

Protest of)	Date: May 30, 1980
)	
T&S PRODUCTS)	
)	
Purchase Order No.)	
161544-90-P-0214)	P.S. Protest No. 90-12

DECISION

T&S Products protests the issuance of a purchase order to 3M Company for 10 cases of strapping tape with cutter, 10 cases of 2" x 14 yd. carton sealing tape with dispenser-cutter and 30 cases of 2" x 8" tan tear strips. The protester contends that it, and not 3M Company, should have been awarded two of the three items since it was the low bidder on these items.

On February 1, 1990, a contract technician in the Support Service Office, South Suburban Division, Bedford Park, IL, orally solicited price quotations from 3M Company and T&S Products for three items using simplified purchasing procedures. Procurement Manual (PM) 4.2.1. T&S Products had no bid for the strapping tape with cutter. 3M Company quoted a price of \$118.08 per case. T&S Products quoted a price of \$70. 56 per case for 2" x 22 yd. carton sealing tape with dispenser-cutter. 3M Company quoted \$95 .76 per case for the requested 2~ x 14 yd. tape. T&S Products quoted \$15 .00 per case for 2" x 6" tear strips; 3M Company quoted \$21. 36 per case for the requested 2~ x 8" strips.

On February 14, T&S Products called to ascertain who would be issued the purchase order. It was informed that it had been disqualified as unable to provide the first of the three items and that 3M Company had been issued a purchase order for all three. T&S Products timely protested to the contracting officer by letter dated February 16. When it did not promptly hear from the contracting officer, T&S Products further protested to this office by letter dated March 20.

In its protest, T&S Products states that it disagrees with the award of items two and three to 3M Company.^{1/} T&S Products notes that it offered the Postal Service 57% more tape for 26% less money on item number two. T&S Products alleges that even though it offered tape strips that were 25% smaller than those requested for item three, it should have received the award because its price was 32.6% less than 3M Company's. The protester accuses the contracting employees of participating in anti-competitive activities in concert with 3M Company by ordering items of a particular size.

The contracting officer's report states that since T&S Products could not bid on two of

^{1/} The protester also states that although item one was a 3M Company "proprietary" item, on which it was precluded from quoting, it does not dispute the correctness of awarding item one to 3M Company. Despite this assurance, as reflected below, the protester's concerns do include the appropriateness of the specification for the first item.

the three items,^{1/} the contract was awarded to 3M Company. T&S Products replies that the contracting officer's untimely report failed to answer its concerns that the solicitation was structured to include one or more proprietary items, thereby excluding all other competitors, and its general concern about the procedures followed.

Discussion

To the extent that the protester is contending that portions of the specification are unduly restrictive as requiring a proprietary item that can only be produced by 3M Company, its protest is against the terms of the solicitation. York International Corporation, P.S. Protest No. 89-77, January 19, 1990. Such a protest "based upon alleged deficiencies in a solicitation that are apparent before the date set for the receipt of proposals must be received by the date and time set for the receipt of proposals." PM 4.5.4 b. Here, T&S Products could have alerted the contract technician to its concerns about the restrictive terms of the oral solicitation, following up with an immediate protest letter. The protester's challenge to the "proprietary" terms of this oral solicitation first raised two weeks after its oral solicitation is thus untimely. To that extent the protest must be dismissed.^{1/} T&S Products alleges that it was the "low bidder"^{1/} on two items and therefore should have been issued a purchase order, for them, even though it offered different size items than that requested in the oral solicitation. The protester assumes in its argument that the purchase order should have been split between the three items solicited. However, there is no indication in the record that it was the contracting officer's intention to split the requirement and issue more than one purchase order. See T&S Products, P.S. Protest No. 90-06, March 9, 1990.^{1/}

^{2/} This was apparently a reference to item one and to item three, for which T&S Products offered a smaller tear strip.

^{3/} We note, however, that "when a protester challenges specifications as unduly restrictive of competition, the procuring agency bears the burden of presenting prima facie support for its position that the restrictions are necessary to meet its actual minimum needs." ~ Carey Machinery & Supply Co. Inc., Comp. Gen. Dec. B-233455, 89-1 CPD |171, February 17, 1989; see also Cardkey Systems, P.S. Protest No. 83-10, April 15, 1983.

In this case, the contracting officer has not set out the basis on which the dimensions of the required items were justified. In future procurements, the contracting officer should bear in mind the obligation, established by PM 2.3.2 b., to use product descriptions, rather than specifications, where standard or modified commercial products will meet the Postal Service's needs. This would include the use of "brand name or equal" purchase descriptions or other means by which the Postal Service's minimum requirements may be understood.

^{4/}The term "bidder" is incorrect since that word applies only to formally advertised procurement procedures. This purchase order was issued under a negotiated procurement procedure, therefore the protester was an ~offeror. ~ Handling Systems. Inc., P.S. Protest No. 89-70, December 19, 1989.

^{5/} The contracting officer can avoid such possible confusion in future procurements by specifically stating before quotes are made that there will be only one purchase order awarded for all items for which a price was requested. Conversely, if there is a possibility that more than one purchase order will be issued, this should be communicated clearly to quoters before they quote.

Since only one purchase order was to be issued and since T&S Products could only supply one of the three requested items, the contracting officer disqualified the protester. In disqualifying T&S Products, the contracting officer made a de facto determination that its offer was technically unacceptable. PM 4.1.4 c. states that "[a] proposal must be examined to determine whether it meets the requirements of the solicitation." A proposal that does not meet the solicitation requirements is technically unacceptable. See TLT Construction Corp. Inc., P.S. Protest No. 89-75~ January 18, 1990. In this case, the contracting officer determined that two of the three requested items that T&S Products offered did not meet the requirements of this oral solicitation. "This office will not substitute its judgment for that of the contracting officer or disturb his evaluation of an offer's technical acceptability unless it is shown to be arbitrary or in violation of procurement regulations.~ TLT Construction Corp. Inc., supra.

In addition, "[t]he determination of the Postal Service's minimum needs is properly to be made by the requiring activity, and is not subject to being overturned absent a clear showing that the determination has no reasonable basis.~ Memorex Corporation, P.S. Protest No. 82-51, August 24, 1982. T&S Products has made no showing that the Postal Service's dimensional requirements had no reasonable basis. Absent such evidence, this portion of the protest must be denied.

The protest is dismissed in part and denied in part.

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[Compared to original 5/26/94 WJJ]