

Protest of)
CASWELL INTERNATIONAL CORPORATION) Date: December 21, 1987
Solicitation No. 16990-87-B-0059) P.S. Protest No. 87-101
)

DECISION

Caswell International Corporation (Caswell) protests the award of a contract for an indoor firing range at the Main Post Office, Chicago, Illinois, to Detroit Armor Corporation (Detroit) under Solicitation No. 16990-87-B-0059. The protester states that a similar contract awarded to it for the same item was terminated for convenience of the Postal Service on September 3, 1987, and asserts that the termination of its contract and the subsequent award to Detroit were improper.

The Request for Proposals was issued on September 8, 1987, by the Central Procurement & Materiel Management Service Center (PMMSC), Chicago, Illinois. In the solicitation which led to the contract award to Caswell, only two companies, Detroit and Caswell, were known or considered to be capable of offering a firing range meeting the requirements of the solicitation. After the contract with the protester was terminated, only Detroit was considered capable of performing the contract requirements. Accordingly, the Acting Director, PMMSC, awarded the contract to Detroit under solicitation 16990-87-B-0059 on a sole-source basis on September 16.

Caswell sent a letter, dated September 9, to the PMMSC which was received on September 14, 1987, stating that since its September 8 receipt of notice of the termination of its contract, Caswell attempted to contact someone in the postal inspectors' office^{1/} to determine the basis for the termination. The September 9 letter strongly objected to the termination for any reason "other than the project being dropped" and asserted that any reprocurement would result in additional cost to the Postal Service and a sole-source procurement. It requested that award not be made to another party, pending inquiry into the matter. The letter also asked for information regarding the Freedom of Information Act (FOIA) and procedures for filing a protest. It is apparent that Caswell was unaware of the issuance of the solicitation to Detroit on September 8 when it wrote its September 9 letter.

A subsequent Caswell letter, dated September 24, received on September 28, contended that the termination for convenience was improper since it is fully capable of

^{1/}The Inspection Service was the requiring activity for the firing range.

complying with the terms of the contract awarded to it. The protester asserts that a determination of its responsibility, i.e., its ability to perform the contract, was made by the signing of the contract by the contracting officer (Postal Contracting Manual (PCM) 1-904.1). In Caswell's view, a pre-award survey should have been conducted if the Postal Service had any concerns about Caswell's product. The September 24 letter stated that Caswell's letter of September 9 represents a protest of award to Detroit, since the contract was awarded contrary to its explicit request.

In his report to this office, the contracting officer explains that the termination of Caswell's contract was based on a memorandum from the Postal Service Inspection Service, which advised him that the firing range offered by Caswell was unacceptable and unsafe.¹⁷ With respect to the protester's claims of a determination of contractor responsibility, the contracting officer states that an initial finding of responsibility at the time of award does not preclude any future termination for convenience action. The contracting officer acknowledges that, at the time of award, he had no information that Caswell was not a responsible supplier; however, the information, upon which the termination was premised, was developed after award.

In submissions filed subsequent to the contracting officer's report, Caswell states that it is a reputable dealer who has been in business since 1926, and that its equipment and reputation match or exceed those of Detroit. It asserts that postal procurement regulations requiring formal advertising have been violated, and that the contracting officer simply ignored its request that award not be made to Detroit pending resolution of the dispute.

¹⁷This brief, four line memorandum, dated September 1, 1987, requested that the contract with Caswell be terminated, stating that "[I]nformation has been developed that makes [Caswell] equipment unacceptable to the U.S. Postal Inspection Service." It also expressed concerns about safety and Caswell's past service record.

Caswell states that the alleged basis for the request for termination was revealed to it under a FOIA inquiry subsequent to the termination of its contract. The relevant document produced by this request was a report dated August 20, 1987, which refers to on-site visits to firing ranges installed by Caswell. The main thrust of concern in this report involves alleged back splatter of spent ammunition. According to the report, in the Caswell product, spent ammunition slides down the face of the impact plates to the collection trays. In the Detroit system, spent ammunition drops behind the impact plates. The report suggests that in the Caswell device spent ammunition is exposed to incoming ammunition as it slides down the front.

In subsequent comments, Caswell asserts that it has never, in its history, had a claim filed against it for injuries or damages resulting from back splatter or lead spit back. It states that the report's contention concerning the cause of the lead spit back is pure speculation, and that Detroit's use of hot-rolled steel on upper slope sheets and side wall deflectors would lead to a greater potential for back splatter than is present in Caswell's design. Caswell states that the termination of its contract and subsequent award to Detroit will cause it significant harm, since the market is small and specialized and a bad reputation concerning the design or operation of its firing range would be "almost impossible to shake."

Caswell further notes that additional requirements for the firing range, such as shielding of electric power cables, were suggested for the first time in the August 20 report, which also states that the targets should be heat-sensitive and programmable with the overhead target system. These requirements had not been set forth in the solicitation to which Caswell responded, nor were they incorporated into the specifications in the new contract with Detroit.^{4/} The protester asks that its contract be re-instated and that the contracting officer be instructed to deal fairly and reasonably with it.

In a submission filed in response to the supplemental arguments of the protester, the contracting officer reiterates that Caswell's contract was properly terminated, and asserts that Detroit was the only company with which negotiations could be held. He states that he did not recognize Caswell's letter of September 9 as a protest against award of the contract to Detroit since it concerned the termination of Caswell's contract and requested information regarding application to the Freedom of Information Officer. The contracting officer asks that the protest be denied.

As a preliminary matter, we must consider whether the protest was timely filed. Caswell's letter of September 9 objects to the termination for convenience of its contract and further states that, if the Postal Service plans to acquire the firing range equipment, excess cost to the government will be incurred and a sole-source procurement will result.^{1/} The award to Detroit had not been made at the time of this

^{3/}The specification, regarding bullet traps, was not amended in the contract with Detroit, so there is no requirement that the ammunition fall behind the impact plates.

^{4/}The contract with Caswell was terminated for convenience. The propriety of the contracting officer's determination to terminate a contract for convenience is a matter of contract administration for

letter and its receipt; on that basis, it cannot be considered a protest of the award to Detroit as it was premature. Knoxville Glove Co., P.S. Protest No. 87-103, October 21, 1987; Kahn Industries, Inc., P.S. Protest No. 85-56, August 26, 1985.

Caswell's subsequent letter of September 24 does not explicitly state that it is a protest of the award to Detroit; however, it harkens back to the statements in the September 9 letter asserting that it protests any sole-source award for the procurement of the indoor firearms range. The contracting officer recognized Caswell's September 24 letter as a protest of award of the contract to Detroit. It is the substance of a protester's submissions rather than any formula or jargon which determines whether a particular submission constitutes a protest. The use of the word "protest" is unnecessary; the communication need only contain a clear expression of dissatisfaction and a request for corrective action. International Mailing Systems, P.S. Protest 84-13, April 27, 1984, citing Radiation Systems, Inc., Comp. Gen. Dec. B-211732, October 11, 1983, 83-2 CPD &434. (expression of disagreement with evaluation factors and request for extension of offer due date found to be a protest); see also ARVCO Containers, Comp. Gen. Dec. B-208785, January 18, 1983, 83-1 CPD &63 (letter from protester to contracting officer stating that awardee of a contract under a small business set-aside was a large business and inquiring regarding what action would be taken held to be a protest); Applied Devices Corporation, Comp. Gen. Dec. B-203241, September 9, 1981, 81-2 CPD &207 (letter to agency conveying concern that sole-source solicitation should be withdrawn and a new competitive solicitation issued determined to be a protest). In the context of Caswell's earlier letter of September 9, the September 24 letter was a timely protest of the September 16 award.

The contracting officer's justification for the sole-source dated September 8, and included in the contract file summarily stated

consideration by the Postal Service Board of Contract Appeals or the Claims Court, not this office. See, e.g., Total Textile Retail Services, P.S. Protest No. 97-07, March 6, 1987; Jack Yanks Construction Co., P.S. Protest No. 75-56, August 13, 1975.

that Detroit was the only source that could provide the required equipment, that Caswell was non-responsible, and that delay in award would injure the Postal Service.^{4/}

Sole-source awards are authorized in circumstances when needed supplies or services can be obtained from only one person or firm. PCM 3-210.2(i). In light of the general requirements that procurements be conducted on a competitive basis, see, e.g., PCM 1-304.2; 2-102.1(a); 3-101(a), procurements on a sole-source basis must be adequately justified. While the information in the August 20 report might have justified a sole-source procurement to Detroit, that report was not before the contracting officer at the time of his determination. (Indeed, as of October 16 the contracting officer did not have that report before him. The requiring activity provided it to him only after Caswell's FOIA request.)

For any sole-source justification to be adequate, it must have a reasonable or rational factual predicate. See, e.g., First Data Resources, Inc., P.S. Protest No. 86-67, November 14, 1986; Chase Econometrics/Interactive Data Corporation, P.S. Protest No. 83-73, April 27, 1984; International Harvester Company, Comp. Gen. Dec. B-205073, May 14, 1982, 82-1 CPD &459. In this matter, at the time of the award to Detroit, the only written information before the contracting officer was the brief memorandum from the Inspection Service, dated September 1, which requested that the contract with Caswell be canceled. The contracting officer did nothing more than follow the directive of the memorandum in terminating the contract with Caswell. Had the contracting officer had the report, he could have considered, for example, whether the existing specifications should have been revised to define the safety concerns or whether additional information was necessary to substantiate the concern with respect to the spit-back problem. In fact, the specifications used in the two solicitations are the same.

Similarly, as to Caswell's responsibility in connection with the reprocurement the contracting officer admits that he made no inquiry concerning Caswell's ability to perform the contract nor of its allegedly unsafe equipment. Pursuant to PCM 1-905, the contracting officer must have or obtain information sufficient to satisfy himself of the responsibility or non-responsibility of the prospective contractor. PCM 1-905.3 details the sources from which the contracting officer shall seek information. See National Fleetway, Inc., P.S. Protest No. 80-26, July 3, 1980. The September 1 memorandum, without more, was an insufficient basis to conclude that Caswell could not perform. Therefore, the sole-source award to Detroit was improper.

There remains a question of remedy. To attain the relief Caswell seeks, the contract

^{5/}The sole-source award was justified on the basis of PCM 3-202, "if the public exigency will not admit of the delay incident to advertising." The invocation of that provision was improper. "Public exigency" has been interpreted by numerous authorities to denote "critical", "unsanitary", or "urgent" circumstances. See Roged Incorporated, ASBCA No 20702, 76-2 BCA &12.018, July 20, 1976; Switlik Parachute Company, Inc., ASBCA No. 18003, 74-1 BCA &10,659, May 24, 1974; TV Electrosystems, Inc., ASBCA No. 16802, 73-1 BCA &9957, March 29, 1973. No explanation has been offered why the procurement of an indoor firearms training range constitutes an event of "public exigency".

with Detroit would have to be terminated. However, the PMMSC advises that all of the firing range equipment purchased under the contract with Detroit has been delivered, inspected, and accepted. Moreover, contractor-assisted installation of the firing range equipment is currently proceeding. Therefore, we are unable to order the relief Caswell has requested. Scandura, Inc., P.S. Protest No. 81-60, March 1, 1982; Inforex Corporation, et al., P.S. Protest No. 78-12, June 26, 1978.

We can direct, however, that Caswell not be precluded from further competition in connection with indoor firing range specifications equivalent to those used here. The specification may be revised with respect to the design of the impact plates only if the specification, as revised, reflects the "actual minimum needs" of the Postal Service. PCM 1-1101(a). The correctness of that determination may, of course, be the subject of a protest against the terms of the solicitation.

The protest is sustained to the extent indicated.

[NO SIGNATURE]

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and Property Law

[checked against original JLS 3/9/93]