

Protest of ) Date: March 13, 1991  
SHELDON TRANSFER & STORAGE CO. )  
Solicitation No. 089990-91-A-0005 ) P.S. Protest No. 91-08

### DECISION

Sheldon Transfer & Storage Co. ("Sheldon"), an incumbent supplier of warehouse services, protests the award of a contract for such services to Southshore Enterprises, Inc. ("Southshore") under solicitation 089990-91-A-0005 after its proposal under an earlier solicitation was not returned to it when that solicitation was canceled. The protester contends that that failure tainted the current solicitation and award and further contends that the Postal Service improperly evaluated its technical and cost proposals under the new solicitation.

On August 10, 1990, the Procurement and Material Management Service Center, Windsor, CT, issued solicitation number 089990-90-A-0149, for warehousing services in the counties of Hampshire and Hampden, Massachusetts, and Hartford, Connecticut, "within a radius of approximately twenty (20) miles" from Springfield, Massachusetts. Offers were to be evaluated on the basis of technical factors including the condition of the facility, the contractor's information reporting capabilities, and particulars of the facility's capabilities.

The solicitation sought monthly prices for a guaranteed quantity of 30,000 square feet of storage space, an additional quantity of storage space estimated at 70,000 square feet, and hour rates for estimated quantities of incoming and outgoing equipment movement (160 hours/month); product repackaging (forty hours/month); and administrative time (twenty hours/month). The solicitation did not explain how price offers were to be evaluated, but did include a provision indicating that price evaluation would consider only the price for the basic requirement, and that option quantities would not be included in the evaluation. Technical factors were to comprise 60 percent and price factors were to comprise 40 percent of the final evaluation.

Sheldon submitted the only technically acceptable proposal on solicitation -0149. Thereafter, the contracting officer cancelled the solicitation by Amendment 03 on October 2, 1990. The amendment identified the following "significant changes to the requirements" as the reason for cancellation:

20 mile radius changed to 30 mile radius, accessibility to state, county or city maintained roads with no commercial restrictions required, and evaluation of

proposals will consider geographic location of the facility, including highway access and road miles to/from the Springfield BMC/ GMF [Bulk Mail Center/General Mail Facility].

Solicitation No. 089990-91-A-0005 was issued on October 3, with an offer due date of October 19. It tracked the terms of solicitation -0149 with minor exceptions. Those exceptions included the following:

-- The description of the area served was modified to provide for "warehouse services located within a radius of approximately thirty (30) miles" from Springfield, MA, "serving the communities in MA & CT within the thirty (30) mile radius."

-- A provision was added to Section A, Items and Prices, as follows:

The facility must be accessible by way of county, city or state maintained roads with no commercial restrictions (including but not limited to underpasses less than 13'6"). Evaluation of proposals will consider the geographic location of the facility, including highway access, and road miles to/from the Springfield BMC/GMF, located at 190 Fiberloid St., Springfield, MA.

-- The first of the five technical factors listed in Section M, Evaluation and Award Factors, was revised to read as follows:

Facility requirements as specified, including type and quality of construction and condition of facility offered; locations of storage space within facility, expansion capability, quality of lighting, quality of location of facility, single or multiple warehouse and geographic locations.  
[Revised portion underlined.]

Like the previous solicitation, this one provided for 80 points for technical factors, 50 in the technical area, and 15 each for "management area" and "quality control." Also the same as the previous solicitation was the 60/40 allocation between technical and price factors.

The statement of work for the new solicitation was identical to that of the old one with two exceptions. One change conformed the contractor's obligation to perform transportation services to the new 30 mile radius requirement. The other reduced the minimum clear ceiling height required from 20 feet to 18 feet.

Five offers were received in response to solicitation -0005 and were evaluated technically by a team of technical and quality assurance personnel. The evaluated technical and price proposals of the three highest offers were as follows:

<u>Offeror</u>	<u>Technical</u>	<u>Price</u>
Southshore	76.25	\$11,700/mo.
RR Storage & W'house	72.5	\$12,749/mo.
Sheldon	46.25	\$17,990/mo.

Southshore was awarded the contract on January 14; Sheldon received written notification of that award on January 17. Its protest was received by this office on January 25.

The protester has three main grounds for protest. First, Sheldon states that after it received notice that the first solicitation was being canceled, it requested that its original proposal be returned, unopened. Sheldon says that the contracting officer informed it that while the proposal would not be returned, it would be held in his office, sealed, in a file, and could be obtained at a later date. According to Sheldon, after it was notified of award under the second solicitation, it again asked the contracting officer to return the original proposal but was informed that it had been thrown away. The protester contends that due to the unprofessional and unethical handling of its original proposal, the possibility exists that the information it contained became the knowledge of another offeror, to the obvious detriment of Sheldon. Sheldon requests that it be awarded a contract under the original solicitation, with its original offer.

The protester's second allegation is that the Postal Service did not incorporate into its cost evaluation the geographical location of the facilities being offered, as required by Section A of the solicitation. Sheldon asserts that the round trip distance between its warehouse and the Springfield BMC/GMF is 25.8 miles, much closer than the comparable distance from Southshore's facility, which Sheldon alleges is 59.2 miles. According to Sheldon, its distance and incumbency advantage can be translated into a total savings of \$88,524<sup>1/</sup> for the Postal Service. Sheldon states that since the solicitation stated that geographic location would be an evaluation factor, it should have been evaluated and it was not.

Finally, the protester accuses the evaluation team of inaccurately scoring its technical proposal. Since it is the incumbent contractor for this warehousing requirement and has been told it is doing an excellent job by the current contracting officer's representative, Sheldon contends it is not possible that another offeror could outscore it. Sheldon demands an explanation of the discrepancy between its score and the winning score.

Responding to the protest, the contracting officer advises that the first solicitation was canceled because "inasmuch as only one technically acceptable proposal was received" it was decided to cancel the solicitation "due to lack of response." The contracting officer further reports that Sheldon's original proposal was never evaluated, but it was opened and placed in a file.<sup>1/</sup> The contracting officer notes that PM 4.1.2 j. provides for the return of proposals when a solicitation is canceled before the date for the receipt of proposals, but is silent about such return when a solicitation is canceled

<sup>1/</sup> This is a composite figure arrived at by Sheldon which includes \$54,877 in mileage costs for an estimated 658 annual trips, the costs of trips necessary to relocate postal equipment from Sheldon's facility to Southshore's (\$27,271) and one month's overlap of space charges to accommodate the changeover (\$6,375).

<sup>2/</sup> The contracting officer's statements that Sheldon's proposal was not evaluated and that it was technically acceptable are mutually inconsistent. A proposal may not be found technically acceptable without evaluation. Procurement Manual (PM) 4.1.4.

after proposals are opened. Upon Sheldon's request that the proposal be returned, the contracting officer asserts that he advised that, after the proper retention period, the proposal would be thrown away. The original Sheldon proposal remains in the contracting officer's possession and the information contained in that proposal has not been disclosed to anyone else inside or outside the Postal Service.

Concerning the protester's allegation about inaccurate evaluation, the contracting officer responds that Sheldon mistakenly believes that it should be awarded this contract because its cost may be lower than the awardee's. The contracting officer points out that the solicitation states that the technical proposal is of primary importance in awarding the contract. The contracting officer emphasizes that the great difference in the technical scores of the protester and the awardee would outweigh a slight price differential, but notes that Sheldon's proposal was evaluated as expensive than Southshore's in any event.<sup>1/</sup> The contracting officer remarks that if the estimated storage space is factored into the price equation, the price differential between the awardee and Sheldon increases since Sheldon offered an even higher unit price on the additional quantity of storage space for which the payment was not guaranteed. The contracting officer comments that the historical trend for Postal Service warehousing needs in the Springfield area has been to need a good deal of space above the guaranteed amount,<sup>1/</sup> further erasing any price advantage suggested by Sheldon.

Responding to Sheldon's calculations concerning the evaluation of proposals, the contracting officer dismisses the cost of transferring material to the warehouse as a one-time cost, but contends that Sheldon has calculated based on the amount actually in storage, rather than on a lesser amount consistent with the amount which could be stored in the 30,000 square feet of guaranteed space. The contracting officer calculates this cost as "only \$13,044.02."

The contracting officer states that although he does not believe that the protest procedure is the proper forum for a discussion concerning the specifics of Sheldon's technical evaluation, he is willing to debrief the protester in accordance with Postal Service regulations. The contracting officer concludes that Sheldon's original proposal was not mishandled and that award was properly made, adding that the protester does not have standing to protest as it had only the third best technical proposal.

Sheldon responds to the contracting officer's statement by demanding a response detailing why it was necessary to open its initial proposal. Sheldon further asks why the Postal Service didn't award it the contract once its proposal was opened and determined to be acceptable. The protester asserts that the Postal Service established

<sup>3/</sup> The contracting officer explains that prices were compared using each offeror's figure for the basic quantity of 30,000 square feet of storage space, plus its figures for the three estimated quantities of labor hours.

<sup>4/</sup> In this regard, the contracting officer cites attachment 5 to the solicitation, showing the average paid hours, administrative hours, and utilized square footage used during twelve "billing months" identified as January through December. The caption identifies the numbers as "Trend from January 1988 to April 1990." The lowest monthly utilized square footage is 58,000 sq. ft.; the highest is 105,000 sq. ft., and the average is 81,666 sq. ft.

a precedent when it awarded a contract to Sheldon in 1987 when it was the only qualified offeror to respond.

Concerning the relative costs of the proposals, Sheldon continues to point to the cost savings inherent in using its physically closer warehouse. It challenges the contracting officer's references to the trend of usage suggested by attachment 5, contending that those figures are overstated.

Sheldon reiterates its desire for a debriefing. The protester contends that the technical proposal information alone did not provide the Postal Service with an accurate, bottom line cost. Sheldon states that since cost/price is 40% of the award decision, it should be carefully analyzed.

### Discussion

We first address the question of standing raised by the contracting officer. Our protest regulations state, at PM 4.5.2 a., that an interested party may protest the award or any other action relating to the award of a contract. "An interested party is a protester who would be eligible for award of the contract if the protester were upheld." (Citations omitted.) Consultants & Designers Inc., P.S. Protest No. 90-11, May 18, 1990. Here, Sheldon is an interested party because it is protesting, among other things, the evaluation of its technical proposal. more If Sheldon's technical proposal is found to be improperly scored, Sheldon may then be in line for award. "Under such circumstances, [Sheldon] has the requisite direct interest to maintain this protest." National Capital Medical Foundation, Inc., Comp. Gen. Dec. B-215303.5, 85-1 CPD & 637, June 4, 1985.

Sheldon's initial concerns involve the consideration and handling of its proposal on the earlier solicitation. Its complaints about the propriety of the cancellation of the first solicitation are untimely raised more than two and one-half months after it was notified of the cancellation. The cancellation of the solicitation was an action for which a protest would have been timely if received "not later than ten working days after the information on which [it was] based [was] known or should have been known, whichever is earlier." PM 4.5.4 d.; see E-Z Copy, Inc., P.S. Protest No. 90-08, March 27, 1990. This portion of the protest is dismissed.

As the contracting officer notes, the Procurement Manual does not address the question of what to do with proposals when the solicitation is canceled after the date for receipt of proposals. Accordingly, although we are uncertain what particular benefit accrues from the retention of Sheldon's proposal on the initial solicitation, we conclude that the contracting officer did not abuse his discretion by deciding to maintain the proposal in a file, rather than to return it. It is unfortunate, and regrettable, that it appears that that decision was the subject of some miscommunication between the parties.

The protester's assumption that because the proposal was retained, its contents somehow became known to others, to its detriment, is an allegation of bad faith unsupported by substantive evidence. "A protester must prove allegations of bad faith . . . by 'well-nigh irrefragable proof' of specific, malicious intent . . . to harm the protester; without such evidence, there is a presumption that a contracting officer has acted in

good faith." Colorado Piping & Mechanical, Inc., P.S. Protest No. 90-23, June 20, 1990. Since the protester has failed to provide any proof of its concerns in this regard, this element of the protest must be denied.

The protester's remaining allegations concern the evaluation of geographic location and the scoring of its technical proposal. "This office will not substitute its judgment for that of the technical evaluators, nor will we disturb the evaluation unless it is shown to be 'arbitrary or in violation of procurement regulations.'" LazerData Corporation, P.S. Protest No. 89-60, September 29, 1989; Computer Systems & Resources, Inc., P.S. Protest No. 86-4, March 27, 1986.

The determination of the relative merits of technical proposals is the responsibility of the contracting office, which has considerable discretion in making that determination. It is not the function of our office to evaluate technical proposals or resolve disputes on the scoring of technical proposals. In reviewing a technical evaluation, we will not evaluate the proposal de novo, but instead will only examine the contracting officer's evaluation to ensure that it had a reasonable basis. The protester bears the burden of showing that the technical evaluation was unreasonable. A protester's mere disagreement with the contracting officer's judgment does not meet its burden of proving that the technical evaluation was unreasonable. (Citations omitted.)

Computer Systems & Resources, Inc., supra. Although Sheldon has not been debriefed on the evaluated weaknesses and deficiencies found in its technical proposal, we have reviewed, in camera, the technical evaluation of its proposal. National Capital Medical Foundation, Inc., supra. That review establishes that the contracting officer's judgment had a reasonable basis. We thus deny this portion of the protest as well.

Many of the protester's concerns about the evaluation are based on misapprehensions of the evaluation scheme. The solicitation did not require that geographic distance be factored monetarily into the price proposals. Instead, geographic location was a factor of the technical evaluation. The technical evaluators all listed and commented on the distance of the offerors' warehouses.

To some extent, the protester's criticism of its evaluation focuses on cost considerations which could have been, but were not, made a part of the proposal evaluation process. Its concerns about the one-time cost of transporting equipment to the new warehouse and the cost of overlapping rentals while this is done are matters of that sort. Since these cost factors were not set out as evaluation factors in the solicitation, however, it would have been inappropriate to include them in the resulting evaluation, and the objection that they were not included would be untimely as not raised before proposals were due. PM 4.5.4 b.<sup>1/</sup>

Finally, the protester's assertion that its position as the incumbent should have somehow been recognized during the evaluation of its technical proposal is untenable.

<sup>5/</sup> We would note, however, that evaluation criteria need not be structured to include factors of the sort Sheldon suggests, which favor incumbents. See Kaufman Lasman Associates, Inc., Comp. Gen. Dec. B-229917.9, 88-2 CPD & 383, October 21, 1988.

"[A]n incumbent contractor cannot rely on its incumbency -- and the contracting agency's familiarity with its product and prior performance -- as a substitute for submitting a technical proposal responsive to the solicitation and which demonstrates compliance with the stated evaluation criteria." Associated Aircraft Manufacturing and Sales, Inc., Comp. Gen. Dec. B-241639, 90-2 CPD &366, November 5, 1990.

The protest is dismissed in part and denied in part.

**[Signed]**

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**[Compared to original 5/16/95 WJJ]**