

Protest of ) Date: November 26, 1990  
DENIS COPY COMPANY )  
Solicitation No. 419990-90-A-0200 ) P.S. Protest No. 90-61

### DECISION

Denis Copy Company ("Denis Copy") protests the rejection of its bid on Solicitation No. 419990-90-A-0200 as nonresponsive.<sup>1/</sup> The Eastern Procurement and Material Management Service Center issued the solicitation for coin-operated photocopy services to be supplied to forty-six post offices in the Erie, PA, area on August 17, 1990, with a due date of September 14.

A standard solicitation form for coin operated copiers, PS Form 7481, was used. Section eleven of the solicitation provided a single blank space next to a percentage sign where bidders were to insert a monthly commission rate, with a warning that this rate could not exceed 100%. Sections nine and ten of the solicitation stated that offers would be evaluated based upon a monthly average of 745 copies and that customers would be charged 25¢ a copy. Paragraph nineteen of the proposed contract listed the evaluation formula that would be used to determine which offeror would receive award. It stated:

Award will be made to the responsible offeror whose offer will give USPS the highest monthly income based on the average number of copies per copier [745].

- a. Monthly income will be calculated by USPS from the USPS commission you offer. . . . Th[at] commission will be multiplied by [25¢]. The result will then be multiplied by [745].
- b. If you offer commission rates that depend on the number of copies sold, USPS will multiply each commission you offered by the copy price and then multiply the result by the number of copies included at that commission rate (up to [745]). USPS will then add its income per rate to get a total monthly income.

<sup>1/</sup>This solicitation was issued as an Invitation for Bids pursuant to Chapter 2 of the Postal Contracting Manual (PCM) because the regulations that would have provided for the procurement of coin-operated photocopying services as a "structured contract" under the new Procurement Manual had not yet taken effect.

Denis Copy and Pitney Bowes were the two bidders. Pitney Bowes submitted a bid with a flat commission rate of 60%, which would give the Postal Service an estimated monthly income of \$111.75. Denis Copy submitted this information in the blank space in section eleven of the solicitation:

(First 480 copies per month) 0-16 per day - 50%  
(Next 270 copies per month) 17-26 per day - 99%

The contracting officer sent Denis Copy a letter, dated September 18, informing it that based upon the fact that it offered two different commission rates and a breakdown by day, he was unable to determine exactly what its bid was, making that bid non-responsive. Award was made to Pitney Bowes, by letter dated September 19. Denis Copy timely protested to this office.

Through counsel, Denis Copy asserts that it submitted a definite and unqualified offer which met all the material terms of the solicitation. The protester insists that it clearly offered to pay the Postal Service 50% on the first 480 copies and 99% on the next 270 copies per month. Denis Copy further insists that there is no other rational interpretation of its bid and therefore, no ambiguity exists. The protester adds that its total number of copies (480 + 270) equaled 750, a mere five copies more than the number (745) on which evaluation was to be based. Denis Copy alleges that this minor deviation from the solicitation provisions is nonmaterial.

The contracting officer, in his report, states that based upon Denis Copy's bid, it was unclear whether the commission rate was to be applied monthly or daily. He explains that if Denis Copy was proposing that its commission rate was to be applied on a daily basis, that would have entailed daily copier meter readings by Postal Service personnel instead of monthly readings. This situation would have created an extra administrative burden on the Postal Service. Since Denis Copy's bid was considered to be ambiguous, it was rejected as nonresponsive.

In its response to the contracting officer's statement, the protester asserts that it submitted the daily average number of copies in section eleven of the solicitation in accordance with paragraph twenty-two, entitled Accounting and Payments<sup>1/</sup> and as it

<sup>2/</sup>Paragraph twenty two reads, in pertinent part: "Under service plan 3, USPS must pay you within 30 days after receiving your invoice. When you make a payment, you must also send reports to the contracting officer and the postmaster in charge of the office where the machine is located. You may use whatever format you choose for the report, but it must contain the following information:

\* \* \*

- c. Number of days the report covers.
- d. Number of copies sold.
- e. Number of copies USPS made for its own use.
- f. Number of test copies (you made).
- g. Amount due USPS.
- h. Credit to USPS for test copies or customer refunds.
- i. Total paid to USPS."

had been doing as the incumbent contractor. According to Denis Copy, under its current contract, paragraph twenty-two states that the manner of accounting and payment is based upon a daily average.

Denis Copy explains that it obtained the number 0-16 by dividing 0-480 by 30 (the number of days in a month). Likewise, dividing 481 to 745 copies by 30 produces a daily average of 17-26 copies. Denis Copy alleges that since both commission rates (50% and 99%) were unqualified as to the monthly average number of copies to be applied to each rate, there is no ambiguity concerning what Denis Copy was bidding.

The protester further asserts that there were no qualifying words, no indefiniteness and no omissions in its bid. Denis Copy stresses that there is no ambiguity concerning whether the contracting officer should use the daily or monthly figures supplied by it in section eleven, because paragraph nineteen requires the use of the monthly average given by the offeror for evaluation purposes. The protester adds that the daily average was given for contract administration purposes only and was superfluous for evaluation purposes.

According to Denis Copy, by applying the language of the solicitation, the alleged ambiguity disappears. The protester insists that since there is only one reasonable interpretation of its bid price, its bid is responsive. Denis Copy adds that because inclusion of language immaterial to a bid evaluation does not render a bid nonresponsive and is not susceptible of causing a bid to become an alternate, it should be disregarded as a minor informality. Finally, the protester calculates that it offered higher monthly commission<sup>1/</sup> and that since the solicitation stated that award would be made to the offeror whose offer will give the Postal Service the highest monthly commission, it should receive award.

"The responsiveness of a bid is measured by whether it unequivocally offers to perform in total conformance with the IFB's terms and specifications for a fixed price." Bascon, Inc., P.S. Pro- test No. 87-91, November 13, 1987. The PCM specifically states that "[a]ny bid which fails to conform to the essential requirements of the invitation for bids shall be rejected. . . . [A] bid should be rejected when a bidder attempts to impose conditions which would modify requirements of the invitation for bids or limit his liability, since to allow the bidder to impose such conditions would be prejudicial to other bidders." PCM 2-404.2 (a) and (d).

Denis Copy's bid was nonresponsive, not only because it added the daily numbers next to its monthly commission rates,<sup>1/</sup> but because it offered two different monthly commission rates - one at 50% and one at 99%, in contravention to the solicitation requirement of bidding only one commission rate.<sup>1/</sup> The solicitation, by leaving only

<sup>3/</sup>By applying the evaluation formula to the monthly numbers supplied by Denis Copy, (50% x 254 x 480) + (99% x 254 x 265), a monthly commission of \$125.59 is obtained, compared to the \$111.75 bid by Pitney Bowes.

<sup>4/</sup>The bid thus creates an ambiguity notwithstanding the protester's earnest assurances to the contrary.

<sup>5/</sup>Arguably, the bid involves a third commission rate as well - no commission for any copies in excess of

one space for the entry of copier commission, clearly indicated that any responsive bid would have to contain only one commission. A similar provision was the subject of a protest in Equipment Marketing Consultants Corporation, P.S. Protest 90-07, April 17, 1990.<sup>1/</sup> In that case, a prospective offeror protested the requirement for a single percentage commission rate as ambiguously conflicting with paragraph 19 b of the solicitation and restricting competition. The protest was denied. We held that, given the clear limitation in block 11 of bids to a single commission percentage rate:

[I]t would be unreasonable for a bidder to rely on & 19 b while ignoring & 19 a. Therefore, since the solicitation is not susceptible to two reasonable interpretations, EMCC has failed to establish an ambiguity. Pitney Bowes, Inc., P.S. Protest No. 89-24, [June 20, 1989].

Similarly, here it is clear that the solicitation required bidders to bid only one commission rate for all copies vended. Denis Copy's use of variable commission rates constituted a material deviation from the requirements of the solicitation and rendered its bid nonresponsive. Compu-Copy, P.S. Protest No. 90-21, July 5, 1990. The contracting officer was correct in rejecting its bid.

The protest is denied.

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**[checked against original JLS 6/23/93]**

750 per month (27 per day or more).

<sup>6/</sup>The only difference between the solicitation language in Equipment Marketing and the present case is that the words "per copy" were located to the left of the single commission rate space in Equipment Marketing. This minor difference does not affect the result reached in this case.