

Protest of) Date: September 25, 1991
DAWSON CONSTRUCTION CO., INC.)
Solicitation No. 1JAN43) P.S. Protest No. 91-47

DECISION

Dawson Construction Company, Inc. ("Dawson"), has protested the award of a contract to William S. Miko, Jr., and Dennis H. Miko ("Miko") for construction and lease of a new postal facility in Bridgeport, CT ("Barnum Station"). Dawson asserts that its proposal should have received award; that sealed bids would be a better method of contracting for the Postal Service; and that the contracting officer improperly rejected the protester's attempt to amend its best and final offer.

Solicitation No. 1JAN43 was issued by the Facilities Service Center in Windsor, CT on January 15, 1991, with a proposal due date of February 22. The solicitation sought offers to construct and lease a new postal facility on property to be purchased from the Postal Service.

The solicitation package included an Agreement to Lease form on which offerors were to submit their proposals. The solicitation required offers to include rental amounts for the basic twenty-year term, and for two five-year renewal terms. It also required offerors to indicate the prices at which the Postal Service could purchase the leased premises, 1) at the end of the basic lease term; 2) at the end of the first renewal option; and 3) at the end of the second renewal option.

Paragraph 7 of the solicitation provided:

Any award made under this solicitation will be made to the responsible offeror whose proposal for the cost, location, overall project economics, and other factors is most advantageous to the Postal Service. The Postal Service reserves the right to negotiate with any and all offerors as to any or all rental rates, or other terms and conditions of the proposal; to secure proposals in addition to those offered initially in response to this solicitation, without waiving its right to accept the proposal as submitted; or to reject any and all proposals. This is not a sealed solicitation and proposals will not be publicly opened. Information as to the number of proposals received or the identity of the offerors will not be made available to anyone whose official duties at the Postal Service do not require such knowledge.

The solicitation did not state that prices for renewal or purchase options would be considered in evaluating the proposals. No additional evaluation factors were listed.

Paragraph 15 of the solicitation read as follows:

Any proposal or modification of a proposal received after February 22, 1991 will not be considered unless it is received before the award is made and consideration of the proposal is determined by the contracting officer to be in the best interests of the Postal Service.

Five amendments were issued, ultimately extending the date for receipt of proposals to April 4. Seven proposals were received; four were determined to be technically acceptable, of which one was withdrawn prior to award. Discussions were held with each of the three remaining offerors, with a best and final offer ("BAFO") due date set individually for each, leading to receipt of BAFO's over approximately a three-week period. Dawson's BAFO was received on April 26, with a basic lease term rental rate ("base term rate") per annum of \$224,191. Fanchar Properties' ("Fanchar") BAFO was received May 6, with an annual base term rate of \$219,000. Miko's BAFO was received on May 15, with a base term rate of \$220,000 per year.

On May 21, Dawson transmitted a facsimile to the contracting officer amending its April 26 BAFO base term rate to \$216,191. On that same date, the real estate specialist returned the offer to Dawson, along with a letter explaining that its amended offer could not be considered, as recommendations were being prepared for the contracting officer to make an award.^{1/} The specialist telephoned Dawson on May 22 and again explained the reasons for the rejection.^{1/}

The Postal Service evaluated and ranked the technically acceptable proposals. Miko's offer was rated most favorable, as indicated in the comments of the evaluator (the real estate specialist), because it had completed two projects for the Postal Service during the past seven years in a very professional manner at near budget cost. Miko was a Bridgeport company, and was therefore perceived as having an advantage in working with local officials and subcontractors. Fanchar's offer was ranked second. The comments of the evaluator mentioned that Fanchar operates about 1,000,000 square feet of space, leased to many tenants, including a lease to the Postal Service.^{1/} Dawson's proposal was ranked third. The evaluator noted that Dawson has built more federally-owned properties than any of the other offerors. The only reason the evaluator did not rank Dawson's offer number one was because it had not built in the northeast, and presumably would not be as able to deal with the city of Bridgeport and local subcontractors as Miko. The evaluator concluded that, should award to Miko and

^{1/} The letter stated, "We will give full consideration to your bid [sic] dated April 26, 1991."

^{2/} The protester acknowledges receiving this telephone call from the specialist.

^{3/} There is nothing in the record indicating whether or not Fanchar has performed work in the Bridgeport area. We do note that Fanchar's home office is in Stamford, CT. Dawson is headquartered in Gadsden, AL.

Fanchar fall through, the evaluator would feel comfortable awarding the contract to Dawson.

Following a full review of the proposals in the competitive range, as well as consideration of the specialist's recommendations, the contracting officer selected the Miko offer for award.

Award was made to Miko on July 16. The unsuccessful offerors were notified of the award by letter from the contracting officer dated July 18.^{4/} A formal letter of acceptance was sent to Miko on July 24. Dawson protested by letter dated July 18 sent to the General Accounting Office. It was referred to this office and received on July 25.

In its protest, Dawson alleges that Miko was not the low responsive bidder^{4/} and that Miko did not offer the best renewal options nor the best purchase options.^{4/} Dawson contends that it should have received the contract. Dawson also protests the method of procurement used by the Postal Service, stating that a sealed bid method would be more competitive. Finally, Dawson challenges the contracting officer's rejection of its amended offer submitted on May 21. Dawson states that, to its knowledge, the contract had not been officially awarded as of the date of its protest. Dawson requests that this office review the offers submitted on this project and direct the contracting officer to award the contract to Dawson. Dawson requests that contract award be postponed until completion of the review by this office.^{4/}

The contracting officer submitted a report responding to the protest. The contracting officer states that this was not a sealed bid offering, and the request for proposals contained no requirement that award be made to the low-cost proposal. Award was to be made to the "responsible offeror whose proposal for the cost, location, overall

^{4/} The materials submitted with the contracting officer's report include an additional letter to Dawson from the specialist, also dated July 18, which informed Dawson that Miko had received the contract, and the reasons Miko was selected:

The contract was awarded to the offeror because of his past performance in the city of Bridgeport, Connecticut; the competitive offer; and assurances that he will be able to finance the project.

^{5/} "Responsiveness" and "nonresponsiveness," like "bid" and "bidder" are terms relevant to sealed-bid solicitations, and are not properly used in evaluating proposals under Postal Service negotiated procurements. TLT Construction Corp., Inc., P.S. Protest No. 89-75, January 18, 1990.

^{6/} In its protest, Dawson mentions that the Postal Service intends to award the contract to a "local firm," and that the "local firm" is not the low responsive bidder. The issue of using the location of the offeror's company as an evaluation criterion was fleshed out only in the protestor's comments responding to the contracting officer's report.

^{7/} Although award was made before this protest was filed, Miko agreed to a temporary, no-cost suspension for a period of 60 calendar days, beginning on August 8, during which this protest could be resolved.

project economics, and other factors is most advantageous to the Postal Service." The four technically acceptable proposals received were all considered to be favorable and very close in cost. Although Miko's proposal contained only the second lowest base term rate, the contracting officer determined that award to Miko was in the best interest of the Postal Service as set forth in the solicitation. Any contention by the protester that award should have gone to the low offeror, the contracting officer argues, is moot, since Dawson's base term rate was third lowest from the four proposals in the competitive range. Dawson has not alleged any basis upon which to dislodge Fanchar, who proposed the lowest base term rate, from its number two position in the evaluation. Explaining his decision to award the contract to Miko, the contracting officer states that the Miko proposal included a favorable price for the twenty-year base term as well as reasonable and balanced renewal and purchase options. The contracting officer also considered favorable: Miko's history of quality work performed in the region for the Postal Service; previous projects completed in a timely fashion within budget; and Miko's being based in Bridgeport--due to the necessity of obtaining specific permits cited in Solicitation Amendment No. 4, securing routine construction permits, and coordinating with local officials.

To the contention that the Miko offer did not contain the best options for renewal and purchase, the contracting officer responds that primary consideration was given to the twenty-year base term rate. Although the future options were required by the solicitation, real estate professionals in the appraisal industry are reluctant to forecast values beyond twenty years. Similarly the Postal Service does not forecast operational requirements beyond twenty years. At the same time, the contracting officer characterizes as unbalanced the protester's renewal and purchase options. The great disparity between low-dollar purchase options compared to the base term rate and renewal options calls into question the future ability of the protester to perform. According to the contracting officer, it is well understood in Federal procurement that, with unbalanced offers, it is reasonably doubtful that the government will ultimately obtain the lowest cost. Accordingly, the contracting officer exercised discretion in discounting the renewal and purchase options in evaluating the proposals.

Regarding negotiated versus sealed bid procurement, the contracting officer responds that this issue is untimely protested pursuant to PM 4.5.4 b, as the protester had notice of the type of procurement to be used as of the date of issuance of the solicitation.

Lastly, the contracting officer contends that Dawson's protest of the rejection of its amended offer is also untimely. The protester was aware as of May 22 that its amended offer had been rejected, but raised the issue only in its July 18 protest. The contracting officer recommends that the protest be denied and/or dismissed as appropriate.

The protester responded to the statements of the contracting officer. Explaining why it didn't protest the rejection of its amended offer immediately, Dawson explains that it was its understanding from the conversation with the specialist on May 22 that Dawson was the offeror being considered for award and that the amended offer did not need to be considered during the award process. Even if its amended offer was properly rejected, Dawson asserts that its original April 26 BAFO is the low technically acceptable offer on this contract.

Dawson appears now to retract its challenge of the method of procurement utilized by the Postal Service, stating that its protest is based solely on the solicitation package for this project. The protester argues that the contracting officer should have considered the renewal and purchase options in evaluating the proposals, since the solicitation specifically requested such options be included in the proposal. Dawson asserts that, normally, at least the first five-year renewal option will be considered in evaluating proposals. Dawson denies that its proposal was unbalanced.

In reviewing Miko's background, Dawson can detect no indication that Miko has ever performed a project as large as the Barnum Station Facility. Dawson believes that Miko received award only because of its local status, and notes that the solicitation did not cite as a necessary qualification that the contractor be a local company. Dawson affirms that, because of its years of experience, it is able to procure permits and licenses in cities throughout the country without major problems. Furthermore, Dawson is financially stable and able to finance this project with its own funds. The protester notes that Dawson has built and owns numerous postal facilities throughout the country, and claims that Dawson has performed more work for the Postal Service than any contractor in its part of the country. Dawson again requests that this office compel the contracting officer to award the contract to Dawson.

Fanchar, the second ranked offeror, has indicated its interest in this protest in a letter received by this office August 12. While stating that it "would like to join the protest of the Dawson Construction as an interested party," it also asserts its own qualifications to perform the contract at issue.

DISCUSSION

The contracting officer has raised the issue of "timeliness" with regard to two bases of protest alleged by Dawson. We cannot consider the merits of any issue that has been untimely raised. Franklin E. Skepton, P.S. Protest No. 88-59, October 3, 1988; Coopers & Lybrand, P.S. Protest No. 89-91, March 21, 1990.

Procurement Manual 4.5.4 b directs that protests "based upon alleged deficiencies in a solicitation that are apparent before the date set for the receipt of proposals must be received by the date and time set for the receipt of proposals." The use of negotiated procurement procedures in soliciting this contract was apparent on the face of the solicitation, and Dawson's failure to raise this issue before offers were due renders this part of its protest untimely.^{1/}

Dawson's protest of the rejection of its amended offer is also untimely. Procurement Manual 4.5.4 d requires that in cases other than protests to the solicitation itself, ". . . protests 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. . . ." The protester was aware of this basis for protest on May 22, when it was notified by the

^{1/} If the protester wishes to challenge the Postal Service's use of negotiated procurement generally, such a challenge is beyond the scope of this office to consider. TLT Construction Corp., Inc., P.S. Protest No. 89-75, January 18, 1990.

specialist that the amended offer would not be considered.^{1/} Dawson did not file a protest within the required time. The reason asserted by Dawson for late filing is unavailing, as "[o]ur protest regulations require the prompt raising of protests and do not allow an offeror to sit quietly with a possible basis for a protest to see how he fares in the competition, raising the protest only if he does not succeed." Donald Clark Associates, Inc., P.S. Protest No. 91-34, September 4, 1991.

Dawson's allegation that the evaluation of proposals was improper was timely raised. Dawson asserts that the contracting officer's decision to award the contract to Miko appears to have hinged on Miko's being a local company.^{1/}

The Procurement Manual states that:

Awards made as a result of solicitations for space must be made to the responsible offeror whose proposal is most advantageous to the Postal Service, cost and other evaluation factors set out in the solicitation considered.

PM 11.4.1 d (emphasis added).

That Miko was a local contractor was a substantial factor in its receiving award. This was improper, since the solicitation made no mention of this factor. While procurement officials have broad latitude in determining the applicable evaluation factors, the evaluation and award factors listed in the solicitation must fairly advise prospective offerors of the basis on which their offers will be considered for award. International Technology Corporation, P.S. Protest No. 89-21, May 8, 1989. Here, for example, had Dawson been aware of the concern about obtaining local permits and working with local contractors, it may have been able to submit information in its proposal demonstrating that it would not have any problem working in that locale. The evaluation was thus in violation of procurement regulations.^{1/} Computer Systems &

^{9/} We note that the rationale for rejection of the amended offer--that it was too late in the process to consider an amendment--is questionable, given that award was made approximately two months later, since PM 4.1.3 d.2 allows late modification of proposals unless such consideration would jeopardize, or give the appearance of jeopardizing, the integrity of the competitive process.

^{10/} We briefly address whether Dawson has standing to challenge anything other than the evaluation of its own proposal. In order to bring a protest, a protester must be an "interested party." PM 4.5.2. A protester is an interested party if the protester would be eligible to receive contract award if its protest were upheld. Canteen Service, Inc., P.S. Protest No. 90-68, November 15, 1990; Compu-Copy, P.S. Protest No. 90-21, July 5, 1990; Strapex Corporation, P.S. Protest No. 85-33, July 11, 1985. Although Dawson's proposal was ranked third in the evaluation, the evaluation materials provide no information as to why Dawson was ranked behind Fanchar, since low price was not the dispositive factor. Furthermore, the specialist's narrative evaluation comments indicate that, but for the fact that Dawson previously had not built in the northeast, Dawson would have ranked first. Since it appears that Dawson's proposal could have been ranked at least second, Dawson has standing to protest the evaluation of the Miko proposal.

^{11/} We note that our analysis is not inconsistent with the more detailed Handbook RE-1 Realty

Resources, Inc., P.S. Protest No. 86-4, March 27, 1986.

We now must determine the effect of the use of the locale criterion on the evaluation process. The only other relevant evaluation factors specified in the solicitation were "cost" and "overall project economics"^{12/} (which also boils down to a cost-related analysis). In evaluating the cost of each proposal, it is appropriate to consider only the base term rate, since the solicitation did not state that the options would be considered. F.R. and Lee Mackercher, P.S. Protest No. 85-45, September 17, 1985 (unless the solicitation indicates that options will be evaluated, "it is improper to evaluate options in determining the low bid"); 52 Comp. Gen. 886, 897 (1973); 52 Comp. Gen. 614, 619 (1973).^{13/}

As between Miko and Dawson, Miko was rightfully awarded the contract, since Miko's proposed base term rate is lower than Dawson's. Accordingly, although there were improprieties in the evaluation process, the award to Miko was justified by the evaluation criteria set out in the solicitation, and insofar as the protest challenges this award it is denied.

The protest is dismissed in part and denied in part.

[Signed Norman DMenegat for]

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

[Compared to original 5/17/95 WJJ]

Acquisition and Management, section 363, Evaluation.

^{12/} "Location" [of the site, we presume] was mentioned, but is inapplicable since offerors were allowed to make offers only for the site already selected and owned by the Postal Service.

^{13/} We need not decide whether Dawson's proposed base term rate together with its options was balanced or not.