also points out that Amendment No. 2 was received by the protester on April 16, 1987, rather than April 17.

On the third basis for BMS's protest, the categorization of the work described in the solicitation, the contracting officer asserts that, despite a number of cleaning tasks within the contract work, the contract requires substantial construction work. The contracting officer states that BMS was not told to deviate from the requirements of the solicitation, but, on the contrary, was told to bid on the package presented. The contracting officer also argues that, given the nature of the work required, bonds would have been required in any event. Finally, the contracting officer argues that BMS, by filing its protest

four days after the date set for the receipt of offers, failed to meet the timeliness requirements of the PCM.

Comments

Comments were submitted by two firms that submitted bids in response to the solicitation. National Electric Inc. (NEI) generally supports BMS in each of the three bases stated for its protest. It agrees with BMS that the requirement of replacement of air handling units should not have been accomplished by an amendment, cast as a matter of clarification, issued only a few days before bid opening and that insufficient time was allowed for modification of bids. While NEI did not ask the Department of Labor to categorize the contract work, it concurs in BMS's conclusion that the solicitation should have called for a service contract.

NEI asserts that the solicitation's bonding requirements are not only expensive, but also very difficult to meet. NEI considers it unlikely that any of the four lowest bidders could obtain the required performance bond, and it expresses concern that the successful bidder would seek a reduced bonding requirement in post-award negotiations.

Ensco Environmental Services, Inc. (Ensco), the second firm submitting comments, objects to cancellation of the solicitation, and opposes BMS's position on each of the three grounds stated in the protest. Ensco considers the second amendment to the solicitation clear in its requirement that certain ductwork be replaced rather than cleaned. It asserts that it understood the requirements of the second amendment, and that, contrary to BMS's assertions, the solicitation's drawings made clear the quantity of ductwork affected by the requirement. Ensco also notes that it had viewed the affected area in an earlier site visit, and that the ductwork change had resulted in only a two percent change in its bid.

Ensco also takes issue with BMS's decision to bid on the basis of an assumption that Davis-Bacon wage rates would not apply. During the bidding process, Ensco states, a bidder cannot unilaterally change the solicitation's requirements. Ensco argues for withdrawal of the BMS bid, rather than cancellation of the solicitation, as the appropriate remedy for mistakes that BMS may have made. Bids having been opened, Ensco would view a resolicitation as bid shopping.

In its response to the contracting officer's report, BMS takes issue with a number of the contracting officer's points. It maintains that Amendment No. 2 required a site visit, and that inadequate time was allowed between the issuance of the amendment and the date set for the receipt of offers, even if BMS had received the amendment one day earlier than it claimed in its protest.

BMS views the contracting officer's timeliness argument as a technical one that ignores the asserted lack of adequate time for response to Amendment No. 2. It points out that its protest was filed within ten days after issuance of the amendment, and argues that any failure to protest in a timely manner was traceable to an unreasonably short time between issuance of the amendment and the date set for receipt of offers.

Discussion

We conclude that the issue of timeliness, which was raised by the contracting officer, is dispositive of BMS's protest. The firm filed its protest after bid opening, yet cites a number of ambi-guities or deficiencies in the solicitation, as amended. Our regulations require that

[w]ritten protests based upon alleged deficiencies in a solicitation which are apparent before the date set for the receipt of offers must be received by the date and time set for the receipt of offers.

PCM 2-407.8 d. (1). BMS's protest is untimely under this standard.

The first basis cited by BMS in support of its protest, the alleged impropriety of the Postal Service's requiring bonds and compliance with the Davis-Bacon Act, was known to BMS on or before April 17, 1987, when it claims to have received an opinion from the Department of Labor. Assuming for purposes of this discussion that BMS was correct in its conclusions about the categorization of the work required by the solicitation, BMS submitted its bid with the knowledge that the solicitation continued to impose the Davis-Bacon Act and bonding requirements.^{1/} Having failed to protest the discrepancy between the solicitation and its understanding of the applicable legal requirements before the opening of bids, BMS's protest based upon that discrepancy is untimely.^{1/}

Any failure of Amendment No. 2 to modify specifications appropriately, or to define the extent of required ductwork replacement, was likewise apparent before the bid-opening date. BMS's assertion that prospective bidders were not on notice of changes in the specifications is not correct. The fifth numbered paragraph of the amendment, a brief and easily digestible document, refers explicitly to an error in the specifications. Whatever the effect of Amendment No. 2 on the specifications, however, the seventh paragraph made it clear that Postal Service sought replacement of certain ductwork. If such work was not described, or was inadequately described, in the earlier-issued specifications -- and if Amendment No. 2 did not effect a change in the specifications -- a deficiency was apparent upon reading the amendment.

As to the third basis for its protest, BMS could have objected to the contracting officer's failure to extend the bid-opening date before bids were due. If, as BMS asserts, the careful preparation of its bid was rendered impossible by the

^{1/}In interpreting the solicitation, BMS was not entitled to rely upon oral statements by Postal Service employees or representatives of the Department of Labor. Paragraph 1 of Instructions to Bidders, PS Form 7389, which was part of the solicitation pack-age, requires that explanations desired regarding the invitation, and its specifications, be requested in writing. It also provides that explanations will be furnished to all prospective bidders in the form of an amendment to the solicitation. A bidder that fails to comply with the requirements of paragraph 1 of PS Form 7389 cannot rely upon oral instructions to justify shortcomings in its bid. Jerry Ganz, Inc., P.S. Protest No. 86-73, December 12, 1986.

^{2/}BMS does not rely on its conversations with postal employees concerning the extent of conveyor and monorail decontamination as a basis for its protest, despite its discussion of its under-standing of the requirement as a basis for the bid it submitted. However, such a basis would face the same problem as its objection to the Davis-Bacon Act requirements. When it failed to receive an amendment altering these requirements, BMS was entitled to protest the terms of the solicitation, but not to bid on the basis of assumptions that were contrary to the terms of the solicitation.

last-minute changes of Amendment No. 2, the prospective bidder should not have proceeded to submit its bid. Any deficiency inherent in the short time allowed between receipt of the amendment and the dead-line for offers was apparent before the date set for the receipt of offers.

The conclusion that BMS failed to protest the alleged deficiencies in the solicitation in a timely fashion determines the disposition of its protest.

Our office has consistently adhered to a strict reading of this provision; any provision of the solicitation in which the deficiency is apparent must be protested before the bids are opened. See, e.g., Irving Stumer, P.S. Protest No. 84-79, November 29, 1984; Division of Blind Services, State of Florida, P.S. Protest No. 84-48,

July 30, 1984; Great Falls Roofing, Inc., P.S. Protest No. 84-45, July 20, 1984; E & K Sales, P.S. Protest No. 84-35, May 8, 1984. This timeliness requirement is jurisdictional, and this office is without authority to waive it. Great Falls Roofing, Inc. On Reconsideration, P.S. Protest No. 84-45, August 15, 1984.

Tulsa Diamond Manufacturing Corp., General Aero Products Corp., and Unidynamics/National Vendors, P.S. Protest Nos. 85-18, 85-20 and 85-23, June 20, 1985, aff'd on reconsideration, July 17, 1985.

Because this office is "without authority to give relief when protests are filed in an untimely fashion," Bula Forge, Inc., P.S. Protest No. 86-14, April 23, 1986, it is clear that dismissal of the protest is appropriate.

The protest is dismissed.

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