

Protest of) Date: September 16, 1991
CUMMINS-ALLISON CORPORATION)
Solicitation No. 104230-90-A-0167) P.S. Protest No. 91-18

ON RECONSIDERATION

Brandt, Inc. ("Brandt"), the awardee of a contract under Solicitation No. 104230-90-A-0167 ("-0167") to supply Type II and Type III coin-counting and sorting machines to the Postal Service, has timely requested reconsideration of our June 4, 1991, decision sustaining Cummins-Allison Corporation's ("Cummins") protest.

Cummins protested the exclusion of its proposal from the competitive range and the subsequent award to Brandt under solicitation -0167. The decision sustained Cummins' protest stating that Cummins' exclusion from the competitive range was arbitrary and unreasonable "[i]n the absence of any reasoned technical analysis of the severity of the [three] deficiencies identified in Cummins' proposal. . . ." Since Brandt had already begun contract performance, the decision did not direct termination of its contract. However, the contracting officer was directed "not to exercise any as yet unexercised options under the Brandt contract for Type II machines." In addition, the decision stated that the "Postal Service's ongoing need for [T]ype II machines beyond the quantities already committed to Brandt shall be the subject of a new solicitation, for which Cummins and all other offerors may propose."

In its request for reconsideration, Brandt asserts that the June 4th decision applies incorrect legal standards and is based upon facts which are either incorrect or not in the record. Brandt focuses its arguments upon the decision's discussion of Cummins' exclusion from the competitive range, arguing that the decision was an inappropriate de novo review of the contracting officer's determination, instead of a limited review of whether the contracting officer had a reasonable basis for his decision.

Brandt contends that the decision does not address the principle that contracting officers are given the discretion to make competitive range determinations. In addition, Brandt asserts that the burden of proof was improperly shifted from the protester to the contracting officer. Brandt contends that a contracting officer's decision is afforded a "presumption of correctness" that must be rebutted by the protester. Once the contracting officer determined that Cummins' proposal was not technically acceptable, Brandt asserts that Cummins had the burden of establishing that the determination lacked a rational basis.

Brandt faults the decision-making process for failing to investigate and clarify how many offerors made the competitive range. Further, Brandt asserts that instead of investigating, this office gave weight to Cummins' supposition that only one offeror,

Brandt, made the competitive range. Brandt finds in Procurement Manual ("PM") 4.5.7 i.^{1/} a duty to inquire about the validity of Cummins' supposition.

Finally, Brandt complains it was denied due process because the decision was made with ex parte information obtained from Cummins during a protest conference not attended by Brandt. Brandt requests that this office reconsider its original decision, affirm the contracting officer's exclusion of Cummins' proposal from the competitive range and reinstate the options originally awarded to Brandt.

Cummins submitted comments on Brandt's request. Cummins finds it ironic that Brandt discusses the need to give deference to the contracting officer's determination that Cummins' proposal was technically unacceptable, since Cummins had admitted that its proposal was technically unacceptable. As Cummins sees it, the issue was not its proposal's technical acceptability, but whether its unacceptable proposal had a reasonable chance of being selected for award following discussions, in which case, its proposal should have been included in the competitive range. Cummins asserts that the contracting officer made no decision on this issue, so there was no decision to which to defer. Cummins views the contracting officer's disregard for the PM's standards for competitive range determinations, itself, as clear evidence of arbitrary action.

Cummins states that all parties agreed that one of the technical matters for which its proposal was rejected - the length of the unit's power cord - was a minor issue. Cummins restates its previously expressed view that the two other technical issues raised by the contracting officer were also minor.

Cummins disagrees that this office was required to ask the contracting officer how many offerors were in the competitive range, pointing out that the contracting officer should have supplied the information in one of the many filings made in the course of the protest. Further, Cummins complains that Brandt's discussion of Cummins' purported ex parte disclosures obscures the fact, recited in the decision, that the information it furnished came from documents supplied by the contracting officer, which it notes were distributed to all participants in the protest, including Brandt. Finally, Cummins notes that under the PM's rules, which are different from those of the General Accounting Office, Brandt was properly excluded from Cummins' protest conference. Furthermore, Brandt had the opportunity for its own conference, yet did not take advantage of that opportunity.^{1/}

^{1/}The section provides, in pertinent part: "When it is necessary to obtain a clear understanding of the protest, the General Counsel may ask the contracting officer for additional information with respect to issues raised by the protest or by comments of other parties. Contracting officers must respond to such requests within ten working days."

^{2/} Our initial decision also involved Cummins' protest of the cancellation of Solicitation No. 104230-90-A-0168 ("-0168") for 160 Type I coin-counting and sorting machines. That protest was sustained, and the contracting officer was directed to reinstate the solicitation, modified "to the extent that changed needs resulting from the delay in the award of a contract under [that] solicitation, the substitution of Type II machines, or other circumstances have affected the number of Type I machines which comprise the Postal Service's actual current need." Brandt's request for reconsideration does not involve that solicitation.

Nevertheless, in commenting on the request for reconsideration, Cummins raises various points

The contracting officer submitted comments on Brandt's request and Cummins' comments, identifying factual errors asserted to have been contained in the original decision. These include the conclusion that only Brandt's proposal was found within the competitive range, when, instead, two offerors (Brandt and Scan Coin) were included within the competitive range, and that there was no technical analysis supporting the conclusion that Cummins' offer contained major technical problems. The contracting officer complains that, like Brandt, he was also excluded from the Cummins protest conference. The contracting officer requests that the order prohibiting the exercise of the Type II options be withdrawn.

Accompanying his comments, the contracting officer submitted an explanation of the procurement history for the Type II machines, the procurement specialist's account of the facts surrounding this protest and an explanation, by the requiring activity, of the technical evaluations of the five proposals received for the Type II machine. These additional materials indicate, inter alia, that two of the five proposals, including Cummins', were rated technically unacceptable on the basis of a paper review of their proposals. The contracting officer contends that this technical evaluation, although brief, was not absent a reasoned analysis. The production sample of a third offeror was tested, but found to be unacceptable due to serious problems of accuracy and reliability. After tests of the production samples of the other two offerors, Brandt and Scan Coin, revealed only "minor technical deficiencies," those two firms were selected for discussions and were permitted to submit best and final offers ("BAFOs") addressing the concerns.^{1/} After BAFOs, Brandt was awarded the Type II contract.

concerning that portion of the initial decision. While acknowledging that Brandt does not challenge that part of the decision, and urging that consideration of Brandt's request should not delay the reinstatement of solicitation -0168, Cummins states that it doubts that a new solicitation will be issued for the Type I machines and requests alternative relief in the form of proposal and protest costs. The contracting officer, on the other hand, advises that a field survey is currently being performed to assess the need for Type I machines, and that the reinstatement of solicitation-0168 will follow. The establishment of the current requirement for Type I machines is consistent with the decision.

Cummins' request for proposal and protest costs, including attorneys fees is denied because that argument was considered and responded to in footnote 9 of the original protest. "Reconsideration is not appropriate where the protester simply wishes us to draw from the argument and facts considered in the original protest decision conclusions different from those reached in that decision."Applied Copy Technology, Inc., On Reconsideration, P.S. Protest No. 89-62, November 7, 1989.

^{3/}Testing of the Brandt unit disclosed an electrical problem. As explained by the technical evaluator:

[The Brandt] unit was a combination of two isolated subsystems [a hopper and a counter]. . . . The Brandt machine passed the leakage current test . . . when each unit was plugged into a separate grounded electrical outlet. . . . [T]he counter contained two electrical receptacles on the rear. We connected the hopper's power cord into the counter and rechecked the leakage current. [In] one particular scenario . . . the leakage current rose slightly above the acceptable level. . . . Brandt offered a remedy for reducing the leakage current that involved replacing a power line filter. The new filter would allow both the counter and hopper to operate from one power cord. Substitution of the line filter was allowed because we had not foreseen a two unit configuration for a Type II CCS machine.

The Scan Coin unit was found to have an 8foot power cord instead of the required 10foot cord, and to lack an Operating and Maintenance Handbook.

The contracting officer states that a very thorough analysis was performed on Cummins' proposal, detailing the severity of its proposal deficiencies. The contracting officer explains how the evaluation criteria were assembled and why Cummins' proposal was adjudged technically unacceptable. The contracting officer refers to the technical report submitted by the requiring activity to detail why Cummins' deficiencies rendered its proposal unacceptable.^{4/}

The contracting officer avers that all offerors were treated equally and fairly. Finally, the contracting officer alleges, for the first time, that Cummins is not and was not an interested party with standing to protest since it did not submit the lowest price out of the five offerors.

Cummins has replied to the contracting officer's comments. It alleges that even though the contracting officer now admits that a competitive range determination was made, no evidence is produced and no facts are alleged to show that the award with discussions criteria were applied, as required. Cummins points out that the information supplied with the contracting officer's report reveals that Brandt's proposal also had deficiencies. Cummins argues that Brandt's deficiencies were at least as serious as those the contracting officer found in Cummins' proposal. Cummins points out that Brandt was allowed to correct its deficiencies by redesigning its product, a

^{4/}The technical analysis describes the seriousness of the Cummins' deficiencies:

The solicitation did not allow contractors to upgradeth[ei]r equipment when major technical deficiencies existed that disqualified them during the paper evaluation. . . .

Had we allowed [Cummins] to make machine modifications, another specification requirement would have been violated. Paragraph 1.1 [of the specification] specifies a commercial OFF-THE-SHELF item, not a modified commercial unit. [Cummins'] unit required one minor and two major changes to bring their product into compliance with [the specification].

The [Cummins] machine was deficient in that it had no mechanical or electrical safety interlock switches. . . . Adding an interlock switch to a production unit is a major change. It requires switch selection, mounting, connection, testing and documentation of the design change. . . . To PROTOTYPE this change, several days would be needed. Procuring parts and production engineering this change . . . add time. Any quick fix that incorporated interlocks into the design[] would be unacceptable. If [Cummins] improvised to meet this requirement, they would have undoubtedly [sic] violated the Materials and Workmanship requirements of . . . [paragraphs 3.16 through 3.16.8 of the specification.]

Another deficiency was the [Cummins] machine did not have the capability to set batch quantities between 5 and 9,999. . . . Extensive redesign and testing is required to modify the [Cummins] machine to include this feature. [Cummins'] machine design had no quick fix available to include the variable batching capability. It would involve the removal of the current switch and batching software and the development of an entirely new concept. Redesign efforts involve step-by-step plans to develop quality products.

* * *

[Cummins'] machine also had an eight foot power cord as opposed to the required 10 foot cord. Definitely a minor change, but still a change that required implementation. Even increasing the power cord's length must follow the same engineering change cycle. . . .

(Emphasis in original.)

fact which illustrates the favoritism practiced by the contracting officer.

Cummins disputes the contention that it was not an interested party. Cummins states that since it was improperly excluded from the competitive range, one can only guess whether it would have been the low offeror after it submitted a best and final offer.

Brandt has commented on the contracting officer's statement and Cummins' remarks. Brandt states that the contracting officer did make a determination that Cummins' proposal did not have a chance, either as submitted or as revised, of being selected for award. As evidence, Brandt points to the technical expert's report which states that the Cummins machine deficiencies would have required major redesign. Brandt argues that Cummins, along with this office, incorrectly placed the burden of proving that Cummins' proposal was technically unacceptable upon the contracting officer. Brandt recommends that this office vacate its original decision if the contracting officer's allegations concerning Cummins' standing are true.

The contracting officer submitted supplementary comments restating that a competitive range determination was made and that Cummins' proposal was found, after a careful, thorough paper evaluation, to be technically unacceptable. Discussions were held with the two remaining offerors and BAFOs were requested from them. Award was made to Brandt, who offered the best value to the Postal Service.

Discussion

PM 4.5.7 n. deals with requests for reconsideration. It provides, in part:

The protester, any interested party that submitted comments on the protest, or the contracting officer may request reconsideration of a protest decision. The request for reconsideration must contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not considered.

"Information not previously considered refers to that which 'a party believes may have been overlooked by our office or to information which a party did not have access to during the pendency of the original protest.'" International Business Machines Corporation, On Reconsideration, P.S. Protest No. 90-66, February 22, 1991; Spaw-Glass Construction, Inc., On Reconsideration, P.S. Protest No. 87-46, September 18, 1987; Fort Lincoln New Town Corporation, On Reconsideration, P.S. Protest No. 83-53, November 21, 1983. Thus, facts available during the course of the original protest that could have been raised at that time may not be raised for the first time during a request for reconsideration. Duane R. Engler, On Reconsideration, P.S. Protest No. 86-52, November 7, 1986.

Brandt contends that an error of law was made when this office failed to apply the "presumption of correctness" standard and instead made a de nova review of the contracting officer's decision to exclude Cummins. Brandt further believes that the error was compounded when information concerning the competitive range was not obtained. Instead, Brandt argues that based on Cummins' suggestion that only Brandt was in the competitive range, an unduly strict standard of review ("close scrutiny") was used.

Brandt is incorrect in reading PM 4.5.7 i. as requiring our inquiry into matters of information not disclosed by the record supplied by the contracting officer. To the contrary, the regulation is clearly permissive, since it provides that we "may ask the contracting officer for additional information." It is the contracting officer's obligation to provide the information necessary for the resolution of the protest. See PM 4.5.7 e.1. and 2.^{1/} In this case, the contracting officer did not furnish information concerning the competitive range, despite the fact that the issue of the competitive range was discussed by both the protester and the interested party, Brandt, in all their submissions. Despite the failure, which was specifically remarked on in the course of the protest and which is not explained in the contracting officer's current comments, neither Brandt nor Cummins requested that we obtain information on that point. Accordingly, the parties cannot now object to that omission.

Brandt is incorrect in concluding that we failed to give the contracting officer's competitive range determination appropriate deference (the "presumption of correctness") or that we applied an unduly strict standard ("close scrutiny") because the contracting officer failed to advise that there was more than one offeror in the competitive range. We restate, briefly, our previous analysis:

- Cummins' proposal was properly found to be technically unacceptable based on the deficiencies found in the paper review.
- Those deficiencies, however, did not preclude Cummins from being included within the competitive range if its unacceptable proposal "had a reasonable chance of being selected for award . . . as revised following discussions." PM 4.1.5 g.2.^{4/}

^{5/}Those sections describe the contents of the contracting officer's report:

1. The contracting officer's statement of the circumstances relevant to the protest, including specific responses to each allegation in the protest and the contracting officer's findings, determinations, and conclusions; and
2. Copies . . . of any documents relevant to the protest, including as many of the following as might be applicable:
 - (a) The solicitation. . . ;
 - (b) The proposal submitted by the protester and the proposal against which the protest is directed;
 - (c) The evaluation of proposals; and
 - (d) Any other documents, statements, or materials necessary to determine whether the protest is valid.

(Emphasis supplied.)

^{6/}As explained by the Comptroller General:

The purpose of a competitive range determination in a negotiated procurement is to select those offerors with which the agency will hold written or oral discussions. . . . The competitive range consists of all proposals that have a 'reasonable chance' of being selected for award, that is, it includes those proposals which are technically acceptable as submitted or which are reasonably

- In making the determination whether Cummins' proposal had that "reasonable chance," the contracting officer should consider both the severity of the deficiencies and the cost savings associated with the proposal. Dwight Foote, Inc., supra.
- The explanation offered by the contracting officer for the exclusion of Cummins' proposal from the competitive range did not include a reasoned analysis of its technical weaknesses, nor did it discuss those weaknesses in comparison to the cost benefits of Cummins' proposal.^{1/} Instead, it stood on Cummins' technical unacceptability as a complete basis for its exclusion from the competitive range.
- By reason of these omissions, the evaluation of Cummins' proposal was sufficiently deficient to lack a rational basis. See American President Lines, Ltd., Comp. Gen. Dec. B-236834.3, 90-2 CPD & 53, July 20, agency's evaluation decisions" and the protest is sustained).

Where, as here, the process of establishing the competitive range did not comport with the requirements of PM 4.1.5 g., there is nothing to which the presumption of correctness can attach, and this is the case whether the record is being strictly scrutinized or analyzed by some lesser standard. We find nothing in the submissions here to require reversal of our previous decision.

susceptible of being made acceptable through discussions. . . . In determining the competitive range, it is an acceptable practice to compare the evaluation scores and consider an offeror's relative standing among its competitors, and to exclude a proposal that is technically acceptable or capable of being made so when, relative to other acceptable offers, it is determined to have no reasonable chance of being selected for award. [Citations omitted and emphasis added.]

Delta Ventures, Comp. Gen. Dec. B-238655, 90-1 CPD & 588, June 25, 1990; see also Dwight Foote, Inc., P.S. Protest No. 87-90, September 28, 1987.

^{Z/}As noted at footnote 5 of the original decision, the technical analysis consisted simply of the identification of the three defects found in Cummins' proposal and the conclusion that the unit offered "is considered technically inadequate . . . and should be given no further consideration for contract award." Unlike the analysis now offered, the initial analysis characterized all three of the identified deficiencies as major, although it did not explain why. There was no analysis approaching the depth of that which has now been belatedly furnished, as set out in footnote 4 supra. While that material is not appropriate for our consideration, since it could have been supplied in the course of the original protest, Duwane R. Engler, supra, it is less clear than the contracting officer would have it that it demonstrates the equitable treatment of the offerors.

We note, for example, that while the contracting officer asserts that "any proposal not meeting all requirements set forth in [the specification] would be immediately disqualified and not considered for contract award," at least one offer with such a disqualifying feature, Scan Coin's noncompliance with the ten foot power cord requirement, was not disqualified, but instead was included in the competitive range. The evaluator's concern with the technical consequences of changing Cummins' unsatisfactorily short power cord was lacking as to Scan Coin's similar defect. Similarly, given the evaluator's concern about the various ramifications of the changes Cummins would have to make to resolve its other technical deficiencies, it seems strange that Brandt's redesign of its electrical system did not give rise to a similar concern.

Finally, we address the ex parte and standing arguments. Brandt alleges that it did not receive all the information in the record since it was not allowed to attend Cummins' protest conference, thereby abridging its constitutional rights. PM 4.5.7 j. states:

The protester, or any interested party, may request a conference with the General Counsel in connection with any protest under consideration by the General Counsel. . . . When more than one party to a protest requests a conference, separate conferences will be held.

This regulation specifically establishes that separate conferences will be held for the interested parties who request them. Brandt did not request its own conference or object, in the course of the protest, to its lack of opportunity to attend Cummins' conference. This matter is untimely raised now since Brandt had access to the information that it could not attend Cummins' conference during the pendency of the original protest. International Business Machines Corporation, On Reconsideration, supra. Similarly, the contracting officer was not disadvantaged by the fact that he was not afforded a conference; while the regulation does not expressly provide for such a conference, the contracting officer had a full opportunity to provide information in his initial statement on the protest and to comment on the submissions of the interested parties.

Brandt requests we vacate our original decision if the contracting officer's allegation concerning Cummins' lack of standing is true. The contracting officer's allegation is untimely raised, since it could have been raised in the course of the initial protest, and does not provide a basis for reconsideration. Duwane R. Engler, supra. In any event, although Cummins was initially the third low out of five offerors, the two offerors with prices below it were excluded from the competitive range, leaving Cummins as a lower offeror than Brandt, with standing to protest.

On reconsideration, we affirm our previous decision.

[Signed]

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[Compared to original 5/10/95 WJJ]