

Protest of) Date: December 13, 1989
YALE MATERIALS HANDLING CORPORATION)
Solicitation No. 089990-89-A-0039) P.S. Protest No. 89-83

DECISION

Yale Materials Handling Corporation (Yale) protests various aspects of Solicitation No. 089990-89-A-0039 for electric pallet truck walkers.

The solicitation was issued by the Northeast Procurement & Material Management Service Center, Windsor, CT, on July 11, 1989, with an offer due date of August 2. Under the solicitation, competition was limited to three different truck walkers manufactured by Big Joe Manufacturing Co. (Model No. PTW-4000); Clark Lift of Chicago, Inc. (Model No. P40); and Yale (Model No. MPW040). The Postal Service had previously entered into "national ordering agreements"^{1/} with these manufacturers for these models. Section A.1 of the solicitation noted that the Postal Service would "only consider offers for the manufacturer models indicated."

Big Joe, Yale, and Clark Lift all submitted offers on the solicitation. In a cover letter to its offer, Yale noted that the Big Joe unit was not comparable with its and Clark Lift's machines which were of a more heavy-duty nature, and offered, in addition to its model MPW040, a different Yale unit which it believed was comparable to Big Joe's. However, Yale did not protest or in any other way express dissatisfaction with the manner in which the procurement was being handled.

By letter dated September 1, 1989, the contracting officer notified Yale that award had been made to Big Joe. On September 13, Yale protested to the Comptroller General, with a courtesy copy to the contracting officer, complaining that the competition was not equal, because Big Joe's lightweight unit could not be compared with its model. Yale stated that Big Joe should not have been given a national ordering agreement because its model did not meet the specification requirements of that agreement and that Yale's

^{1/}National ordering agreements are a procurement mechanism encouraged by the Postal Service Procurement Manual (PM). See PM 3.1.4; 5.1.8. As PM 5.1.8 a. 1. states, "[a]n ordering agreement is not itself a contract." Rather, it is a document which contains terms and conditions which will apply to future contracts (expressed as orders) placed under the agreement. While ordering agreements may be mandatory, the ones involved here were not.

machine complied with the specification and was superior in all respects to Big Joe's.^{4/} Yale noted that it had proposed a lightweight model as an alternate offer, and stated that it should have received award on that model as actually comparable to Big Joe's model.

Since the Comptroller General does not have jurisdiction to consider Postal Service protests,^{1/} the contracting officer treated the protest as filed with him pursuant to PM 4.5.3 b and 4.5.6. He found the protest untimely pursuant to PM 4.5.4 b, as a protest based on alleged deficiencies in the solicitation (the fact that Big Joe's nonconforming model was permitted in the competition) which were not raised prior to the time set for the receipt of proposals. The contracting officer states that it was Yale's responsibility to raise in a timely manner its concerns as to possibly unequal competition, and that, since he was assured by the Engineering and Technical Support Division that the recipients of the national ordering agreements all met the minimum technical requirements for PSIN-1937A, award was properly made to Big Joe. The contracting officer dismissed Yale's protest as untimely on September 22.

Yale filed a further protest with our office by letter of October 9, which we received on October 16. Yale disputes the adequacy of any justification for a national ordering agreement for Big Joe's unit. Yale complains that it has been refused copies of the national ordering agreements at issue and that it assumed that, if Big Joe had an agreement for these walkers, it would have been for their heavy duty, rather than their light duty models. Yale professes confusion concerning the use of the national ordering agreements and their relationship with the present solicitation.

Yale's protest to this office is untimely. PM 4.5.4 e. requires a protest to our office following initial adverse action on a protest by the contracting officer to be filed within ten working days of the protester's "formal notification of, actual knowledge of, or constructive knowledge of initial adverse action." Here, the contracting officer dismissed Yale's protest by letter dated September 22. Although the date of Yale's receipt of the letter is not known, even allowing a week for that receipt, its subsequent protest received on October 16, was untimely. See Great Falls Roofing, Inc., P.S. Protest No. 84-45, July 20, 1984.

In addition, the contracting officer was correct in finding Yale's protest untimely. Protests "based upon 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. This timeliness requirement is jurisdictional and may not be waived. Air Transport Association of America, P.S. Protest No. 84-29, May 17, 1984; Wilton Corporation, P.S. Protest No. 83-45, September 9, 1983. The approved

^{2/}Throughout its protest, Yale refers to a "specification" for the truck walkers. The solicitation did not contain a specification as the companies involved had been issued ordering agreements. There is, however, a performance specification related to the truck walkers associated with the Postal Service part number walkers, PSIN-1937A.

^{3/}PM 4.5.1; Falcon Systems, Inc., 65 Comp. Gen 584 (1986); Cardinal Glove Company, P.S. Protest No. 89-84, November 14, 1989.

Big Joe model was apparent on the face of the solicitation. Yale's failure to protest this defect in the solicitation before offers were due renders its later protest untimely. See National Electric, Inc., P.S. Protest No. 87-59, June 23, 1987; BMS Technologies, Inc., P.S. Protest No. 87-32, May 29, 1987.

Because our office is "without authority ... to give relief when protests are filed in an untimely fashion," Bula Forge, Inc., P.S. Protest No. 86-14, April 23, 1986, dismissal of the protest is appropriate.

The protest is dismissed.

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

[Checked against original JLS 5/26/93]