

Protests of)	Date: January 7, 1993
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CLARK MATERIAL HANDLING CO.)	
)	
AND)	
)	
YALE MATERIALS HANDLING CORP.)	
)	
Purchase Order No. 249990-92-B-0598)	P.S. Protest No. 92-84

DECISION

Clark Material Handling Co. (Clark) and Yale Materials Handling Corp. (Yale) protest the award of a contract for six sit-down forklifts and six battery chargers to H. O. Penn Machinery Co., Inc. (Penn). Clark and Yale claim that their proposals were erroneously rejected.

National ordering agreements for these items (NOAs) exist with five manufacturers. The contracting officer initially planned to procure the supplies from the NOAs, and, accordingly, sent letters to the five NOA holders on July 9, 1992, attaching a copy of the specification and requesting pricing and delivery data along with verification that each manufacturer's equipment met the specification. One NOA holder did not respond, and two NOA holders indicated that their equipment did not meet the required specifications. Clarklift of Chicago South, Inc., indicated that it had changed its name to First Access, had changed its product line, and made an "open market" proposal. Yale submitted a proposal which contained pricing which was not the same as that under the NOA.

Since neither of the proposals received priced the items under an NOA, the contracting officer requested and received approval to purchase the items using simplified purchasing procedures. Because the contracting officer had some question as to whether the two vendors who had submitted proposals had offered forklifts that met the required Postal Service specifications, the specifications were also sent to two other vendors, Penn and Clark Material Handling Co., (Clark) who did not have NOAs, by letter dated August 28.^{1/} Four offers were received; and were evaluated as follows:

^{1/} We note that the letters sent to Penn and Clark were somewhat more detailed than the letters originally sent to the NOA holders, in that the former letters specified that the 72" overall height on guard, 6" free lift, and 3" minimum truck under clearance were critical requirements. The letters to Penn and Clark also stated that if the forklift they proposed did not meet the specification, the offeror should note the extent of any deviation, but also stated that the offeror should enclose "literature that will verify that your proposed equipment meets our specifications."

- 1) Penn proposed Caterpillar forklifts that met the specification;
- 2) Clark proposed Clark forklifts that did not meet three specification requirements: a lifting height of 95" rather than the required 106"; a free lift of 4.8" instead of 6"; and a minimum forklift under clearance of 2.4" instead of 3";
- 3) Yale proposed Yale forklifts that did not meet one specification requirement: the lifting height was 104" rather than 106"; and
- 4) First Access proposed Toyota forklifts that did not meet two specification requirements; the lowered height on guard and the lifting height requirements could not be met simultaneously with the same forklift configuration; and the free lift was 4.5" rather than 6".

Since Penn's offer was the only proposal that met all the requirements, award was made to Penn on September 4, 1992. Yale's and Clark's protests followed.

Yale complains that it did not envision that the 2" difference in its lifting height from the lifting height required would be important enough to result in the rejection of its offer, and opines that that degree of exactness in lift height was unrealistic. It stated that it was capable of offering a forklift which met all the specification requirements,^{1/} which was set forth in its specification sheet accompanying its proposal. Its price for its proposed forklift was \$5,300 less than Penn's, and its alternate forklift would have been \$433 cheaper. Yale concludes that the Postal Service has made a mistake and needlessly wasted money by failing to make award to it.

Clark notes that the three dimensions where its unit does not meet the specification requirements are not critical to the operation of the forklift and that the model it proposed was and is acceptable to the Postal Service, as evidenced by the 150 forklifts of this type currently in use in the Postal Service. Since its offer was \$6,156 below Penn's, it believes it should have received award.

The contracting officer's report notes the justification for the specification requirements at issue here.^{1/} He argues that Yale is not an interested party, pursuant to Procurement Manual (PM) 4.5.2.a., because it would not be in line for award even if its proposal was technically acceptable. The contracting officer states that past purchases from Yale have been unsatisfactory because of poor quality and long delays in receiving spare parts, and, therefore, if Yale had been the lowest priced proposal, he would have found Yale to be nonresponsible, and, therefore, ineligible for award. As to the merits of the protests, the contracting officer states that neither Yale's nor Clark's proposals met the

^{2/} In its comments on the contracting officer's report, Yale clarifies that the forklift it thinks would meet all the requirements included a collapsed free mast. Presumably, if Yale had offered this forklift, it would have been rejected because it could not meet all the specification requirements simultaneously, as First Access' offer had been rejected.

^{3/} Briefly, the six inches of free lift is required to allow double and triple stacked pallets of mail to be removed from trailers, the 106 inch lift height is needed to accommodate 104 inch high stored racks of pallets and the three inch under carriage clearance is required because of the characteristics of the variety of buildings in which the forklifts are used.

required specifications, and that, because of this, the proposals were correctly found to be technically unacceptable. Therefore, even if they were lower in price, award could not have been made to either offeror.

Yale has submitted comments on the contracting officer's report which states that the Postal Service has used forklifts with less than 106" lift height and that, if the storage racks are, in fact, 104" tall, even 106" lift height would not provide sufficient clearance. It also disputes the contracting officer's statement concerning the alleged poor quality of its forklifts. It states that almost all warranty service was performed on the same day as the problem occurred, and that the two-month delay is incorrect and refers to two cases where an overhead guard was damaged due to an accident and, because of the structural nature of the component, it took one month for a new part to be fabricated. Clark submitted comments revising its offer so that it would meet all the specification requirements except the carriage under clearance.

Neither Yale nor Clark dispute the fact that the forklifts on which they submitted proposals did not meet the solicitation requirements; rather, they argue that the requirements are unnecessary and do not justify the rejection of their proposals. When viewed in this manner, their protests are untimely. Our protest regulations require protests based on alleged deficiencies in a solicitation apparent before the time set for receipt of proposals to be filed by that time. PM 4.5.4.b., see Neil Gardis & Associates, Inc., P.S. Protest No. 92-08, March 13, 1992. This requirement is jurisdictional, POVECO, Inc., et al., P.S. Protest No. 85-43, October 30, 1985, and we do not have the authority to waive it or otherwise consider a protest which has been untimely filed. M. Ross Masson Company, P.S. Protest No. 92-14, April 23, 1992. Therefore, the protests must be dismissed as untimely.

Further, the contracting officer is correct that he was not authorized to make award to a proposal that was technically unacceptable, even if that proposal's price was lower. The failure of the rejected proposals to meet the solicitation requirements rendered Yale's and Clark's proposals technically unacceptable, and the contracting officer was under no obligation or requirement to negotiate in order to make the proposals technically acceptable since there was a technically acceptable proposal and the PM permits award to be made on the basis of initial proposals without discussions. PM 4.1.4.c.^{1/}

The protest is dismissed.

For the General Counsel:

William J. Jones
Senior Counsel
Contract Protests and Policies

^{4/} Because of the decision we reach on these protests, we need not, and do not, resolve the issue of whether Yale's prospective nonresponsibility serves to make it not an interested party for purposes of filing a protest.