

Protest of )  
EQUIPMENT MARKETING CONSULTANTS ) Date: April 17, 1990  
CORPORATION ) P.S. Protest No. 90-07  
Solicitation No. 489990-90-A-R179 )

### DECISION

Equipment Marketing Consultants Corporation ("EMCC") timely protests the terms of Solicitation No. 489990-90-A-R179 for coin-operated copier services in the Dallas/Fort Worth area issued on January 26, 1990, by the Dallas Procurement and Materiel Management Service Office.

The solicitation was issued as a result of the default termination of a previous contractor using Standard Form 7481, dated September, 1983. Having obtained a proper deviation, the contracting officer altered Block 11 of the solicitation to require a monthly commission to the Postal Service, not to exceed 100%, based on a single percentage rate per copy, regardless of the number of copies sold. Paragraph 19 of the solicitation stated that:

- a. Monthly income will be calculated by USPS from the USPS commission you offer in block 11 on page 1. The commission will be multiplied by the copy price in block 10. The result will then be multiplied by the number of copies shown in block 9 (this monthly average will be based on the last 2 contract years in the contract area, whenever possible).
- b. If you offer commission rates that depend on the number of copies sold, USPS will multiply each commission you offered by the copy price and then multiply the result by the number of copies included at that commission rate (up to the average in block 9). USPS will then add its income per rate to get a total monthly income.

The contracting officer also altered the specifications at 4.c to require "dry, electrostatic transfer, plain bond copiers that run 16 to 32-pound paper." The solicitation required Service Plan 3, under which the Postal Service provides most services including power, space, loading paper and clearing paper jams. The solicitation provides for copiers to be located at 160 locations, including 26 locations not included in the defaulted contract.

EMCC contends that, rather than resolicit the required services following the default termination, the contracting officer should have awarded a contract to EMCC, the next low bidder on the solicitation. Additionally, EMCC complains that certain terms in the solicitation are ambiguous, restrict competition and favor an incumbent contractor to the prejudice of all other bidders.<sup>1/</sup>

EMCC alleges that the requirement for a single percentage revenue figure is ambiguous and restricts competition. The ambiguity arises from the contradiction between Block 11's limitation to a single commission percentage rate, and Paragraph 19 b's procedure to evaluate bids offering varied commission rates. EMCC further asserts that the elimination of variable percentage rate bidding restricts competition. It claims that in the past only one competitor (Pitney Bowes, Inc.) offered single percentage rate bids. EMCC stated that the variable rate bidding method is more economically realistic and that it bears a closer relationship to the contractor's costs. EMCC also contends that the variable rate bidding option encourages contractors to offer higher quality service in order to achieve greater profitability.

Finally, EMCC complains that the twenty-six new locations to be served increase the service area from 29,394 square miles to 77,745 square miles and asserts that the additions are illogical, arbitrary, and have an adverse effect on all small business competitors. It contends that, coupled with Service Plan 3, the large geographical area cannot be serviced economically by small competitors of Pitney Bowes, which, because of its extensive postage meter business, has several service and repair stations set up.

EMCC requests that the solicitation be amended to allow variable percentage rate bidding, to eliminate the higher paper weight requirement,<sup>1/</sup> and to limit the geographical area to a 100 mile radius from Dallas. As to the last point, EMCC

<sup>1/</sup>With respect to the issue of whether there is an incumbent contractor, EMCC raises two points. First, it asserts that services are being provided in at least two locations that were part of the original service area under the terminated contract, stating it has observed equipment belonging to Pitney Bowes, Inc. in those locations. The contracting officer has explained that services were never provided by the defaulted contractor and the services provided by Pitney Bowes were pursuant to an even earlier contract. He states that there may be some locations where Pitney Bowes has not yet picked up its equipment, but that the Pitney Bowes contract has expired. "In resolving factual conflicts between the protester and the contracting officer, the statements of the contracting officer are given a 'presumption of correctness' which the protester bears the burden of overcoming." Fairfield Stamping Corporation, P.S. Protest No. 88-04, June 3, 1988; see also Pitney Bowes, Inc., P.S. Protest No. 89-86, December 20, 1989. EMCC has not met that burden here. EMCC also asserts that in fourteen of the newly added locations, there is an incumbent contractor. With respect to these, the contracting officer states that he is planning to terminate those contracts pursuant to the contract terms and that the current vendor is aware of the situation.

<sup>2/</sup>Since the filing of the protest, the contracting officer has issued an amendment to the solicitation, changing the paper weight requirement to 16 to 24 pounds, making this portion of the protest moot. See Hardigg Industries, Inc., P.S. Protest No. 86-69, October 10, 1986.

suggests in the alternative that bidders be allowed to split their bids between locations within the 100 mile radius and the more remote locations.

In his report on the protest, the contracting officer states that resolicitation was proper, as EMCC's original bid had expired. With respect to EMCC's concern of ambiguity about the single commission rate, he states that Paragraph 19 b does not apply this procurement, since only bids offering a single commission rate will be accepted.

The contracting officer states that limiting commissions to a single percentage rate is reasonable, since it eliminates the potential for unbalanced bidding and has been recommended for inclusion in the pending update of the solicitation package for coin-operated copiers. He disputes the suggestion that the requirement will exclude any bidders, noting, contrary to EMCC's allegation, that two of the four bidders in the most recent solicitation offered flat commission rates.

The contracting officer states that the geographical requirements for this solicitation were provided by the Dallas Division and that all locations are within the Dallas Division and encompass both the Dallas and Fort Worth Management Sectional Centers ("MSC"). The additions were a result of MSC consolidations that became effective in September, 1989.

In comments responding to the contracting officer's report, EMCC states that its original bid could not have expired because it orally renewed its bid prior to the default of the previous contractor, at which time the Contracting Officer's Representative told him that the decision to resolicit had already been made and that no bid would be considered unless it offered a single commission percentage to rate. EMCC states that it remains prepared to accept a contract under the terms of its original offer.

EMCC disagrees with the contracting officer's rationale for limiting the commission to a flat rate. EMCC suggests that a flat rate ignores the actual variable costs of performing the services. Citing prior bid protest decisions regarding unbalanced bidding,<sup>1/</sup> EMCC states that although the reinstatement of a variable rate percentage option will not limit the contracting officer's right to reject a bid that is both mathematically and materially unbalanced, restrictions on the contracting officer's discretionary business judgment at the outset of the procurement process are not in the best interest of the Postal Service.

EMCC further asserts that it is not fair for the contracting officer arbitrarily to impose the flat rate commission on bidders in this solicitation merely because it will be part of the new solicitation package. It reasons that, since all procurements under the new package will be negotiated, the contracting officer will be able to evaluate factors other than price. It concludes that this will mitigate the restrictive nature of the flat rate commission, something which cannot occur under the current advertised format.

Finally, EMCC asserts that the estimated monthly volume in the solicitation has been

<sup>3/</sup>Pitney Bowes, Inc., P.S. Protest No. 89-24, June 20, 1989;E-Z Copy, Inc., P.S. Protest Nos. 89-63, 64, & 68, September 28, 1989.

artificially lowered, stating that this conclusion stems from an evaluation of actual usage in the Dallas area. It alleges that the lowered estimate favors a flat rate bidder who doesn't care what the volume is.<sup>4/</sup>

## Discussion

We find no merit in EMCC's contention that it should have received award as the second low bidder on the previously-defaulted contract. Following a default termination, a contracting officer has considerable discretion in deciding the appropriate method for repurchasing goods or services following a default termination. Igard Manufacturing Co., Comp. Gen. Dec. B-192316, 78-2 CPD & 315, November 1, 1978. Award to the second low bidder on a solicitation after the low bidder's contract is terminated for default may be proper in some circumstances. See, for example, Hemet Valley Flying Service, Inc., Comp. Gen. Dec. B-191922, August 14, 1978, 78-2 CPD & 117, where the Comptroller General noted that well-documented urgent need for the items and the short time span between the original competition and the default acted to justify the reprocurement to the second low bidder. Even under these circumstances, the reprocurement must not be in excess of the undelivered requirement. Master Security, Inc., B-235711, October 4, 1989, 89-2 CPD & 303.

Here, the original contract was awarded in May, 1989 and terminated on October 31, a lapse of almost six months. Furthermore, the record reflects no great urgency to acquire the services. Finally, with the addition of twenty-six locations, the present solicitation is in excess of the original requirement, requiring resolicitation.<sup>5/</sup>

EMCC suggests that the flat rate commission requirement conflicts with the portion of the solicitation dealing with evaluation of bids, creating an ambiguity. The provisions of a solicitation must be:

"sufficiently definite and free from ambiguity to permit competition on a common basis," Bru Construction Co., Inc., Comp. Gen. Dec. B-228206, November 10, 1987, 87-2 CPD & 476, and an ambiguity exists if the specifications are "susceptible to two reasonable interpretations." Nasuf Construction Corporation -- Reconsideration, Comp. Gen. Dec. B-219733.2, March 18, 1986, 86-1 CPD & 263. "To be reasonable, an inter-

<sup>4/</sup>As EMCC first raised this issue in its comments to the contracting officer's report, and it is not against the terms of the solicitation, it is untimely. The Postal Contracting Manual (PCM) is applicable to this procurement. See Equipment Marketing Consultants Corporation, et. al, P.S. Protest Nos. 89-34, 89-42, July 27, 1989. The PCM states that such a protest "must be received not later than 10 working days after the information on which they are based is known or should have been known, whichever is earlier." PCM 2-407.8 d. EMCC should have known of the alleged action by the contracting officer on the date it received the solicitation, which was more than ten days before it submitted its comments. In any event, the allegation lacks merit, given the solicitation limitation of offers to flat rate commissions.

<sup>5/</sup>PCM 8-602.6 (b) states that "[i]f the repurchase is for a quantity in excess of the undelivered quantity terminated for default, for the purpose of determining whether advertising or negotiations should be used, the entire quantity shall be treated as new procurement."

pretation must be consistent with the solicitation read as a whole." Tek-Lite, Inc., Comp. Gen. Dec. B-225747.2, September 4, 1987, 87-2 CPD & 223.

Pitney Bowes, Inc., P.S. Protest No. 89-24, supra. Here, Block 11 on the first page of the solicitation clearly limits the bids to a single commission percentage rate. Paragraph 19 explains the evaluation process used for both bids offering a flat rate, at & 19 a, and bids offering a variable rate, at & 19 b. Under these circumstances, it would be unreasonable for a bidder to rely on & 19 b while ignoring & 19 a. Therefore, since the solicitation is not susceptible to two reasonable interpretations, EMCC has failed to establish an ambiguity. Pitney Bowes, Inc., P.S. Protest No. 89-24, supra.

EMCC contends that the flat rate commission requirement and the addition of twenty-six new sites are unduly restrictive of competition. Where there is an allegation that a provision is unduly restrictive:

...it is incumbent upon the procuring agency to establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

Portion-Pac Chemical Corp., P.S. Protest No. 84-49, August 1, 1984, quoting Amray, Inc., Comp. Gen. Dec. B-208308, January 17, 1983, 83-1 CPD & 43. "The determination of what constitutes the Postal Service's minimum needs is properly to be made by the requiring activity, and is not subject to being overturned in the absence of a clear showing that the determination lacks a reasonable basis." Crown Industries, Inc., P.S. Protest No. 82-83, January 6, 1983, citations omitted; see also Portion-Pac Chemical Corp., supra; S.H. Demarest, P.S. Protest No. 84-1, February 9, 1984.

The decision to limit the commission percentage requirement is within the discretion of the contracting officer, who has considerable flexibility in determining what is reasonable. Comprehensive Health Services, Inc., P.S. Protest No. 83-46, October 28, 1983; see also E-Z Copy, Inc., P.S. Protest Nos. 89-63, 64, & 68, supra. Here the contracting officer stated several reasons for limiting the commission percentage to a flat rate, not the least of which was an attempt to prevent unbalanced bidding. A contracting officer is not precluded from ameliorating concerns before they present problems. DHL Airways, Inc., P.S. Protest No. 89-36, July 7, 1989. EMCC has not shown that the contracting officer's discretionary action at this point is clearly unreasonable.

In any event, if the terms of the solicitation reflect the legitimate needs of the procuring activity and the specifications are otherwise reasonable, the fact that one or more potential offerors may be precluded from participating in the solicitation does not render its terms restrictive. International Technology Corporation, P.S. Protest No. 89-21, May 8, 1989; See Willard Company, Inc., Comp. Gen. Dec. B-187628, February 18, 1977, 77-1 CPD & 121. While the economic reasons cited by EMCC may make it more difficult for it to compete, it is not precluded from submitting a bid.

Finally, the contracting officer states that the geographical area is defined by the

recently altered boundaries of two MSC's within the Dallas Division. This comports with the ordinary manner in which the Postal Service is organized, and as such, the Postal Service has met its burden of establishing prima facie support that the restriction is reasonably related to its minimum needs.<sup>6/</sup> With regard to the issue of current contracts still in effect for some of the locations, given the termination clause common to this type of contract<sup>7/</sup> and the contracting officer's explanation, we do not find any improprieties in the inclusion of those sites in this solicitation.

The protest is denied.

William J. Jones  
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Office of Contracts and Property Law

**[checked against original 6/2/93 JLS]**

<sup>6/</sup>We do not understand how Service Plan 3 will have a greater adverse effect on bidders than the other service plans, since Service Plan 3 places the least amount of burden on the contractor.

<sup>7/</sup>The standard solicitation form includes a termination clause which states that ". . . you or USPS may terminate all or any part of [the contract] at any time, without liability, after 60-days written notice."