

Protest of) Date: July 14, 1992
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 RITA DWIGHT)
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 Solicitation No. 369990-92-A-0174) P.S. Protest No. 92-15

DECISION

Ms. Rita Dwight protests the award of a contract for cleaning services at the Avon, NC, post office to Sunshine Quality Services (Sunshine). Ms. Dwight argues that she submitted the lowest priced acceptable "bid"^{1/} and that the award to Sunshine was erroneous.

Solicitation No. 369990-92-A-0174 was issued on November 26, 1991, by the Greensboro, NC Procurement Service Office with an offer due date of December 12. The solicitation covered cleaning services for the Avon, NC, post office for two years, with four two-year extension options. Sections B.4 - B.6 of the solicitation set forth, in detail, the tasks necessary for successful performance of the contract requirements. Section A.3 stated that the Postal Service estimated that satisfactory completion of the work would take an average of 35 hours every two weeks. Section B.1 specified that the cleaning services must be performed between 8:00 a.m. and 5:00 p.m., Monday - Friday, and required that "[s]ervices must be performed when Postal Service employees are on official duty, and in a manner and time that will not interfere with the movement of the mail."

^{1/} The protester's use of the terms "bid," "bidder" and "sealed bid" throughout its protest are incorrect; with limited exceptions, all Postal Service procurements are negotiated, on which "offerors" submit "proposals" or "offers." See Dawson Construdion Co., Inc., P.S. Protest No. 91-47, September 25, 1991; TLT Construction Corp., Inc., P.S. Protest No. 89-75, January 18, 1990.

Sections G.5 of the solicitation requires that an offeror who is "self-employed"^{1/} receive wages not less than the minimum wage prescribed by the Fair Labor Standards Act. Section G.6 specified that:

Contractors who are not classified as 'self-employed' are not held to a specific number of work hours. The contract provides for specific cleaning tasks that must be performed to acceptable standards regardless of the amount of time.

The solicitation provided that award would be made "to the responsible offeror whose proposal will be most advantageous to the Postal Service, considering cost or price and other factors specified elsewhere in the solicitation."^{1/}

Four offers were received. Discussions were held and best and final offers received from two offerors. Ms. Dwight proposed a price of \$14,560.00 and Sunshine a price of \$15,015.00 for the two-year contract term. Since Ms. Dwight was the low offeror, an on-site interview between her and the Avon postmaster was held. The postmaster found two problems with Ms. Dwight's proposal. First, Ms. Dwight indicated her belief that she could do the required tasks in much less time than the estimated 35 hours, and that she could not afford to perform the contract otherwise, as she had other jobs and her time was tightly allotted. The postmaster felt that any substantial reduction in the number of hours worked would result in an unacceptable job. Second, Ms. Dwight could not guarantee that she could arrive at 8:00 a.m. to scrub and mop the floors when the facility was least busy. The postmaster thought that any such cleaning done after 10:00 a.m. would be dangerous and inconvenient to both employees and customers. A similar interview with Sunshine occurred without incident, and the postmaster recommended award be made to Sunshine. The contracting officer agreed, and award was made to Sunshine on January 17. Ms. Dwight's timely protest followed.

Ms. Dwight alleges that, in her conversation with the Avon postmaster, the postmaster indicated that, if Ms. Dwight was able to finish her required tasks within the estimated 35 hours every two weeks, the postmaster could assign Ms. Dwight additional tasks that she felt needed to be done. Ms. Dwight told the postmaster that that interpretation of the contract was in error,^{1/} that she had premised her proposal on the actual tasks required in the solicitation, and that she felt that she could do those tasks in less than the time estimated in the solicitation. She also indicated that she was prepared to

^{2/} "Self-employed" is defined "one who, except for vacations and emergencies, personally works 51 percent or more of the hours required to perform the contract work." Contracting for Cleaning Services, Handbook AS-707D, February 1991, ' 152 (hereafter Handbook).

^{3/} Award here was to be based solely on price, as the solicitation did not specify any other factors to be considered in making award.

^{4/} Ms. Dwight is correct in this regard. Section 145 of the Handbook provides that contract cleaners "must not be directed to perform duties outside the scope of their contract."

spend the time necessary to perform the required tasks conscientiously and responsibly and would not interfere with either postal employees or customers.

Ms. Dwight claims that the postmaster's error as to whether the contractor could be required to perform duties outside those stated in the solicitation tainted her evaluation of Ms. Dwight and led to the postmaster's recommendation of someone other than her as the awardee. Ms. Dwight also questions the process by which the offeror's prices were allowed to be changed. She concludes by stating that she does not believe her proposal was given fair consideration by the contracting officer, because of the biased recommendation of the postmaster who interviewed her.

The contracting officer states that Ms. Dwight told the postmaster she was planning on completing the required contract work in one-half the time estimated in the solicitation, a reduction that the postmaster did not think was possible. Additionally, Ms. Dwight told the postmaster that she could not guarantee that the cleaning would be finished by 10:00 a.m. every morning, which the postmaster desired in order to assure the uninterrupted processing and movement of the mail by postal employees and conduct of transactions by postal patrons. Because the postmaster and Ms. Dwight never reached agreement on a time for cleaning the facility and the postmaster was concerned that the facility would not be cleaned properly and postal funds would be wasted, she recommended award be made to Sunshine.

The contracting officer notes that the interview between the offeror and the postmaster is used "as a basis for determining [sic] the contractor's ability to perform the contract requirements and to work out a time schedule that would not interfere with the mail." He states that it is important that the postmaster "be completely satisfied" with the offeror, and he implies that positive recommendation from the postmaster is a necessary condition to make award to an offeror. He concludes that the protest should be denied because Section B.1 of the solicitation required that services be performed in a manner and time that would not interfere with the movement of mail and the postmaster and Ms. Dwight could not work out a schedule which met the terms of this provision.

Ms. Dwight responds that she was the low offeror, and, barring any question as to her ability to perform the contract satisfactorily, she should have been awarded the contract. Rather than checking her references, the postmaster relied solely on her unsatisfactory interview with Ms. Dwight, which was adversely colored by the postmaster's misconceptions regarding the requirements of the solicitation. She reiterates that the postmaster had to concede that Ms. Dwight's understanding of the hours she would have to work was correct and that this embarrassment led to the postmaster's biased evaluation. Ms. Dwight further notes that, while she was not prepared at the time of the interview to commit to particular times to clean the facility, she called the postmaster one-half hour after the interview to tell her that all cleaning would be completed each day prior to 10:00 a.m., as the postmaster had requested.

Therefore, Ms. Dwight thinks that she was entitled to receive award because she had assured the postmaster that she would perform all the work required by the postmaster before 10:00 a.m. Ms. Dwight faults the contracting officer for not properly managing the interview process and for accepting without question the biased evaluation report of the postmaster.

In response to specific questions which our office posed pursuant to PM 4.5.7 i., the contracting officer states that the postmaster was mistaken when she originally told Ms. Dwight that Ms. Dwight would be required to perform the estimated hours set forth in the solicitation. He further notes the following:

- a) the postmaster did not tell Ms. Dwight that she would have to perform other duties in addition to those set forth in the solicitation;
- b) the postmaster does not remember Ms. Dwight stating that she would perform all the required tasks regardless of the time required; and
- c) Ms. Dwight called the postmaster back after the interview and stated that she would try to have all the work completed by 10:00 a.m., but could not guarantee that this could be accomplished because of other jobs she had.

Ms. Dwight has submitted lengthy final comments.^{4/} Much of what Ms. Dwight sets forth reiterates and expands her previous comments. She believes that the contracting officer has improperly subordinated his duty to determine whether she possesses the necessary capabilities to perform the contract successfully to his feeling that the postmaster be satisfied with the choice. Ms. Dwight notes that the questions posed by the postmaster to the contract specialist during and after the procurement process should have alerted him that there may have been problems occurring during the interview and that he should have more closely monitored the process after being put on notice of such possible problems. She notes that the postmaster preferred the awardee to Ms. Dwight, and allowed this personal preference to determine her recommendation.

Ms. Dwight argues that the contracting officer should have done more to determine her qualifications independently, especially including review of her references, rather than relying only on the postmaster's recommendation. She also notes the substantial difficulty she has had throughout the post award period in extracting information from the contracting officer as to how award was made, concluding that the contracting officer's failure to provide her with required documentation on her protest further indicates his bias and prejudice against her.

^{5/} The contracting officer failed to furnish Ms. Dwight with necessary documentation, despite the obligation to do so established by Procurement Manual (PM) 4.5.7 g. and our direct request to the same effect. Eventually, our office sent the documents directly to Ms. Dwight.

She states that she cannot prove either that she committed to spend whatever time necessary to fulfill the solicitation requirements in a professional and competent manner or that she committed to perform the bulk of the work by 10:00 a.m. daily. She believes that the postmaster had a closed mind towards anyone proposing to perform the requirements in less time than the estimated hours set forth in the solicitation. While Ms. Dwight also cannot prove that she told the postmaster that she or her husband would complete the bulk of the work by 10:00 a.m. every day, she notes that they talked extensively as to the scheduling of the work. Ms. Dwight points out the inconsistency of requiring all work daily to be completed in a two-hour time slot when the solicitation itself estimated that three-and-one-half hours of work would be needed each day. Ms. Dwight notes that she was never given any indication that her inability to schedule the work within the 8:00 a.m. to 10:00 a.m. time frame would disqualify her from consideration for award, and states that the postmaster told Ms. Dwight that the work would probably have to be completed outside this ideal time slot. She indicates that her later affirmals that she would complete all required work before 10:00 a.m. to be sufficient to put the postmaster's concerns to rest. Ms. Dwight reiterates her belief that the postmaster's decision was dictated by personal bias and prejudice rather than her ability to perform the required tasks successfully.

As an initial matter, we must determine the basis on which Ms. Dwight's proposal was rejected. Among the rationales which may serve to justify the rejection of a proposal, the two most frequently invoked are the technical unacceptability of the proposal and the nonresponsibility of the offeror. While there can often be a substantial amount of overlap between these two concepts, they are analytically distinct. A proposal is technically unacceptable when it does not meet the requirements of the solicitation. Owens Roofing Inc., P.S. Protest No. 91-75, December 3, 1991; T&S Products, P.S. Protest No. 90-12, May 30, 1990. An offeror is nonresponsible when, in the contracting officer's judgment, it does not have the capacity nor the capability to perform the solicitation requirements in accordance with the proposal it has submitted. Fagan Construction Co., P.S. Protest No. 91-31, July 31, 1991; Southern Air Transport, P.S. Protest No. 89-56, October 3, 1989.

In this case, Ms. Dwight was rejected as nonresponsible. Her proposal did not conflict with or take any exception to the solicitation requirements. In addition, the reasons why Ms. Dwight's proposal did not receive award were solely the result of her interview with the postmaster, which the contracting officer stated was used to determine the offeror's ability to perform the solicitation requirements. Therefore, Ms. Dwight was rejected because she was found to be nonresponsible.

The standard of review of a contracting officer's finding of nonresponsibility is well established:

A responsibility determination is a business judgment which involves balancing

the contracting officer's conception of the [requirements of the contract] with available information about the contractor's resources and record. We well recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, 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.

Express by B & M, P.S. Protest No. 91-02, February 12, 1991, quoting Craft Products Company, P.S. Protest No. 80-41, February 9, 1981. Section 344 of the Handbook requires the contracting officer to "assess the capability of the offerors to provide the services required. ... Evaluation is to be made in concert with the requesting office manager,^[1/] and may include interviews with the offerors submitting the most favorable prices." Therefore, use of the interview technique to assist in determining Ms. Dwight's responsibility was expressly authorized by the applicable regulations.

Of particular importance in a case such as this, where facts are disputed, is that the statements of the contracting officer are entitled to a presumption of correctness which it is the protester's burden to overcome. Garden State Copy Company, P.S. Protest No. 84-31, July 5, 1984. Our office is not the proper forum in which to conduct adversary proceedings, rather, our function is the limited one of resolving protests based upon written reports provided by protesters, contracting officers, and interested parties. See Haselrig Construction, On Reconsideration, P.S. Protest No. 76-2, March 22, 1976.

It is clear from the protest file that the contracting officer relied upon the recommendation of the postmaster to find Ms. Dwight nonresponsible. It is also clear that the postmaster found Ms. Dwight nonresponsible for two reasons: that her proposal was based on performing the contract requirements in one-half the estimated hours set forth in the solicitation and her inability to guarantee that all required tasks would be completed between the hours of 8:00 a.m. and 10:00 a.m.^{1/}

Given the file before us, we are unable to overturn the contracting officer's decision. While the determination that Ms. Dwight was nonresponsible was a close call, there is adequate evidence in the record to support it as not being arbitrary or capricious. There was a reasonable dispute over whether Ms. Dwight would be able to do the work within the time and for the amount which she proposed, and there was also a reasonable dispute over the time within which the cleaning work would be

^{6/} The requesting office manager in this case would be the Avon postmaster.

^{7/} The third rationale cited by the postmaster for her recommendation that Ms. Dwight not be awarded the contract, that she had a "rigid and overbearing" attitude and emphasized her other jobs was only mentioned after the protest had been filed, and, therefore, appear to be a post hoc rationalization.

accomplished. We do not substitute our judgment for that of the contracting officer, and the evidence is sufficient to uphold that judgment in this case.

The protest is denied.

William J. Jones
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