

Protest of ) Date: January 19, 1990  
YORK INTERNATIONAL CORPORATION )  
Solicitation No. 355825-89-A-0030 ) P.S. Protest No. 89-77

### DECISION

York International Corporation (York) timely protests a portion of the award of a contract for rehabilitation work at Church Street Station, New York, to Leewin Mechanical Corporation (Leewin). The solicitation includes a requirement for provision and installation of two chillers at the facility. York protests that chillers which it manufactures should have been selected for inclusion in Leewin's contract, rather than chillers manufactured by Carrier Corporation (Carrier).

On August 3, 1989, Solicitation No. 355825-89-A-0030 was issued by the New York Field Division, for rehabilitation work to be performed at Church Street Station, New York, including the installation of two chillers at the facility. The solicitation originally called for the provision of two steam turbine centrifugal chillers as manufactured by York, Carrier or an approved equal. The required chillers were fully described in the technical provisions.

Amendment AO2, issued August 17, provided, in pertinent part:

All offerors are required to submit a technical and price proposals [sic] for both a centrifugal and screw type chiller. Offerors are to note that both proposals will be evaluated using the following criteria:

CRITERIA FOR TECHNICAL PROPOSAL TO CONSIST OF:

EQUIPMENT DESIGN AND PERFORMANCE:

Performance; history; reliability; maintainability; parts availability; ease of repair; environmental impact.

In addition, Amendment AO2 listed the fourteen items for which offerors were required to provide information in order to enable the proposal to be evaluated properly:

1. Type of chiller (centrifugal or screw).
2. Manufacturer of chiller.
3. Model number of chiller and compressor.
4. Efficiency of chiller at 100% rated capacity (in pounds
5. Cost of chiller.
6. Noise rating for the full range.
7. Cuts of chiller and physical dimensions.
8. Performance and construction dimensions.
9. History.
10. Reliability.
11. Maintainability.
12. Parts availability.
13. Ease of repair.
14. Environmental impact.

The amendment noted that award would not necessarily be made to the lowest priced offer and extended the offer due date to August 24.

Amendment AO2 had resulted from complaints by York to the contracting officer before offers were originally due that the solicitation excluded screw type chillers (which York manufactures and Carrier does not). The solicitation, as amended by AO2 thus provided that screw type chillers could be utilized so long as their performance was equivalent to that of centrifugal chillers. York took no exception to Amendment AO2 or its evaluation criteria.

Leewin's proposal, which offered chillers manufactured by York --the York Turbopak (centrifugal chiller) and the York screw chiller -- was evaluated by a technical evaluation committee which found both types of York chillers to be technically unacceptable. Discussions were held with Leewin, in which Leewin was advised of the evaluation committee's determination that the offered chillers were unacceptable. In response, Leewin offered Carrier centrifugal chillers. The Carrier chiller was thereafter found to be technically acceptable and Leewin was sent a notice of intent to award it the contract on this basis on August 28.

On August 31, York protested to the General Accounting Office (GAO), with a follow up letter on September 12. The contracting officer received a copy of the protest on September 2 and referred the protest to this office for resolution on September 13.<sup>1/</sup>

A series of comments and exhibits were received from York and the contracting officer, and a protest conference was held. Comments were also offered by Carrier. We

<sup>1/</sup>The protest was properly forwarded to this office by the GAO which lacks jurisdiction to consider protests arising out of postal contracting practices. See Procurement Manual 4.5.1; Falcon Systems, Inc. -- Request for Reconsideration Comp. Gen. Dec. B-222549.2, June 5, 1986, 86-1 CPD & 526.

briefly summarize the basic positions of the parties.

York's arguments fall under three general categories. First, it claims that the specifications improperly favor Carrier's chillers and that the contracting officer intended to make award based on Carrier units from the start. Second, York argues that the determinations of the evaluation committee were erroneous. Third, York argues that the contracting officials have acted in bad faith toward York both in their evaluation and in their presentations to this office.

York alleges that the specifications are proprietary in nature, intended to obtain the Carrier chillers which were accepted for inclusion in the contract despite Leewin's initial offer of York chillers. York objects to what it contends are requirements that could be met only by Carrier chillers, alleging among other things that the Carrier chillers cost more, are of inferior quality to York's chillers, have higher operation costs, outdated controls, and an unproven record. York asserts that both of its proposed models are better suited to the project than that of Carrier.

The contracting officer disputes York's factual contentions and asks that the protest be denied. He contends that York's complaints about the specifications are untimely. He states that the evaluation committee made an independent evaluation based upon the information presented to them and utilized the evaluation factors set forth in Amendment AO2. The contracting officer accepted the recommendations of the committee.

The contracting officer emphasizes that although the solicitation was amended to allow screw chillers to be considered, retained were the technical requirements otherwise stated in the solicitation. The relevant specification sections and the areas of deficiency of the York chillers were detailed in a chart presented to this office.<sup>1/</sup> The more important areas include: access problems of York's units, their difficulty to inspect and repair, that the York screw unit uses a refrigerant, R-500, which is being phased out of production, that the proposed York units are commercial in nature, unlike the Carrier unit, which is an industrial unit, and that the York units are larger than those of Carrier and thus, present unacceptable rigging problems, re-piping requirements, and the need for staggered installation.

He further notes that price was not determinative as stated in the solicitation, and that, while descriptive literature presented during this protest tends to clarify some of the areas in which information was lacking at the time of the evaluation, the evaluation committee could have evaluated the proposals only on the basis of the information available to it at that time.

<sup>2/</sup>York contends that this exhibit should be disregarded because it is undated, appears to be written in response to the contentions of York as opposed to contemporaneously with the evaluation, and represents post-hoc rationalizations for the actions of the contracting officer in bad faith. We reject this argument. The individual evaluations are consistent with the exhibit and are dated prior to or contemporaneously with the notice of intent to award. The chart is consistent with the narrative explanations offered by the contracting officer and York has presented no evidence to the contrary.

York counters that its chillers present no rigging problems and cites this "erroneous" conclusion coupled with its claim that its units take up 45% less space as evidence that the evaluators made no effort to investigate in this regard. York charges that the contracting officer made no effort to clarify a number of points of confusion despite the much lower cost of its chillers, and argues that it should not be held responsible if all the information it provided to offerors was not in turn provided to the Postal Service. It contends that the contracting officer should have asked York for additional information if he felt that areas of the proposal were unclear and that such information was crucial for a thorough evaluation.

York claims that an adequate substitute for R-500 refrigerant will become available and notes that its screw unit utilizes R-22 refrigerant which is not a restricted refrigerant, that its units are easily accessible and maintainable, and that they comply fully with the specifications.

In addition, York alleges that the contracting officer acted in bad faith because he was predisposed to basing award on Carrier chillers and fabricated technically inaccurate justifications for finding the York chillers unacceptable. The reasons given for finding the York chillers unacceptable were allegedly not formulated until the pendency of this protest, after the decision had been made to reject the York chillers.

The contracting officer directly contradicts with specificity nearly every one of York's factual assertions regarding its chillers and their evaluation, and states that the Postal Service did not seek clarification from York because York was not an offeror and that it is the offeror's duty to demonstrate compliance with the specifications.

### ANALYSIS

There is an initial question whether York has standing to challenge the evaluation of the chillers. The contracting officer argues that since York is not an offeror it could not receive award of the contract and award to Leewin would not be affected by the resolution of the protest, York is not an interested party and, consequently, has no standing to bring this protest. York argues that it stands to lose a substantial amount of money without an adequate avenue of review were it denied standing to protest.

Procurement Manual (PM) 4.5.2 vests this office with jurisdiction to decide protests where the protester is an "interested party." Generally, "interested party" has been interpreted to mean that a party must be eligible for award if its protest were upheld. Strapex Corp., P.S. Protest No. 85-33, July 11, 1985. The reasoning behind the general rule that potential suppliers are not considered interested parties is that the prospective prime contractor usually has a greater interest in relation to contract award, Falcon Systems, Inc., et. al, P.S. Protest Nos. 86-31, 86-22 and 86-35, July 25, 1986, and, thus, the issues will be more sharply defined and the record more complete where the prospective prime contractor protests. Damper Design, Comp. Gen. Dec. B-190785, January 12, 1978, 78-1 CPD & 31.<sup>17</sup> In certain limited circumstances,

<sup>3/</sup>The Comptroller General will no longer consider protests by potential suppliers who have not submitted an offer because the Competition in Contracting Act of 1984, (CICA) 31 U.S.C. " 3551et seq., defines an interested party as an "actual or prospective bidder or offeror whose direct economic interest would be

however, a potential supplier may be an interested party where no other immediate party has a greater interest concerning the issue raised, and where there is a possibility that recognizable interests would be inadequately protected were access to our protest forum limited to potential awardees. See Falcon Systems, supra; Photonics Technology, Inc., Comp. Gen. Dec. B-196437, November 7, 1979, 79-2 CPD & 337; Climatological Consulting Corp., Comp. Gen. Dec. B-197906, August 4, 1980, 80-2 CPD & 81.<sup>4/</sup> Consideration must be given to the nature of the issues raised and the direct or indirect benefit or relief sought by the protester. Damper Design, supra. We must examine the degree to which the interest is both established and direct. Climatological Consulting, supra.

Conversely, a subcontractor is not an interested party with standing to protest where its financial interest in the relief requested is wholly contingent on factors outside the contract

award process, Damper Design, supra, where the subcontractor has only an indirect interest and prospective prime contractors with direct interests do not protest, American Satellite Corp., Comp. Gen. Dec. B-189551, March 6, 1978, 78-1 CPD & 171, or where the protest is not specifically related to the qualifications of the prospective subcontractor. Photonics Technology, Inc., supra.

Here, York falls within the narrow exception for supplier jurisdiction and is an interested party for purposes of our bid protest jurisdiction. Leewin freely substituted Carrier for York chillers, thereby affecting York's economic interest. Thus, no other immediate party has a greater interest concerning the issue raised, and there is no party to protect York's economic interest. Further, York has a recognizable and substantial economic interest in whether the chillers were properly evaluated since substantial potential revenue to York is directly affected by the outcome of such a protest and it raises genuine issues of the propriety of the evaluations conducted which are ripe for resolution. The interest is both established and direct, and the relief sought would directly redress the alleged harm suffered by York. Finally, the protest is specifically related to the qualifications of the subcontractor's product.

Another preliminary matter concerns the contracting officer's decision to withhold certain documents from the protester under a claim of privilege. York claims that it has been prejudiced by the lack of disclosure of the individual evaluation sheets of the technical evaluation committee. We have in the past not attempted to resolve conflicts between contracting officers and parties to a protest over the release of allegedly

affected by the award of the contract or by failure to award the contract." See PolyCon Corporation, Comp. Gen. Dec. B-218304, B-218305, May 17, 1985, 85-1 CPD 567. Since the Postal Service is not subject to CICA, our jurisdiction is not limited by it. We look, therefore, to the Comptroller General's interpretation of interested party prior to CICA as well as to prior Postal Service protest decisions. See Falcon Systems, supra.

<sup>4/</sup>Similarly, where a subcontractor or supplier would be precluded from receiving a subcontract because of allegedly unduly restrictive provisions in a prime contract solicitation, the subcontractor would be an interested party to protest those provisions. Donald W. Close Co., Comp. Gen. Dec. B-192696, B-194037, B-194103, February 27, 1979, 79-1 CPD & 134.

privileged information. See Cohlma Airline, Inc., P.S. Protest No. 87-118, April 13, 1988; CACI Systems Integration, Inc., P.S. Protest No. 87-79, August 27, 1987, at note 6. We have reviewed the disputed documents in camera to determine whether the assertedly privileged material impacts upon the protest decision. If it does, such information is taken into account in rendering the decision. Cohlma Airline, Inc., supra; see also Southern Air Transport, P.S. Protest No. 89-56, October 3, 1989. We have reviewed the withheld documents and have considered them in reaching this decision. The materials withheld are consistent with the information released to the protester and no prejudice results from the withholding.

The Postal Service has a legitimate and important interest in limiting disclosure regarding the deliberative process of the procuring office. See Cohlma Airline, Inc., supra; cf. CACI Field Services, Inc. v. United States, 12 Cl. Ct. 440 (1987). If a protester could get information, otherwise not disclosable, the Postal Service's ability to maintain the integrity and efficiency of the procurement process could ultimately be weakened. Cf. Metric Systems Corporation v. United States, 13 Cl. Ct. 504 (1987). See generally Southern Air Transport, supra, at note 8 (release of individual evaluations not ordered where sufficient information to apprise protester of facts necessary to prosecute protest has been released).

A good deal of York's contentions go to the alleged preference of the specifications for Carrier chillers and argue that the specifications are proprietary and were designed around Carrier equipment. The argument goes that no matter what York would propose it would be found technically unacceptable as a result of the nature of the specifications. This amounts to a charge that the specifications are unduly restrictive and is a protest against the terms of the solicitation. See Pitney Bowes, Inc., P.S. Protest No. 89-22, July 7, 1989. Such protests must be received by the time and date set for receipt of offers. PM 4.5.4.b. York's challenge to those terms now is untimely. Huntington Laboratories, Inc., P.S. Protest No. 89-46, November 15, 1989.<sup>1/</sup> To this extent, the protest is dismissed.

The second basis for York's protest concerns the evaluation committee's conclusion that its chillers are not technically acceptable while those of Carrier are acceptable. In this regard:

this office will not substitute our judgment for that of the evaluators or disturb the evaluation unless it is shown to be arbitrary or in violation of procurement regulations. H & B Telephone Systems, P.S. Protest No. 83-61, February 6, 1984; Amdahl Corporation, P.S. Protest No. 81-34, September 29, 1981. The determination of the relative merits of technical proposals is the responsibility of the contracting office, which has considerable discretion in making that determination. It is not the function of our office to evaluate technical proposals or resolve disputes on the scoring of technical proposals. See Mid-Atlantic Forestry Services, Inc.,

<sup>5/</sup>The York screw chiller was an alternative design to the centrifugal. Any claim by York that the specifications do not allow for a fair comparison between screw and centrifugal chillers is also one against the terms of the solicitation and is untimely, as previously discussed. See Pitney Bowes, supra.

Comp. Gen. Dec. B-217334, September 9, 1985, 85-2 CPD & 279. In reviewing a technical evaluation, we will not evaluate the proposal de novo, but instead will only examine the contracting officer's evaluation to ensure that it had a reasonable basis. Rice Services, Comp. Gen. Dec. B-218001.2, April 8, 1985, 85-1 CPD & 400. The protester bears the burden of showing that the technical evaluation was unreasonable. Id.

Computer Systems & Resources, Inc., P.S. Protest No. 86-4, March 27, 1986.

[T]he assignment of numerical scores or ratings to a proposal is an attempt to quantify what is essentially a subjective judgment. This is an accepted procedure. Book Fare, Inc., P.S. Protest No. 80-29, July 3, 1980; Didactic Systems, Inc., Comp. Gen. Dec. B-190507, June 7, 1978, 78-1 CPD & 418. "The determination of the desirability of proposals is largely subjective, primarily the responsibility of the procuring [activity], and not subject to objection ... unless shown to be unreasonable, arbitrary, or violative of the law." High Plains Consultants, Comp. Gen. Dec. B-215383, October 18, 1984, 84-2 CPD & 418; Credit Bureau Reports, Inc., Comp. Gen. Dec. B-209780, June 20, 1983, 83-1 CPD & 670.

Management Concepts, Inc., P.S. Protest No. 86-29, July 10, 1986.

The issues involved in deciding whether a reasonable basis exists for the conclusions of the contracting officer are technical in nature and the arguments of the parties present stark factual conflicts. Neither party has presented overwhelming evidence of the accuracy of its position. In resolving these factual discrepancies, we note, as we have frequently done before, that

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. 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. In a factual dispute we adopt the contracting officer's position absent sufficient evidence 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.

Cohlmia Airline, Inc., supra. These admonitions are particularly significant where, as here, the factual disputes are technical in nature.

After due consideration of all the materials presented, we conclude that the protester's contentions have not overcome the "presumption of correctness" which attaches to statements of the contracting officer of these types. Edsal Machine Products, supra. York has not met its burden of persuasion. The contracting officer's explanations for his actions, while disputed, cannot be said to be without a reasonable basis. The proper evaluation factors were applied; it is the scoring of the evaluation which is

contested, a determination which we are precluded from reviewing de novo. The recommendations of the evaluators are reasonably supported by the record. Under such circumstances, and where no violations of procurement regulations have been proven, the protest must be denied.<sup>1/</sup> Canteen Company, P.S. Protest No. 89-15, March 22, 1989.

Additionally, we concur with the contracting officer that the evaluation committee's technical review is limited, by necessity, to the information furnished or included in the proposal before it. Huntington Laboratories, supra. It is the burden of the offeror to present information sufficient to assure compliance with the specifications. Id.; H & B Telephone Systems, supra. Where it has not done so, the actions of the evaluation committee (and those of the contracting officer) cannot be said to be unreasonable. Id.; Southern Air Transport, supra.<sup>1/</sup>

Regarding the allegations of bias and bad faith, our standard of review is that the protester must prove such allegations by "well-nigh irrefragable proof" of malicious and specific intent to harm the protester, not merely by inference or supposition. In the absence of such evidence, contracting officers are presumed to act in good faith. Graphic Technology, Inc., P.S. Protest No. 85-66, December 30, 1985. We have examined the evidence presented by York in support of its contention and conclude that it does not begin to approach the "extremely high standard of proof" required. Garden State Copy Company, P.S. Protest No. 84-31, July 5, 1984.

The protest is dismissed in part and denied in part.

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**[checked against original JLS 5/25/93]**

<sup>6/</sup>In negotiated procurements, awards are not required to be made solely on the basis of lowest price. International Technology Corp., P.S. Protest No. 89-21, May 8, 1989. The solicitation clearly advised offerors of this, amendment AO2 at page 2, and York's argument that its chillers should have been included in the contract because of their lower price is unavailing.

<sup>7/</sup>The offeror's failure to provide information which York may have supplied to it must be imputed to York as opposed to the contracting officer. Since York's portion of the proposal was reasonably found to be technically unacceptable, as discussed herein, the substitution of Carrier equipment was an appropriate type of discussion to be held with Leewin. The contracting officer's statement that any required discussions would be with Leewin, the offeror, rather than with York, its potential supplier, is correct, and the contracting officer acted properly in this regard. York's complaint concerning the information supplied to the contracting officer seems more appropriately directed to Leewin rather than to the contracting officer.