

Protest of)	
)	Date: July 5, 1990
CUTLER MANUFACTURING CORPORATION)	
)	P.S. Protest No. 90-28
Purchase Order Nos.484145-90-P-0256,)	
-0257, -0258, -0259, -0260,)	
& -0261)	

DECISION

Cutler Manufacturing Corporation ("Cutler") timely protests the issuance of Purchase Order Nos. 484145-90-P-0256, -0257, -0258, -0259, -0260, & -0261 by the Houston Division, USPS, to Security Manufacturing Company ("Security") for Type I, Type II, and Type III Neighborhood Delivery and Collection Box Units ("NDCBUs"). The NDCBUs had been solicited by means of simplified purchasing procedures pursuant to Procurement Manual ("PM") 4.2.2.

On May 1, 1990, the procurement specialist requested oral quotations from five vendors on the approved sources list^{1/} for fifty each of each type of NDCBU. The procurement specialist based the requests for quotations on six different requisitions, each for a total of one hundred units (fifty each of two of the three types). Cutler and Security were the two lowest offerors; Cutler quoting \$125.22 for Type I, \$149.41 for Type II, and \$173.18 for Type III and Security quoting \$128.00 for Type I, \$155.50 for Type II, and 175.50 for Type III. The purchase orders were issued to Security on May 8.

In its protest, Cutler claims that since it quoted the lower prices, it, and not Security, should have been issued the purchase orders. It states that in the week of May 7, it

^{1/}NDCBUs are purchased pursuant to the approved sources purchasing program which:

provides for prequalification of standard commercial products or modified commercial products offered by manufacturers or distributors. Supply categories included in the program are listed in the Postal Bulletin. Supplies in those categories may be ordered only from those firms whose products have been tested for compliance with Postal Service requirements and approved for purchase When national agreements have been negotiated with approved sources, they are listed in Postal Supply Schedules . . . otherwise, contracts are negotiated using competitive purchasing procedures, but competition is restricted to approved sources.

telephoned the procurement specialist to inquire about the results of the request for quotations. It claims that the procurement specialist informed it that it was the "low bidder." Cutler alleges that, based on this information and past experience with the Postal Service, it advised its manufacturing division to begin fabricating and assembling the units. Cutler contends that on May 18, it once again called the procurement specialist to find out when the purchase orders would be issued. It alleges that at that time, it was informed that the purchase orders had been issued to Security despite Cutler's lower price because Cutler's units rusted more quickly.

Cutler claims that its units were recertified and approved by the Postal Service on August 10, 1989,^{1/} and that three hundred units shipped on April 24, 1989, had been accepted. It maintains that, prior to May 18, 1990, it had never been advised of any problems with its units. It states that had it been notified of problems, it would have corrected them.

In her report, the contracting officer states that the purchase orders were issued to Security based on best value to the Postal Service. She states that Cutler failed to provide a satisfactory unit in the past, even though its units may be meeting the minimum requirements of the specifications. She maintains that many of the Cutler units are rusting before they are removed from the cartons, even when the units are stored in a controlled environment. Additionally, some units installed in August, 1989, have already been replaced, or are in the process of being replaced, due to problems with rust. She cites numerous customer complaints about the Cutler units. She states that the additional maintenance costs of replacing the units far exceeds the additional purchase price of the Security units.

The contracting officer states that Cutler was never given any information that would lead it to believe that the purchase orders would be issued to it and that Cutler was informed on May 7 that Security would receive the purchase orders.

Finally, the contracting officer reports that Security is well into production on two of the orders and has ordered all the materials for the remaining orders. She states that there is an urgent need for the units, as many projects remain unfinished due to an insufficient supply of NDCBUs.

Cutler's comments on the contracting officer's report contend that its units meet or exceed all the requirements for NDCBUs. It reiterates that it had no prior knowledge of any problems with its units.

Discussion

The essence of Cutler's protest is that its quotation was improperly evaluated. When a protester claims that improper evaluation procedures were used, this office will not disturb the evaluation of a proposal unless it is shown to be "arbitrary or in violation of procurement regulations." Computer Systems & Resources, Inc, P.S. Protest No. 86-

^{2/}The contracting officer submitted information showing that Cutler's units were recertified on August 5, 1988, not August 10, 1989. Cutler subsequently corrected its statement to reflect the 1988 date.

4, March 27, 1986; Amdahl Corporation, P.S. Protest No. 81-34, September 29, 1981. PM 4.2.1 a. states that:

The simplified purchasing procedures established in this section are for use in making fixed-price purchases up to the ceiling amount [\$50,000.00]

Where the solicitation is oral, as here, the PM refers to guidelines in the Procurement Handbook ("PH") which recommend, among other things, that the contracting officer "[p]rovide the vendor with any other information pertinent to the buy." PH 4.2.2 II.3. Simplified purchase procedures allow the contracting officer to restrict competition to approved sources or prequalified contractors pursuant to PM 3.1.6 "when necessary to ensure that quality requirements will be met." PM 4.2.1 e. Finally, proposals and quotations solicited pursuant to simplified purchasing procedures must be evaluated "on the basis of best value to the Postal Service, taking into account price and price-related factors (such as transportation charges and administrative costs to the Postal Service)." PM 4.2.3 b.

Here, the contracting officer erred by evaluating Cutler's quotation based on technical factors, i.e., perceived deficiencies in Cutler's NDCBUs, because it resulted in an award based on criteria other than price or price-related factors, an evaluation not available under the PM's simplified purchase procedures.

If the contracting officer had utilized regular solicitation procedures to consider factors other than price, she would have been obligated to advise the prospective offerors of the basis on which their offers would be evaluated for award. PM 2.1.6 c.5.; The Office Place, Inc., P.S. Protest No. 90-15, May 11, 1990; International Technology Corporation, P.S. Protest No. 89-21, May 8, 1989. No technical factors were included in the request for quotations and Cutler was not informed of the basis on which its offer would be evaluated. The contracting officer does not refute Cutler's claim that it was not informed of problems with its units and nothing in the record indicates that Cutler had prior knowledge of the defects or had been required to take corrective action. Furthermore, Cutler has not been disqualified as an approved source.^{1/} The protester has met its burden of showing that the evaluation was arbitrary and in violation of procurement regulations. Computer Systems, supra., and its protest is sustained.

There remains the question of the remedy or relief available to the protester. In an appropriate case, this office will direct termination of a contract awarded in the course of an improperly handled solicitation, Illinois Lock Company, P.S. Protest No. 89-35, September 26, 1989; Le Prix Electrical Distributors, Ltd., P.S. Protest No. 80-13, April 15, 1980.

^{3/}Once a product has been tested for compliance with Postal Service requirements and placed on the approved sources list, the contractor can assume that its product is technically acceptable. PM 3.1.6 b. The Procurement Handbook recommends periodic evaluations to "determine whether current sources continue to provide quality products at competitive prices" and provides procedures for notifying vendors of perceived problems, requiring the contractor to take corrective measures, and if necessary, disqualifying the vendor. PH 3.1.6 V. The record provides no evidence that such measures were taken here.

Whether to require termination action in a given case depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the requirement, and the impact of termination on the accomplishment of the agency's mission.

Inforex Corporation, et al., P.S. Protest No. 78-12, June 26, 1978, quoting Honeywell Information Systems, Inc., Comp. Gen. Dec. B-186313, April 13, 1977, 77-1 CPD & 256. There is no doubt that Cutler was prejudiced because of the procurement deficiencies in that it did not receive any purchase orders. However, the contracting officer attempted to procure items of the best value to the Postal Service, indicating a lack of bad faith. Also, she states that the extent of performance by Security is such that the cost to the Government in terminating the existing orders would be great. She cites an urgent need for the product in order to complete unfinished projects. These facts indicate that cancellation of the orders to Security would not be appropriate.^{1/} CFI, P.S. Protest No. 88-82, February 17, 1989.

This protest is sustained.

William J. Jones
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Office of Contracts and Property Law

[checked against original JLS 6/4/93]

^{4/}We note that "the degree of prejudice to the integrity of the competitive procurement system will prove not to have been great provided that the lessons of this procurement are observed in future procurements." Dwight Foote, Inc., P.S. Protest No. 87-90, September 28, 1987. In that regard, we suggest that more care be taken in procurements contemplating the use of simplified purchase procedures. The Office Place, Inc., supra. Where the procurement activity anticipates evaluating quotations or offers based on criteria other than price or price related factors, the simplified purchase procedures may not be appropriate. PM 4.2.3 b.