

Protest of) Date: April 24, 1990
N.R.F. ENTERPRISES, INC.)
Solicitation No. 197101-90-A-0455) P.S. Protest No. 90-13

DECISION

N.R.F. Enterprises, Inc. ("NRF") timely protests the award of two contracts for personnel support services to Marion W. Aycock and Madeline R. Aycock, self-employed individuals. NRF claims that its proposal was improperly rejected as technically unacceptable and that it should have been awarded the contract as the apparent low bidder. NRF also alleges that since the two awardees' bids were identical, there is an assumption of a conspiracy which violates government contract regulations.

Solicitation No. 197101-90-A-0455 was issued by the Contract Branch of the National Inventory Control Center in Topeka, KS, on January 26, 1990, with an extended offer due date of February 23. The solicitation sought one or two fixed-rate, labor-hour contracts for two Logistics Management Specialists to work an estimated 2,080 hours per person for a one-year period. Section A.1 of the solicitation set the parameters of evaluation and award.

The USPS requirement is for two Logistics Management Specialists. Award(s) may be made to self-employed individuals. Award(s) will be made on the basis of price. Each individual must submit a current legible resume indicating their qualifications. A technical evaluation will be conducted of the resume after consideration of the price. Offers based on resumes which are evaluated as technically unacceptable will be rejected.

The Postal Service reserves the right to reject any and all proposals in response to this solicitation. The USPS additionally reserves the right to enter into a contract without further negotiations; therefore, each offeror responding should initially submit their best offer.

Section M.1 of the solicitation, entitled Proposal Evaluation, stated that award would be made "to the responsible offeror who submits an acceptable offer in compliance with solicitation terms and conditions, and the lowest offer price." The solicitation further

stated that "resumes and references submitted with the offer must clearly exhibit the experience and qualifications stipulated in the Statement of Work. Otherwise, the offer may be rejected."

Section B-6.1.4 in the Statement of Work listed these required qualifications and experience:

1. Knowledge of the Federal Cataloging and Standardization Program.
2. Knowledge of Current Technology in Applicable Federal Supply Classes. Minimum of 4 years experience in the federal cataloging and standardization program.
3. A working knowledge of federal catalog and standardization programs through Integrated Logistics Support planning, item entry control, interchangeability and substitutability, and proper cataloging procedures.
4. A working knowledge of military specifications, military standards, federal specifications and standards, and industry specifications and standards.
5. Skills in the development of an item of supply through the complete in depth process of cataloging and standardization.
6. Capability to analyze form, fit, and functionality of items to be loaded into central catalog and operating knowledge of data base access.

Seven proposals were received. NRF was the apparent low offeror, offering two employees at \$17.50 an hour. Marion Aycock and Madeline Aycock, husband and wife, were the second low offerors; each bid \$21.00 an hour for their individual services. The two resumes offered by NRF were technically evaluated by a representative in the Logistics Support Branch. They found NRF's proposal wanting because both of its candidates lacked the minimum hands on experience required in the Statement of Work. The contracting officer concurred in the evaluation analysis and rejected NRF's proposal. The Aycock resumes were technically evaluated and each was found to be acceptable. Contracts were awarded to Marion Aycock and Madeline Aycock on March 1, 1990.

NRF received notice of the awards by certified mail on March 5. Its protest was timely received by the contracting officer on March 19. The protester raises two concerns. First, it contends that its two candidates were well qualified and that a personal interview should have been scheduled with them to allow them to demonstrate equivalent qualifications per Sections B-6.2 and B-6.3^{1/} of the solicitation. NRF's

^{1/}Sections B-6.2 and B-6.3 of the Solicitation read as follows:

second allegation is that since both Marion Aycok and Madeline Aycok offered a \$21.00 an hour labor rate, it appears that they conspired to offer the same price in violation of government contracting regulations.

The contracting officer advises that, although NRF's candidates had extensive management and training experience, they did not have any recent job journeyman worker experience, as required by the solicitation. On the other hand, the awardees both submitted resumes with the requisite cataloging, standardization, form, fit, function, interchangeability and substitutability experience.

The contracting officer adds that Solicitation Section M.3 warned prospective offerors that "the Postal Service may award a contract on the basis of initial proposals received, without discussions." The contracting officer asserts that a Section B-6.2 personal interview would have been requested only in order to reinforce an affirmative technical evaluation. Since NRF's evaluation was negative, it was not necessary to schedule an interview. Further, the contracting officer states that there was no need to invoke Section B-6.3 and accept equivalent qualifications when otherwise acceptable offers were received.

Regarding NRF's second allegation, the contracting officer replies that the awards were made to two self-employed individuals, who were also husband and wife. The contracting officer declares that he sees nothing improper in the fact that both offered the same hourly rate-unit price. The contracting officer concludes by reporting that NRF's allegations of anti-competitive activities are not within bid protest jurisdiction.

The protester responds to the contracting officer's statement, stating that the contracting officer ignored Sections B.6.2 and B.6.3 of the solicitation and based his statement solely on Section M of the solicitation. NRF contends that the government "cannot totally rely on an applicant's resume to determine his/her job qualifications." Finally, the protester asserts that even though the awardees were husband and wife, contract law does not allow them to conspire to bid the same price as individual contractors.

B-6.2 Interviews:

Applicants for the positions may be required to show evidence of their ability to provide the services required by this Statement of Work by appearing for a personal interview at Logistics Programs Support Branch. . . .

B-6.3 Equivalent Qualifications:

Where potential contractor personnel do not meet all of the job qualifications, if the contractor can demonstrate that the individual possesses equivalent qualifications, the person may be hired under the contract with the express written permission of the Contracting Officer.

Decision

The standard of our review of the contracting officer's determination that a proposal was technically unacceptable is as follows:

The determinations of a contracting officer will not be overturned unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence. When such a determination rests upon the judgment of technical personnel, we will not substitute our views for their considered judgment in the absence of fraud, prejudice, or arbitrary and capricious action. The protester bears the burden of affirmatively proving its case. This burden must take into account the "presumption of correctness" which accompanies the statements of the contracting officer, and if such allegations do not overcome the presumption of correctness, we will not overturn the contracting officer's position. [Citations omitted.]

POVECO, Inc., et al., P.S. Protest No. 85-43, October 30, 1985; Southern Air Transport, P.S. Protest No. 89-56, October 3, 1989.

NRF does not dispute the contracting officer's findings that its personnel were not as qualified for the two positions as the awardees. Its major complaint is that the contracting officer should have done more to prevent the rejection of its proposal.

It is clear that the contracting officer's determination that NRF's proposal was technically unacceptable is supported by the terms of the solicitation. Section B-6 of the solicitation set out detailed qualification standards for the contract personnel required for the two positions. The solicitation stated that "contract personnel . . . shall . . . meet the qualification requirements set forth [in the Job Qualification Requirements]" [Emphasis added]. The word "shall" connotes a mandatory requirement. The resumes NRF supplied did not show the required qualifications.

On the other hand, Section B-6.2 stated that "applicants . . . may be required . . . [to appear] for a personal interview...." [Emphasis supplied]. The word "may" describes an optional course of conduct.^{1/} Likewise, Section B-6.3 states that "if the contractor can demonstrate that the individual possesses equivalent qualification, the person may be hired . . . with the express written permission of the Contracting Officer." [Emphasis added]. Again, the hiring of contractor personnel with equivalent qualifications is described in the solicitation as a discretionary option.

Thus, according to the solicitation terms, the contracting officer was not required to apply Sections B-6.2 and B-6.3 to NRF's proposal in order to ensure that the two NRF applicant resumes complied with the job qualification requirements. Contrary to the protester's contention, the solicitation anticipated that the government could rely on an applicant's resume to determine his/her job qualification. Since NRF has not carried its burden of proof in challenging its technical evaluation, the determinations of the

^{2/}Procurement Manual (PM) 1.6.2 j defines "may" as being permissive. This definition supports our interpretation of that term in Section B-6.2.

contracting officer will not be overturned on this point.

NRF's second allegation is that even though the awardees are husband and wife, contract regulations and law do not allow them to conspire to bid the same price. NRF's "assertions, in fact, amount to allegations of restraint of trade, collusion or other anti-trust violations involving other participants in the competition." Western Publishing Company, Inc., P.S. Protest No. 84-23, April 10, 1984. We have held that such allegations lie outside the scope of the bid protest function. Liberty Carton Company, P.S. Protest No. 85-35, July 30, 1985; Western Publishing Company, *supra*.

The protester broadly asserts that the alleged price conspiracy is in violation of "contract law and government contract regulations" without citing to any particular case or regulation. While we note general principles concerning collusive bidding, we doubt they are violated, where, as here, two related individuals decide to offer their individual services at similar rates. See Fred Austin Trucking, Inc., P.S. Protest No. 86-66, December 10, 1986.

The protest is denied.

William J. Jones
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Office of Contracts and Property Law

[checked against original JLS 6/2/93]