

Protest of) Date: October 30, 1992
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B & S TRANSPORT, INC.)
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Solicitation No. 479990-92-A-S019) P.S. Protest No. 92-69

DECISION

B & S Transport, Inc. ("B&S") timely protests its disqualification from competition under Solicitation No. 479990-92-A-S019 for vehicle tires. The solicitation, which was issued on April 20, 1992 by the Southern Procurement and Materiel Management Service Center, Memphis, TN, sought offers for 20 different types of vehicle tires for the Postal Service's national fleet.

Section A.1 of the solicitation listed each type of tire that was being solicited under a separate line item, while Sections A.24 and M.2 advised offerors that they could submit an offer on any or all of the line items and alerted them to the possibility that the Postal Service might make multiple awards under this solicitation. The solicitation also advised offerors that the contract(s) resulting from this solicitation would be indefinite quantity/indefinite delivery contract(s).^{1/}

The solicitation further provided in Section B.2, Statement of Work, that:

[a]ll tires shall conform to the latest revision of the applicable Federal Specification cited below and shall be listed on the applicable Federal Qualified Products List:

Type Tire	Federal Specification and Qualified Products List
Automobile	ZZ-T-381-4 or latest edition
Over the Road Truck	ZZ-T-381-4 or latest edition
Off the Road Truck	ZZ-T-1083E or latest edition

^{1/} In an indefinite quantity contract the Postal Service obligates itself to buy "an indefinite quantity of specific supplies or services, within stated minimum and maximum limits, to be delivered during the contract period . . . when ordered." Procurement Manual ("PM") 5.1.5 d. In this solicitation, the minimum and maximum quantities that the Postal Service required of each type of tire were listed separately under each line item for each of the two years of the contract.

With respect to state waste taxes, Section A.28 notified offerors that they should not include any state waste tax in the unit prices they were offering, but instead should "provide a list of all known states and their minimum state waste tax with their proposal."

The contracting officer received five proposals in response to the solicitation. B&S submitted an offer for all line items except number seven, twelve, thirteen, sixteen and twenty. After evaluating the prices offered by each of the five offerors, the contracting officer determined that B&S had submitted the lowest prices for line items one through four.¹⁷ As a result, the contracting officer sent B&S a letter on June 15 advising it that a pre-award survey would be conducted at B&S' facility in order to determine its responsibility. The letter also requested that various items of information be provided by July 3, in order to expedite the completion of the pre-award survey. The requests included a layout of the plant, a list of equipment needed to perform the contract, financial statements for the past two years, a list of the state waste tax for tires for each state, and "Written Material Availability Confirmation from subcontractors and vendors for key nonstandard items or components, including actual proposed delivery dates for quantities required to meet end item delivery schedule."

On July 1, B&S called the contracting officer to request additional time to provide these items. The contracting officer granted an extension until July 7, but B&S failed to meet that deadline. On July 9, a new deadline of July 14 was established. On July 13, the protester sent some of the information that was requested to the contracting officer. The contracting officer determined that although some of the critical information, such as the supplier certifications and the state waste tax data, was still missing, the information which had been supplied was sufficient to conduct the pre-award survey that was scheduled for the following day. On July 14, the Postal Service's Quality Assurance Program Coordinator conducted the pre-award survey as planned. The record does not disclose the findings made at the pre-award survey.

On August 3, the contracting officer sent B&S a letter requesting once more that supplier certifications for line items one through four be furnished. In response, the contracting officer received a facsimile from B&S which contained a letter from Denman Tire Corporation ("Denman") to B&S stating that Denman was "willing to bid and manufacture subject tires for [B&S]" and that it had the "manufacturing capacity to meet [B&S]' annual requirements of approximately 80,000 to 90,000 tires." On August 4, the contracting officer sent another letter to B&S explaining that if B&S wished to offer tires manufactured by Denman, rather than by B.F. Goodrich as originally proposed, it would have to modify its proposal. The August 4 letter also pointed out that the list of state waste taxes had not been furnished. On August 10, the contracting officer received a letter from B&S stating that it wished to modify its proposal to reflect that the supplier of the tires for line items one through four would be Denman. The August 10 letter also provided a list of the states which B&S knew to have a state waste tax with the corresponding amount of tax for each state.

¹⁷ B&S offered tires manufactured by B.F. Goodrich for line items one through four. It appears from the record that the tires manufactured by this company were listed on the Federal Qualified Products List ("QPL") as section B.2 required.

On August 11, the contracting officer responded with a letter stating that the letter from Denman to B&S was inadequate because it failed to provide a firm commitment by Denman to supply the tires and the brand name and the product numbers required for each line item. The contracting officer further noted that the letter from Denman failed to state whether the tires met the specifications and whether they were on the QPL. As a result, the contracting officer asked B&S to supply the following information: a layout of the plant, a list of the equipment needed to perform the contract, and confirmation of material availability from Denman. On August 17, the contracting officer received a facsimile from B&S supplying the three pieces of information that had been requested for Denman. It did not, however, provide documentation establishing that Denman's proposed tires were on the QPL. The contracting officer called the General Services Administration and confirmed that Denman's tires were not on the QPL. By letter dated August 19, the contracting officer advised B&S of his determination that it was a nonresponsible offeror, citing the fact that Denman's tires were not on the QPL as justification. By letter dated August 25, B&S filed a protest challenging its disqualification from the competition. The contracting officer forwarded the protest to this office for resolution.^{1/}

In its protest, B&S suggests that it should have received award of line items one through four since it was "the lowest bidder with credentials of being a Blue Ribbon Award contractor with the United States Army Tank" B&S also claims that it was unjustly denied an opportunity to ask for a waiver of the QPL requirement, and was therefore unjustly disqualified. B&S states that such a waiver would have given B&S, which is a small minority-owned business, an opportunity to "share in a major portion of a huge tire contract."

B&S further claims that it was unfair for the contracting officer to place stringent time requirements on B&S to submit the required information. The protester does not understand why it had to submit information on July 13, if a Postal Service representative was scheduled to do a pre-award survey at its facility the next day and could have obtained the information at that time. The protester further argues that the contracting officer incorrectly allowed other offerors to revise the falsified information they had submitted concerning state waste taxes.

In his report, the contracting officer states that he had to make a determination that B&S was not responsible since the tires which B&S ultimately proposed were not on the still QPL, as required by the solicitation. The contracting officer also denies the allegation that he allowed offerors to revise falsified information that they had submitted. The contracting officer explains that all offerors "provided the information based on the states which charge them a fee/tax for selling tires." The contracting officer points out that the waste tax charged for the disposal of tires varies from state to state and that manufacturers may be exempt from the tax in some states even though dealers are not. The contracting officer further states that all offerors were given an

^{3/} On August 26, the contracting officer issued Solicitation No. 479990-92-A-S058 for line items one through four. This new solicitation no longer contained the QPL requirement, but instead required the tires to be produced in accordance with Department of Transportation regulations. B&S was sent a copy of this solicitation.

opportunity to clarify the information they had supplied with respect to state waste taxes.

Discussion

We begin by pointing out that the contracting officer improperly characterizes the protester's disqualification from the competition as resulting from a determination concerning the protester's responsibility rather than a determination involving the technical acceptability of the protester's proposal. Technical acceptability is a matter distinct from responsibility. Technical acceptability involves an assessment of whether an offeror's proposal complies with the requirements set out in the solicitation. "In contrast, responsibility involves an assessment of an offeror's ability to perform in accordance with the terms of its proposal" Chesapeake Laser Systems, Inc., Comp. Gen. Dec. B-242350, 91-1 CPD & 358, April 8, 1991. Thus, where the contracting officer rejects an offer because it does not adequately meet the technical requirements in the solicitation, as was the case here, the contracting officer has made a determination involving the technical acceptability of an offeror's proposal, not one concerning the responsibility of the offeror.^{1/}

The protester's basic contention is that it was unfair for the contracting officer to disqualify it from the competition because the tires it offered were not on the QPL. Although B&S does not dispute that the tires it offered in its modified proposal were not on the QPL, it argues that the contracting officer should have granted B&S a waiver of this requirement so that B&S, a small, minority-owned business, could have shared in the proceeds of this contract. We note that the contracting officer was correct in not waiving this requirement for B&S. "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." Weber's White Trucks, Inc., P.S. Protest No. 91-63, December 16, 1991. (emphasis added). If the contracting officer had accepted B&S' nonconforming proposal without informing the other offerors of the change in the requirements, he would have violated PM 4.1.2 i. which requires that an amendment be issued to all prospective offerors when changes are made in the specifications. Therefore, we conclude that the contracting officer's actions were not arbitrary or improper in this instance. This portion of the protest is denied.^{1/}

^{4/} We note that with respect to B&S' initial proposal, it would have been proper for the contracting officer to have found B&S nonresponsible since B&S was not able to show that it was capable of delivering the B.F. Goodrich tires it had proposed. Once the protester modified its proposal, however, it was no longer technically acceptable since the tires it proposed did not conform to the solicitation requirements.

^{5/} To the extent that B&S challenges the QPL requirement as unduly restrictive of competition, its protest is untimely. A challenge that specifications are unduly restrictive is a protest against the terms of the solicitation. Lista International Corporation, P.S. Protest No. 90-47, September 11, 1990. PM 4.5.4 b. requires that such challenges, when apparent before the offer due date, must be made prior to that date. In addition, we note that the protester's concern about the restrictive nature of the QPL requirement is moot since a new solicitation was issued on August 26, 1992 which no longer requires the tires to be on the QPL. See Joseph Carter, Comp. Gen. Dec. B-227094, 87-1 CPD & 608, June 17, 1987. Accordingly, that part of B&S' protest questioning the restrictiveness of the QPL requirement is dismissed.

The protester also vaguely makes allegations of fraud and bad faith when it suggests that the contracting officer gave preferential treatment to other offerors by allowing them to correct information they had submitted concerning the state waste taxes. The contracting officer denies this allegation and states that all offerors were given an opportunity to clarify the information they had supplied. "Allegations of bad faith must be shown by virtually irrefutable proof of malicious and specific intent to harm the protester, not merely by inference or supposition." Peritek Corporation, P.S. Protest No. 90-27, July 3, 1990 (quoting Graphic Technology, Inc., P.S. Protest No. 85-66, December 30, 1985. Without such evidence, there is a presumption that a contracting officer has acted in good faith. Id. Since the protester has failed to show any malicious intent on the part of the contracting officer, this part of the protest must be denied.

The protest is dismissed in part and denied in part.

For the General Counsel:

William J. Jones