

November 30, 1995

P.S. Protest No. 95-29

PRESERVATION, INC.

Contract No. 380087-95-P-0014

DIGEST

Protest against award of masonry restoration contract is dismissed and denied. Protester's contentions that specification was vague and amended statement of work afforded insufficient time to respond are untimely; challenge to affirmative determination of awardee's responsibility is insufficient.

DECISION

Preservation, Inc., protests the award of a contract to Quality Masonry Company for masonry restoration at the Orrville, OH, post office.

According to the contracting officer's supplemental statement on the protest,¹ in April, 1995, the Administrative Services office of the Akron, OH, District orally solicited quotations for various items of exterior masonry restoration from Quality and Preservation.² After Preservation noted its intention to make further submissions in the IQC format, which the Postal Service believed inappropriate for this project, by memoranda dated June 14, written statements of work (SOW) were presented to each firm. That SOW was soon superseded by a new SOW dated June 16, which was provided to each firm.³

¹ The contracting officer's initial statement was not fully responsive to the issues set out in the protest. The supplemental statement was much more comprehensive.

² In March, Preservation had submitted a quotation for this work in the spreadsheet format for an indefinite quantity contract (IQC). Quality may also have submitted an earlier proposal since the date March 20, 1995, appears on the cover sheet of the proposal ultimately accepted.

³ The Akron District was using the simplified purchasing procedures of Procurement Manual (PM) 4.2 (citations throughout are to the Procurement Manual as promulgated by Transmittal Letter 7, June 30, 1993, in effect during the period at issue in the protest, which has since been replaced by Transmittal

Preservation was given the June 16 version of the SOW at a meeting with the Akron project manager, who advised that quotations were expected to be received by June 21. The project manager's notes at that meeting reflected Preservation's assertion that the revisions reflected in the new SOW would not require any revisions in its previously submitted proposal.

Both firms provided subsequently submitted timely quotations. Quality's price was approximately 20% less than Preservation's price. Award was made to Quality on June 20, and Quality acknowledged the award on June 26. Preservation was notified of the award by letter dated June 21.

Preservation's subsequent protest to this office presents five objections to the award, as follows:

The contractor selected was not the cheapest, most qualified bidder.

The consistent quality and craftsmanship abilities of the selected contractor [are] challenged.

The [c]ontracting [o]fficer did not allow sufficient time for the competing bidder to prepare a bid on the revised specification.

The specifications were too vague to assure fairness to all bidders.

Possible pre[judice] on the part of the [c]ontracting [o]fficer.

The protester's correspondence in the course of this protest and a separate protest, subsequently mooted, involving a contract for work at the Fostoria, OH, post office, indicates that the first two of these issues pertain to its objections to the manner in which Quality, working as a subcontractor, earlier performed masonry repairs on the Bucyrus, OH, post office. The protester has furnished the contracting officer and this office photographs of that work accompanied by its annotations of the errors which it perceives in it. Preservation characterizes these photographs as documenting "irreversible damage" to the Bucyrus facility. Accordingly, the protester contends that it was better qualified than Quality to perform the required work.

The contracting officer's supplemental statement asserts that the Akron district had reviewed the information presented by the protester concerning the Bucyrus project, and had concluded, contrary to the protester's assertions, that the work had "met all of the [project's] specifications." She concludes that Quality and Preservation are both acceptable contractors for restoration projects.

With respect to the remaining issues, the contracting officer notes that Preservation had

Letter 8, July 12, 1995), which is made applicable to minor repairs and improvements for owned postal facilities by PM 11.5.2 b. PM 4.2.2 b.2 allows the use of oral solicitations under those procedures, including oral solicitations accompanied by written SOWs.

responded to the revised SOW by advising on June 16 that no change to its proposal was needed, and further notes that at no time prior to its notification of the award had it requested any further time to submit a proposal. Similarly, she disputes that the SOW was vague, noting that Preservation had reviewed it with the project manager and had stated that it did not need to revise its proposal because of the revised SOW's language. Finally, the contracting officer denies any prejudice with respect to the award, and notes that the protester has no evidence of prejudice other than its bare allegations.

The protester did not respond to the contracting officer's supplemental statement.

DISCUSSION

Preservation's objections to the adequacy of the revised SOW and the extent of time allowed to respond to it are protests against the terms of the solicitation. "Protests of alleged deficiencies in a solicitation that are apparent before the date set for the receipt of proposals must be received by the date and time set for the receipt of proposals." PM 4.5.4 b. Accordingly, these issues are untimely raised after contract award and must be dismissed. *Comcraft, Inc.*, P.S. Protest No. 92-20, May 28, 1992 (vagueness); *Paragon Dynamics, Incorporated*, P.S. Protest No. 92-58, September 10, 1992 (insufficient time to respond).

The protester's contention that award was improperly made to someone other than the "cheapest, most qualified bidder" is either a challenge to the award not being made in accordance with the evaluation criteria announced as part of the solicitation, or a contention that the awardee was not eligible for the award. Simplified purchases may be made on the basis of price, or on a combination of price and other evaluation factors. PM 4.2.1 e.1. When evaluation factors other than price are to be used in oral solicitations, "they must be communicated to each potential proposer or quoter." PM 4.2.2 b.2.(e). Here, neither the protest nor the contracting officer's submissions suggest the existence of any non-price-related evaluation factors, and we conclude that award was to be made on the basis of price, and there is no basis for the protester's contention that award was not made in accordance with the solicitation.

Before making any award, a contracting officer must establish that the prospective contractor is responsible, that is, that it has the capability to perform the required work. PM 3.3. The protest can be read as challenging the contracting officer's affirmative determination of Quality's responsibility.

It is well settled that:

An affirmative determination of responsibility is a matter within the broad discretion of the contracting officer and is not subject to being overturned by this office in the course of a protest absent fraud, abuse of discretion, or failure to apply definitive responsibility criteria.

C.R. Daniels, Inc., P.S. Protest No. 90-62, December 21, 1990; *Georgia Power Company*, P.S. Protest No. 90-01, February 14, 1990.

Here, there are no definitive responsibility criteria, but Preservation's assertion of the possibility of prejudice on the part of the contracting officer may imply fraud or abuse of discretion. When allegations of impropriety are made against government officials, however, a protester bears an extremely heavy burden of proof because it must be presumed that the government acted in good faith. It requires "well-nigh irrefragable proof" to overcome that presumption. *Anthony Owens*, P.S. Protest No. 94-32, September 9, 1994. That burden has not been approached, yet alone met, in this case. Accordingly, we lack any basis on which to overturn the contracting officer's affirmative determination of Quality's responsibility.

The protest is dismissed in part and denied in part.

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Contract Protests and Policies