

Protest of) Date: December 3, 1991
OWENS ROOFING INC.)
Solicitation No. 363192-91-A-0031) P.S. Protest No. 91-75

Decision

Owens Roofing Inc. ("Owens") timely protests the award of a contract to replace a roof to any other offeror than itself. Owens argues that the "equal" products it offered in its proposal complied with the specification requirements, making it the low, technically acceptable offeror which should have received award.^{1/}

Solicitation No. 363192-91-A-0031 was issued by the Support Services Office, Greensboro, NC, on July 31, 1991, seeking offers for roof replacement at the Main Post Office, Scotland Neck, NC. Simplified purchasing procedures authorized by Procurement Manual ("PM") 4.2.2 were followed. Proposals were due August 15.

The solicitation required a total price for the cost of replacing the roof, and a unit price per square foot and per linear foot, respectively, for replacing the deck and the wood blocking.

The solicitation permitted submission of "equal" products where brand names were specified. Provision 2-4, Brand Name or Equal, found in Part 3.16 of the solicitation, provided:

- a. One or more items called for by this solicitation have been identified in the Schedule by a brand-name-or-equal product description. Proposals offering equal products will be considered for award if these products are clearly identified and are determined by the Postal Service to be equal in all material respects to the brand-name products referenced in the solicitation.
- b. Unless the offeror clearly indicates in the proposal that the proposal is for an equal product, the proposal will be considered as offering a brand-name product referenced in the solicitation.

^{1/} Owens protested, on September 23, the "intention" of the contracting officer to award the contract to another offeror. The contract had already been awarded to Waters Brothers Contractors, Inc., on September 12. It was determined by the contracting officer that performance on the contract would continue despite the protest.

c. If the offeror proposes to furnish an equal product, the brand name and model or catalog number, if any, of the product to be furnished must be inserted in the space provided in the solicitation. The evaluation of proposals and the determination as to equality of the product offered will be based on information furnished by the offeror or identified in the proposal, as well as other information reasonably available to the purchasing activity. The purchasing activity is not responsible for locating or obtaining any information not identified in the proposal and reasonably available to the purchasing activity. Accordingly, to ensure that sufficient information is available, the offeror must furnish as a part of the proposal -

1. All descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to establish exactly what the offeror proposes to furnish and to determine whether the product offered meets the requirements of the solicitation; or

2. Specific references to information previously furnished or to information otherwise available to the purchasing activity to permit a determination as to equality of the product offered.

Provision OA-1, Information on "Equal" Products, found in Part 3.11 of the solicitation, instructed:

Offerors proposing to furnish an "equal" product, in accordance with the Brand Name or Equal provision of this solicitation, must provide the following information for the offered product:

- a. Item Number:
- b. Manufacturer's Name:
- c. Address:
- d. Product Name (if any):
- e. Product Make, Model, or Catalog Description:

Provision 1.08, Substitutions, of attachment 2, Specifications, stated:

- A. When a particular make or trade name is specified, it shall be indicative of standard required. Bidders proposing substitutes shall submit [the] following 7 days prior to bid date to Owner:
 1. Written application with explanation of why it should be considered.
 2. Accredited testing laboratory certificate comparing substitute's physical/performance attributes to those specified.
- B. Only substitutes approved in writing by USPS prior to scheduled bid date will be considered.

- C. Only substitutes approved in writing by USPS prior to scheduled bid date will be considered. [sic]
- D. Notification of approvals will be mailed at least three (3) days before bid opening.
- E. USPS reserves right to be final authority on acceptance or rejection of any substitute.

On August 21, the contracting officer issued an amendment extending the proposal due date until September 6.^{4/} Nine proposals in all were received. Although Owens' proposal initially appeared to be the low offer, it ultimately was rejected as technically unacceptable^{4/} because it proposed "equal" products, and Owens had not submitted the required data in advance as required by the solicitation to allow the Postal Service to determine whether the offered products were equal.^{4/}

Owens' protest was received by the contracting officer on September 23, and by this office on October 7. In its protest, Owens contends that its bid was the low bid and was acceptable and responsive.^{4/} Owens explains that it telephoned the project manager at the telephone number listed in the solicitation on August 8, the day Owens received the solicitation, and requested clarification of the provisions regarding submission of "equal" and "substitute" products. Owens asserts it was concerned with the requirement that certain data on the "equal" or "substitute" products had to be submitted seven days prior to the due date for proposals, since Owens only received the solicitation on what would have been the final date for submission of such data. Owens asserts that the project manager instructed Owens to submit a proposal anyhow, since Owens had not received the specifications in time to submit descriptive and comparative data seven days in advance and since "equal" products were allowed. Owens contends that in reliance on these instructions, it visited the site and submitted its proposal by the August 15 deadline. Owens argues that since it offered an "equal" product as permitted by the specifications, and in accordance with the project manager's instructions, it met the specifications and is technically acceptable. Owens also points out that it meets all the evaluation criteria specified in the solicitation.

^{2/} One other amendment had been issued earlier, which did not affect the date proposals were due.

^{3/} The contracting officer's statement and documents in the file state that Owens was found "nonresponsive." However, it is clear from the documents that Owens' proposal was rejected as technically unacceptable. "A proposal that does not meet the solicitation requirements is technically unacceptable." Lista International Corporation, P.S. Protest No. 90-47, September 11, 1990, quoting T&S Products, P.S. Protest No. 90-12, May 30, 1990.

^{4/} Owens' proposal included the following information on the "equal" products it intended to use: the solicitation provisions identifying the products for which it proposed substitutes; the manufacturer's name and address; and the product names. Owens listed eight products which it intended to substitute.

^{5/} Owens uses the terms "bid" and "bidder," and "responsiveness" throughout its protest. Such terms are relevant only to sealed bid solicitations. In simplified purchasing procurements, "offerors" submit "proposals" or "quotations," which are determined to be either "technically acceptable" or "unacceptable." PM 4.2.3.

The contracting officer submitted a report in response to this protest. She states that, although the project manager did advise Owens that it could submit its offer, he did not approve Owens' "equal" products. According to the contracting officer, the project manager advised Owens that, should Owens choose to submit a proposal, it would be reviewed and a decision made when the proposals were opened as to whether the product was acceptable as an equal. The Postal Service, not the offeror, determines, by review of the requested data on the "equal" or "substitute" products, whether a proposed product meets the specifications, the contracting officer argues. In response to the implicit contention in Owens' protest that it did not have sufficient time to submit the required data, the contracting officer states that Owens should have had ample time once the proposal due date was extended to September 6. Even without the extension, however, the contracting officer contends that it is the offeror's decision whether to attempt to make an offer when the solicitation is requested near the end of the solicitation period.¹⁷ Finally, the contracting officer states that, even if Owens had been found to be technically acceptable, it did not submit the lowest offer, as its unit prices were extremely high.¹⁷ The contract award criteria were price and price related factors. She recommends that the protest be denied.

The protester did not submit rebuttal comments.

Discussion

To the extent that Owens is protesting the requirement in the solicitation that descriptive information on any "substitute" products be submitted seven days prior to the date proposals are due, the protest is untimely. Procurement Manual 4.5.4 b. states:

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.

^{6/} The contracting officer states that Owens' check requesting a solicitation was received by Support Services on August 5, and the solicitation sent to Owens on August 6. Owens states that it received the solicitation on July 8, a date which the contracting officer points out must have been August 8, since the solicitation was issued July 31.

^{7/} The contracting officer provides the following comparison of Owens' offered unit prices with the awardee's, Waters Brothers Contractors, Inc. ("Waters"), offered unit prices:

Owens: Deck replacement - Tectum \$19.00 per square foot
Wood 8.00 per square foot

Wood Blocking - 5.00 per linear foot

Waters: Deck Replacement - \$ 4.35 per square foot

Wood Blocking - 2.50 per linear foot

The timeliness requirements imposed by our regulations are jurisdictional, and we cannot consider the merits of any issue which has been untimely raised. Hi-Tech Power Wash, Inc., P.S. Protest No. 91-30, June 19, 1991.

As to Owens' protest of the evaluation of its proposal, the determination that Owens' proposal was technically unacceptable will not be overturned by this office unless it is shown to be arbitrary, capricious, or the result of fraud or prejudice. Thermico, Inc., P.S. Protest No. 90-71, December 21, 1990; Southern Air Transport, P.S. Protest No. 89-56, October 3, 1989; POVECO, Inc. et al., P.S. Protest No. 85-43, October 30, 1985. The protester has the burden to show arbitrary or capricious action by a contracting officer, whose decisions are afforded an initial presumption of correctness by this office. Thermico, Inc., *supra*; see Southern Air Transport, *supra*; Liberty Carton Company, P.S. Protest No. 85-35, July 30, 1985. Owens has presented no evidence indicating that the contracting officer's decision here was arbitrary or capricious. We accept the contracting officer's determination that Owens did not submit enough descriptive data to allow her to determine whether its "equal" products satisfied the specifications.

Owens claims that the project manager essentially approved the "equal" products it intended to offer in a telephone conversation one week prior to the date proposals were due. The project manager has no recollection of granting such approval. It is not necessary for this office to decide whose recollection of the conversation is accurate, because the solicitation expressly provided that oral explanations or instructions would not be binding:

Any prospective offeror desiring an explanation or interpretation of the solicitation, drawings, or specifications must request it in writing soon enough to allow a reply to reach all prospective offerors before the submission of their proposals. Oral explanations or instructions will not be binding.

Provision A-6, Explanation to Prospective Offerors, Part 3.6 of the solicitation. Prior decisions of this office have held that the inclusion of this language in solicitations clearly precludes any offeror from relying upon oral advice given prior to the proposal due date. Friendswood Building Company, Inc., P.S. Protest No. 83-11, June 20, 1983; NEDCO Construction, P.S. Protest No. 77-38, September 13, 1977; C.A. Adkins Construction Co., P.S. Protest No. 82-59, November 1, 1982. Thus, Owens acted at its peril in relying upon any sort of oral advice that it may have received from Postal Service representatives pertaining to the need to submit descriptive data on "equal" or "substitute" products.

This protest is denied.

[Signed]

William J. Jones
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Office of Contracts and Property Law

[Compared to original 5/17/95 WJJ]