

Protest of) Date: August 16, 1988
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AUTOMATION INDUSTRIAL CONTROL, INC.)
)
Solicitation No. 104230-87-B-0105) P.S. Protest No. 88-06

DECISION

Automation Industrial Control, Inc. (AIC), protests the award of a contract to Chamberlain Manufacturing Corporation (Chamberlain) under Solicitation No. 104230-87-B-0105, issued July 31, 1987, by the Office of Procurement, Headquarters. The solicitation required the design, development, fabrication, testing and documentation of 10 Engineering Development Model 8 keyboard units for the Model 775 Flat Mail Sorting Machine and 20 Production Prototype Model keyboard units for the Model 775 Flat Mail Sorting Machine.

The solicitation's evaluation criteria, set out in Section B, emphasized the technical approach. Under those criteria, award of a contract would be made to the offeror whose proposal is determined by the contracting officer to be "capable of being performed in a manner most advantageous to the Postal Service. The evaluation criteria set forth [below in this section] shall be the basis for determining which proposal is most advantageous." Section B.2, on the solicitation, further provided that "technical review and analysis will be based upon an evaluation of the capabilities indicated by each offeror; their understanding of the requirements of this solicitation; and their ability to satisfy these requirements;" this general proposition is followed by enumerated, weighted criteria to rank each technical proposal. The solicitation permitted the award of one or more contracts for the development of the engineering model (Work Group I of the Statement of Work). However, only one contract would be awarded for the Production Prototype Model and the Technical Documentation Package (Work Groups II and III). Three offers were received.

Offerors were specifically advised in Section J.3.B of the solicitation of the possibility of making award without discussion. That section provided, in pertinent part, as follows:

In addition, notice is hereby given to all of the possibility that award may be made without discussion of the proposal and that proposals should therefore be submitted initially on the most favorable terms, from a technical and price standpoint, which the offeror can submit. In reviewing the technical proposals, the technical evaluators found AIC's and Chamberlain's proposals acceptable, assigning them scores of 96.3 and 94.8, respectively. The third offeror's proposal was assigned a score of 19.9, found technically unacceptable, and dropped from the competition.

AIC priced its offer at \$384,184. Chamberlain's initial cost proposal was \$191,455. On November 4, Chamberlain voluntarily submitted revised cost and technical proposals. The technical evaluation committee concluded that the revised technical and pricing proposal submitted by Chamberlain did not affect its technical evaluation score.^{1/} Chamberlain's revised cost was \$148,292.

The contracting officer did not conduct negotiations with either offeror, nor did he request best and final offers from them. On January 13, 1988, the contracting officer contacted Chamberlain, and authorized it to commence performance on Work Group I of the Statement of Work at a cost not to exceed \$53,633, the cost Chamberlain had estimated to perform the work group. The contracting officer did not advise AIC of this authorization.

AIC states that on January 27, Chamberlain informed it, during business discussion for

^{1/}The revision of the technical proposal consisted of eight pages which were corresponding replacement pages for the original proposal. The replacement pages, as reviewed by the technical evaluations, provided as following, according to the contracting officer:

Page Basic Change Description

Cover Date changed from 9-15-87 to 11-04-87.

Table of Contents Item III.B.3 - Special Test Equipment, page number changed from 60 to 60A.

1 Paragraph I.B - Statement that the original design which exceeded USPS dimensions now fully meets USPS specifications.

56 Sketch of revised keyboard housing.

60 Paragraph added to document the use of separate illuminated indicators instead of illuminated push-button function switches.

60A Added an extra page to hold text overflow from page 60.

67 Eliminated the paragraph in the original proposal explaining the reason for the extra height in the rear of the keyboard housing.

Dwg. 4649-001 Updated print of the keyboard housing.

another purpose, that Chamberlain had been "awarded the keyboard contract" in mid-January. In addition, AIC remarks that it called the Office of Procurement on January 27, and was advised "that the contract ... was awarded on January 13, 1988 to MRC Chamberlain for a sum of \$53,633.00." By letter dated and received by this office on February 1, AIC protested the award of a contract to Chamberlain. Between January 27 and April 27, a series of meetings took place between AIC and the Postal Service to attempt to allay the concerns of AIC. However, AIC's complaints were not resolved to its satisfaction.

On April 11, the Assistant Postmaster General, Procurement and Supply Department, ratified the unauthorized action of the contracting officer in orally authorizing Chamberlain's performance of Work Group I of the Statement of Work on January 13. On April 18, Chamberlain and the Postal Service executed a contract for the entire requirement in the amount of \$147,558.

The bases of AIC's protest are that AIC was not given appropriate notice of the award to Chamberlain and that AIC was not given an opportunity to negotiate and modify its proposal (an opportunity which was allegedly afforded to Chamberlain). In support of these claims, AIC asserted that the procedures surrounding the award of the contract were flawed, giving the impression of unfair treatment.^{1/} Specifically, the protester claimed that the Postal Service violated PCM 2-404.3(b) (Notice to Bidders of Rejection of Bids) and PCM 2-408.1(b) (Unclassified Bids) by failing to notify AIC of award to Chamberlain on January 13. In addition, AIC contended that PCM 3-805 (Selection of Offerors for Negotiation and Award) was violated since it was not given the opportunity to negotiate, and modify its price proposal, in light of the alleged modification in the scope of work.^{1/}

The contracting officer submitted a report on the protest, which was received by this office on April 6. The contracting officer stated, in response to AIC's contentions that provisions of the PCM (2-404.3(b) and 2-408.1(b)) were not followed, that notification was not required as no contract was entered into with Chamberlain on January 13. However, the contracting officer concedes that certain PCM regulations (PCM 1-

^{2/}AIC, anticipating the defense of untimeliness, references various sections of the Postal Contracting Manual (PCM) to support its assertion that its protest is timely. However, the contracting officer, in his statement, notes that the protest was timely filed. A protest against award, such as this, is timely if it is received within 10 working days after the protester knew or should have known of the grounds for protest, as long as the protest is received within 15 working days of contract award. Given the contracting officer's failure to advise it of the January 13 notice to Chamberlain, AIC had no reason to know of it until advised by Chamberlain. There is nothing in the record that demonstrates that AIC was aware of the authorization to Chamberlain prior to January 27. AIC's February 1 protest, therefore, was timely.

^{3/}AIC's initial protest states that substantial changes must have been made in the scope of the solicitation to permit award for \$53,633. The protester claims that a price of \$53,633 is "unrealistically low," and that it would have been in the Postal Service's best interests to negotiate with all qualified offerors regardless of price.

403.3(c) and (d)) and internal instructions (Administrative Instruction 86-1) were not followed in the oral notification to Chamberlain. Therefore, ratification was required.

In response to AIC's allegation that a substantial change must have occurred in the scope of work, the contracting officer stated that this allegation is based on mistaken information since Chamberlain was orally authorized only to perform Phase I, not the entire requirement, for the \$53,633. Further, the contracting officer contended that since the respective proposals of AIC and Chamberlain were evaluated by a technical evaluation committee and found to be technically equivalent, AIC's pricing proposal was considered to be "exceedingly high" and "out of the competitive range."

By letter dated April 14, AIC recasted the bases of its protest, setting forth information which was not previously presented. Specifically, AIC objected that the Postal Service did not fully respond to a Freedom of Information Act (FOIA) request which ICT, an AIC subcontractor, made on January 27 and 28, as AIC contended that there are at least several documents responsive to ICT's FOIA request. According to AIC, the Postal Service responded to ICT's FOIA request that "[i]nsofar as [ICT's request] for other documentation (i.e., negotiations, notes, etc.), this information is nonexistent." Further, in that AIC stated that acceptance of Chamberlain's revised proposal, which was non-compliant as revised, constituted a decision by the Postal Service to modify the scope of work or statement of requirement, violative of PCM 3-805, absent amendment. AIC contended that Chamberlain's proposal was non-compliant in that Chamberlain proposed to utilize illuminated indicators, separate from the function switches, thereby substantially reducing the units cost of parts. The contracting officer did not respond to AIC's additional allegations stated in its April 14 letter.

Discussion

On the record before us, we find no basis to grant AIC relief on account of any failure of notice by the contracting officer. Moreover, the technical evaluation was not arbitrary or in violation of procurement regulations, the Postal Service was not required to negotiate with AIC, and the award to Chamberlain was justified.

Although the contracting officer claimed that he did not award the contract to Chamberlain on January 13, stating that he only orally authorized Chamberlain to perform Phase I of the contract, he acted then as if he were awarding a contract at that time.^{4/} The telephone conversation between AIC and the Office of Procurement, on January 27, in which AIC was advised that a contract was awarded to Chamberlain, supports this conclusion. There was a regulatory violation of notice requirements of

^{4/}AIC's reliance upon PCM 2-404.3(b), which requires notice of rejection of individual bidders, is misplaced since that provision applies to advertised procurements, not to negotiated procurements, such as this. AIC also relies upon PCM 2-408.1; that section similarly is applicable to advertised procurements. However, PCM 3-103.d provides that the procuring office shall notify offerors, in procurements in excess of \$25,000, "on the same day of award and in accordance with the procedures of [PCM] 2-408.1," of the fact that their offers were not accepted.

PCM 3-103.d by the contracting officer's failure to inform AIC of his actions in awarding the contract on January 13. However, that violation affords a protester no basis for relief if it does not directly prejudice the protester. Artech Corporation, P.S. Protest No. 84-58, October 5, 1984, citing Emerson Electric Co., Comp. Gen. Dec. B-213382, February 23, 1984, 84-1 CPD & 233 and Technical Fiberglass, Inc., Comp. Gen. Dec. B-213940, February 1, 1984, 84-1 CPD & 137. AIC was not prejudiced by the actions of the contracting officer in failing to provide notification, since it was otherwise informed of the award and was able to, and did, timely protest.¹⁴

The technical evaluators determined that the respective proposals submitted by AIC and Chamberlain were both accepted as technically equivalent. Moreover, according to the evaluators, the voluntary revised technical and pricing proposal submitted by Chamberlain did not affect its technical evaluation score. This office will not substitute its judgment for those who determined that Chamberlain's revised proposal was appropriate absent a showing that that determination was arbitrary or in violation of procurement regulations. Frederick Manufacturing Co., Inc., P.S. Protest 88-01, March 24, 1988; Telex Federal Telephony, Inc., P.S. Protest No. 87-104, November 17, 1987; Computer Systems & Resources, Inc., P.S. Protest No. 86-01, March 27, 1986; H&B Telephone Systems, P.S. Protest No. 83-61, February 6, 1984. There was no such showing in this case.

PCM 3-805.2 provides that the primary consideration in determining to whom an award shall be made is "which contractor can perform the contract in a manner most advantageous to the Postal Service." The technical evaluations of AIC's and Chamberlain's respective proposals were almost equal and both were determined capable of performing the contract. Although price was not assigned a specific weight in the evaluation process, it is well settled that where the solicitation does not indicate the relative importance of price as an evaluation factor, it must be presumed that it will be given a weight equal to the technical evaluation in making an award. Ira T. Finley Investments, Comp. Gen. Dec. B-222432, July 25, 1986, 86-2 CPD & 112; see also Riggins Co., Inc., Comp., Gen Dec. B-214460, July 31, 1984, 84-2 CPD & 137. Given the significant differential in prices between AIC's proposal and Chamberlain's proposal (AIC's pricing proposal is more than 2.5 times that of Chamberlain), it was not unreasonable for the contracting officer to conclude that AIC's proposal was outside the competitive range. Moreover, since the solicitation provided at Section J.3.B that award could be made without negotiations, we find no basis to sustain the protest on the basis that negotiations were not held.

^{5/}The Postal Service's failure to respond adequately to CT's FOIA request, if true, is not a ground for relief. A claim of noncompliance with a FOIA request is not within the jurisdiction of the bid protest mechanism. See CACI Systems Integration, Inc., P.S. Protest No. 87-79, August 27, 1987; Garden State Copy Company, P.S. Protest No. 84-31, July 5, 1984.

The protest is denied.

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Office of Contracts and Property Law

[checked against original JLS 2/23/93]