

Protest of ) Date: October 26, 1980  
TRANSNORM SYSTEM INC. )  
Solicitation No. 036364-90-A-0103 ) P.S. Protest No. 90-58

### DECISION

Transnorm System Inc. ("TSI") timely protests the award of a contract for spiral mail chutes to S.L. Henry Service. TSI claims that S.L. Henry cannot meet the specification requirements.

The Support Services Office in Phoenix, Arizona, issued Solicitation No. 036364-90-A-0103 on July 17, 1990, with offers due August 15. Offers were sought for nine molded fiberglass spiral chutes to feed two Advanced Facer Canceller Systems. A one page list of specifications for the chute attached to the solicitation included such items as length, diameter and type of material. The list also stated that:

The spiral chute shall employ a proven contour design which will convey loose letter mail without jamming or damaging said material. The speed of the conveyed mail shall be regulated by [the] varied slope and contour of the chute. The chute surface shall be smooth without intrusions, corrosion free, wear resistant and shall not significantly change friction characteristics due to humidity or non-use. The chute shall have proven ability to allow conveyed mail to restart automatically after becoming backed up from the bottom of the chute.

Section M.3 of the solicitation stated:

- a. Award will be made to the responsible offeror who submits the best combination of Technical Proposal, Business Proposal (cost/price), Business/Management Proposal (if applicable), and other factors considered. The primary areas to be used in determining which proposal is most advantageous to the Postal Service are listed below in descending order of importance:

Items meeting all specifications  
Responsibility of prospective contractor

- b. Cost/price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price.

TSI and S.L. Henry were the two offerors and S.L. Henry was the low offeror. S.L. Henry accompanied its offer with a letter which explained that it would fabricate its chutes based on molds of the existing chutes located in the post office. The offers were evaluated and award was made to S.L. Henry on August 22 and TSI's timely protest followed. Performance under this contract has been suspended pending resolution of this protest.

In its protest, TSI alleges that the awardee has never tested or manufactured a spiral chute for the functions stated in this solicitation, specifically, that the chutes be of "proven design" and have a "corrosion free, wear resistant" coating. TSI surmises that there is no assurance that S.L. Henry will provide a chute which will meet the specification requirements. TSI, on the other hand, offered a Safeglide spiral chute to the Phoenix General Mail Facility where it garnered favorable performance results. According to TSI, the Postal Service subsequently purchased that unit and two more. TSI requests that S.L. Henry's contract be terminated and that it receive award.

The contracting officer reports that she does not know if there are any spiral chutes that have been built in the United States and tested for the stated function, as the chute TSI supplied may have been built in Britain and shipped to TSI. The contracting officer asserts that the coating used by S.L. Henry Service will be adequately tested to determine whether it will meet the required standard. She further states that after the pre-award conference between the Postal Service and S.L. Henry, it was determined that S.L. Henry was qualified to receive award. The contracting officer states that the chutes provided by S.L. Henry will be given tests before acceptance which will require the chutes to have proven ability to allow mail to restart automatically after becoming backed up.

In response to the contracting officer's report, TSI claims that it is the only bidder<sup>1/</sup> with a product that meets the solicitation requirement of being a proven design. TSI admits that the Safeglide chute tested by the Phoenix General Mail Facility was produced by its British supplier, however, it adds that it is currently manufacturing the Safeglide chute under a license agreement with the British Post Office.

TSI does not believe that acceptance testing satisfies the solicitation's requirement that the Postal Service be supplied with a proven product. It points out that the contracting officer failed to indicate that S.L. Henry satisfied the requirement for a "proven product," adding that if prior testing is necessary and the chutes are needed by March 1991, the Postal Service would have only approximately two months for testing, leaving no time for actual production or installation.

The protester states that it has been improperly and unjustly overlooked for award, considering it has already offered a proven spiral chute to the Postal Service which satisfies the specifications. TSI argues that the word "proven" can only have meaning if it is interpreted to mean "a requirement that the successful bidder offer a product that has already been proven at the time the contract is awarded."

<sup>1/</sup> Since this is a negotiated procurement, the use of the word "bidder" is incorrect. "Bidders" respond to formally advertised procurement procedures. The correct term of art in negotiated procurements is "offeror." Handling Systems, Inc., P.S. Protest No. 89-70, December 19, 1989.

TSI further asserts that a product that does not meet the specification requirements cannot properly be considered for award even if that product is cheaper. It adds that most of the cost of the Safeglide chute it is offering is royalty payments to the British Post Office, who developed the technology for these chutes and who vigorously enforces its proprietary rights. The protester states that based upon the contracting officer's statement, award was made arbitrarily and without reasonable basis.

### Discussion

TSI's basic contention is that S.L. Henry Service cannot provide a chute which meets the specification requirements set forth in the solicitation. Such a contention is a challenge to the contracting officer's affirmative responsibility determination of the awardee since responsibility relates to a firm's ability to comply with the terms of the solicitation. Telex Communications, Inc., Comp. Gen. Dec. B-236981, 90-1 CPD & 120, January 29, 1990.

"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." Gage Constructors, P.S. Protest No. 87-11, July 13, 1987 (quoting Logan Co., P.S. Protest No. 83-1, February 9, 1983). Fraud and abuse have not been alleged here and would not be supported by the record.

Instead, TSI alleges that S.L. Henry Service does not meet the requirements of the solicitation that it supply a chute with a "proven" design and ability. Implicit in the protester's argument is the fact that these requirements represent definitive responsibility criteria which the contracting officer failed to apply. We conclude, however, that these requirements are performance requirements, not definitive responsibility criteria.

As stated by the Comptroller General and adopted by this office:

Definitive responsibility criteria are objective standards established by a contracting agency in a particular procurement to measure the offeror's ability to perform the contract. . . . Such criteria in effect represent the agency's judgment that an offeror's ability to perform in accordance with the specifications for that procurement must be measured not only against the traditional and subjectively evaluated factors, such as adequate facilities and financial resources, but also against more specific requirements, compliance with which at least in part can be determined objectively. . . . Definitive responsibility criteria thus concern an offeror's eligibility for award by limiting the class of offerors to those meeting specified qualitative and quantitative qualifications that the agency determines are necessary for adequate contract performance. . . . Such criteria do not involve an offeror's performance obligations under the contract.

W.H. Smith Hardware Company, Comp. Gen. Dec. B-228576, 88-1 CPD & 110, February 4, 1988; accord TLT Construction Corp., Inc., P.S. Protest No. 89-75, January 18, 1990; Abco Peerless Sprinkler Corp., P.S. Protest No. 84-50, August 24, 1984.

"On the other hand, the offeror's ability to meet specification requirements concerning the product to be furnished is encompassed by the contracting officer's subjective responsibility determination." Walbar Inc., Comp. Gen. Dec. B-237228, 90-1 CPD & 108, January 25, 1990; see also Leslie Controls, Inc., Comp. Gen. Dec. B-229813, 88-1 CPD & 349, April 7, 1988 (RFP requirement that the contractor repair and overhaul a specific manufacturer's valve is a performance requirement); W.H. Smith Hardware Company, supra (requirement in federal specification that the requested valve "shall be the 'manufacturer's standard commercial product'" is a performance requirement); Noah Howden, Inc., Comp. Gen. Dec. B-227979, 87-2 CPD & 386, October 22, 1987 (solicitation requirement that fan assemblies incorporate a component obtained from specified approved sources is not a definitive responsibility criterion); Repco Incorporated, Comp. Gen. Dec. B-225496.3, 87-2 & 272, September 18, 1987 (specification provision requiring "standard current products" does not set out specific, objective standards necessary to be a definitive responsibility criterion).

In this case, the solicitation did not define the word "proven" or otherwise contain objective, qualitative standards for applying this criteria. There were no specific, numerical requirements that offerors had to meet in order to demonstrate their chute was of a "proven design and ability". In fact, if the Postal Service had truly desired to limit the class of prospective awardees only to those contractors who had previously designed and manufactured these chutes, it could have so stated in the solicitation by imposing specific, numerical standards as a way to determine, before award, if the prospective offeror's proffered chute met these requirements.

The requirements that the awardee provide a chute with a proven contour design and proven ability to restart automatically are not the type of specific, objective requirements that could be viewed as definitive responsibility criteria. Compare Unison Transformer Services, Inc., Comp. Gen. Dec. B-232434, 88-2 CPD & 471, November 10, 1988 (requirement that offeror provide evidence of one year of successful performance of its product is a definitive responsibility criteria) and Abco Peerless Sprinkler Corp., supra (requirement that contractor have installed at least five prior projects a definitive responsibility criterion) with Rolen-Rolen-Roberts International, et. al., Comp. Gen. Decs. B-218424, B-218424.2, B-218424.3, 85-2 CPD & 113, August 1, 1985 (general requirement that offerors must be regularly engaged in the business of providing the type of service and equipment covered by the solicitation a performance requirement).

The specification language stating the chutes shall be of a proven design with a proven ability are performance requirements because they merely advise potential offerors that the ability to supply a chute that works will be considered by the contracting officer when she makes her subjective responsibility determination. Further, the level of performance required of a contractor during contract performance is a matter of contract administration and is not properly before our office in a protest proceeding. See Nelson Window and Glass Company, P.S. Protest No. 86-44, July 25, 1986.

The contracting officer performed a preaward conference at S.L. Henry Service and determined that it was capable of supplying the chutes. In addition, S.L. Henry, in a letter attached to its offer, revealed that it planned to reverse engineer the chutes already in use at the Phoenix main post office in order to obtain the molds to make the chutes specified in the solicitation. Such evidence indicates a reasonable basis existed

to support the contracting officer's determination that S.L. Henry would be able to comply with the specifications and was a responsible contractor. Absent allegations of fraud, abuse of discretion or a failure to apply definitive responsibility criteria, we can not overturn the contracting officer's affirmative responsibility determination.<sup>1/</sup>

The protest is denied.

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<sup>2/</sup> We note that S.L. Henry proposed to meet the solicitation's requirements by reverse engineering its chutes off of the exist-ing chutes. Any issue which such engineering might present is not before this office.