

Protest of) Date: September 26, 1989
ILLINOIS LOCK COMPANY)
Solicitation No. 337100-89-A-0020) P.S. Protest No. 89-35

DECISION

Illinois Lock Company (Illinois) timely protests award of a contract under Solicitation No. 337100-89-A-0020 to Hudson Lock, Inc. (Hudson) for two locks, P.S. Items 0910A and 0910B.^{1/} The protester contends that the contracting officer erroneously determined that it was nonresponsible.

Invitation for Bids (IFB) No. 337100-89-A-0020 was issued by Materials Distribution Center (MDC), Somerville, NJ on December 20, 1988, with an offer due date of January 19, 1989.^{1/} It provided in Section C - Description and Specifications, as follows:

Locks shall comply with USPS-L-379E (ESC) dated August 12, 1985, copy attached.

* * *

Locks shall be shipped with key fully inserted in the lock. The plug shall be retained when the key is fully inserted...

* * *

The solicitation also specified that the keys be "Brass Alloy No. 353, or Equivalent" (Note 1, Drawing No. D-256303) and that the locks must pass or not be impaired by an impact test defined as striking the locks "not less six times" with a mallet weighing "not more than 12 ounces" (paragraph 4.7.2 Impact Test, USPS-L-379E (ESC), at page 13). As amended in the solicitation, Drawing D-256303 also provided:

^{8/}The locks are identical except for the direction of the rotation of the key.

^{9/}The IFB was issued prior to the date that the MDC adopted the Procurement Manual (PM). The Postal Contracting Manual (PCM), therefore, governs the procedures at issue here.

C. Zone C-8, Add Note 5

Only the lock described on this drawing, when procured from the vendors listed hereon, is approved by the U.S. Postal Service for use in this application. A substitute item shall not be used without prior approval by the U.S. Postal Service.

The drawing's list of vendors did not include Illinois Lock. However, as discussed infra, Illinois had previously been awarded contract no. 337100-88-V-0328 ('0328) for the same locks which contained the same provision.

Three bids were received. Illinois was low; Hudson was second low. On January 27, 1989, Hudson filed a protest against award to Illinois asserting, in part, that the product offered by Illinois did not meet the requirements of the solicitation. This protest was dismissed as premature, Hudson Lock, Inc., P.S. Protest No. 89-09, March 27, 1989.^{10/} While Hudson's protest was pending, the contracting officer sent a sample of ten locks delivered by Illinois under contract '0328 to the Engineering Support Center (ESC), Merrifield, VA, for testing in accordance with the specifications.

In an April 7, 1989, report, the ESC informed the contracting officer that Illinois' locks did not meet the specifications in three respects: the lead content of the key was 0.83% by weight, outside the range of 1.3% to 2.3% required for 353 brass alloy; one of the locks had come apart in shipment, thus failing the requirement that the plug remain in the lock when the key is inserted; and the locks failed an impact test in which they were subjected to an eight foot-pound impact performed by a machine, not by a 12-ounce mallet. The report pointed out that since the machine may be accurately calibrated to given force, it is more reliable than the manual use of a hammer; also, a mallet could exert a force greater than eight foot-pounds.^{11/}

By letter dated April 28, the contracting officer informed Illinois that it was nonresponsible because: (1) it was not an approved source for the locks as referenced in Drawing No. D-256303, and (2) tests by the ESC had disclosed that Illinois' locks failed to conform to the requirements of the solicitation.

^{10/}In this decision, we noted that Hudson's objection to Illinois' product as nonconforming was a question of responsibility. Since that determination had not been made at that time, the protest was premature. Hudson also complained that Illinois would receive an unfair economic advantage by offering a foreign product. We found this issue unavailing since the contracting officer had properly added a six-percent factor to Illinois' bid under Postal Contracting Manual (PCM) 1-1800 et. seq.

^{11/}The report also states that Illinois' locks (plug and shell) failed a hardness test and that the impact strength is a function of hardness. A note to the report states that the specifications of the IFB do not include a "material specifications" (SAE J 469) for a required hardness and that the failure of hardness test was therefore not a basis for rejecting the locks.

Illinois timely protested the determination of its nonresponsibility to the contracting officer, who referred the protest to this office for resolution pursuant to Postal Contracting Manual (PCM) 2-407.8 e. In its protest, Illinois expressed disbelief that it could be found nonresponsible bidder since it had delivered over 240,000 locks which had been accepted under contract '0328. The protester stated that the nonresponsibility determination would have a significant financial impact on its company and requested that award be withheld pending the resolution of its protest.^{11/}

In supplemental comments, Illinois characterizes the findings of the ESC as inaccurate and without factual support. It asserts that the minute variation of the lead content in its key is solely for the reasons of machinability and has absolutely nothing to do with the strength or longevity of the key. It notes that the specifications state that the keys should be 353 brass "or equivalent" and its key is fully equivalent. The protester maintains that the locks do not, in fact, come apart when shipped with the key fully inserted as evidenced by the large number of locks that had been delivered and accepted under contract '0328. It claims that the summary nature of ESC's report shows the "discriminating manner" in which its product was tested.

In his report to this office, the contracting officer explains that in prior contracts, the first article test was submitted to the Mail Equipment Shops, Washington, D.C., for testing. However, after Hudson filed its protest, he was advised by the Manager, Quality Assurance, National Inventory Control Center, Topeka, KS, that all locks should be tested by the ESC. He states that he followed the recommendations of the ESC in making the nonresponsibility determination and that the technical issues raised in the protest would have to be responded to by the ESC.^{12/} However, the contracting officer's report concludes that the specifications need to be revised and also notes that the sources approved by the drawing have not been retested in over six years.

The protester submitted additional arguments to this office in rebuttal to the contracting officer's statement. Illinois contends that the contracting officer and the ESC ignore the specifications which provide that the keys may be 353 brass "or the equivalent". It asserts that a metallurgist or other expert would recognize that its key is equivalent in all material respects and that the mechanical function, life, or service of its keys will not be affected by the lower level of lead. A metallurgical report was submitted by Illinois in support of these contentions. That report concludes that the higher levels of lead in the 353 brass alloy enhances the machining characteristics; however, the mechanical properties of the 353 brass alloy are "very similar" to the "335" brass alloy of the Illinois key and the keys should perform "equally."

^{12/}The contracting officer did not acquiesce in that request. On May 31, a contract was awarded the contract to Hudson, notwithstanding the protest because of the urgent need for the locks. Before award, the contracting officer obtained the approval of the Assistant Postmaster General as required by PCM 2-407.8 g. (1).

^{13/}In a further report in response to a letter from the contracting officer, the ESC maintains that its original report was accurate.

The protester further contends that its locks are designed to be shipped with the key fully inserted and will remain together unless there is manipulation of the key or the mechanism. It explains that a retaining pin is used to hold the plug into the barrel of the lock for transit and subsequent handling. It notes that the plug can come out if forced but not from normal handling. In this regard, it adds that the locks are shipped "less cam." To remove the key, the cam must be attached to or replaced in the lock. It surmises that attempts were made to remove the key without the cam, which could pull the plug out of the barrel.

Concerning the impact test, Illinois asserts that any lock having the design or dimensions required by the specifications will fail if struck hard enough. Its locks passed the first article test on previous occasions, and it questions the validity of the use of an impact machine by the ESC in its tests. The protester maintains that its product is constructed of a harder material than that used in Hudson's locks and attaches reports in support of this contention. It states that Hudson's product is "softer" than Illinois' product.^{14/}

Decision

Although as amended by the solicitation the specifications recite that only locks obtained from the approved sources noted on Drawing No. D-256303 are acceptable, and the contracting officer relied on this limitation as one basis for its finding of Illinois' nonresponsibility, we find that the contracting officer's actions are inconsistent with reliance on this limitation. As a general rule, contracting officials may restrict the award of contracts to approved sources where it is necessary to ensure the procurement of satisfactory end products provided that, if time permits, other offerors are given the opportunity to qualify as alternate sources. Interstate Diesel Services, Inc., Comp. Gen. Dec. B-230107, May 20, 1988, 88-1 CPD & 480, B.H. Aircraft Co., Comp. Gen. Dec. B-222565 et seq., August 4, 1986, 86-2 CPD & 143. By forwarding Illinois' locks to the ESC for testing the contracting officer implicitly agreed to consider Illinois as a source, waiving the source-control provisions as a basis for rejecting the protester's bid.^{14/} Thus, the issue before us is the basis in the record, if any, to disturb the contracting officer's determination of nonresponsibility based on the findings and recommendations of the ESC.

If the information obtained concerning a contractor's responsibility does not indicate clearly that the prospective contractor is responsible, the contractor must be found nonresponsible. Currency Technology Corporation, P.S. Protest No. 85-22, July 8, 1985. Moreover, where, as here, the contracting officer's determination of responsibility is based on the judgment of technical personnel, we will not substitute our views for their judgment in the absence of fraud, prejudice, or arbitrary and capricious action. See Graphic Technology, Inc., P.S. Protest No. 85-66, December

^{14/}Hudson submitted comments in response to the protest. It urges that the low lead content in Illinois' brass could adversely affect the life cycle of the key. It asks that the protest be denied.

^{15/}Alternatively, the award to Illinois under the earlier contract containing a similar provision constituted the "prior approval" contemplated by the drawing.

30, 1985: Hi-Line Machine, Inc. and Gardner Industries, Inc., P.S. Protest No. 85-6, March 7, 1985.

The protester has not alleged or submitted evidence sufficient to show fraud or bad faith. However, it has submitted evidence that tends to show that the testing of its product, or the conclusions drawn from these test, were arbitrary or without a reasonable basis. Cf., First Data Resources, Inc. P.S. Protest No. 86-67, November 14, 1986.

The protester claims that its key is the functional equivalent of the 353 brass alloy, as permitted by the specifications. It also maintains that the lower lead content has nothing to do with the strength or longevity of the key and has submitted independent metallurgical reports in support of these contentions. The evidence submitted by the protester tends to support its position. In the absence of any opposing factual contentions or other argument by the contracting officer or his technical staff on the issue of equivalence, we cannot say that the rejection of the lock on this ground was rational. The specifications do not define the expression "or equivalent" or otherwise explain how equivalence is to be measured. Illinois could reasonably assume that it could offer an equivalent product. See Crenio, Inc./Emcor Products, Comp. Gen. Dec. B-228099, November 6, 1987, 87-2 CPD & 458.

We also agree with the protester that the rejection of its locks on the ground that the lock mechanism falls apart when shipped is not reasonably supported by the record. The ESC received ten locks. A single lock had the plug partially out of the shell. The protester asserts, without evident contradiction, that it has shipped over 240,000 locks that have been received intact after shipment, and explains that the plug can come out if the key is forcibly removed prior to the insertion of the cam. This reasonable explanation supports the protester's position.

Concerning the impact test, the ESC has advised that an impact machine, rather than a mallet was used to test Illinois' locks. Any deviation from the testing method set out in the specifications raises serious concerns about the validity of the tests. While the ESC is undoubtedly correct that the use of an impact machine produces a more consistent result, it remains a fact that the test differs from the one prescribed. It is not appropriate to conclude based on a different test that the item will not pass the prescribed test. Isratex, Inc., Comp. Gen. Dec. B-218085, February 8, 1985, 85-1 CPD & 172; Maremont Corporation, Comp. Gen. Dec. B-186276, August 20, 1976, 76-2 CPD & 181 (potential suppliers must be treated fairly and informed as fully as possible of what is needed when tests are conducted on suppliers' product or side by side tests are performed on products of several offerors).

There remains the question of the remedy or relief available to the protester. In an appropriate case, this office can direct termination of a contract awarded in the course of an improperly handled solicitation, Le Prix Electrical Distributors, Ltd., P.S. Protest No. 80-13, April 15, 1980. However, the contracting officer has advised that Hudson has delivered 170,000 locks under the contract and that an additional 70,000 locks are in transit. He also states that the cost to the Postal Service of termination for convenience of the contract would be on the order of \$206,000 based on Hudson's current stock on hand or inventory.

As we have previously stated, the substantiality of the cost to the procuring activity associated with terminating contracts as well as the extent of performance under the contract are to be considered in ascertaining whether termination would be in the best interest of the Postal Service. Dwight Foote, Inc., P.S. Protest No. 87-90, September 28, 1987, Honeywell Information Systems, Inc., Cong. Gen. Dec. B-186313, April 13, 1977, 77-1 CPD & 256. Here, performance of the contract is about 23% complete (170,000 locks out of a total of 750,000) and the estimated cost of termination is over \$200,000. Termination under these circumstances would not be in the best interest of the Postal Service. We will not direct termination. However, should the need for additional locks exist, Illinois is an eligible source which should be considered.

Finally, the contracting officer should take steps to ensure that the difficulties presented in this case are not repeated in future competitive solicitations. See ACCO Industries, Inc., P.S. Protest No. 79-49, January 30, 1980. As both the contracting officer and the ESC recognize, the specifications need to be reviewed.

The protest is sustained to the extent indicated.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[checked against original JLS 5/24/93]