

Protest of) Date: July 20, 1990
HILL'S CAPITOL SECURITY, INC.)
Solicitation No. 104230-90-A-0034) P.S. Protest No. 90-25

DECISION

Hill's Capitol Security, Incorporated ("Hill's"), protests the award of a contract under solicitation 104230-90-A-0034 to O&R Management Corporation ("O&R") to provide bus operators for the William F. Bolger Management Academy, Potomac, MD. Hill's contends that the United States Postal Service used an unfair evaluation process and that O&R was ineligible to receive the contract award. Hill's requests immediate suspension and cancellation of the award to O&R with award to it, or in the alternative, recompetition of the contract after expiration of the base year.

Solicitation no. 104230-90-A-0034, issued February 21, 1990, by the Office of Procurement, Headquarters, sought proposals for the provision of bus operators to drive three USPS-owned 25-passenger buses and three USPS-owned 15-passenger vans on both scheduled and as-needed bases in metropolitan Washington, D.C. The contract period of performance included a base period of one year, with four one-year renewal options.

Evaluation criteria were set forth in Section M and in Attachment 4 of the solicitation. Attachment 4 stated that "technical qualifications of offeror and drivers will be paramount to proposed pricing." Technical qualifications were to be evaluated based upon demonstrated ability in the areas of Management, Resources (drivers), and Experience and Past Performance. Resources evaluation criteria included evidence that the offeror "has or can obtain the necessary resources (drivers) that are capable of performing required work." Cost or price, however, was also to be a consideration in the award decision. Item M.1.a stated that the contract would be awarded to the responsible offeror whose proposal "will be the most advantageous to the Postal Service, cost or price and other factors specified elsewhere in this solicitation considered." Item M.3.a provided that award would be made to the offeror who submitted the best combination of Technical Proposal, Business Proposal (cost/price), Business/Management Proposal and other factors.

Three further solicitation provisions particularly apply to the protest at hand. Section F of the Statement of Work ("SOW") and solicitation Item J.2 required the offeror to demonstrate its financial soundness through the provision of current financial statements. Item K.7 stated: "The Postal Service may award a contract on the basis of initial proposals received, without discussions. Therefore, each initial proposal must contain the offeror's best terms from a cost or price and technical standpoint."

The Office of Procurement issued two amendments to the solicitation. On February 26, Amendment A01 was issued to eliminate the requirement for bonding of shuttle drivers. On March 12, Amendment A02 was issued to clarify the applicable minimum hourly wage rate for the subject contract.

Two proposals, Hill's and O&R's, were received by the offer due date of March 26, 1990. The technical evaluation committee, which included the proposed Contracting Officer's Representative (COR) for the contract, found both proposals to be "technically acceptable" based upon the criteria set forth above. O&R's proposal received a rating of "very good" (80 out of 100 points) while Hill's proposal received a rating of "marginal" (54 out of 100 points).^{1/} Hill's was downgraded in the area of Resources (drivers) because of information provided in Hill's proposal that the three individuals proposed as drivers lacked Virginia Commercial Bus Licenses. However, since Hill's proposal was technically acceptable, an evaluation of the price proposals for both companies was conducted. The price analysis was based upon three comparisons:

- 1) Hill's proposed total price of \$263,028 was determined to be 60% higher than O&R's proposed total price of \$164,686.
- 2) O&R's proposed hourly rate was \$26.80, only 5.5% higher than the hourly rate on its current contract. Hill's proposed hourly rate range was \$42.52 to \$43.09.
- 3) O&R's proposed price was 16% lower than the USPS estimate of price.

O&R's overall price was determined to be "fair and reasonable" as required by Procurement Manual ("PM") 5.3.3.b.1.

As the result of the evaluation of technical and price proposals and following a determination that O&R was a responsible contractor, contract award was made to O&R on May 1. Hill's requested a debriefing, which was conducted on May 10. Hill's timely protest was filed with our office on May 15. A protest conference was held on June 6, and on June 12, Hill's submitted supplemental comments on the contracting officer's report which renewed the allegations present in its protest.

Hill's protest raises four issues. First, Hill's alleges that the proposal evaluators relied on false information, independently collected by one proposal evaluator, the COR,

^{1/}After an examination of the record, this office has determined that Hill's total point score correctly tabulates to 55. This minor discrepancy results in no prejudice to Hill's since the relative standing of the offerors is not changed. See Cohlma Airline, Inc., P.S. Protest No. 87-118, April 13, 1988.

regarding the technical capability of Hill's proposed bus operators. Hill's alleges that the COR went beyond its proposal and relied upon information gained through independent telephonic contact with the Virginia Department of Motor Vehicles ("DMV") which indicated that Hill's drivers lacked necessary Virginia Commercial Bus Licenses.^{1/} Hill's views this contact as impermissibly tainting the evaluation of its proposal.

Second, Hill's alleges that O&R fails to meet the solicitation's financial soundness requirement. Hill's objects to the staleness of O&R's September 30, 1989 financial statements and maintains that O&R is in perilous financial condition due to a recent loss of a parking fee collection contract. Hill's alleges that this contract loss has led to O&R's default on two notes with Sovran Bank.

Third, Hill's alleges that the Postal Service's evaluation was inconsistent with the stated evaluation criteria and therefore was unreasonable. Hill's contends that the use of a "best-value" analysis failed to ensure that technical qualifications were given more emphasis than price. Hill's also claims that it was unfairly penalized in the Experience category because its transportation service experience was not given due weight by the evaluation committee.

Fourth, Hill's alleges that the Postal Service showed unfair bias toward O&R when it eliminated the requirement for bonding of shuttle drivers. Hill's maintains that since O&R's financial condition is such that it cannot obtain bonds, the elimination of this requirement unfairly assisted O&R in winning the competition.

The contracting officer's report addresses each allegation in Hill's protest. The contracting officer maintains that the qualifications of Hill's proposed bus operators were evaluated based upon information provided by Hill's in its proposal. Although the COR did contact the Virginia DMV, it was solely for clarification of information that Hill's had submitted. The contracting officer maintains that the information supplied by Hill's reflects its inability to provide an adequate supply of drivers to meet the stated solicitation requirements. Two of the three drivers did not hold Class B Virginia licenses, one driver was disqualified due to the suspension of his commercial license, and Hill's proposal contained no information to support its statement that applications for Maryland Class B licenses were pending for its three drivers.

The contracting officer further maintains that O&R's financial capability was evaluated

^{2/}To satisfy the Resources evaluation criteria requirement of evidence that it could obtain the "necessary resources (drivers) that are capable of performing required work," Hill's named three individuals and included copies of their resumes and Virginia DMV Transcripts of Records (dated March 23, 1990, three days prior to the proposal due date). The technical evaluation committee noted from this information that two of the three drivers did not hold Class B Virginia licenses and that one driver had had his commercial license suspended. The transcripts provided also did not indicate, by Endorsement P, that any of the drivers were licensed to drive passenger-carrying vehicles. The COR was informed by a Virginia DMV representative that none of the three drivers were licensed to drive buses in Virginia. Hill's proposal contained no evidence beyond its mere statement that the three drivers had pending applications for a Maryland Class B license as is specifically required by the SOW. The evaluators expressed concern that "[t]his situation may reveal an inability to provide adequate supply of drivers for backup and or special bus services."

after it had been selected for award. The contracting officer states that O&R demonstrated its financial soundness through provision of updated financial records and through proof of its insurance coverage. During the time period following the loss of the parking fee collection contract, O&R continued to perform successfully as the incumbent contractor for the bus operator services. Furthermore, O&R provided supplementary information regarding bank loan refinancing that refutes Hill's contention of financial instability.

In addressing Hill's allegation that the evaluation committee failed to ensure that technical qualifications were given more weight than price, the contracting officer states that the evaluation committee did not see any of the pricing proposals during the evaluation process. He also cites PM 2.1.6.c.3 which prohibits placing a weighting on cost or price: "[c]ost or price factors are to be treated separately and apart from the other criteria, and they are not to be weighted." To refute Hill's charge that the evaluation of its proposal in the Experience category was unreasonable, the contracting officer notes that Hill's operational experience and performance were in areas generally unrelated to the type required.

The contracting officer denies the charge of bias and maintains that the bonding requirement for drivers was eliminated because the costs incurred in acquiring bonding would have been passed on to the Postal Service which would have received very little benefit from bonding. The contracting officer states that the bonding requirement was never discussed with O&R. He also notes that O&R provided supplemental information which showed that its drivers are already bonded for \$250,000 per employee. Finally, the contracting officer notes that Hill's objection to the deletion of the bonding requirement occurred after the closing date for the receipt of proposals and is therefore untimely.

Discussion

Hill's contention that the evaluators relied on independently collected incorrect information stems from the evaluation committee's determination that the three proposed drivers lacked Virginia Commercial Bus Licenses. According to Hill's, this determination was partially the result of information independently gathered by the COR.

To the contrary, the summary evaluation rating by the committee was based upon the information provided by Hill's in its proposal. The Summary Evaluation Sheet states that the "proposal fails to produce evidence that proposed drivers have current or required types of operator licenses." (Emphasis supplied.) There is no indication that the COR's independently gathered information had an adverse impact upon the numerical rating given to Hill's.

Postal Service procurement regulations provide that each proposal must be examined to determine whether it meets the requirements of the solicitation. PM 4.1.4.c.1. "When evaluation factors are set out in a solicitation, they must be followed." TPI International Airways, Inc., P.S. Protest No. 87-40, October 30, 1987; cf. POVECO, Inc., P.S. Protest No. 85-9, May 21, 1985. The regulations and solicitation provisions place the burden on Hill's to submit verified information that supports its statements.

Since the burden is on an offeror to submit an adequately written proposal, any reduction in the evaluation scoring which results from an improperly structured proposal is properly attributable only to the offeror. Chamberlain Manufacturing Corporation, P.S. Protest No. 85-83, February 14, 1986.

Hill's proposal, on its face, did not conform to the solicitation requirements. Hill's maintains that it should have received an opportunity to clarify the uncertainty surrounding the qualifications of its drivers. However, the solicitation provisions clearly state that the Postal Service may award a contract on the basis of initial proposals received. Since Hill's had notice of this provision, there was no prejudice to it in this regard.

Hill's further contends that had the USPS given full credit to them in the category of Resources, Hill's would have received the contract award. This is by no means certain. The Procurement Manual states that selection for award must be based upon the proposal most advantageous to the Postal Service. PM 4.1.5.b.1. Since the solicitation itself gave notice that cost or price factors would be considered, Hill's was fully apprised of this consideration and thus has no basis to complain. "The Postal Service may make award on the basis of any factors it chooses, consistent with applicable regulations, so long as the evaluation and award factors in the solicitation fairly advise prospective offerors of the basis on which their offer[s] will be considered for award." Sea-Land Service, Inc., P.S. Protest No. 77-28, August 18, 1977.

Furthermore, a contracting officer has considerable discretion and his determination will not be disturbed by this office "unless the decision is arbitrary, capricious, or not reasonably based on substantial evidence." Jindal Builders and Restoration Corporation, P.S. Protest No. 90-10, April 19, 1990 (quoting Craft Products Company, P.S. Protest No. 80-41, February 9, 1981). See also Cohlma Airline, Inc., *supra*. Since Hill's total price was 60% higher than O&R's, the information before the contracting officer was sufficient to support the selection of O&R even if the technical rating of the two proposals had been equivalent.

Hill's argument that O&R lacks the financial capability to perform this contract raises the question of O&R's responsibility. "Whether an offeror has the capacity and capability to perform a contract is usually reviewed in the determination of an offeror's responsibility." TPI International Airways, Inc., *supra*. The determination of responsibility is made separately from the evaluation of the proposals. *Id.* The contracting officer determined that O&R was a responsible contractor within the meaning of PM 3.3.1. A determination of responsibility is "a business judgment which involves balancing the contracting officer's conception of the requirement with available information about the contractor's resources and record." Craft Products Company, *supra*. Since a contracting officer has considerable discretion, his affirmative determination that an offeror is responsible will not be disturbed in the absence of bad faith, fraud, or a failure to apply definitive responsibility criteria. EDI Corporation, P.S. Protest No. 83-51, January 26, 1984. None of these have been alleged, and indeed, the evidence indicates that O&R has been able to refinance and to substantially reduce its loan balance with Sovran Bank.

Hill's raises three issues to support its contention that the evaluation was unreasonable

and inconsistent with the stated evaluation criteria. Hill's bases its complaints regarding the "best value" analysis on Evaluation Criteria 2 which states that technical qualifications will be paramount to proposed pricing. However, Evaluation Criteria 2 states that cost/price also will be considered. The solicitation also clearly states that award will be made to the offeror who submits the best combination of Technical Proposal, Business Proposal (cost/price), Business/ Management Proposal and other factors. Since both the technical and price aspects of Hill's proposal were rated substantially below O&R's, the contracting officer's analysis was reasonable. Absent a clear showing that a contracting officer's determination was arbitrary, capricious, or an abuse of discretion, his decision will not be overturned. Chamberlain Manufacturing Corporation, supra.

Hill's second and third contentions can be resolved together. Hill's claims the evaluation was unreasonable because its transportation service experience was not given due weight by the evaluation committee. Hill's also claims that its managers' level of experience was not carefully assessed. This office's review of the technical evaluation of proposals is limited. Id. A contracting officer has considerable discretion and his decisions will not be reversed absent a showing of arbitrariness or violation of procurement regulations. Apec Technology Limited, P.S. Protest No. 88-23, June 30, 1988. Hill's simply has not met its burden of showing the existence of unreasonableness or inconsistency that rises to the level of arbitrariness or violation of regulations.

Hill's allegation concerning bias in the procurement process arises from Amendment AO1 of the solicitation. This allegation is untimely. Amendment A01 was issued on February 26. Proposals were due on March 26. Hill's allegation was not presented until it submitted its protest which was dated May 15. "Protests 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.

The protest is denied.

William J. Jones
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Office of Contracts and Property Law

[checked against original JLS 6/4/93]