

Protest of) Date: December 16, 1991
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WEBER'S WHITE TRUCKS, INC.)
)
Solicitation No. 104230-91-A-0075) P.S. Protest No. 91-63

DECISION

Weber's White Trucks, Inc. ("Weber"), protests award of a contract for production of truck tractors to Mack Trucks, Inc. ("Mack"). Weber claims the contracting officer violated applicable regulations in evaluating offers received and in awarding the contract to Mack.

On April 23, 1991, the Operational Equipment Procurement Division, Office of Procurement, Headquarters, issued Solicitation No. 104230-91-A-0075 for the production of truck tractors. The original offer due date of May 23 was extended to June 10. Four proposals were received. Mack's proposal stated a total price of \$17,455,455, underneath which was the notation: "W/ FET IF APPLICABLE \$19,455,150."^{1/} The other three offers each contained a single price proposal: Weber offered \$17,815,455, followed by offers of \$20,516,805 and \$27,018,189. None of these offers mentioned FET.

Because he believed FET was not applicable to the contract, and because Mack's proposal specifically included a price without FET, the contracting officer crossed out Mack's higher price and, on July 11, wrote to Mack, awarding it the contract based on its lower, non-FET price of \$17,455,455, stating, "We are pleased to provide you with your copy of the contract . . . which has been awarded to your firm under the subject solicitation." On that same date, he notified the three unsuccessful offerors of the award and Mack's winning price. The contracting officer did not conduct discussions to ascertain whether the other offerors' price proposals included FET; in fact, there was no contact between the contracting officer and any of the offerors from the time offers were received until the letters of July 11 were sent.

Mack contacted the contracting officer on July 29, seeking an official FET exemption certification. The contracting officer responded by sending Mack a copy of Section 4051(a)(2) of the Tax Code (Title 26, United States Code), which he believed explained that this procurement was FET-exempt. Mack then wrote the contracting officer on

^{1/} "FET" refers to federal excise tax.

August 14, expressing its view that the transaction would not be exempt from FET unless the Internal Revenue Service issued a Certificate of Exemption, and complaining of the purported acceptance, without Mack's knowledge, of Mack's price which excluded FET.

On August 23, the contracting officer issued Amendment A03 to all original offerors, rescinding the earlier award to Mack and reopening the solicitation:

1. Contrary to advice in our letter of 7/11/91, no binding contract with Mack Trucks has come into existence.
2. You may advise the USPS of the continuing validity of your previous offer by signing and returning this amendment, or
3. You may advise the USPS that your offer is withdrawn.

Amendment A03 also contained standard language which stated:

If, by virtue of this amendment, you desire to change an offer already submitted, such change may be made by telegram or letter provided such telegram or letter makes reference to the solicitation and amendment numbers, and is received prior to the date and time specified.

However, a separate August 23 cover letter to Mack, accompanying Mack's copy of Amendment A03, stated:

By the issuance of Amendment A03 to all offerors, copy enclosed, the Postal Service is reopening solicitation 104230-91-A-0075. Offerors may 1) advise the Postal Service of the continuing validity of their previous offers or 2) advise that those offers are withdrawn. So as to avoid the possibility of an auction, however, offerors may not revise or amend their previous offers, and no new request for best and final offers is made.

All four offerors responded to Amendment A03 by the August 29 due date. Mack telefaxed the contracting officer a signed copy of A03, along with a letter advising of "the continuing validity of Mack's previous offer of \$17,455,455 inclusive of all applicable taxes, including Federal Excise Tax." The other three offerors signed and returned A03, thereby extending their previous offers.

The contracting officer, after determining that only Mack and Weber were in the competitive range, sought Best and Final Offers ("BAFO") from those two offerors on September 3. On September 5, both offerors submitted BAFOs (Mack: \$17,455,455; Weber: \$17,989,575).^{1/} The contracting officer determined that it would be in the best interest of the Postal Service to award the contract to Mack.

By letter to the contracting officer dated September 6, Weber protested any potential

^{2/} Thus, Mack's price, inclusive of FET, now matched its original, non-FET proposal; Weber's price was slightly higher than its original proposal of \$17,815,455.

award to Mack, and urged that it be awarded the contract. On September 13, with the approval of the Assistant Postmaster General, the contracting officer awarded the contract to Mack. On that same date, the contracting officer wrote to Weber, stating Mack's winning price and explaining that selection for "award was based primarily on pricing, with due consideration given to contractor capabilities." Concurrent with award, the contracting officer issued Modification M01, a stop work order.

In its initial protest letter of September 6, Weber asserts that Mack's original bid was ambiguous because it listed two prices, one with FET and one without FET, contrary to "past rulings" of the Postal Service. Weber also criticizes the contracting officer's "faulty" evaluation of Mack's bid, stating that the contracting officer should have consulted other postal divisions to determine whether FET applied to this solicitation. The protester concludes that, had the contracting officer correctly determined that FET was applicable, "Mack's price for the tractors plus Mack's price for FET would have been higher than our price." Weber seeks award of the contract as the firm submitting the "low responsive and responsible offer."

In his report on this protest dated September 23, the contracting officer admits that he erroneously believed FET was not applicable to this procurement; thus, the contract was originally awarded to Mack, and then the award was rescinded. Amendment A03 was issued to revive the solicitation and determine the continued interest of the offerors.

After receiving the responses to Amendment 03, the contracting officer advises that he sought BAFOs from Mack and Weber, because:

Since we had exposed Mack's offer, and in order to avoid any semblance of an auction, it was determined that Best and Final Offers (BAFO) were required.

Finally, the contracting officer asserts that the protester's use of the terms "bid" and "responsive" is not appropriate for this solicitation. The report concludes by admitting the initial error but asserting that the reinstatement of the solicitation and the process that followed resulted in a fair and reasonable procurement.

In its October 10 comments on the contracting officer's report, Weber summarizes its position by asserting that the contracting officer acted arbitrarily and capriciously in three ways: 1) by accepting Mack's original, two-price proposal rather than rejecting it as nonresponsive; 2) by altering Mack's proposal without consulting Mack, and without holding discussions with other offerors concerning the question of FET's applicability; and 3) by accepting Mack's response to Amendment A03. Weber requests that Mack's award be rescinded and award made to Weber. As a postscript, Weber claims it can prove that the Postal Service knew that FET was applicable to the procurement.

Weber criticizes the contracting officer for failing to hold discussions with Mack or the other offerors when contemplating Mack's FET and non-FET price proposals, and asserts that the contracting officer "unilaterally altered" Mack's proposal in violation of procurement procedures. Weber claims that Amendment A03 specifically directed, "[s]o as to avoid the possibility of an auction, however, offerors may not or amend their

previous offers."^{1/} Weber then notes that Mack did not heed this directive, offering \$17,455,455 in response to A03 as now including FET. Rather than rejecting Mack's offer as nonresponsive, since it did more than extend its previous offer, the contracting officer, according to Weber, improperly sought BAFOs from Mack and Weber. Weber claims this action by the contracting officer "lacked support in substance and procedure[.]" and denies that Mack's offer had been exposed or that any danger of an auction existed. Weber claims it responded to the BAFO request by "lowering" its offer to \$17,989,575.

By memorandum dated October 24, the contracting officer filed rebuttal comments to Weber's October 10 letter. After again explaining that the protester's use of the terms "bid" and "responsive" is inappropriate under a negotiated procurement, the contracting officer admits that, when Mack's two-price proposal was first received, discussions should have been held for clarity's sake. The contracting officer discusses the Amendment A03 process after the initial award to Mack was rescinded, noting that A03 did not forbid offerors from revising or amending their original proposals, as was claimed by Weber. Instead, the contracting officer notes that only in his October 23 letter to Mack did such prohibitive language occur. The contracting officer also points out that standard language found in A03 allows offerors to amend their offers.

Thus, the contracting officer asserts that, contrary to Weber's allegations, Mack acted properly and permissibly in altering its original offer when it responded to A03. The contracting officer also notes that Weber, in response to the subsequent BAFO request, raised its offer to \$17,989,575, contrary to the protester's claims. Finally, the contracting officer asserts that the BAFO process provided Weber a new opportunity to compete with Mack, and in fact gave Weber an advantage over Mack, since Weber was now aware of Mack's previous offer amount.

By letter dated November 6, Weber filed further comments in this matter. Weber restates some of its prior arguments, and asserts that Mack's offer was never "exposed" to other offerors since the earlier, purported award to Mack was invalid and later rescinded. Finally, Weber makes note of previous postal procurements for similar items, which clearly required inclusion of FET in proposals, as proof that the contracting officer must have been aware of FET's applicability to this solicitation.

Discussion

The protester is correct in criticizing the contracting officer's treatment of Mack's initial proposal. Besides his error concerning the applicability of FET (which he later admitted), the contracting officer initially awarded Mack the contract based on an ambiguous two-price proposal.^{1/} Given the uncertainty of Mack's proposal, the

^{3/} As noted above, the quoted language appeared in the cover letter transmitting A03 to Mack. It did not appear in the amendment.

^{4/} We note the protester's incorrect terminology in describing proposals. "Responsiveness" and

contracting officer would have been justified in conducting discussions:

Whenever appropriate, written or oral discussions may be held with offerors to resolve uncertainties in their proposals, to give them an opportunity to correct deficiencies, and to give them an opportunity to revise their proposals. If discussions are held with one offeror, discussions must be held with all offerors in the competitive range.

PM 4.1.5 g.1. Rejection of a nonconforming proposal under the negotiated procurement rules applicable to this solicitation is not mandatory. See PM 4.1.5 g.

The contracting officer's initial award to Mack also represented a violation of the solicitation's terms, which requested a single price that included "all applicable Federal, State, and local taxes and duties." See Solicitation Clause H.17, Federal, State, and Local Taxes (Clause 7-6) (October 1987). The government may not award a contract to an offeror whose proposal does not conform to mandatory requirements in a procurement without notifying all offerors of changes in the solicitation requirements. See Falcon Systems, Inc., et al., P.S. Protest Nos. 86-31, 86-33, 86-35, July 25, 1986; CDI Corp., Comp. Gen. Dec. B-209723, May 10, 1983, 83-1 CPD &496. See also Southern California Copico, Inc., P.S. Protest No. 83-76, March 5, 1984. By accepting Mack's non-FET price without informing other offerors, the contracting officer failed to treat all offerors equally. See POVECO, Inc., P.S. Protest No. 85-9, May 21, 1985; Handling Systems, Inc., P.S. Protest No. 89-70, December 19, 1989.

Once the contracting officer realized his error concerning FET, he cancelled the award to Mack. At this point, the contracting officer had two possible courses of action: cancel the solicitation, or reopen the solicitation. The protester does not challenge the contracting officer's decision to proceed with the solicitation; Weber contends it should have received the award without further competition from Mack.

The contracting officer alleges that he wished to avoid any semblance of an auction once the solicitation was reopened, since Mack's price had been revealed to all offerors when the initial award was announced.^{1/} Thus, specific instructions typed on

"nonresponsiveness," relevant to earlier sealed-bid procedures, are inappropriate terms to describe present negotiated procurements under the Procurement Manual (PM). See PM 4.1.4. Under negotiated procurements, offers and proposals are evaluated to determine "technical acceptability" or "unacceptability." See TLT Construction Corp., Inc., P.S. Protest No. 89-75, January 18, 1990; CFI, P.S. Protest No. 88-82, February 17, 1989.

^{5/} The PM precludes auction techniques:

The contracting officer must ensure that no one involved in the discussions engages in:

...

(3) Auction techniques, such as:

the Amendment A03^{4/} form gave the offerors two options: extend the previous offer or withdraw that offer. However, and as pointed out by the contracting officer, standard language on the amendment form indicated an offeror could amend a previously submitted offer. As if this state of affairs were not confusing enough, the contracting officer sent a separate letter to Mack, accompanying A03, which specifically prohibited offerors from revising or amending previous offers. Incredibly, the contracting officer now asserts that Mack reacted to A03 in an entirely proper manner by amending its previous offer,^{4/} and that any of the offerors could have done the same in reliance on the general language on the amendment form. For reasons explained below, we do not need to decide whether Mack's response to A03 was proper, but the contracting officer's supposition that A03 contemplated such amendment flies in the face of the explicit statement in the letter to Mack that the contrary was intended.

We need not accept the contracting officer's arguments on the issue of Mack's response to Amendment A03, however, as Weber's arguments are also defective on this point. First, the second award to Mack was not made on the basis of its response to A03 (which incorrectly asserted that its earlier offer was unchanged), but rather on the basis of the price submitted as its BAFO. Second, the PM does not require rejection of late modifications to proposals. Section 4.1.3 d.2. of the PM allows consideration of proposal modifications received after the date and time set for receipt of proposals if the proposal offers a significant cost, quality, or technical benefit. Thus, whether A03 allowed modification is irrelevant, as the PM allows consideration of such a late modification when the contracting officer determines it would be to the advantage of the Postal Service to do so. See PM Provision A-4, included in the solicitation as Provision J.5, which provides:

Any proposal or modification of a proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and:

- (i) Indicating to an offeror a cost or price that it must meet to obtain further consideration; or
- (ii) Furnishing information about other offerors' prices or advising an offeror of its price standing relative to another offeror

PM 4.1.5 g.3(b). See Neil Gardis and Associates P.S. Protest No. 89-44, September 15, 1989; F.R. and Lee Mackercher, On Reconsideration, P.S. Protest No. 85-45, October 7, 1985.

^{6/} It is by no means clear that a request for offerors to extend their offers is an amendment to the solicitation. An amendment contemplates a change in "matters such as quantity, specifications, delivery schedule, or date for receipt of proposals, or to clarify or correct ambiguities or defects." PM 4.1.2 i.1. "Amendment" A03 conveyed no change to the solicitation, and only asked offerors if their offers would remain open.

^{7/} That Mack did, in fact, amend its offer in responding to A03 is clear from the record before us. Mack's \$17,455,455 price proposal in its initial offer did not include FET; the same \$17,455,455 price it offered after A03 did include FET.

- a. It is the only proposal received; or
- b. Consideration of the proposal is determined by the contracting officer to be in the Postal Service's interest.

Thus, the contracting officer was under no obligation to eliminate Mack from the competition for the price modification submitted with its response to A03.

Once the request for extensions of offers was issued as an amendment which included directly conflicting advice and one offeror had submitted a modified offer, discussions with the offerors in the competitive range were in order. See PM 4.1.5 g.1. Requesting BAFOs where there is no particular need to discuss issues with an offeror satisfies the requirement that discussions be held with all offerors in the competitive range. Input Output Computer Services, Inc., P.S. Protest No. 86-28, July 2, 1986; Information Management, Inc., Comp. Gen. Dec. B-212358, January 17, 1984, 84-1 CPD & 76. Thus, allowing Mack and Weber to submit BAFOs removed any prejudice to Weber resulting from Mack's earlier modification of its proposal.

When the contracting officer asked for BAFOs from Weber and Mack, any advantage resulting from disclosure of Mack's first proposal would have been Weber's, since Weber was being given the opportunity to revise its bid with knowledge of the previous price offered by Mack. Although this scenario did create the danger of an impermissible auction, no such auction occurred;^{4/} Weber raised its price instead of lowering it below Mack's price. An offeror who makes a final offer after being told of another offeror's price has not been harmed, and thus cannot complain that an auction violation has occurred. ARA Services, Inc., P.S. Protest No. 76-53, October 15, 1976. While the contracting officer committed severe errors in administering this solicitation, Weber has suffered no real harm or prejudice as a result.

The protest is denied.

[Signed]

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[Compared to original 5/17/95 WJJ]

^{4/} Weber does not argue that an impermissible auction occurred by the release of Mack's original, non-FET price when the first contract award was announced. As Weber raised its price for the BAFO, it does not appear to have been influenced, and it is clear that the price was disclosed because of the erroneous award to Mack and not in discussions in an effort to cause Weber to lower its price. See PM 4.1.5 g.3.(b)(3)(ii). In any event, any argument of such influence by Weber would be untimely. A protest complaining of an auction resulting from the continuation of the solicitation after the disclosure of Mack's price must have been raised before the BAFOs were due to be timely. See generally PM 4.5.4 b. and c.; cf. TLT Construction Corp., Inc., supra; Leder, Inc., P.S. Protest No. 88-62, October 25, 1988.