

Protest of)
ALABAMA METAL PRODUCTS, INC.) Date: May 7, 1991
Solicitation No. 059990-91-A-E006) P.S. Protest No. 91-20
)

DECISION

Alabama Metal Products, Inc. ("AMP"), through its agent, Federal Group, Inc.,^{1/} protests the award of two contracts under Solicitation No. 059990-91-A-E006, one for PSIN 124-D Carrier Case & Tables and PSIN 143-D Carrier Case Swing Wings to Dehler Manufacturing Company, Inc. ("Dehler"), and the other for PSIN 124V40 Carrier Case Vertical Dividers to Jebco, Inc. The solicitation was issued by the Western Procurement & Materiel Management Service Center, San Bruno, CA, on October 31, 1990 with an offer due date of November 30.

The solicitation sought offers for several items, including carrier case and table, carrier swing wing, and 7" vertical case dividers. Offerors could submit proposals for any or all of the items on the basis of either F.O.B. Origin or F.O.B. Destination delivery. Offers could also provide for the waiver of first article testing if they met certain conditions set forth in Section E.7 of the solicitation. The specifications required that "[a]ll surfaces must be made perfectly smooth by sandblast, filing, grinding, sandpapering, or polishing."

Section K.7 of the solicitation contemplated the possibility of multiple awards and stated that the proposals would be evaluated accordingly. Section M.3 stated that award would be made to the responsible offeror submitting the best combination of technical, business, and, if applicable, business/management proposal. Ability to adhere to the delivery schedule was the most important evaluation factor. Price, including transportation for the F.O.B. origin offers, was the second most important factor.

The contracting officer received eleven offers in response to the solicitation. After preaward surveys, Cooper Industries, the low offeror for the case divider, was

^{1/} Federal Group, Inc. is represented by Mr. Howard S Fincke, who signed AMP's proposal under this solicitation. Mr. Fincke is listed as AMP's authorized negotiator under section L of the solicitation. A letter from the president & CEO of AMP gives Mr. Fincke authorization to act on behalf of AMP with regard to this bid protest.

determined to be nonresponsible because its manufacturing process did not include a deburring procedure. Dehler had submitted offers for all items and although offering the second lowest price for the case divider, also was determined to be nonresponsible as to that item. The preaward survey team concluded that Dehler could not show how it planned to meet the delivery schedule, had no area set aside for divider production, and had no plan for deburring the dividers. Additionally, its paint line capacity was insufficient to accommodate the manufacture of the dividers, in addition to the carrier case and table and the swing wing. A second production plan submitted by Dehler was also found to be unacceptable, as it did not adequately assure the preaward survey team that Dehler could meet the delivery schedule, and still did not address the deburring issue. Dehler merely stated that the dies it would use would not require a deburring process. Jebco, the next low offeror for the case divider, subsequently was found to be responsible and was awarded a contract for that item on February 11.

Despite his findings with respect to the case divider, the contracting officer determined that Dehler was the low, responsible offeror for the carrier case and table and the swing wing. The preaward survey revealed that Dehler was set up and ready to produce these items and recently had successfully completed a contract for the swing wings. Award for these two items was made to it on February 19. AMP did not submit offers for any of the dividers and was the second low offeror on the swing wings.

The contracting officer initially notified the interested parties of the awards on February 20 and sent a second notice, correcting the unit price for the award to Jebco, on February 27. The total award amounts remained unchanged. AMP received the initial notice on February 25 and the corrected version on March 5. The protest was received by this office on March 13.

In its protest, AMP agrees that Dehler was appropriately found to be incapable of manufacturing all three items, but alleges that Dehler should not have been found to be nonresponsible for the manufacture of the case dividers. AMP contends that it knows of no sheet metal manufacturer that does not have dies that eliminate the deburring process. It suggests that the preaward survey team should have examined a sample of the product before eliminating Dehler for award of this item.

The protester would have the contracting officer award Dehler a contract for manufacturing the carrier case and tables and the case dividers, and find it nonresponsible for manufacturing the swing wings. With AMP thus becoming the second low offeror for the swing wings, it would be in line for award for that item. According to AMP, this would result in a savings of \$257,760.^{2/}

In his statement, the contracting officer reiterates the facts leading up to award. He states that the technical proposals were evaluated using a risk assessment formula and that, where appropriate, transportation costs were also evaluated. He states that he

^{2/} AMP does not explain why its suggestion would be more appropriate than the alternative of awarding Dehler contracts for the swing wings and the dividers, finding it nonresponsible for manufacturing the carrier case and table, and making award for that item to the next low offeror. This would appear to result in greater savings to the Postal Service. We presume AMP does not suggest this solution, as it was not the second low offeror for the carrier case and table.

made a best value determination, based on the technical proposal ratings and price. The contracting officer defends his determination of nonresponsibility with respect to Dehler's ability to manufacture the case divider. He states that Dehler's plan for producing the dividers was awkward and labor intensive, creating uncertainty as to whether it could attain the daily production necessary to meet the delivery schedule. He reiterates that the solicitation specifically calls for the deburring of the dividers and disagrees that all sheet metal manufacturers have readily available dies that eliminate the deburring process. He states that in a high production operation, burrs can be caused by dull dies and that, notwithstanding possible delays while dies are being sharpened, the Postal Service is not convinced that burrs would be eliminated with constant die sharpening. The contracting officer states that it is not common practice for the Postal Service to request samples of a product manufactured to Postal Service specifications prior to award. Additionally, one sample of a divider would not necessarily indicate a burr-free operation.

The contracting officer concludes that the finding of responsibility with respect to Dehler's ability to perform a contract for the carrier case and table and the swing wings was proper. Since Dehler's technical proposal and price were found to be most advantageous to the Postal Service pursuant to section M. 3 of the solicitation, award was properly made to Dehler.

Responding to the contracting officer's statement, AMP disagrees with the contracting officer's assessment of the daily production schedule required for manufacturing the case dividers, suggesting that its own calculations indicate that Dehler would be capable of producing the item in a timely manner. As to the deburring issue, AMP asserts that in the event that Dehler does not have its own tool and die shop, it should have access to tool and die servicing companies twelve hours a day, six days a week, presumably to take care of die sharpening requirements. In any event, AMP questions whether Jebco, the awardee, will "file, sandpaper or polish the edges" of six million case dividers.^{1/}

Several interested parties submitted comments on the protest and the contracting officer's statement. Cooper Industries, in comments dated March 20, asserts that had it been awarded the contract for the case dividers, it would have produced burr free parts. It alleges that prior to award, it submitted samples that met the specifications and that it would have used a flash process to deburr the parts, if necessary.^{2/} Jebco states in its comments that award was made to it according the solicitation requirements and that the protest is without merit.^{3/} In its comments, Dehler disagrees

^{3/} AMP also questions why preaward surveys were carried out with respect to some offerors and not others and why the technical evaluations were not attached to the contracting officer's statement.

^{4/} Although these comments have some of the indicia of a protest themselves, we do not treat them as such. Cooper intended to submit its comments in response to AMP's protest, rather than as a separate protest. Even if its comments did amount to a protest, it would be untimely. PM 4.5.4 d. Award to Jebco for the dividers was made on February 11, more than fifteen working days before the receipt of Cooper's comments.

^{5/} Jebco is primarily concerned with the appearance of a possible conflict of interest between AMP and Dehler arising from certain actions by AMP. However, nothing in the record indicates an actual conflict of interest, nor does it appear that any offeror has or will receive an unfair competitive advantage in this

with the assessment that it is incapable of manufacturing all three items at the same time. It nonetheless asserts that the Postal Service had the authority and the responsibility to make the award based on its best judgment and emphasizes that it is not protesting the award to Jebco.

Discussion

There is an initial matter of whether AMP's protest was timely filed. The Postal Service Procurement Manual ("PM") states that protests filed after award "must be received not later than ten working days after the information on which they are based is known or should have been known, whichever is earlier; provided that no protest will be considered if received more than 15 working days after award of the contract in question." PM 4.5.4 d. Untimely protests cannot be considered on their merits. The requirement that a protest be timely filed is jurisdictional and cannot be waived. Pitney Bowes, Inc., P.S. Protest No. 89-86, December 20, 1989. Award to Dehler, which formed the basis of AMP's protest, was made on February 19. AMP initially received notice of the awards to Dehler and Jebco on February 25. Although it did not receive the corrected version of the award notice until March 5, the minor correction was not the basis for the protest. This office received AMP's protest on March 13, twelve days after the basis for the protest was known or should have been known and sixteen days after award of the contract. Therefore, the protest is untimely.

There is an additional threshold issue of whether AMP has standing to protest either the award to Jebco for the case dividers, or the finding of nonresponsibility with respect to Dehler's offer for the same item. The PM vests this office with jurisdiction to decide protests where the protester is an "interested party." PM 4.5.2. An interested party has been held to mean a party that would be eligible for award if its protest were upheld. Dataview Electronic Systems, Inc., P.S. Protest No. 90-9, March 29, 1990; York International Corp., P.S. Protest No. 89-77, January 19, 1990; Strapex Corp., P.S. Protest No. 85-33, July 11, 1985. AMP did not submit an offer for the case dividers and would not be eligible for award for that item if the protest were sustained. Therefore, AMP does not have standing to protest the award for the case dividers.

This protest may not be decided on the merits. Thus, while our views on the issues raised are not dispositive, for purposes of clarification, we briefly address them. See American Telephone Distributors, Inc., P.S. Protest No. 87-117, February 23, 1988 (and cited cases). Although erroneously couched in terms of a complaint against the contracting officer's determination of Dehler's nonresponsibility with respect to the manufacture of case dividers, AMP is actually challenging the contracting officer's affirmative determination of responsibility with respect to Dehler's ability to manufacture swing wings, as a finding in AMP's favor would make it eligible for award.^{1/} It is well

procurement. As such, these matters have no bearing on this decision.

^{1/} In any event, with respect to the finding that Dehler was nonresponsible for manufacturing the dividers, "we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information." Craft Products Company, P.S. Protest No. 80-41, February 9, 1981; see also, Amigo Supply Company, P.S. Protest No. 89-80, November 9, 1989. In addition to the fact that Dehler itself is not protesting the

settled that:

An affirmative determination of responsibility is a matter within the broad discretion of the contracting officer and is not subject to being overturned by this office in the course of a protest absent fraud, abuse of discretion, or failure to apply definitive responsibility criteria.

Gage Constructors, P.S. Protest No. 87-11, July 13, 1987; Georgia Power Company, P.S. Protest No. 90-01, February 14, 1990. AMP has not alleged fraud and such an allegation is not supported by the record. Nor did the contracting officer abuse his discretion, as his determination that Dehler was fully capable and prepared to manufacture both the carrier case and table and the swing wings was supported by the preaward survey results. Although AMP may disagree with the contracting officer's findings, this does not establish abuse of discretion. Cf. Novadyne Computer Systems, Inc., P.S. Protest No. 90-49, November 9, 1990. Finally, there were no definitive responsibility criteria to be applied here.¹⁷

This protest is dismissed.

[Signed]

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

[Compared to original 5/16/95 WJJ]

determination, the preaward survey provided substantial information to support a finding of nonresponsibility here.

¹⁷ With respect to the incidental concerns AMP raises in its comments, the solicitation stated at section K.14 that the Postal Service "may contact prospective contractors to determine their capabilities" and "may visit a prospective contractor's facilities . . ." (emphasis added). Only when available information does not provide an adequate basis for determining responsibility or nonresponsibility must a contracting officer conduct a preaward survey. PM 3.3.1 e.5.