

May 13, 1994

P.S. Protest No. 94-11

SHEFFIELD PRESS P&L INC.

Request for Quotations No. 162745-94-A-0239

DIGEST

Protest against issuance of purchase order is sustained where identity of entity which received purchase order could not be established when order was issued; other deficiencies require resolicitation of the requirement.

DECISION

Sheffield Press P&L, Inc., (Sheffield) protests the issuance of a purchase order to J & A Printing (J & A) under request for quotations number 162745-94-A-0239.

The subject request for quotations (RFQ) was issued by the Purchasing Service Center, Chicago, IL, on February 14, 1994, requesting quotes by February 17 for the printing of the Great Lakes Area Update newsletter. The RFQ stated a "performance period/delivery date" beginning March 1, 1994, and ending March 1, 1995, and sought production of monthly newsletters of varying numbers of pages (16, 20, 24, or 28) either in black and white or in black and white plus two-color highlights from film negatives provided by the Postal Service. The RFQ included the following:

The Postal Service may issue a Purchase Order to, or enter into a Basic Pricing Agreement with, the quoter offering the best value to the Postal Service. Best value includes price, quality, delivery terms and supplier capability and reputation.

The RFQ includes various required provisions, including Provision A-20, Type of Business Organization, requesting the quoter to identify itself as an individual, partnership, joint venture, or corporation; Provision A-23, Parent Company and Taxpayer Identification Number, requesting the quoter's Taxpayer Identification Number (TIN); and Provision 10-2, Regular Dealer/Manufacturer Representation, requesting the quoter to indicate whether it was a regular dealer in or manufacturer of the supplies offered.

Three quotes were received,¹ of which those the of J & A and Sheffield were the lowest, with J & A's quote, as evaluated, lower than Sheffield's. J & A's quote identified the quoter as "J & A Printing, 3026 - 45th Avenue, Highland, IN 46322," either an Indiana corporation or a joint venture² with Taxpayer Identification Number (TIN) 35-1884820. The quote identified J & A as a regular dealer in the supplies offered, and gave the name and title of the person authorized to sign the quote as "Walter Murray (Sales)."

A note on a worksheet for the solicitation dated February 23 recommended award to J & A on the basis of price,³ and on that date the contracting officer issued a purchase order to J & A for thirteen monthly issues of the newsletter in the amount of \$250,000.

On March 1, Sheffield filed a protest with the contracting officer. The protest complained that until February 22, Walter Murray had been an employee of Sheffield, that Mr. Murray had seen Sheffield's quote, and that it was Sheffield's belief that Mr. Murray's quotation violated paragraph a. of the RFQ's Certificate of Independent Price Determination.⁴

Sheffield supplemented its protest on March 4, confirming Mr. Murray's previous employment with it and further asserting that it had contacted the Secretaries of State of both Indiana and Illinois, and found no record of the incorporation of J & A Printing in either state. Sheffield concluded from this that J & A was an "illegal corporation" with a false "corporate ID number" which was not entitled to a Postal Service contract.

Sheffield further supplemented its protest by March 8 and 9 letters which reiterated some of its previous points, and further objected that the Postal Service could not have applied the

¹ The worksheet for the solicitation indicates that four prospective quoters did not respond, and that two of them indicated that the "turnaround time" for the preparation of quotations was too short.

² The blocks for "corporation" and for "joint venture" were both checked in paragraph a. of Provision A-20.

³ The RFQ had not indicated how price quotations would be evaluated. The contracting officer evaluated price by adding the unit prices offered for each different newsletter combination (that is, the prices for black and white and color newsletters in each of the four page lengths specified). As so evaluated, J & A's price was more than \$14,000 lower than Sheffield's price.

⁴ That paragraph provides as follows:

By submitting this proposal, the offeror certifies . . . that in connection with this solicitation--

1. The prices proposed have been arrived at independently, without consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to the prices with any other offeror or with any competitor;
2. Unless otherwise required by law, the prices proposed have not been and will not be knowingly disclosed by the offeror before the award of a contract, directly or indirectly to any other offeror or to any competitor; and
3. No attempt has been made or will be made by the offeror to induce any other person or firm to submit or not to submit a proposal for the purpose of restricting competition.

RFQ's "best value" elements to J & A and Mr. Murray, "when he's never been in business and his address is a store front of an ad agency, not even his."

Mr. Murray submitted two letters to the contracting officer concerning Sheffield's protest. The first, dated March 14, discusses his decision in April, 1993, while working for Sheffield on commission, "to apply for a company ID and become a broker." The letter asserts that he incorporated "under my name." Following a dispute with Sheffield in January, 1994, concerning his commissions, Mr. Murray asserts that he advised one of Sheffield's owners "that I would be brokering for myself . . . unless there was a written agreement regarding my commission and/or employment" Mr. Murray recounts that although Sheffield advised him that he could not pursue contracts which he had obtained for Sheffield, including postal contracts, he was advised otherwise by his counsel. The letter concludes by stating that he has "requested the necessary papers from the State of Indiana to operate under name of Walter A. Murray, Jr. [sic] DBA (doing business as) J & A Printing" and that his TIN would remain 35-1884820. The second letter, dated March 17, discusses circumstances relating to the RFQ, including Mr. Murray's insistence that he did not know the prices which Sheffield intended to submit in response to the RFQ. The letter states that Mr. Murray had "sub-contracted this printing job with Strathmore Printing, 2000 Gary Lane, Geneva, Illinois, 50134."

By separate letters dated March 18, the contracting officer furnished copies of his decision denying the protest to Sheffield and J & A. The decision stated that the contracting officer could not conclude that Mr. Murray knew of Sheffield's prices when he submitted his quotation; that the RFQ did not prohibit an employee from submitting a quotation while working for another; that the certificate of independent price determination was not violated; that Walter Murray Jr., Inc., did exist, having been incorporated in Indiana on June 23, 1993; that "[t]he fact that he submitted a bid [sic] under the name of J & A Printing, instead of Walter Murray Jr., Inc., is not significant, since he intended to file to do business under the name of J & A Printing"; that Mr. Murray "is a [sic] acting in the capacity of a broker" who has subcontracted the job to a responsible subcontractor, Strathmore Printing; and that the contract was properly awarded using best value procedures.

By letter dated and received March 28, Sheffield, now represented by counsel, protested the award to this office.⁵ The protest makes the following points:

-- Award to J & A violates the Walsh-Healey Act, which requires that a provider of supplies to the government must be either the manufacturer of those supplies or a regular dealer in them. The contracting officer has acknowledged that Mr. Murray is a broker, and the Walsh-Healey Act is specifically intended to preclude brokering of contracts.⁶

⁵ Procurement Manual (PM) 4.5.4 e. provides for the consideration of a protest to the General Counsel "received within ten working days of the protester's formal notification of, actual knowledge of, or constructive knowledge of initial adverse action by the contracting officer" on a protest filed initially with the contracting officer.

⁶ As the protester was advised when the protest was received, the protest jurisdiction of this office does not extend to matters involving the WashHealey Act. PM 4.5.1. *Monarch Marking Systems*, P.S. Protest No. 91-49, January 14, 1992. Applicable regulations at PM 10.2.5 i.3. direct the contracting officer to refer such protests made after award to the Department of Labor. In this case, the contracting

-- J & A's quotation erroneously stated that it was a regular dealer in the supplies offered. A regular dealer must maintain "an establishment in which items of the general character of those solicited are bought, kept in stock and sold to the public in the usual course of business." J & A does not meet this test.⁷

-- Award to J & A Printing was improper because that entity does not legally exist. No corporation of that name existed, nor is there evidence of longstanding use of J & A Printing as a trade name. Accordingly, there is "no basis to find that the bid submitted was legally binding upon the offeror."⁸

-- Mr. Murray was employed by Sheffield when he submitted his quotation, and Sheffield contends that he "had access to and was knowledgeable of" Sheffield's intended quote, so that his submission violated the certificate of independent price determination.

The protester requests that the remainder of the contract with J & A be terminated for convenience, and that a purchase order for the remaining requirement be awarded to it.

The contracting officer's statement responds to the various points raised by the protest. He contends that the Walsh-Healey Act does not apply to the RFQ or to the purchase order issued to J & A, noting that the RFQ did not incorporate a Walsh-Healey provision.⁹ He notes that the purchase order incorporates a provision stating that the agreement is subject to the Service Contract Act,¹⁰ and providing for the inclusion into the agreement of an applicable Service Contract Act wage determination if one is issued. The contracting officer also points to the use of a commodity code for "printing services" on the purchase order and an account number on the account payable commitment for "other services"

officer advises that that has been done by furnishing the Department of Labor a copy of the contracting officer's report on this protest.

⁷ The protester also contends that J & A does not meet the definition of a manufacturer, a contention which appears irrelevant since J & A has not claimed to be one.

⁸ The protester cites *Ebsco Interiors, Inc.*, Comp. Gen. Dec. B-205526, August 16, 1982, 82-2 CPD 130, for the proposition that such a bid would not be binding.

⁹ The contracting officer suggests that to the protester's Walsh-Healey arguments are untimely because "[t]he Walsh-Healey Public Contract Act was not in the . . . RFQ," and its omission accordingly was a defect in the solicitation which could be timely protested only prior to the date set for the receipt of the quotations, citing PM 4.5.4 b. The bases for these assertions are unclear.

PM 10.2.5 c. requires that solicitations that will result in contracts subject to the Walsh-Healey Act include Provision 10-2, Regular Dealer/Manufacturer Representation. As noted, the RFQ contained such a provision. The substance of the protest is not that the RFQ did not reflect the applicability of the Act, but rather that J & A did not meet the standards of the Act which the RFQ did reflect.

¹⁰ PM 10.2.10 sets out instructions concerning the Service Contract Act. While PM 10.2.10 prescribes clauses for incorporation into service contracts, no provisions are prescribed for incorporation into solicitations for services.

(including outside printing and reproduction) as evidence of the service-related nature of the requirement. Because the contract is one for services, the contracting officer finds it "of no consequence" that Mr. Murray indicated that he was a regular dealer. Alternatively, the contracting officer contends that if the contract is subject to the Walsh-Healey Act, the exemption from the Act at 41 CFR 50-201.603(d) for "[c]ontracts awarded to sales agents . . . for the delivery of newspapers, magazines or periodicals by the publishers thereof" applies to the award.

The contracting officer asserts that Walter Murray, Jr., Inc., is a corporation, that Mr. Murray intended to quote on behalf of that entity (as evidenced by the use of the corporation's TIN) but under a new trade name of J & A Printing.¹¹ The contracting officer distinguishes the *Ebsco* decision cited by the protester because in this case a corporate entity existed, and concludes that the quoter was a legal entity, despite confusion about its name on the quotation.

With respect to Mr. Murray's knowledge of Sheffield's quote, the contracting officer notes that there is no evidence of such knowledge other than Sheffield's claim, and that claim is rebutted by Mr. Murray and refuted by the large difference between J & A's price and Sheffield's price. The contracting officer suggests that had Mr. Murray known Sheffield's price, his quotation would have been closer to it.

The contracting officer refers to his denial of the original protest with respect to the remaining issues of Sheffield's protest.

Responding to the contracting officer's statement, the protester makes the following points:

- That Mr. Murray had a corporation at the time he submitted his quotation in J & A's name is irrelevant. Because the quotation was not made in the name of the corporation and the purchase order was not issued to the corporation, the corporation was not obligated to perform.
- Doing business under the assumed name before filing the assumed name certificate renders the contract void under Indiana law (citing *Horning v. McGill*, 166 N.E. 303, 188 Ind. 332 (Sup. Ct. Ind., 1917)).
- With respect to the Walsh-Healey Act, the RFQ did not classify the procurement as one for services, but rather called for "supplies/services" and included the Walsh-Healey provision. Contracts in which services are incidental to the provision of supplies are subject to the Act.
- Because J & A checked both the corporation and joint venture blocks in the business organization provision, its offer is nonresponsive.

¹¹ Included in the contracting officer's report are copies of the Articles of Incorporation for Walter Murray, Jr., Inc., which were filed with the Indiana Secretary of State on May 3, 1993, the corporation's certificate of incorporation dated June 21, 1993, and a certificate dated and filed with Lake County, IN, on March 18, 1994, giving the name J & A Printing as an assumed business name for "Walter Murray Inc. [sic]."

DISCUSSION

As indicated above, this office is without jurisdiction to consider the protester's Walsh-Healey Act protest. Accordingly, we turn to the remaining issues of the protest.

If Mr. Murray were aware of Sheffield's intended price when he submitted J & A's quotation, a contention not directly established by Sheffield and disputed by Mr. Murray, that knowledge did not occasion a violation of the certificate of independent price determination. "[I]n the absence of evidence of collusive bidding, allegations such as those raised by [Sheffield] do not show a violation of the offeror's certificate of independent price determination." *Complete Mobile Wash U.S.A., Inc.*, P. S. Protest No. 90-64, November 15, 1990. "That Mr. [Murray] might have had an employment relationship with [Sheffield] at one time 'will not constitute a violation of the certificat[e] absent collusion between offerors or an indication that a firm was prevented from submitting an offer.'" *Sanimasters, Inc.*, P.S. Protest No. 93-09, August 2, 1993, quoting *Secure Engineering Services, Inc.*, Comp. Gen. Dec. B-252270, B-252271, B-252271.2, B-252270.2, 93-1 CPD 452, June 11, 1993. Establishing the identity of the intended quoter is, however, more troublesome. The quotation is in the name of J & A Printing, and Mr. Murray, who signed the quotation, was identified by title only as "Sales." Neither the name of the quoter nor the title of the signer established that the quoter was a corporation. (Under Indiana law, a corporate name must include the word "Corporation," "Incorporated," "Limited," or "Company" or an abbreviation of one of them. *Ind. Code Ann. 23-1-23-1 (Burns 1994)*. A title such as "President" would also indicate corporate status.) The information provided in Provision A-20 about J & A's status was equivocal because it allowed for two alternatives; the entity could have been either a corporation or a joint venture.¹² The contracting officer would have us understand that the matter is not significant because Mr. Murray had a corporation, subsequently confirmed his intention to quote on behalf of the corporation under an assumed business name, and has subsequently undertaken the procedure to establish that name. The only evidence that established Walter Murray, Jr., Inc. as the intended quoter either as of the time the quote was made or the purchase order was placed was the inclusion of the corporate TIN in the quotation.¹³

The *Ebsco* decision cited by the protester and the progeny of that decision establish the proposition that in the absence of contemporaneous, publicly available evidence

¹² Contrary to the protester's last-minute suggestion, this confusion does not make J & A's quotation nonresponsive. Responsiveness is a characterization appropriate to sealed bids under formally advertised procedures; a request for quotations is a form of negotiated procurement (*Automotive Service Equipment*, P.S. Protest No. 87-74, September 2, 1987) to which responsiveness is not applicable. *Government Contract Advisory Services, Inc., B & B General Contracting, Inc.*, P.S. Protest Nos. 93-21, 93-25, December 16, 1993. In any event, the incorrect completion of the representation concerning business type, like the failure to complete it at all, does not affect the responsiveness of a bid. *Cf. Franklin E. Skepton*, P.S. Protest No. 87-98, October 6, 1987.

¹³ Sheffield's initial protest challenged the correctness of the TIN, an issue not reasserted in the protest to this office. The only evidence in the protest file establishing that TIN 351884820 is associated with Walter Murray, Jr., Inc. is Mr. Murray's March 14 letter to the contracting officer in response to the initial protest.

establishing the actual bidder's use of a trade name, the actual bidder is not bound by a bid submitted in the trade name, and the bid is accordingly nonresponsive.¹⁴ The rule in sealed bidding that award can be made only to an entity which has been bound by its bid to perform the work is not applicable to contracts awarded by negotiation, because in negotiated procurements "an offeror may withdraw its offer at any time prior to award." *Pedestrian Bus Stop Shelters, Ltd.*, 63 Comp. Gen. 265, March 20, 1984.¹⁵ However, negotiated procurements involve a different issue; whether there has been an attempted transfer or assignment of a proposal other than as allowed by law. *Id.* Cases involving advertised procurements are helpful, but not controlling, in such an analysis. *Id.*¹⁶

In the instant case, we agree with the protester that the record contemporaneous with the submission of the quote and the issuance of the purchase order is insufficient to establish that a legal entity named "J & A Printing" existed or that the name was a trade name of Walter A. Murray, Inc. Accordingly, the issuance of a purchase order to J & A Printing was improper.

We also agree with the protester that the best value criteria set out in the RFQ were not used in evaluating J & A's quotation.¹⁷ The protest record is devoid of any indication that

¹⁴ Thus, for example, in *National Foundation Company*, Comp. Gen. Dec. B-253369, September 1, 1993, 93-2 CPD 143, the General Accounting Office concluded that the protester's bid was properly found nonresponsive where the bid was submitted in the name "Nicholson Construction Company," a Georgia corporation, and signed by a vice-president. The bid was accompanied by a bid bond issued to "National Foundation Company dba Nicholson Construction Company" which bore the signature of the same vice-president who had signed the bid. It was established that no Nicholson Construction Company was incorporated in Georgia, and that there was no contemporaneous evidence available as of bid opening that "Nicholson Construction Company was a trade or assumed name for National Foundation Company and that the two firms were the same legal entity." While the bid included the TIN and other reference numbers assigned to National Foundation Company, the decision disregarded them as "unrelated to the bidder actually named in the bid and certified to be an existing corporation in Georgia." The decision also noted that the similarities of addresses and corporate officers "are simply insufficient to establish National Foundation Company as the actual bidder." *Accord, Sunrise International Group, Inc.; Eagle III Knoxville, Inc.*, Comp. Gen. Dec. B-252735.2, 93-2 CPD 58, July 27, 1993.

¹⁵ Where, as here, the negotiated procurement results in the issuance of a purchase order, the firm to which the purchase order is issued is not bound until it "either begins performance of the work or accepts the purchase order in writing." PM 4.2.4 b.

¹⁶ The cited case concluded that a proposal which described the offeror variously as "Convenience & Safety Corporation of Washington, D.C., Inc.," "CSC of Washington, D.C., Inc.," and further minor variations of that name were intended to refer to "CSC of Washington D.C., Inc.," the name under which the offeror was, in fact, incorporated.

¹⁷ PM 4.2.3, Receipt and Evaluation of Proposals and Quotations, states, with respect to purchases of this sort:

Award will be made to the responsible . . . quoter who submits the combination of price and other evaluation factors offering the best overall value to the Postal Service. This will be determined by comparing differences in the evaluation of other factors with differences in price to the Postal Service. The contracting officer must make the contractor selection decision and is responsible for trade-off judgments involving price and other evaluation factors. Contractor selection must be made in accordance with the evaluation strategy (i.e., price and other evaluation factors) and must be clearly noted in

any consideration was given to J & A's "quality, delivery terms, and supplier capability and reputation." Neither Mr. Murray nor Walter Murray, Jr., Inc., apparently had a prior record of providing newsletter printing services, and the quotation provided no information about quality, delivery terms, or supplier capability and reputation. The only record evidence concerning the manner in which Mr. Murray intended to perform (by subcontracting the entirety of the work to a printer in Geneva, IL) postdates the issuance of the purchase order.

We use a balancing text to determine the appropriateness of a particular remedy, or, indeed, whether any remedy is called for in a particular case:

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

Leslie-Locke, Inc., P.S. Protest No. 92-50, November 23, 1992, quoting *C.D.E. Air Conditioning Company, Inc. and Coastal Mechanical Corporation*, P.S. Protest Nos. 92-11, 92-18, April 2, 1992 (citations omitted).

In this case, the deficiencies in the procurement were serious, and the degree of prejudice to the procurement system was high. On the other hand, the costs associated with termination of the contract for convenience should be relatively low and the extent of performance is not material since it is a recurring requirement. Termination need have no impact on the Postal Service's mission and may be accomplished without affecting the requirement by postponing the effective date of the termination until a replacement contract is in place.

We do not adopt the protester's suggestion that it is entitled to receive the contract for the remaining quantity. At best, it is entitled to the reevaluation of its quote along with that of the third quoter. In this case, however, the existence of other deficiencies in the solicitation and the solicitation process, including the short response time and the inconsistency between the RFQ and the resulting purchase order with respect to whether the contract was one for supplies or for services warrants the resolicitation of the requirement. Accordingly, the contracting officer is directed to resolicit the requirement on a schedule consistent with adequate competition. The purchase order to J & A is to be terminated for convenience when a new agreement is in place.

The protest is sustained.

the purchase file.

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