

Protest of) Date: March 24, 1989
CAPITAL ELEVATOR SERVICE CO.)
Solicitation No. 389990-89-A-0064) P.S. Protest No. 89-07

DECISION

Capital Elevator Service Co. (Capital) protests the award of a contract for elevator repair work in the Columbus, OH, main post office to General Elevator Company (General). The protester contends that the procurement process unfairly favored General, the incumbent contractor.

Solicitation No. 389990-89-A-0064 was issued on December 12, 1988, with an offer due date of January 13, 1989. The solicitation required bids on two separate line items, premaintenance repairs, item 1, and monthly maintenance services for a three year period, item 2. Item 1 for premaintenance repairs required the bidder to furnish:

all materials, labor, supervision, tools, and equipment necessary to make those repairs required to place the elevator equipment ... near its original state of repair and operation before placing on maintenance, and under which the contractor will accept full responsibility for continued maintenance of the elevator equipment, as required by the terms of the contract. These premaintenance repairs shall not include alteration, change, or addition to the equipment other than ordinary repair or replacement.

Section C - DESCRIPTION 7 SPECIFICATIONS also stated:

[e]ach offeror shall submit with his bid an itemized list (by elevator) of any premaintenance repairs he proposes to make, and his bid price for making each of the premaintenance repairs listed. (See Exhibit B for the suggested format for the list of premaintenance repairs.) Failure of the offeror to include any item requiring premaintenance repair on his list shall not relieve him of his responsibility to repair same under the terms of the contract.

The solicitation provided that one award would be made in the aggregate for items one and two. The solicitation invited offerors to visit the site to ascertain the precise nature and location of the work required under the solicitation (paragraph J-3 at page 15).

Capital and General were the only bidders. Their bids were as follows:

General -	Item 1	- 0 -	- 0 -	
	Item 2	\$2,617.53/mo.	<u>\$94,231.08</u>	Total
			\$94,231.08	
Capital -	Item 1	\$23,375.00	\$23,375.00	
	Item 2	\$2,498.00/mo.	<u>\$89,928.00</u>	Total
			\$113,303.00	

General's bid was not accompanied by a list of premaintenance repair items as provided by Section C; Capital's bid was accompanied by a list of the premaintenance items it proposed to accomplish. Award was made to General on January 30, 1989. This protest followed.

Capital states that before bid opening it contacted postal procurement officials by telephone concerning an inspection report dated September 1, 1988, which listed numerous deficiencies for the subject elevators. It was told that all deficiencies were to be corrected by the incumbent contractor before award. However, Capital contends that in its on-site inspection of the elevators on January 12, one day before bid opening, it found that many of the items on the inspection report had not been completed. Since the solicitation stated that the offerors would be responsible for repair items, Capital included the cost of those uncompleted items in its bid for item 1. After bid opening, however, Capital telephoned the contracting officer and told him that cost for the line item 1 as included in its bid could be disregarded if the work was to be completed by the incumbent contractor. The protester asserts that if all preexisting repairs were to be completed after bid opening and before award, then it should have been awarded the contract since it was the low bidder as to item 2.

In his report, the contracting officer advises that on December 6, the Columbus Manager, Plant Equipment and Engineering, had told him that all the repair items which had been identified in the September 1 inspection report had been corrected, with two exceptions, for which parts had been ordered and the repairs would be completed before bid opening. Accordingly, the manager concluded that there were no uncompleted items of premaintenance repair which remained to be accomplished. The contracting officer asserts that had the protester addressed its questions or inquiries to him in writing as required in paragraph 3, P.S. Form 7333, Solicitation Instruction and Conditions, page 2 of the solicitation any misunderstanding which Capital may have had about the status of the repairs could have been resolved; in the absence of such a request, any misunderstanding is chargeable to Capital.

The contracting officer further notes that he obtained a copy of the September 1 inspection report annotated to show the dates by which each deficiency was corrected, and all repairs, including the two for which parts were on order, were completed by January 12. The contracting officer further notes that when the September 1 list is compared to the list of premaintenance repairs submitted by the protester, only one

item (cleaning the car frame of elevator No. 1, which the protester priced at \$195) appears on both lists. Even if this common item were removed from Capital's bid, its price was substantially higher than General's.

The contracting officer asserts that the solicitation was prepared in accordance with Regional Instruction Filing No. 641, Solicitation Format and Specifications for Elevator Maintenance Service, dated January 23, 1978; all regulations were followed and the procurement process was proper. He asks that the protest be denied.

In a supplemental submission, Capital asserts that the contracting officer failed to address the need to repair the specific items set forth in its list of premaintenance repairs. Although some of these items were not included in the inspector's report, Capital contends that they were deficiencies which existed at the time of its inspection.

Capital states that its main concern was that improper bolts were used to fasten the door chains, and that there were many missing parts on the doors and gates of the elevators. These items were not corrected, in Capital's view, as of the bid opening date. In a telephone conference with this office, the protester reiterated its main concern is safety. Its repair list included only items that were essential for safety purposes. The difficulty with the procurement scheme, according to the protester, is that the incumbent could repair all deficiencies after bid opening.^{1/}

As a preliminary matter, we agree with the contracting officer that any explanations desired by the protester concerning the solicitation should have been requested in writing. Paragraph 3 of P.S. Form 7333 of the solicitation prohibits the Postal Service from being bound by the oral statements of postal employees. DeSantis Industries, Inc., P.S. Protest No. 84-27, May 2, 1984; Jet Hardware Manufacturing Corporation, P.S. Protest No. 82-62, November 8, 1982. Thus any misunderstanding with respect to the status of the premaintenance repairs is chargeable to the bidder rather than the Postal Service. It is not clear, however, that any misunderstanding occurred, as the protester and the contracting officer agree that the protester was told before the bid opening that the items identified on the September 1 inspection report were the responsibility of the incumbent contractor to complete.^{1/}

^{1/}General submitted comments in response to the protest. It maintains that it had been in constant contact with the building supervision and is proceeding with its commitments and will meet all obligations.

^{2/}This agreement obviates our need to inquire whether the requirement of section V.B.2.K of Regional Instruction No. 641, cited by the contracting officer, was met. That section provides that if the requirements office has furnished a list of maintenance items to be completed by the current contractor, then this list must be attached to the solicitation with a notation that the completion of those items is "the responsibility of the current contractor" and that offerors "shall not include any of these items in the list of premaintenance repairs...." Although it does not appear that the September 1 list was included in the solicitation, Capital was aware of it and that the repairs were the responsibility of the incumbent.

Similarly, it would be inappropriate to allow Capital to undertake to change or explain its bid after bid opening. Mid-America Elevator Co., Inc., P.S. Protest No. 87-73, April 11, 1987. Thus, the protester's bid could not properly be changed or modified to indicate that the costs for premaintenance repairs could be disregarded.

The main thrust of the protester's contentions is that there were preexisting deficiencies existed for the elevators as shown by its own on-site inspection of the premises, which it felt compelled to price in its bid, but which the incumbent contractor could complete after bid opening.^{1/} The difficulty with this view, however, is the provision of Section C quoted above, which establishes that the successful contractor will have to complete any necessary premaintenance repairs at the start of the contract term whether it has identified (and priced) those repairs in its bid or not. An incumbent, thus, does not necessarily gain from its incumbency. If it doesn't complete the repairs under the previous contract, it will have to make them under the new, whether it has set a price for them or not. See Mid-America Elevator Co., Inc., supra.

Further, it is clear here that there was a substantial difference between Capital's understanding of the premaintenance repairs which were required and the understanding of the contracting officer and his technical representatives. This is shown by the variance between Capital's maintenance list and the technical representative's understanding that there were no outstanding maintenance items required. This difference could have been avoided had the bidder inquired of the contracting officer before bids were due whether the Postal Service agreed that the repair items its pre-bid survey had disclosed were, in fact, necessary to begin performance.

The protester argues that the repairs it noted are necessary and must be done for safety purposes. The contracting officer disagrees. As we stated in Cohlmya Airline, Inc., P.S. Protest No. 87-118, April 13, 1988, our bid protest forum, unlike a judicial one, is ill-suited to resolving factual disputes, as we cannot conduct adversary functions to any significant extent or degree. See also, International Mailing Systems, Inc., P.S. Protest No. 84-13, April 27, 1984; Southern California Copico, Inc., P.S. Protest No. 83-76, March 5, 1984. Instead, we must adopt the contracting officer's position, absent evidence sufficient to overcome the presumption of correctness which attaches to the contracting officer's action. Harper's Ferry Properties, Inc., P.S. Protest No. 76-67, November 8, 1976; Alta Construction Co., P.S. Protest No. 85-2, February 26, 1985; Edsal Machine Products, Inc., P.S. Protest No. 85-84, January 29, 1986. We thus must decline to determine the necessity for the repair items submitted by the protester. See Concept Office Furnishing, Inc., P.S. Protest No. 85-59, November 18, 1985; Garden State Copy Company, P.S. Protest No. 84-31, July 5, 1984.

^{3/}To the extent that this argument suggests that the terms of this solicitation were unfair, it is untimely. Postal Contracting Manual (PCM) 2-407.8 d(1) provides that 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. Capital's protest was received in this office on February 7, 1989, 23 days after bid opening.

The protest is denied.

William J. Jones
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Office of Contracts and

Property

Law

[checked against original JLS 5/3/93]