

Protest of)	
)	Date: September 28, 1989
E-Z COPY, INC.)	
)	
Solicitation Nos. 059991-89-A-0129,)	
-0132, and -0136)	P.S. Protest Nos. 89-63,
)	89-64,
)	and 89-68

DECISION

E-Z Copy, Inc. (E-Z Copy) protests the award of contracts for coin-operated photocopying services under Solicitations 059991-89-A-0129 and -0136 to APS Affiliates and Solicitation 059991-89-A-0132 to California Copy Service. E-Z Copy contends that these bids are nonresponsive and must be discarded because they are materially unbalanced.

These solicitations were issued on April 4, 5 and May 2, 1989, respectively, by the Procurement and Material Management Service Office, Bell, California, with offer due dates of June 30. The standard solicitation form for coin-operated machines, PS Form 7481, was used without any ceiling on the commission percentage figures which could be bid. The solicitations stated that offers would be evaluated based upon a monthly average of 700 copies per copier for -0129 and -0132 and 800 copies per copier for -0136. Award would be made to the bidder who offered the highest commission for the evaluated number of copies.

Four bids were received for solicitation -0129 and -0136 and three for -0132. E-Z Copy was the second highest bidder for each of these solicitations.^{1/} Award was made to the

^{1/}On Solicitation -0129, APS Affiliates bid 0-600 copies at 0% and 601-700 copies at 351% for an estimated USPS revenue of \$70.20. E-Z Copy bid 1-700 copies at 48.1% for an estimated revenue of \$67.34.

On Solicitation -0132, California Copy Service bid 0-690 at 0% and 691-700 copies at 2,238% for an estimated USPS revenue of \$44.76. E-Z Copy bid 1-700 copies at 30.1% for an estimated revenue of \$42.14.

On Solicitation -0136, APS Affiliates bid 0 to 700 copies at 0% and 701-800 copies at 521% for an estimated revenue of \$78.15. E-Z Copy bid 1 to 800 copies at 60.1% for an estimated revenue of \$72.12.

bidders who offered the highest commissions and E-Z Copy's timely protests followed.^{1/}

E-Z Copy states that the bidders whose bids were calculated to return the highest amount of commission only did so by offering commission rates which greatly exceeded 100% over a specified tier of the evaluated copier volumes. In addition, the Postal Service would receive no commission for a large number of copies. Since these bids unduly place the risk of changes in copier volume on the Postal Service, E-Z Copy argues that they should be rejected as materially unbalanced, citing E-Z Copy, Inc., P.S. Protest No. 88-28, July 29, 1988. E-Z Copy also argues that acceptance of these materially unbalanced bids pose a policy problem, because, while the contracts at issue were awarded despite containing very high commission levels, it has had bids rejected for the very same reason.

E-Z Copy does not challenge the solicitations or the contracting officer's discretion in deciding whether or not to put a 100% ceiling on the commissions. It points out that even though the solicitation did not place a limit on the commissions, this office has done so through our recent past decisions. See E-Z Copy, Inc., *supra*; VNP Vending Corporation, P.S. Protest No. 87-107, February 4, 1988. The crux of its protest is that these awards are front-loaded and materially unbalanced and in direct contravention to previous decisions.

In his reports, the contracting officer stated that E-Z Copy should have protested the solicitation since in their protest they discussed an "inability to bid" due to the Postal Service's unclear policy on how to treat bids in excess of 100% commission. The contracting officer recommended denial of this protest based upon that veiled conclusion of untimeliness.

Many interested parties filed comments on these protests. West Coast Copy and APS Affiliates commented on Solicitation -0129. Ward Copy Systems, APS Affiliates and California Copy Service commented on -0132. No comments were received on Solicitation -0136.

West Coast Copy agreed with the protester that the awardee's bids were impermissible and materially unbalanced. It suggested that a resolicitation be held with strict parameters for the bidding guidelines. Ward Copy Systems commented that it doubts that the bids would return the highest possible commissions to the USPS, and indicates the risks which the Postal Service runs by accepting the bids.

APS Affiliates, in its comments, supported the contracting officer's viewpoint that E-Z Copy should have protested the solicitation, not the award. California Copy Service contended that its bids were prepared within the guidelines of the subject solicitation. It based its bids, which were over 100%, upon the "spirit" of the recent Pitney Bowes decision from this office. Pitney Bowes, Inc., P.S. Protest 89-24, June 20, 1989. It read that case to say that the decision to limit (or not limit) the commission provision in a solicitation is in the contracting officer's discretion. It also quoted that "arbitrarily

^{2/}Performance on the contracts was suspended at no cost to either party by a bilateral modification pending the outcome of these protests.

limiting the commission percentage rate might limit competitiveness." Pitney Bowes, Inc., supra. California Copy Service concluded that, although limitation of bidding to one commission rate might simplify future procurements, it thinks it was within the letter of the law in its present bid.

Discussion

The standard for determining if a bid is unbalanced and the attendant consequences are well established. A bid must first be adjudged to be mathematically unbalanced. "A bid is mathematically unbalanced if the bid is structured on the basis of nominal prices for some work and inflated prices for other work; that is, each element of the bid must carry its proportionate share of the total cost of the work plus profit." Howell Construction, Inc., Comp. Gen. Dec. B-225766, April 30, 1987, 87-1 CPD &455. See also E-Z Copy, Inc., supra; VNP Vending Corporation, supra.

The next determination is whether the bid is also materially unbalanced. A materially unbalanced bid is "one which causes reasonable doubt that award to the bidder would result in the greatest return to the Postal Service. . . ." E-Z Copy, Inc., supra; see also E-Z Copy, Inc. and Hawaii Copico, P.S. Protest Nos. 86-48, 86-50, August 1, 1986. The "'reasonable doubt' test . . . is a factual determination which varies depending on the particular circumstances of each procurement." Howell Construction, Inc., supra. "A materially unbalanced bid may not be accepted for award." E-Z Copy and Hawaii Copico, supra, quoting Reliable Trash Service, Comp. Gen. Dec. B-194760, August 9, 1979, 79-2 CPD &107.

Applying this legal standard to the facts at hand, it is obvious that California Copy Service's bids are mathematically unbalanced. It structured its bid so that it would pay nothing to the Postal Service for the first 690 copies made and a grossly disproportionate commission on copies 691 to 700. California Copy Service's bid of 2,238% for copies 691-700 is also materially unbalanced. As we stated in E-Z Copy, Inc., supra, such a "commission rate bid has no relationship to the costs of the copies. The extremely high percentage of commission offered over a very narrow band of copies places substantial risk on the Postal Service, and is not in its best interest."^{1/}

APS Affiliates' bids are also mathematically unbalanced. It, like California Copy Service, structured its bids so that a nominal price would be paid for some work and an inflated price would be paid for a narrow band of copies. Although APS Affiliates' bids were closer to 100% (351% for copies 601-700 on Solicitation -0129 and 521% for copies 701-800 on Solicitation -0136), they too are materially unbalanced. In VNP

^{3/}In E-Z Copy, Inc., supra, E-Z Copy's bids were rejected as materially unbalanced because it bid 5% on copies 1-940, in excess of 1000% on copies 941-1000 and 0% on copies over 1000. It is obvious that a 2,238% commission spread over only 9 copies is a narrower band than 1000% over 59 copies.

Vending Corporation, supra, we stated that:

[W]hile the commissions offered by [the bidder] appear to provide the greatest revenue to the Postal Service, the bids are premised upon the expectation that the estimated number of copies would not be run and that [the bidder] would pay only a small commission, if any, on the below-estimated number of copies. . . . [The bidder] is in a no-lose position: If the number of actual copies run is below the estimates, it reaps a windfall profit; if the number of actual copies is above the estimate, it terminates the contract and only pays for two months of losses.^{4/}

As our previous decisions have noted, whether to limit the commission percentage is a decision within the contracting officer's discretion. Pitney Bowes, Inc., supra. However, should the solicitation be silent concerning such a limit, each case must be judged for material imbalance upon its particular facts using the "reasonable doubt" test for the determination of whether a bid is materially unbalanced. Howell Construction, supra.

Because APS Affiliates and California Copy Service's bids are materially unbalanced, we sustain these protests. The bids are to be rejected and the contracting officer is to take further action with regard to these procurements as appropriate.

The protests are sustained.

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

[checked against original JLS 5/25/93]

^{4/}Like the standard form solicitation used in VNP Vending Corporation, supra, the subject solicitations contain a termination clause with only a 60 days' written notice required.