

February 8, 1995

P.S. Protest No. 94-51

GOULD METAL SPECIALTIES, INC.

Solicitation No. 089480-94-A-0017

DIGEST

Protest against award of contract for merchandising displays is denied where award was made in accordance with the solicitation to the technically superior offeror rather than to the lowest priced; it was not an abuse of discretion for the contracting officer to conclude that the protester's proposal was inferior technically to the awardee's and therefore did not offer the best value to the Postal Service.

DECISION

Gould Metal Specialties, Inc., timely protests the award of a contract for the supply of merchandising displays to Gustafson Enterprises, Inc.

Solicitation 089480-94-A-0017 was issued June 20, 1994, by the Purchasing Service Center in Windsor, CT. The initial offer due date was July 20; the offer due date was extended to July 29 after an amendment was issued. The solicitation sought two items--retail packaging products merchandising displays and Priority/Express Mail merchandising displays. Section B.1. stated that the first item "must be equal to model PKG100 with Merchandiser," manufactured by Gustafson, and that the second item "must be equal to model EXP300," also manufactured by Gustafson. To be considered equal, the product "must include the essential characteristics listed" in Attachments 1 and 2 to the solicitation.¹

Section B.1 also referred offerors to Section K.5, "Brand Name or Equal," which provided, in pertinent part:

¹ Attachments 1 and 2 specified details such as maximum and minimum product dimensions, materials from which the items were to be constructed, and display and merchandising requirements, including numbers of specific products to be displayed.

Proposals offering equal products will be considered for award if these products are clearly identified and are determined by the Postal Service to contain all of the essential characteristics of the brand-name products referenced 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.

Section M.1 stated that award would be made "to that offeror whose proposal contains the combination of those criteria offering the best overall value to the Postal Service." That determination would be made by "comparing differences in the value of technical and management features with differences in cost to the Postal Service." The section further provided:

In making this comparison the Postal Service is more concerned with obtaining superior technical or management features than with making an award at the lowest overall cost to the Postal Service. However, the Postal Service will not make an award at a significantly higher overall cost to the Postal Service to achieve slightly superior technical or management features.

Section M.1.a. listed the following evaluation factors in descending order of importance:

1. Product Appearance^[2]
2. Commitment that to Quality
3. Ability to Perform
4. Reputation and Experience

Section J.6, "Additional Instructions for Preparation of Technical Proposals," was added to the solicitation by Amendment A01, and provided that "[o]fferors must address each evaluation factor as specified in Section M.1, Contract Award and Proposal Evaluation." Section K.1., "Provisions Incorporated by Reference," stated that the provisions listed there "are incorporated by reference as if set forth in full text. The full text of these provisions is available from the contracting officer upon request." The list included contract provision A-9, "Award Without Discussions (October 1987)."³

² The solicitation listed the followingsubfactors under Product Appearance:

- a. Promotes the product displayed.
- b. Reflects a quality image.
- c. Products are displayed and arranged in neat and orderly fashion with ease of customer accessibility.

³ Provision A-9 states:

Four offers were received and evaluated by a three-person committee. Technical proposals were scored on the basis of 390 possible points. The lowest score was 49; Gustafson's score, the highest, was 371. Gould was second with 287. Gould's price was \$177,611; Gustafson's price was \$208,774. Award was made to Gustafson without discussion on October 21.

By letter dated October 28, Gould initially protested to the contracting officer, objecting to the award to Gustafson because its offer had been "for the *same design and materials* as the units [required]." [Emphasis supplied.] Gould further stated:

As contracting officer, you have the knowledge of both the technical and cost elements of the proposals. In this instance, Gould's offer stated that the product was the same design and material and there is a savings to the Postal Service of over thirty one thousand dollars.

There is the appearance that award to Gustafson was predetermined and there was no real desire on the part of the Postal Service to do the work necessary to obtain the best value.

In a response dated November 8, the contracting officer stressed that the solicitation stated that technical superiority was more important than price. According to the contracting officer, Gould's proposal had "simply restated the sub factors and did not discuss or elaborate on them. [Gould's] response appears to have addressed section K.5, Brand Name or Equal." The contracting officer pointed out that the solicitation incorporated the Award Without Discussions provision, which put "[o]fferors . . . on notice to put all necessary information into their proposals." The contracting officer denied the protest as obviously without merit,⁴ stating that "award was made to the offeror whose proposal contained the best overall value to the Postal Service, considering all of the factors set forth in the solicitation."

Gould then protested to this office stating that it also was forwarding its initial protest for "further review." In its protest, which was received on November 15, Gould asserts that the contracting officer erred in stating that Gould did not address each evaluation factor as specified in solicitation section M.1. "Gould's 27 July letter does just that and in several

The Postal Service may award a contract on the basis of initial proposals received, without discussions. Therefore, each initial proposal should contain the offeror's best terms from a cost or price and technical standpoint.

⁴ Procurement Manual (PM) 4.5.6 c. states:

The contracting officer, . . . may, within the time allowed for a decision [with respect to a protest addressed to the contracting officer]:

* * *

2. With the concurrence of assigned counsel, determine that the protest is obviously without merit and advise the protester in writing accordingly.

areas offers to provide additional details if requested by the [P]ostal [S]ervice."⁵ Gould complains that "[f]urther details were never requested." Gould denies that its offer merely restated the subfactors of section M.1.a.1. and requests to be told which "essential characteristic" of the brand name product was missing from its proposal.

The protester complains that the "award without discussions" clause is "buried in the solicitation," asserts that the evaluation panel still "could have very easily . . . requested and received amplifying information" and inquires about the experience and qualifications of the technical evaluators. Gould asserts that the Postal Service "is needlessly expending additional funds because the technical evaluation panel failed to do a thorough job" and concludes by requesting various remedies including new technical evaluations.

In his statement in response to the protest, the contracting officer reasserts that Gustafson's proposal offered the "best overall value to the Postal Service in accordance with the terms of the solicitation." Gustafson's proposal was said to be superior in the elements comprising Product Appearance:

The evaluation committee found that while the Gould proposal met the technical requirements, they failed to address significant issues, such as how display items would be placed in the packaging center, and how products would be arranged inside the display. It was not spelled out whether the connection tubing at the top and bottom of the display case would be plastic or metal. The illustration did not provide any color scheme, nor did it indicate the type of metal, polished or rough, to be used. Perhaps most importantly, the proposal failed to address the display and arrangement of the products in a neat and orderly manner, with ease of customer accessibility.^[6]

⁵ Gould's July 27 letter contained its response to the subfactors listed in solicitation M.1.a.1. Under Product Appearance, it stated that Gould personnel had visited Absecon, NJ, and Westtown, PA, "to study the units called out in the specifications," concluding that those units were "well designed, promote the products very well, reflect a quality image, and present an orderly product arrangement. Consequently, Gould's offer is the same design and materials." Gould's drawings and specifications, attached to the letter, were said to be a part of its offer.

⁶ The evaluation committee summarized its conclusions regarding each proposal's product appearance. For two offerors, the committee stated: *'Did not offer a sketch, we have no idea of what their product will look like!'* For Gustafson, the committee noted:

Supplied the model for the others to follow. a) They promote the products that are displayed in two ways: by supplying a suggested display presentation with every merchandiser (allows for consistency) and by coordinating the materials & colors to complement the display products. b) Color schemes used match those of our products being promoted. c) products are handicapped accessible, the suggested display presentation they provide maximizes space utilization & provides uniformity to all offices.

Gould's evaluation for Product Appearance was summarized as follows:

Sketch showed that they measured sizes, dimensions, thickness - in order to reproduce the item we have requested. a) They have addressed size and dimensions but have ~~not~~ *not addressed how to place display items on the packaging center or how to arrange the*

The contracting officer points out that even if Gould had received the maximum score in the area about which it protests, Product Appearance, its overall technical score still would have been lower than Gustafson's.⁷ According to the contracting officer, the burden is on the offeror to provide all the information necessary for an evaluation in accordance with the solicitation, and the solicitation put Gould on notice that award could be made without discussions. "The burden cannot be shifted to the Postal Service merely because additional information could have been easily obtained. The Postal Service should be able to rely on the proposal being complete in all relevant respects."

The contracting officer denies that he informed Gould that its proposal was deficient with respect to section K.5. He states that he merely commented Gould's proposal with respect to the evaluation subfactors "appeared to be responsive to Section K.5, rather than to discuss how the product would meet the Postal Service's requirements." The contracting officer asserts that to the extent that Gould's questions about its proposal with respect to section K.5 and the qualifications of the evaluators may be considered protestable issues, they are untimely because they were first raised in Gould's protest to the General Counsel, more than 15 working days after award.⁸

In reply to the contracting officer's statement, Gould complains that the contracting officer refuses to explain what essential characteristic of the brand-name product was missing from its offer. Gould claims that "[t]his is the heart of the dispute" and that Gould "provided construction drawings with its proposal and clearly stated that its offer was for the same design and materials as the units called out in the solicitation. Section K.5 is most important because it requires that an 'or equal' offer contain all essential characteristics."

DISCUSSION

The thrust of Gould's protest is that its proposal was improperly evaluated. Our standard of

products inside the display. Also, the tubing to be used to connect the top & bottom pieces, size is 3/4" but is it plastic or metal - not spelled out. How secure will the connection be? b) their illustration does not include any color scheme to be used, in particular with the finishes which will become prominent components of the display. Metal plate sign holders do not indicate the type of metal to be used, only the thickness. For appearances, the type is very important-polished or rough? c) this factor was not addressed. The most important element with the merchandiser is to ensure that the products in it are arranged in a neat & orderly fashion, & are easily accessed by customers, including those who are handicapped.

(Emphases in original.)

⁷ Gustafson received 180 points for Product Appearance; Gould received 138. Gustafson outscored Gould in the other three evaluation factors as well.

⁸ Although Gould takes exception to it, the contracting officer's suggestion is correct. Since Gould's protest to this office was received more than 15 working days after the October 21 contract award, our review is limited to the issues presented in the original protest to the contracting officer. PM 4.5.4 d see, e.g., *IMPCO Technologies*, P.S. Protest No. 94-13, June 29, 1994. Accordingly, we do not reach these issues, which are dismissed as untimely raised.

review of technical evaluations is narrow. This office will not substitute its judgment for that of the technical evaluators unless it is shown to be arbitrary or in violation of procurement regulations. *American Bank Note Company*, P.S. Protest No. 94-02, May 11, 1994.

The determination of the relative merits of technical proposals is the responsibility of the contracting office, which has considerable discretion in making that determination. It is not the function of our office to evaluate technical proposals or resolve disputes on the scoring of technical proposals.

In reviewing a technical evaluation, we will not evaluate the proposal *de novo*, but instead will only examine the contracting officer's evaluation to ensure that it had a reasonable basis. The protester bears the burden of showing that the technical evaluation was unreasonable.

Id. The technical determinations of a contracting officer will not be overturned unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence. *W.M. Schlosser, Inc.*, P.S. Protest No. 93-30, March 9, 1994; *Southern Air Transport*, P.S. Protest No. 89-56, October 3, 1989. Accordingly, we reviewed the evidence on the record to determine whether it supports Gould's allegations. It does not.

Protests against technical evaluations often center on disputes of fact, in which it is well settled that the protester bears the burden of overcoming the "presumption of correctness" which accompanies the statements of contracting officers. *Id.*; see also, *T&S Products*, P.S. Protest No. 90-06, March 9, 1990. The contracting officer's statement to Gould to the effect that the part of its proposal intended for Product Appearance (section M.1.a.1) seemed more responsive to Section K.5 did not mean that Gould's products lacked essential characteristics of the named products. The contracting officer has denied that he said the protester's products lacked essential characteristics, and his version of this dispute makes more sense than the protester's. If Gould's offered products had lacked the essential characteristics of the brand-name products, its proposal would have been rejected as technically unacceptable, which it was not.

The record makes it clear that Gould's proposal was technically acceptable but inferior to Gustafson's. We have examined both proposals. Gustafson's proposal clearly included more details in its descriptions of its products' appearance and contained information pertaining to each subfactor under that category which the evaluators noted was missing from Gould's. Gould's proposal left many questions unanswered. (Footnote 6, *supra*.)

The protester asserts that the Postal Service could and should have asked for answers to those questions. However, the solicitation gave notice that award could be made on the basis of initial proposals received, without discussions. PM 4.1.5 c.1.; 4.1.5 f.1. The burden was on the offerors to submit adequately written and complete proposals. *American Bank Note Company, supra*. "Any reduction in the evaluation scoring that results from an incomplete proposal is attributable only to the offeror." *Id.*; see also, *Hill's Capitol Security, Inc.*, P.S. Protest No. 90-25, July 20, 1990; *Chamberlain Manufacturing Corporation*, P.S. Protest No. 85-83, February 14, 1986.⁹

⁹ The omissions involved in this case are not so minor as to be appropriate subjects for "clarification," which PM 4.1.5 a.2 defines as "[c]ommunication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in proposal." *Compare Hrach Kouyoumdjian & Associates, Inc.*, P.S. Protest No. 93-03, April 16, 1993. It also is questionable that the deficiencies in

The protester complains that the Postal Service is needlessly spending more money by choosing Gustafson's products over Gould's. However, choosing Gustafson's technically superior proposal over Gould's less costly one was fully consistent with the solicitation's evaluation scheme, which provided that technical superiority was more important than price in determining which proposal offered the best value to the Postal Service. See *Standard Register; Moore Business Forms, Inc.*, P.S. Protest No. 92-68, November 23, 1992; *International Technology Corporation*, P.S. Protest No. 89-21, May 8, 1989. Accordingly, this office has no basis to overturn the contracting officer's best value determination in favor of Gustafson.¹⁰

The protest is dismissed in part and denied in part.

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Gould's proposal would have been appropriate for discussions had they been conducted, since it is not the purpose of discussions to help an offeror bring its proposal up to the level of another offeror's. PM 4.1.5 g.3.(b)(1); cf. *American Bank Note Company, supra*.

¹⁰ Regarding the allegation that award to Gustafson was predetermined, the protester falls far short of supplying the "irrefragable proof" necessary to show that agency contracting officials acted in bad faith. See, e.g., *A-1 Transmission*, P.S. Protest No. 93-14, October 29, 1993, and cases cited therein.