

Protest of)
CFI) Date: February 17, 1989
)
Solicitation No. 089990-89-B-0025) P.S. Protest No. 88-82

DECISION

CFI protests award of a contract for oak data stands and drawers to Virco Manufacturing Co. (Virco) under Solicitation No. 089990-89-B-0025. CFI states that it was the low offeror and that it was unfairly denied award of the contract.

Solicitation No. 089990-89-B-0025 was issued by the Northeast Procurement & Materiel Management Service Center on September 13, 1988, with an offer due date of October 4. The solicitation requested proposals for 480 48-inch oak data stands, 214 60-inch stands and 214 drawers. The solicitation specified that offers could be on specific part numbers of one of four listed brand names: Devoke, Viking, Haskell or Virco. The solicitation required incremental delivery of the stands and drawers in groups by specific dates, beginning with 90 48-inch stands, 20 60-inch stands and 20 drawers delivered to six locations by November 14, 1988. At Section B.1, the solicitation provided that award would be made as follows:

The Postal Service intends to award a contract to the responsible offeror whose proposal will be most advantageous to the Postal Service, considering cost or price and other factors specified elsewhere in this solicitation.

However, the solicitation did not specify any factor other than price to be used in determining award of the contract.

On September 26, CFI filed a protest with the contracting officer which alleged that the limitation of proposals to only the four brand names specified was unduly restrictive and prevented it from competing on the solicitation. The contracting officer denied this protest as obviously without merit by letter dated September 29 and modified on October 7.

Proposals were received on October 4, and CFI was the low offeror. Its proposal offered Virco units without any exceptions noted. On October 11, the contracting officer requested that CFI confirm its prices and delivery dates, which CFI did on October 17. In this letter, however, CFI noted that it would have to deliver the first quantity, due on November 14, late, since they were estimating a six-week lead time on

the items. This would result in delivery of the first group of items being made November 28, two weeks after the specified date. A conversation on October 19 between the contracting officer and CFI indicated that CFI's offer was based on the Virco 8400 series, not the 8300 series specified by the solicitation. In his notes of this conversation, the contracting officer states that "[s]ince CFI is submitting cost proposals on the 8400 [series] in lieu of the 8300, the proposal is found to be non-responsive."^{1/} After this determination, negotiations were entered into with the offerors remaining in the competitive range. Two of the offerors, including Virco (the second low offeror) stated that they could not deliver the items due on November 14 until November 21, and then only if award were made by November 1.^{1/} Award was made to Virco on November 2.

On November 8, CPI was notified that its offer had been rejected because it could not furnish the supplies by November 14, and that award had been made to Virco. CFI protested to the contracting officer on November 21, stating that it did not read the solicitation as indicating that the delivery schedule superseded the prices offered in evaluation of the proposals. CFI contended that since it offered the lowest price and a reasonable delivery schedule, it should have received the award. The contracting officer found CFI's protest to be timely, but denied it as obviously without merit on November 30. A subsequent protest was filed with our office on December 8.

CFI's protest restates the issues which it had previously argued before the contracting officer. It notes that offers could be accepted as long as 60 days after the receipt of offers, which was over two weeks after the November 14 deliveries were due. CFI states that there was no indication that "time was of the essence" to the extent that compliance with the delivery schedule was more important than price. It claims that no offeror could have accomplished the November 14 delivery in a timely manner and that it has been unfairly evaluated.

^{1/}Since this procurement was negotiated, it was incorrect to refer to the proposal as nonresponsive. Responsiveness is a characteristic of formally advertised or "sealed bid" procurements. See L. P. Fleming, Jr. Hauling, Inc., P.S. Protest No. 83-64, December 19, 1983. Proposals under negotiated procurements are first evaluated to determine whether they are technically acceptable (PM 4.1.4); if award is made with discussions, as was the case here, discussions are held with those offerors whose acceptable technical proposals are within the competitive range. PM 4.1.5.g.

^{2/}The contracting officer's memorandum of his conversation with Virco is as follows:

As per telecon on 10/28/88 with Joseph Lehman of VIRCO Manufacturing Corp. He advises that his company can meet the delivery date of November 21st, 1988 for the offices requesting same if he has a FAX copy of the award by Monday, October 31st, 1988 but no later than November 1st, 1988. After November 1st, 1988 it will be difficult to furnish the ninety (90) quantities for item # 1c, but they could meet the necessary requirements for items 2c & 3c. Mr. Lehman advises that if the U.S.P.S. wants the 8400 series it would take 5 to 6 weeks to have that particular item available because they do not have this quantity on hand at this time. If an award document is FAX[ed] to VIRCO they can have the 8300 series available to the U.S.P.S. by the first delivery date of November 21st, 1988.

The contracting officer's report indicates that CFI's initial proposal was rejected on two grounds. First, the solicitation required delivery of the initial units by November 14, and that CFI, by its own admission, was unable to meet that schedule. Second, CFI's proposal was based on the Virco model 8400 series rather than the 8300 series called out by the solicitation.^{1/} The contracting officer states, however, that:

Despite the fact that C.F.I. offered items different from those specified [in the solicitation], because there was a potential cost savings to the U.S. Postal Service, we asked our clients whether they could accept a later delivery date. Our clients in the field advised us that the delivery date was non-negotiable, inasmuch as training dates had been scheduled for all locations.... Delivery was to be made no later than November 14, 1988.

The contracting officer further notes that, to the extent that CFI protests that the offers were to remain open for acceptance past the date for the required first delivery, its protest is untimely pursuant to PM 4.5.4.b., since it was only raised in the December 8 protest to this office, although CFI knew about it in September when it received the solicitation.

CFI's response to the contracting officer's report addresses each of these issues. It notes that it offered the Virco 8400 series as an alternate to the Devoke 8200 series specified in the solicitation, and that the contracting officer's rejection of its offer was based solely on its failure to meet the required delivery schedule. It claims that, at the time proposals were opened, the contracting officer himself did not consider compliance with the delivery schedules to be mandatory, but only took this position during negotiations after being advised by the requiring activity that adherence to the delivery schedule was "non-negotiable." CFI alleges that there was no indication from the solicitation that the delivery schedule was deemed to be more important than price in making award.

The principal issue to be resolved is narrow. Was CFI's proposal evaluated correctly? We hold that it was not. CFI's proposal was rejected because it stated it was unable to meet the November 14 delivery date.^{1/} Discussions with Virco subsequently indicated, however, that it would also be unable to meet the November 14 date. Once the contracting officer established that fact, two options were available. He could reject Virco's offer and negotiate with the third low offeror or allow variation in the delivery dates by amending the solicitation to allow all offerors in the competitive range an opportunity to propose. PM 4.1.5.f.3.

Rather than take either of these two courses, the contracting officer awarded a contract

^{3/}Under the terms of the solicitation, a proposal offering the 8400 series could not be considered for award because the solicitation did not allow offerors to propose items other than the four identified brands and series. Consideration of CFI's offer would have required amendment of the solicitation allowing the other offerors a similar opportunity to propose equal items.

^{4/}The contracting officer's statement makes it clear that CFI's proposal was not rejected for offering the 8400 series.

to Virco, who had admitted that it could not meet the November 14 delivery date, while rejecting CFI on the same basis. This unequal treatment among offerors is unacceptable because all offerors must be treated fairly and equally. Cf. American Telephone Distributors, P.S. Protest No. 87-117, February 23, 1988; POVECO, Inc., P.S. Protest No 85-9, May 21, 1985.

The Comptroller General has recently sustained a protest in a situation almost identical to this procurement. In Information Ventures, Inc., Comp. Gen. Dec. B-232094, November 4, 1988, 88-2 CPD & 443, the low offeror withdrew from competition because it could not meet the compressed delivery schedule; however, the contract awarded to the successful offeror substantially relaxed the delivery schedule. The Comptroller General found this to be impermissible because it prevented a responsible source who had the best evaluated score from competing for award stating that the agency should have amended the solicitation to reflect its changed requirements and give the protester an opportunity to make or propose on that basis. Similarly, here CFI has been prevented from competing for award because of a delivery requirement which was later relaxed for a competitor.

CFI also objects to the solicitation's provisions regarding delivery.^{1/} The solicitation was materially deficient. It failed to indicate that offers would be rejected if they failed to meet the required delivery schedule. PM 2.2.5 d. states as follows:

d. When the Postal Service requires delivery by a certain date, or within a specified number of days after the date of the contract, Provision 2-2, **Time of Delivery** must be included in the solicitation. When the Postal Service desires, but does not require, delivery by a certain time, or desires delivery earlier than the required delivery schedule, the provision must be modified accordingly.

Paragraph (a) of Provision 2-2, **Time of Delivery** further provides that:

a. The Postal Service requires delivery to be made according to the delivery schedule specified in section C of the contract Schedule. The Postal Service will evaluate offerors' proposed delivery schedules to determine the proposal most advantageous to the Postal Service. Proposals that propose delivery that will not clearly fall within the required delivery period will be unacceptable. The Postal Service reserves the right to award under either the required delivery schedule or the proposed delivery schedule when an offeror proposes an earlier delivery schedule than required. If the offeror proposes no other delivery schedule, the required delivery schedule will apply.

Inclusion of Provision 2-2 in the solicitation would have put the offerors on notice of the

^{5/}On the issue of the timeliness of CFI's objection to the solicitation structure, it is timely, not as to a deficiency in the solicitation but as evidence that, when the solicitation was issued, adherence to the delivery schedule was not an intended evaluation factor.

consequence of failing to meet the delivery schedule.¹⁴ "Once offerors are informed of evaluation criteria, the procuring agency must adhere to those criteria or inform all offerors of any changes made in the evaluation scheme." POVECO, Inc., supra, quoting PAE GmbH, Comp. Gen. Dec. B-212403.3 et al., July 24, 1984, 84-2 CPD & 93. CFI's protest is sustained.

As to relief, whether termination for convenience of the Postal Service is an appropriate remedy depends on the best interests of the Postal Service. TPI International Airways, Inc., P.S. Protest No. 87-40, October 30, 1987. As stated in Inforex Corporation, et al., P.S. Protest No. 78-12, June 26, 1978:

Whether to require termination action in a given case depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the requirement, and the impact of termination on the accomplishment of the agency's mission. Honeywell Information Systems, Inc., Comp. Gen. Dec. B-186313 (April 13, 1977), 77-1 CPD & 256, p. 7.

In this case, procurement deficiencies occurred which may have prejudiced CFI. However, since CFI offered items not described by the solicitation, it was not entitled to the award. There is nothing to indicate that the contracting officer has acted in bad faith and performance of the improperly awarded contract has been substantially completed. On balance, these factors indicate that Virco's contract should not be terminated. We note that "the degree of prejudice to the integrity of the competitive procurement system will prove not to have been great provided that the lessons of this procurement are observed in future procurements." Dwight Foote, Inc., P.S. Protest No. 87-90, September 28, 1987.

The protest is sustained to the extent indicated.

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

[checked against original JLS 3/8/93]

^{6/}We note, however, that Provision 2-2 as currently written does not fully resolve CFI's concerns, since it does not relate the time of delivery to the time of award. The clause previously called for by Postal Contracting Manual 1-305.3 is more satisfactory in this regard.