

Protest of ) Date: July 5, 1990  
COMPU-COPY )  
Solicitation No. 489990-90-A-R179 ) P.S. Protest No. 90-21

### DECISION

Compu-Copy protests the award of a contract for coin-operated copier services in the Dallas/Fort Worth area to Pitney Bowes, Inc.

The solicitation was issued by the Dallas Procurement & Materiel Management Office on January 26, 1990, with an offer due date, as amended, of April 30. The contracting officer, acting under a valid, one-time deviation, changed the standard solicitation package in three areas; requiring the offerors to propose a single, flat-rate commission for all copies vended, to offer both letter size and legal sized copies, and to offer copiers using dry, electrostatic transfer to plain bond, 16 to 32 pound paper.<sup>1/</sup> A protest that these solicitation terms were unduly restrictive was denied. Equipment Marketing Consultants Corporation, P.S. Protest No. 90-07, April 17, 1990. Six offers from five offerors were opened on April 30, with the following commissions:

Compu-Copy (Alternative 1)	70%
Pitney Bowes	64%
Zeno Systems	55%
Compu-Copy (Alternative 1A)	50%
E-Z Copy	40%
Sharp Electronics	40%

Compu-Copy's Alternative 1 was not considered for award, as it was based on commission rates which varied with the number of copies vended. Award was made to Pitney Bowes on May 2 and Compu-Copy's protest followed.

Compu-Copy raises numerous issues regarding the award of the contract to Pitney Bowes. It alleges that it should have received award on its Alternative 1 offer of 70% because it was the highest commission rate offered and the highest as evaluated. Compu-Copy states that the award to Pitney Bowes was flawed because Pitney Bowes' offer was unbalanced. It acknowledges that Pitney Bowes' offer was arithmetically

<sup>3/</sup>An amendment to the solicitation changed this requirement to 16 to 24 pound paper.

balanced, but argues that the rule covering unbalanced bidding should be modified to allow rejection of an offer as unbalanced if it is only materially unbalanced.

Compu-Copy further alleges that Pitney Bowes' offer of 64% is in violation of a Texas criminal statute which prohibits payment of more than 50% of the revenue generated by a coin-operated machine.<sup>4/</sup> Compu-Copy doubts that the Postal Service is immune from these state provisions, but notes that the offerors are clearly covered. It concludes, therefore, that any contract with a commission level higher than 50% is void under Texas law and Compu-Copy's alternative offer 1A is the highest offer which is in accordance with Texas law.

Compu-Copy further alleges that Pitney Bowes' offer is defective as a "buy-in" below its cost. It also notes that Pitney Bowes offered a cost for internal Postal Service copies that was 1.25 cents per copy higher than its offer and that Pitney Bowes' offer did not take into account all known acceptable economic factors. It also alleges that award to Pitney Bowes was in violation of the Postal Service's policy to award contracts to small businesses. Finally, Compu-Copy states that the evaluation criteria governing the solicitation were unprecedented, procedurally irregular, arbitrary, capricious, anticompetitive and biased toward a particular company. In addition, the criteria were alleged to fail to take into account all material economic factors.

In his statement, the contracting officer explains that the solicitation was specifically designed to require offerors to offer a single, fixed commission rate, and that Compu-Copy's variable rate in contravention of the solicitation's requirement rendered its alternative offer technically unacceptable. As to its 50% commission offer, the contracting officer notes that Zeno Systems would have been in line for award if Pitney Bowes' offer had been rejected. He states that Pitney Bowes' offer, as well as all the offers, was evaluated in accordance with the criteria set forth in the solicitation and award was made to the responsible offeror whose offer conformed to the solicitation requirements and gave the Postal Service the highest monthly income. As to the evaluation criteria, the contracting officer notes that challenges against the criteria were rejected previously in Equipment Marketing Consultants Corporation, supra. He recommends that the protest be denied as without merit.

Pitney Bowes has submitted comments on the protest. It denies that its offer was unbalanced, noting that a flat rate offer must be mathematically balanced, and that there is no doubt that its offer will generate the greatest revenue to the Postal Service. It notes that Pitney Bowes offer does not violate Texas law because the statutory provision Compu-Copy cites applies only to coin-operated amusement machines.

<sup>4/</sup>Title 132, Article 8802 of the Texas Civil Code provides, in pertinent part, as follows:

No owner shall agree or contract with a bailee or lessee of a coin-operated machine to compensate said bailee or lessee in excess of fifty percent (50%) of the gross receipts of such machine after the above reimbursement has been met.

Articles 8811 and 8812 prescribe monetary and criminal penalties for violation of the above provision, with such violation being deemed a Class C misdemeanor.

Pitney Bowes also states that Compu-Copy's allegations concerning the propriety of the evaluation factors are untimely, as raised after the date set for opening of offers, and were already denied in the earlier Equipment Marketing decision. Finally, it states that its offer cannot constitute a "buy-in," because Compu-Copy does not possess Pitney Bowes' cost data and cannot determine whether the offer was in fact below cost. In addition, it notes that there is no prohibition against award to an offeror whose offer is below cost.

## DISCUSSION

The first issue to be addressed is whether the contracting officer acted properly in rejecting Compu-Copy's alternative offer which proposed variable commission rates. We conclude that he did. The solicitation required offerors to propose a single, fixed rate of commission for all copies vended. This requirement was upheld in Equipment Marketing Consultants Corporation, supra, for several reasons, including the desire to prevent unbalanced bidding. Given the propriety of the flat-rate commission requirement, the contracting officer was justified in rejecting Compu-Copy's alternative offer which proposed a variable-rate commission structure. See, e.g., Computer Data Systems, Inc., Comp. Gen. Dec. B-223921, December 9, 1986, 86-2 CPD &659 (agency reasonably determined that proposal which deviated materially from solicitation requirements presented an unacceptable cost risk and should be rejected). This is especially so given that variable rate commissions were the specific reason why the solicitation had been structured to require flat-rate proposals.

Next, we address whether Pitney Bowes' offer is in violation of Texas law. Compu-Copy has alleged that award of a contract to Pitney Bowes would be in violation of Texas law which prohibit commissions on "coin-operated machines" of more than 50%. This argument lacks merit. First, Texas legal precedent is relatively clear that the provisions cited by Compu-Copy do not apply to coin-operated machines located on federal land. See Adams v. Calvert, 396 S.W.2d 948 (Tx. 1965) (state cannot tax privately owned coin-operated machines located on federal land); Op. Tx. Atty. Gen. No. H-1307, 1979 (federal post exchanges immune from section's prohibitions). Second, the services provided by coin-operated photocopiers appear to be expressly exempt from the 50% limitation.<sup>5/</sup> Therefore, we find that Texas law does not limit the commissions which can be collected on the contract awarded to Pitney Bowes.<sup>6/</sup>

As to the other issues Compu-Copy raises concerning Pitney Bowes' offer, it lacks standing to raise these. In order to raise an issue in a bid protest, a protester must be an interested party. Procurement Manual (PM) 4.5.2 a. Our prior decisions have established the test of whether a protester is an interested party as "whether the

<sup>5/</sup>Article 8803 of Title 132 of the Texas Code states that "'service coin-operated machines' . . . are expressly exempt from the . . . provisions of this Chapter." Article 8801(6) defines "service coin-operated machines" as "all other machines or devices which dispense service only and not merchandise, music, skill or pleasure."

<sup>6/</sup>Even if the Texas law limited the commissions payable under these photocopying contracts, that limitation would be Pitney Bowes' problem, not the Postal Service's.

protester would be eligible for award of the contract if the protest were upheld." Strapex Corporation, P.S. Protest No. 85-33, July 11, 1985; see also Electrocraft Industries, Inc., P.S. Protest No. 83-42, September 1, 1983. Even if Pitney Bowes' offer was defective in some manner, award would not have been made to Compu-Copy, but rather, to Zeno Systems, which was next in line for award. Therefore, Compu-Copy lacks standing to raise these issues concerning Pitney Bowes' offer.

Finally, Compu-Copy's allegations concerning the evaluation criteria are not only untimely, PM 4.5.4 b, but have already been reviewed and denied in the earlier decision of Equipment Marketing Consultants Corporation, supra. Therefore, we are foreclosed from any further review of those issues.

The protest is dismissed in part and denied in part.

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**[checked against original JLS 6/4/93]**