

Protest of) Date: December 10, 1991
C.J.M. CONSTRUCTION, INC.)
Solicitation No. 549986-91-A-0038) P.S. Protest No. 91-74

DECISION

C.J.M. Construction, Inc. ("CJM"), has timely protested the award of a contract for construction of a new postal facility in Fairbanks, AK ("North Pole Branch"), to Watterson Construction Company ("Watterson"). CJM contends that it would have received contract award, but for the contracting officer's mistake in overlooking a price modification, timely submitted by facsimile, making CJM the low offeror.

Solicitation No. 549986-91-A-0038 was issued by the Seattle Facilities Service Office ("FSO") on July 29, 1991, with a proposal due date of August 28. The cover page of the solicitation, paragraph 6, advised offerors that:

Wherever in the provisions the words "telegraphic notice (including Mailgram)" are used, it is understood that FAX is also included. Any notice, via FAX, must be signed and must be followed by the original signed written notice. The Seattle Facilities Service Office FAX number is 206/656-4359.

Section J.2, "Submission of Proposals (Provision A-2)," subsection b., stated:

[P]roposals may be modified by telegraphic notice (including Mailgram) if that notice is received by the time specified for receipt of proposals.

See also Section J.3, "Modification or Withdrawal of Proposals," subsection a.

The solicitation indicated a subcontracting goal of 10% for Minority Business Enterprise ("MBE") participation. Section H.29, "Small, Minority-Owned, and Woman-Owned Business Subcontracting Requirements," subsection b., provided:

The offeror must submit and negotiate a subcontracting plan that separately addresses subcontracting with small, minority-owned, and woman-owned businesses. This plan will be included in and made a part of the contract. The subcontracting plan must be negotiated within the time specified by the contracting officer. Failure to submit and negotiate

the subcontracting plan will make the offeror ineligible for award.

Section J.9, "Submission of Proposals (Provision OA-15)," subsection e., instructed:

Names of principal subcontractors and supplies [sic] must be listed on [the] format identified as 'Subcontractor Information Input Form.' Each subcontractor or supplier listed as a Minority Business Enterprise must complete and sign a PS Form 7319-C (See Section I), to be forwarded through you to this office, Attention: Facilities Contract Specialist. NOTE: If this information is unavailable prior to award, you must provide your subcontracting plan, which includes estimated value to be subcontracted, as well as a separate amount planned to be subcontracted to MBEs. The Subcontractor Information Input Form may be used to submit your subcontracting plan.

Section K.12, "Notice of Small, Minority-Owned, and Woman-Owned Business Subcontracting Requirements," provided, "Offerors must submit with their proposals the subcontracting plan required by the clause entitled Small, Minority-Owned, and Woman-Owned Business Subcontracting Requirements."

Section M.2, "Contract Award and Proposal Evaluation," stated:

a. Award will be made to the responsible offeror who submits the best combination of Technical Proposal, Business Proposal (cost/price), Business/Management Proposal (if applicable), and other factors considered. The primary areas to be used in determining which proposal is most advantageous to the Postal Service are listed below:

1. Ability to obtain bonding as required.
2. Prequalified contractor.

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.

c. Subcontracting plans, if required, will be reviewed for acceptability in the types and amounts of subcontracts to small, minority-owned, and woman-owned business concerns, if this solicitation results in a contract for more than \$1 million (\$500,000 for construction), the otherwise successful offeror must have an acceptable Small, Minority-owned, and Woman-owned Business Subcontracting Plan to receive award of the contract.

One amendment was issued, extending the time for receipt of proposals until September 4 at 4:00 p.m. Seven prequalified contractors submitted proposals by the due date. The project manager and the facilities contract specialist opened all proposals on September 5, and noted that four of the proposals had been modified by facsimile. CJM's proposal, not one of those four, was the highest priced offer. The contracting officer decided to award to Watterson, the apparent low offeror. By letter dated September 5, the contracting officer notified Watterson of the Postal Service's intent to award it the contract. Award was made and a notice to proceed was sent to Watterson on September 20, as were letters of notification to the unsuccessful

offerors.

On September 24, CJM telephoned the contracting officer to request a debriefing^{1/} and informed him that CJM's proposal had been the subject of a faxed amendment and, as amended, was \$40,000 lower than the awardee's price. The contracting officer referred CJM to the project manager. The project manager reviewed the file and found the faxed modification, as well as the original of the modification which had been sent by certified mail September 9 and date stamped "received" September 10.^{1/}

In a letter dated September 27, referring to the misplaced modification, the contracting officer acknowledged the error and apologized to CJM for "this regretful oversight," but informed CJM that under the circumstances it was in the best interest of the Postal Service to proceed with the award to Watterson.

On September 30, CJM filed this protest, which was received by this office on October 1. Also on September 30, the project manager telephoned Watterson, instructing it to stop work on the project and notifying Watterson that, because of a mistake during the evaluation of proposals, the contracting officer had decided that Watterson's contract would be terminated for the convenience of the Postal Service and the contract would be awarded to the actual low offeror, CJM.^{1/} He then contacted CJM and relayed the same message, indicating that CJM would receive two letters from the contracting officer. The first (apparently a reference to the September 27 letter) would be a letter of apology which could be disregarded because the second letter would award the contract to CJM.

On October 1, CJM telephoned the contracting officer, who confirmed the content of the project manager's telephone call of September 30. CJM suggested that, in the best interest of the Postal Service, it would be prudent for the Postal Service to instruct Watterson to complete the excavation and back fill as soon as possible. CJM feared that winter freeze could occur and would damage the site before CJM could execute the paperwork and mobilize its work force to finish the site work. The contracting officer agreed with CJM and so notified Watterson. CJM confirmed this conversation in a letter to the project manager dated October 2.

Thereafter, however, the contracting officer apparently had second thoughts about the

^{1/} It appears a debriefing was not held.

^{2/} CJM has provided evidence that the faxed amendment was received by the FSO before the deadline on September 4, which is not disputed by the contracting officer. The FSO's "FACS TRANSMISSION LOG" shows an incoming facsimile message received from CJM on September 4. Watterson transmitted its proposed subcontracting plan by facsimile approximately one half hour after CJM's facsimile was transmitted. Watterson's facsimile message, unlike CJM's, was date stamped "received" and was incorporated into its proposal.

^{3/} By letter dated October 1, Watterson notified the contracting officer it protested any award of the contract to CJM. But award to CJM did not materialize. Watterson's protest, therefore, is moot, as the contracting officer left the award undisturbed. See Hardigg Industries, Inc. & Zero Corporation, P.S. Protest No. 86-69, October 10, 1986.

propriety of the course of action which had been outlined to CJM and Watterson. The contracting officer's October 2 letter to Watterson did not terminate its contract, but only issued a stop work order (excepting the completion of rough grading site work) to be effective during resolution of CJM's protest. The promised second letter awarding the contract to CJM was not sent.

CJM protests the award of the contract to Watterson, contending that CJM is the proper responsive and responsible low bidder on the solicitation who should receive award. CJM states that it was authorized under the solicitation to modify its proposal by facsimile, and that it followed the procedures outlined in the solicitation in doing so, following up with the original, which was date stamped "received" five days later by the FSO. CJM contends that under the solicitation and the Postal Service's procurement manual, the award to Watterson was improper, as CJM's proposal constituted the most advantageous offer. CJM argues that the FSO breached its implied contract to consider all offers fairly. CJM requests that the award to Watterson be set aside and the award properly made to the protester.

Watterson also submitted comments on the protest. Based upon erroneous information initially provided by the FSO about the protest, Watterson believed that the original follow-up letter to CJM's faxed modification of its proposal did not arrive at the FSO until approximately September 25 or 26, and it argues that this was not a reasonable time within which to have sent the original follow-up letter, so that the modification, therefore, should be disregarded. Watterson also argues that the solicitation clearly stated that the contract would not necessarily be awarded to the offeror submitting the lowest price. Watterson states further that CJM had at least one qualification in its proposal, having to do with the metal roofing, which may or may not have been in the best interest of the Postal Service. Watterson had no qualifications in its proposal.^{4/} It contends that, for these reasons, the award to Watterson is justified.

The contracting officer's statement, signed by the general manager of the FSO, says that the FSO has been unable to determine where CJM's facsimile modification was misfiled at the time proposals were opened. The general manager contends, however, that CJM's proposal was incomplete because it did not include required subcontractor information, and, therefore, its proposal was not in compliance with the requirements of the solicitation. For this reason, he believes that the award to Watterson should be upheld.

The general manager points to the solicitation's goal of 10% Minority Business Enterprise participation for subcontracts. The general manager argues that the solicitation specifically required all offerors to submit information regarding all proposed subcontractors with the proposal, and if such information was unavailable, to submit a proposed subcontracting plan, including the information regarding MBE participation. The general manager cites Section H.29 b., quoted above, as the provision which disqualifies CJM for award. CJM failed to submit either the subcontractor information or a subcontracting plan. It did include in its proposal the blank form on which the subcontracting plan was to be furnished.

^{4/} This line of argument has not been pursued further by Watterson, nor has the contracting officer commented on any lack of technical qualification in CJM's proposal.

Additionally, the general manager contends that the award to Watterson should be upheld because much of the preparatory work of scheduling and ordering of materials has been started and that it is possible that a reversal of the award to Watterson may cause delays and additional cost to the Postal Service.

CJM submitted rebuttal comments. Initially, CJM questions whether the general manager of the FSO is a contracting officer, such that he may sign the contracting officer's statement.¹⁴ The protester also expresses surprise at the general manager's contention that CJM is not entitled to award because it did not submit a subcontracting plan, since at no previous time has this alleged deficiency been mentioned. CJM contends that, had the contracting officer not overlooked the timely modification of CJM's proposal, making it the low offeror, CJM surely would have been given the opportunity to submit the one page attachment containing its subcontracting information during discussions. It claims that all of this could have been accomplished between the due date for receipt of proposals and September 20, the contract award date, saving the Postal Service \$40,000 in the process.

The protester argues that the absence of a subcontracting plan does not preclude the Postal Service from holding discussions with CJM. Section H.29 b. expressly states that the offeror "must submit and negotiate a subcontracting plan." Negotiations are contemplated in any event. The protester argues that this is precisely the type of paperwork deficiency that discussions are designed to correct, so that the Postal Service truly may select the best offer. CJM points out that the contracting officer's statement failed to address the real issue in this protest, whether discussions would have been held with CJM to correct its deficiency had its modification not been overlooked, and instead the statement hides behind the argument that CJM was not eligible for award. The protester argues that the procurement was fatally flawed, and that CJM was deprived of its ability to participate fairly in this procurement.

Watterson also submitted comments in response to the contracting officer's statement. Watterson points out that an offeror's subcontracting plan is listed as one of the factors which will be evaluated in determining award in Section M of the solicitation. Watterson argues that it is apparent that this is a requirement in order to be a responsive bidder.¹⁵ CJM therefore should be considered nonresponsive for failure to comply with requirements for minority subcontracting.

DISCUSSION

It is clear from the record that the only factor considered in selecting the successful offeror was price. Watterson was selected the day after proposals were due as the apparent low offeror. The proposal evaluation sheet listed only each offeror's price and its comparison with the Postal Service's estimate. Subcontracting and bond

¹⁴ A different contracting officer was responsible for the solicitation.

¹⁵ "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.

information, which were listed in the solicitation as evaluation factors, were in fact only evaluated with regard to responsibility.^{1/}

Based upon our examination of the record, there is no reason to conclude that CJM's offer would not have been considered the successful offer, if its modification had not been mishandled after its timely receipt. Had its offer been identified as the successful offer, CJM would then have been required to demonstrate its responsibility, provide the appropriate bonds and meet the subcontracting requirements, before it could have been awarded the contract.

The general manager^{1/} asserts that CJM, although the low offeror, is ineligible for award because it did not include a subcontracting plan with its initial proposal. That is incorrect. Although Section K.12 instructed offerors to submit their MBE subcontracting plan with their proposals, Sections H.29 and J.9 indicated that this information must be negotiated prior to award of the contract. Section M.2 c. stated that, "the otherwise successful offeror must have an acceptable Small, Minority-owned, and Woman-owned Business Subcontracting Plan to receive award of the contract." These statements, read together, indicate that subcontracting information is relevant only to award. Notwithstanding the contracting officer's arguments to the contrary, the solicitation did not put offerors on notice that the subcontracting information must be provided in order to demonstrate technical acceptability. We conclude, therefore, that ability to comply with the subcontracting requirements of the solicitation was a matter of responsibility, and such information may be obtained after proposals are due and before award. See Comcorps, P.S. Protest No. 82-48, September 15, 1982.^{1/}

^{2/} The documentation concerning the evaluation of proposals suggests that no more than a paper review of the offers' contents was conducted. There are four sheets. The first lists each offer in relationship to the "Government Estimate," noting that Watterson's offer was 9.4% below the estimate, and includes the project manager's handwritten recommendation: "Based on the USPS estimate I recommend the contract award be made to Watterson Construction." The second is an abstract of offers which sets out initial offers and the deductions made by the offerors' amendments. The third is a determination of Watterson's responsibility which restates Watterson's offer; summarizes the project manager's price analysis; and notes that "the prospective contractor has a record of satisfactory performance under previous contracts, as determined by the Prequalification Evaluation Committee," that it is not listed as a debarred, suspended, or ineligible contractor and that its surety is listed on Department of Labor^{3/}, Treasury] Circular 570 with an adequate underwriting limitation; and concludes that the offeror is a responsible contractor eligible for the award. The final sheet is a checklist of the offeror's qualifications which notes that Watterson was prequalified, was not on the debarred list, had provided the necessary proposal bond, had furnished two signed copies of its proposal, had acknowledged the solicitation amendment, had completed its certifications and representations, and had submitted a subcontracting plan, in which no more than 88% of the proposal price would be subcontracted, and 10% of the subcontracted amount would be awarded to minority business enterprises.

^{3/} The protester questions whether the FSO general manager may sign the contracting officer's statement. As the general manager has contracting officer authority, there was no impropriety in his signing the contracting officer's statement.

^{4/} James E. McFadden, Inc., P.S. Protest 75-81, November 26, 1975, where a subcontracting list was held to be a material requirement of the solicitation which had to be submitted with initial bids, is distinguishable. In McFadden, the subcontracting list was required in order to prevent bid shopping after

Since in this case both the initial facsimile modification and the follow-up original were found in the contract file, the situation presented is different from the more common scenario, where a proposal is received late by contracting officials solely due to mishandling by Government employees, usually employees handling incoming mail. The contracting officer, in such a case, has discretion to consider the proposal, if it is in the best interest of the Postal Service. PM 4.1.3 d.2.

Postal Service decisions have held that an amendment acknowledgment timely received but misplaced by contracting officials was properly considered in awarding a contract under a sealed bid solicitation. Dars Publishers and Manufacturers Representatives, P.S. Protest No. 87-06, May 11, 1987:

The contracting officer's consideration of Dars' bid was proper because the [amendment] acknowledgment was received at the depository specified in the solicitation prior to the closing date for receipt of offers, and was mishandled after receipt.

We have also held that a letter from an offeror, following up a site visit by contracting officials and received in the designated post office box prior to the date best and final offers were due but not picked up by contracting officials until several days later, should have been considered in evaluating the offeror for award. International Jet Aviation Services, P.S. Protest No. 87-36, September 1, 1987.^{10/}

The principle to be derived from these decisions is that information submitted by an offeror which will have bearing on the outcome of proposal evaluations, and which was timely received by the designated office, must, as a matter of fairness, receive consideration in evaluating the proposals for award. Accordingly, we sustain CJM's protest.

We are still faced, though, with the question of remedy. Since award has already been made in this case, relief may include an order to terminate for the convenience of the Postal Service the improperly awarded contract. TPI International Airways, Inc., P.S. Protest No. 87-40, October 30, 1987. The factors which have been regularly used in determining whether to order termination were stated in TPI International Airways, Inc., *supra*, citing Inforex Corporation, et al., P.S. Protest No. 78-12, June 26, 1978:

Whether to require termination action in a given case depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful

selection for award. Here, a subcontracting plan was requested. Section J.9 clearly contemplates actual subcontractors may not be known until after award, and Section M.2 c. speaks of an "otherwise successful offeror," indicating that the plan is not a matter of technical acceptability.

^{10/} In that case, however, we accepted the contracting officer's determination that the letter, if considered, would not have affected the evaluation of the offeror's proposal. No determination has been made by the contracting officer in the present case that consideration of CJM's faxed modification would not have affected the evaluation of its proposal.

offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the requirement, and the impact of termination on the accomplishment of the agency's mission.
Honeywell Information Systems, Inc., Comp. Gen Dec. B-186313 (April 13, 1977), 77-1 CPD & 256, p. 7.

In weighing these factors, we direct the contracting officer to consider CJM's modified proposal for award. If CJM's amended offer was most advantageous to the Postal Service and CJM is otherwise eligible for award, Watterson's contract should be terminated for convenience and the remainder of the work awarded to CJM. While the good faith of the parties is not questioned, the integrity of the procurement process is compromised by the mystery surrounding the circumstances of the misplaced modification. This must be corrected.

Factors which would mitigate against terminating the improperly awarded contract--such as cost to the Postal Service and impairment of accomplishment of its mission, urgency of the requirement, and the amount of work already completed on the contract--all weigh in favor of termination of the contract. We have been informed that all work has stopped on this contract until Spring, because the ground has frozen. The contract is to be completed 365 days from Notice to Proceed. Watterson has performed, at most, a few weeks of excavation. The general manager indicated that there may be additional costs to the Postal Service if Watterson's contract were terminated. However, we can foresee no great expense to the Postal Service which might outweigh the factors dictating that relief be provided. (To the extent that materials already ordered become the Postal Service's property, by reason of the termination, they may be made available to CJM.)

In evaluating CJM's amended proposal for award, the contracting officer may not take into consideration the reasonable costs associated with a termination for convenience of Watterson's contract. The evaluation should be conducted based only upon CJM's proposal and how its proposal compares to the other proposals received; in other words, as if the contract had not yet been awarded. While CJM's amended proposal price will be the basis of the evaluation, it may be the subject of post-award negotiation with CJM, reflecting the work which has already been performed and materials acquired pursuant to Watterson's termination.

The protest is sustained and the contracting officer directed to act in accordance with this decision.

[Signed]

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

[Compared to original 5/17/95 WJJ]