

Protest of) Date: December 21, 1990
THERMICO, INC.)
Solicitation Nos. 169982-90-A-0038 and)
169982-90-A-0040) P.S. Protest No. 90-71

DECISION

Thermico, Inc. protests the contracting officer's decision to exclude it from the technical competitive range under two solicitations for asbestos abatement work. Thermico was rejected under each solicitation for failing to furnish an emergency action plan and evidence of its capability to obtain asbestos insurance.

Solicitation No. 169982-90-A-0038, for an Indefinite Quantity Contract for Asbestos Abatement Work in the State of Michigan, was advertised on June 20, 1990, by the Design and Construction Branch of the Chicago Facilities Service Center (FSC). The FSC issued Solicitation No. 169982-90-A-0040, for an Indefinite Quantity Contract for Asbestos Abatement Work in the Detroit, MI metropolitan area on the same day. Except for the geographical area served by each solicitation, the two solicitations are identical in all terms and respects. Thermico's offers were timely received by the deadline date, July 20, as were several other offers.

Paragraph M.2 of each solicitation, Contract Award and Proposal Evaluation, states, in part:

a. . . . The primary areas to be used in determining which proposal is most advantageous to the Postal Service are listed below in descending order of importance:

Past performance; project management; phasing and scheduling capabilities; emergency action plan; financial stability; insurance acceptability.

b. Cost/price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price.

Paragraph K.14, Notice of Preaward Survey, explains that the Postal Service may visit an offeror's facility or request further written information as part of the evaluation process. Attachment XVI to the Solicitation, Notice of Additional Qualification

Requirements, lists several items to be included with offers, including a copy of "emergency procedures." And Attachment XV, General Liability - Asbestos Abatement Insurance, states: "The bidder/contractor agrees, upon request, to submit copies of its insurance policies required by these specifications to the contracting officer for inspection."

The offer submitted by S.E.M.A.C. on each solicitation contained the lowest multiplier; Thermico made the second low offer. However, each contract was awarded to Brand Asbestos Control, Inc. (Brand), the third low offeror, because the contracting officer determined that S.E.M.A.C. and Thermico were "nonresponsive"^{1/} to certain of the evaluation factors specified in Paragraph M.2. Awards were made to Brand on October 4. Unsuccessful offerors were informed of the awards on the same date. Thermico protested the awards directly to the contracting officer by letter dated October 11; the contracting officer responded, denying the protest, by letter dated October 24. Thermico's further protest was timely received by this office on November 5.

In its protest, Thermico takes issue with several points made in the contracting officer's letters of October 24. First, Thermico contends the contracting officer made an improper analysis of the timeliness of its performance on prior postal contracts. As to the contracting officer's assertion that Thermico submitted no evidence of an emergency action plan or insurance acceptability, Thermico asserts such documents are in the Postal Service's possession since Thermico is currently under contract on another project. Thermico claims the contracting officer used prejudice and favoritism in awarding the contract to a larger firm. Finally, Thermico notes that Paragraph M.1 of the solicitation allows the Postal Service to waive informalities and minor irregularities in evaluating proposals.

In his November 14 statement to this office, the contracting officer references his October 24 letter to the protester, which explains the basis for the decision to exclude Thermico from the competitive range for award. That letter points out that the committee which evaluated Thermico's proposal deemed its past performance "marginal," finding its bulk sample reporting work to be unacceptable, but its asbestos abatement work to be acceptable. However, Thermico's offer was not rejected by the committee because of past performance, but rather because the offer failed to include evidence of an emergency action plan or insurance acceptability, as required in Paragraph M.2 of the solicitation.

The contracting officer's statement also references a "Memo to File" signed by the chairman of the evaluation committee on August 31. The memo notes that the chairman telephoned Thermico on August 15, requesting that information regarding an

^{1/}The contracting officer found Thermico "nonresponsive" to solicitation requirements because of its failure to provide evidence of an emergency action plan and insurance acceptability. The Procurement Manual (PM) explains that all postal procurements are conducted on a negotiated basis; thus, under PM 4.1.4, proposals are evaluated to determine technical acceptability or unacceptability. Reference to "responsiveness" or "nonresponsiveness," relevant to sealed bid procedures, is no longer appropriate. See TLT Construction Corp. Inc., P.S. Protest No. 89-75, January 18, 1990; CFI, P.S. Protest No. 88-82, February 17, 1989. A more accurate depiction of the contracting officer's decision would be that Thermico was deemed technically unacceptable.

emergency action plan and insurance acceptability "be submitted with utmost urgency."

The memo next notes that, as of August 31, the requested information had not been received; therefore, the committee recommended against awarding the contract to Thermico, as not being "in [the] best interest of the U.S.P.S."^{1/} The memo then states that, after reviewing the third low offer of Brand, which was fully "responsive" to all solicitation requirements, the committee recommended award to Brand.

In its November 27 response, Thermico first questions why no written request for its bonds and proof of insurance was ever made by the Postal Service. It also notes that it has received "excellent performance reviews and evaluations" on prior postal asbestos abatement contracts. Finally, Thermico asserts the evaluation committee's recommendation for award to Brand was made before Thermico was notified in writing of the need for the requested evaluation items.

By letter dated December 3, the contracting officer responded to Thermico's November 27 letter, noting that Thermico has only been given a "good," not an "excellent," performance review for past postal projects.

Discussion

The determination that Thermico's offer was technically unacceptable, and the evaluation on which it is based, will not be overturned by this office unless it is shown to be arbitrary, capricious, or the result of fraud or prejudice. Southern Air Transport, P.S. Protest No. 89-56, October 3, 1989; POVECO, Inc. et al., P.S. Protest No. 85-43, October 30, 1985. The protester has the burden to show arbitrary or capricious action by a contracting officer, whose decisions are afforded an initial presumption of correctness by this office. See Southern Air Transport, *supra*; Liberty Carton Company, P.S. Protest No. 85-35, July 30, 1985. Thermico has not met this burden, merely alleging prejudice and unfairness on the part of the contracting officer. A protester must prove allegations of bad faith or bias by "well-nigh irrefragable proof" of specific, malicious intent by a contracting officer to harm the protester; otherwise, we presume the contracting officer has acted in good faith. Colorado Piping and Mechanical, Inc., P.S. Protest No. 90-23, June 20, 1990; Graphic Technology, Inc., P.S. Protest No. 85-66, December 30, 1985.

Thermico's claim that its past performance has not been fairly depicted by the contracting officer is irrelevant. The contracting officer's statement clearly explains that Thermico was rejected because it failed to provide evidence of an emergency plan and insurance acceptability, not because of poor past performance.

Finally, there is no merit to Thermico's assertions that the contracting officer should have obtained the required information from other Postal Service records, or should have fixed a deadline for receipt of the information from the protester. The solicitation

^{2/}S.E.M.A.C. was also contacted by the evaluation committee for certain missing evaluation information, according to the "Memo to File." When S.E.M.A.C. failed to respond, it was also excluded from the competitive range.

gave all prospective offerors clear notice that information on an emergency action plan was to be part of an offeror's initial submission, and that the emergency plan, as well as insurance acceptability, would be among the primary areas used in evaluating proposals. Attachment XVI; Paragraph M.2. It is the offeror's responsibility to place before the contracting officer information necessary to permit evaluation of its proposal. See Huntington Laboratories Inc., P.S. Protest No. 89-46, November 15, 1989; H&B Telephone Systems, P.S. Protest No. 83-61, February 6, 1984. The contracting officer gave the protester an indication of willingness to consider late-received information;^{1/} however, nothing in the PM requires the contracting officer to set a new deadline or follow other formal procedures for the submission of portions of a proposal that were already subject to the requirement of timely receipt established by the solicitation itself. Thus, the contracting officer properly determined the protester technically unacceptable.

The protest is denied as to both solicitations.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[checked against original JLS 6/29/93]

^{3/}Although Thermico takes issue with the content of the telephone call requesting additional information, in disputes of fact, we adopt the contracting officer's version absent sufficient evidence to overcome the presumption of correctness which attaches to that position. Cohlmia Airline, Inc., P.S. Protest No. 87-118, April 13, 1988; Edsal Machine Products, Inc., P.S. Protest No. 85-84, January 29, 1986.