

Protest of) Date: August 25, 1987
MALCOLM A. MILLER, INC.)
Solicitation No. 419980-87-B-0068) P.S. Protest No. 87-87

DECISION

Malcolm A. Miller, Inc., (Miller) timely protests a contracting officer's decision to award a contract for engineering and technical services to H. L. Yoh Company (Yoh). Miller asserts that Yoh's offer was for less than the cost of supplying the contract services and therefore is unfair. Miller asserts in the alternative that Yoh's low price resulted from its omission of items required by the solicitation.

Request for Proposals (RFP) No. 419980-87-B-0068, issued June 10, 1987, solicited offers for engineering and technical services at the USPS Facilities Service Center, Eastern Region. The RFP called for offerors to propose a mark-up factor for the services to be performed. During performance, the mark-up factor is applied to established labor rates to yield the actual billing rates. Eleven proposals were received of which Yoh's mark-up factor of 26.8% was low. Miller's mark-up factor of 29.92% was third low. NESCO Design Group was second low at 27.4%. All offers were evaluated in a pre-agreement survey, as specified in the RFP, and Yoh's offer was deemed most advantageous to the Postal Service. The contract was awarded to Yoh July 20.

Miller argues that Yoh's mark-up factor of 26.8% is below cost. It notes that overhead, profit and various fringe benefits, including holiday pay, must be included within the mark-up percentage. Miller asserts that its offer includes all such factors, and its fixed costs equalled 29.12%. Miller fails to see how Yoh's fixed costs could be much different from its own. It therefore alleges that Yoh's lower figure must be either below cost or must not have been based on all the requirements of the solicitation.

The contracting officer contends that Yoh, which has the current contract to provide these services, is familiar with the terms and conditions of the RFP and the 26.8% figure was verified by Yoh. The contracting officer notes that Yoh is required to perform the contract in accordance with its proposal. He claims that Miller's objections merely concern matters of contract administration.

The contracting officer further notes that NESCO, the second low offeror, also presented a mark-up factor less than Miller's calculated fixed costs of 29.12%. He

urges Miller's protest be denied.

Postal regulations provide that only an interested party can protest the proposed award of a contract. PCM 2-407.8 c. A party is interested for these purposes if it could be eligible for award of the contract if the protest is sustained. Safety Technology, Inc., P.S. Protest No. 86-13, March 21, 1986. Since Miller is the third low bidder and does not challenge NESCO, the intervening second low bidder, it lacks standing to complain about Yoh's low bid. See E & K Sales, P.S. Protest No. 84-35, May 8, 1984. Were its protest to be sustained, Miller would not be in line for award. "Where it does not appear that the protester, even if correct, would be eligible for award, resolution of its protest would be an academic exercise." Strapex Corporation, P.S. Protest No. 85-33, July 11, 1985.^{1/}

The protest is dismissed.

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

[Compared to original 3/12/93 WJJ]

^{1/} The submission of a bid which is below cost, even if the bidder will suffer a loss thereby, does not constitute a sufficient basis for precluding contract award to that low bidder. Lightron of Cornwall, Inc., P.S. Protest No. 84-6, February 27, 1984; Baumgartner Trucking Inc., Top Hat Partners Express, Edward W.Higgins, and David R. Anderson, P.S. Protest No. 85-37, July 12, 1985. Due to the lowness of Yoh's proposal, the contracting officer asked for and received verification of Yoh's offered price. Upon award, Yoh is obligated to perform all services called for in the RFP for that price.