

Protest of) Date: July 3, 1990
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 PERITEK CORPORATION)
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 Solicitation No. 197101-90-A-0184) P.S. Protest No. 90-27

DECISION

Peritek Corporation ("Peritek") timely protests the award of a contract for repair service on PVM-15E/2 monitors to Tachyon Corporation ("Tachyon"). Peritek alleges that Tachyon's price was unrealistically low and that the firm does not have the technical expertise to perform the contract. The protester requests that the award be rescinded and that all future offerors be required to be pre-qualified in their ability to perform.

Solicitation No. 197101-90-A-0184 was issued on December 12, 1989, by the Contract Branch of the National Inventory Control Center in Topeka, KS. Offers were opened on January 3, 1990. The solicitation sought a contractor "to furnish all necessary labor, equipment and material to repair and test . . . a monitor of Peritek Corporation manufacture, upon request of authorized [postal] personnel" for either a one or two year period. The contract was a firm-fixed price, indefinite delivery, requirements contract. The solicitation listed an estimate of 150 repairs per year for pricing purposes. The solicitation required offerors to separate their prices according to the type of service that would be performed. Items 1 and 2 represented the offeror's price for repair work and Items 1A or 2A represented the price for testing only.

The solicitation's general requirements stated that in order to be considered for award, "the offeror must demonstrate they do have access to OEM original and latest revision technical specifications, test procedures and equipment necessary to test [and] repair . . . the item(s) to OEM revision level specifications." Section M.4 of the solicitation stated that "[a]ward will be made to the responsible offeror who submits an acceptable offer in compliance with solicitation terms and conditions, and the lowest offer price. The award(s) will be made for either the single year's quantity or the multi-year (2 year's) quantity that results in the lowest unit price, . . . most advantageous to the Postal Service.

Three companies submitted offers. The prices offered by Peritek and Tachyon for the one and two year period are listed below.

<u>OFFEROR</u>	<u>UNIT PRICE FOR 1 YEAR</u>		<u>UNIT PRICE FOR 2 YEARS</u>	
	Item 1	Item 1A	Item 1	Item 1A
Peritek	\$683.00	\$493.00	\$728.00	\$573.00
Tachyon	\$ 68.00	\$ 39.00	\$ 54.00	\$ 33.00

Peritek included with its offer an addendum that listed questions and exceptions to various solicitation provisions. For example, Peritek asked that a portion of the Termination for Convenience clause be revised to give it 30 days' notice. The protester also objected to portions of the warranty provision.

After the submission of offers, Tachyon verified its price and provided information that the PVM-15E/2 monitor was actually a Motorola P/N DS4000-557A model. The pre-award survey conducted at Tachyon was favorable and it was determined to be a responsible contractor. Award was made without discussions on May 4 to Tachyon for a total (estimated) contract price of \$16,200. Unsuccessful offerors were notified of the award in writing on the same day. Peritek's timely protest was received on May 17 by the contracting officer, who forwarded it to this office for resolution.^{1/}

The protester raises many specific concerns. Peritek asserts that since it is the manufacturer of the monitor that will be repaired under this solicitation, its specific repair knowledge and information is essential to any offerors. Therefore, since Tachyon did not contact it about repair of the monitor, Peritek alleges that it lacks the knowledge to perform the contract. In addition, the protester disputes Tachyon's allegation that Motorola, not Peritek, is the original manufacturer of the monitor in question. Peritek claims that not only is it the original manufacturer, but that it does not approve of unqualified (Tachyon) personnel repairing its monitors.

Peritek also complains that the awardee did not submit a cost breakdown. Peritek states that Tachyon's price is 1/10th of its price and is therefore clearly unrealistic. Peritek goes on to state that it believes it is unfair that a pre-award survey was performed at Tachyon's plant and not at Peritek's. Finally, Peritek asserts that it has information that Tachyon was informally promised this award some time ago and that this raises doubt concerning the confidentiality and competitiveness of the solicitation and award process. Peritek requests rescission of the contract to Tachyon and a resubmission of offers on an equal basis.

The contracting officer responds that Tachyon did comply with the solicitation requirement that the offeror demonstrate it has access to the OEM original monitor and its latest revisions. The contracting officer points out that Tachyon examined the monitor at a Postal facility and discovered that it was, in fact, a Motorola monitor. According to the contracting officer, Tachyon contacted the authorized Motorola dealer, who sold it the necessary repair information. The contracting officer further reports that Peritek need not be concerned that Tachyon is "unqualified" to repair these monitors since Tachyon's repair process was evaluated and approved during its pre-award survey. In addition, although the monitors may have the Peritek label on them, they are Postal Service property. Since Tachyon has been labeled a responsible contractor, the contracting officer considers them to be qualified to perform these repairs.

Next, the contracting officer replies that according to the solicitation, Tachyon was not required to submit a cost and pricing data breakdown since its offer was under \$100,000.^{2/} He

^{1/}The contracting officer has allowed the contract to proceed during this protest but advises that no delivery orders have been placed under the contract, to date.

^{2/}J.12 of the solicitation states, in pertinent part, that "[i]f the total offer exceeds \$100,000.00,
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further states that the authorized Motorola dealer informed Tachyon, by letter, that it could repair each unit for \$85.00, plus parts. Taking into account the volume of business estimated by the Postal Service, the contracting officer assumes that Tachyon could submit an even lower price in its offer to the Postal Service.

The contracting officer explains that a pre-award survey was not conducted at Peritek because it had been previously approved as a repair service source and in fact, had been the previous contractor for this requirement. Since Tachyon had never before contracted with the Postal Service, a pre-award survey was required for it. Finally, the contracting officer denies there were any inappropriate actions on the part of postal employees during the solicitation and award process, pointing out that the protester failed to specifically name any person in its allegations.

The protester responds to the contracting officer's remarks, emphasizing in particular that the Postal Service has been misinformed concerning the origin of the PVM-15/E-2 monitor. Peritek states that while the monitor was initially manufactured by Motorola, Peritek improved the PVM-15/E-2 with circuit modifications, making it Peritek's own product. Peritek restates its fear that since these monitors bear Peritek's name, its reputation may be tarnished by any unqualified repair work performed by Tachyon.

Peritek reiterates that Tachyon's prices are well below the average cost of the parts to repair the monitor, excluding labor, profit, and shipping. For instance, the protester alleges that to replace a picture tube, it would cost \$60. Peritek adds that it doubts that Tachyon could perform this contract when it wasn't even in existence four months ago and therefore, has no track record. The protester ends its remarks by asserting that it believes that there must be "some other mechanism active which will allow Tachyon to perform on this contract without incurring substantial loss."

Discussion

Peritek's basic contentions are that Tachyon lacks the knowledge to perform this contract and that its price is unrealistically low. Both contentions are a challenge to the awardee's affirmative responsibility determination. "Responsibility . . . relates to the ability of an offeror] to perform any resultant contract." Sensory Electronics, Inc., P.S. Protest No. 87-124, January 21, 1988; Automated Data Management, Inc., P.S. Protest No. 89-71, November 9, 1989. "An assertion that an offeror's] price is unreasonably low or below cost is generally viewed as a challenge to the responsibility of the [offeror]." R.M. Carpenter Co., P.S. Protest No. 82-53, November 12, 1982.^{3/} "[T]his office does not consider protests against affirmative determinations of responsibility unless there are allegations of fraud, bad faith, or a failure to apply definitive responsibility criteria set forth in the solicitation." Automated Data

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the following requirement applies: Cost or Pricing Data . . . must be submitted with the proposal."

^{3/}It may be added that "[t]he submission of [an offer] which is below cost, even if the [offeror] will suffer a loss thereby, does not constitute a sufficient basis for precluding contract award to that low [offeror]." Malcolm A. Miller, P.S. Protest No. 87-87, August 25, 1987.

Management Inc., supra.

The protester vaguely makes allegations of fraud and bad faith when it suggests that Tachyon was informally promised this award and that some other mechanism was active which would allow Tachyon to perform without incurring substantial loss. "Allegations of bad faith must be shown by virtually irrefutable proof of malicious and specific intent to harm the protester, not merely by inference or supposition. Otherwise, contracting officers are presumed to act in good faith." (Citations omitted.) Graphic Technology, Inc., P.S. Protest No. 85-66, December 30, 1985; Colorado Piping & Mechanical, Inc., P.S. Protest No. 90-23, June 20, 1990.

Peritek is unable to specify which postal employees acted improperly during this competition and award. It also simply disagrees with the contracting officer concerning Tachyon's ability to perform at such a low price. Since the protester cannot prove its contentions of bad faith or fraud, the contracting officer's affirmative determination of Tachyon's responsibility may not be overturned on such grounds. In addition, "[t]hat the protester has a different view of [the offeror's] financial responsibility . . . than the contracting officer does not suffice to show that the contracting officer acted fraudulently or in bad faith." Automated Data Management, Inc., supra (quoting Pitney-Bowes, Inc., P.S. Protest No. 87-95, November 20, 1987).

On the grounds that there was a failure to apply definitive responsibility criteria set forth in the solicitation, Peritek alleges that Tachyon can't meet the solicitation requirement that the offeror have access to the monitor original and latest revision specifications. See Restore Specialties, Inc., P.S. Protest No. 88-13, June 21, 1988 (quoting Auto Discount Rent-N-Drive Systems, Inc., Comp. Gen. Dec. B-197236, B-197236.2, B-197236.3, July 28, 1980, 80-2 CPD ¶73 (demonstration required in order to be "considered for award" deemed a definitive responsibility criterion)). The contracting officer found that Tachyon was able to demonstrate that it had access to the original and latest revisions of the technical specification. Peritek's assertions to the contrary do not prove a failure to apply the definitive responsibility criteria. Since the protester has failed to show fraud, bad faith or a failure to apply the definitive responsibility criteria, its protest must be denied.

The protest is denied.

William J. Jones
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Office of Contracts and Property Law

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