

Protest of) Date: July 31, 1991
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FAGAN CONSTRUCTION CO.)
)
Solicitation No. 199986-91-A-0038) P.S. Protest No. 91-31

DECISION

Fagan Construction Co. ("Fagan") has timely protested the award of a contract for construction of a new postal facility in Olathe, KS ("East Olathe Station"), to McPherson Contractors, Inc. ("McPherson"). Fagan, whose price was the lowest offered, contends that the contracting officer improperly failed to consider Fagan's technical data, sent under separate cover the previous week in response to another solicitation.

Solicitation No. 199986-91-A-0038 was issued by the Facilities Service Office, Overland Park, KS, on March 19, 1991, with a proposal due date of April 18. The solicitation sought offers to construct a new postal facility. The solicitation included Section M.1, Contract Award, and Section M.2, Contract Award and Proposal Evaluation, which provide for award to the responsible offeror whose proposal is the most advantageous to the Postal Service, cost or price and other factors considered. Section M.2 described the other factors to be considered:

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 on the attached pages in descending order of importance.

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.

Section M.2 included four pages of questions which elicited required information, and provided that the responses would be used in evaluating the offers.

Solicitation Section K, Award Without Discussions, provided, "The Postal Service may award a contract on the basis of initial proposals received, without discussions. Therefore, each initial proposal should contain the offeror's best terms from a cost or price and technical standpoint."

Three amendments were issued, none of which altered the time or location for receipt of proposals. Six proposals, Fagan's among them, were opened on April 18. Fagan's

proposal did not include any of the technical information required by Section M.2 of the solicitation. A cover letter accompanying Fagan's proposal directed the evaluator to refer to a separately submitted prequalification package for its financial statements: "J-9: Financial Statements forwarded in prequalification package under separate cover."^{1/}

The contracting officer did not retrieve any information from Fagan's previous prequalification statement for use in evaluating its East Olathe Station proposal.^{1/}

A technical review committee evaluated each offeror's technical data without any knowledge of the offeror's cost or price proposal. Each of the three members of the technical review committee gave Fagan a score of "zero" for each factor evaluated, noting on the evaluation sheet that the Section M information had not been provided. Other offerors besides Fagan received a score of "zero" for particular factors where information had not been provided,^{1/} but only Fagan received a "zero" for every factor evaluated.

After reviewing the evaluation committee's comments and ranking of the firms, and giving equal weight to the technical ranking of the firms and their prices, the contracting officer selected McPherson as the prospective awardee.^{1/} A letter advising McPherson of the Postal Service's intent to award it the contract upon the receipt of appropriate bonds was sent on May 10, and the contract was awarded to McPherson on May 21, for \$2,281,000.^{1/} The unsuccessful offerors were notified of the award by letter dated May 21.

Fagan immediately requested a debriefing, which was held on May 24. Notice to proceed was issued to McPherson on May 31. Fagan's protest of the award, dated May 31, was received by the contracting officer on the same date.

In its protest, Fagan alleges that it was denied a review of the technical portions of its proposal because the contracting officer failed to incorporate in its proposal the technical information submitted in its prequalification statement of the previous week, as instructed by the cover letter. Fagan claims it was led to believe that the

^{1/}The prequalification package referred to in the cover letter had been submitted under Solicitation No. 199986-91-A-0029, "Prequalification Package For: New Construction of Postal Facilities within the States of Missouri, Kansas and Southern Illinois." The prequalification statement for that solicitation was due April 12, 1991.

^{2/}Fagan's protest letter concedes that its prequalification statement had not yet been reviewed by the Postal Service at the time of debriefing.

^{3/}For example, McPherson received a "zero" for "Financial Capability" because its financial statement was not provided with its initial proposal.

^{4/}McPherson had not included its minority subcontracting plan or goals specifically for this solicitation with its proposal. McPherson was contacted and advised to submit its proposed plan immediately. Its plan was received on May 10, and was approved the same date.

^{5/}The estimated cost of the project was \$2,669,850. Fagan's offer was \$2,225,000.

prequalification statement had to be submitted in order to be considered for award of the East Olathe Station project. It claims that all the information required for an evaluation was in the hands of the contracting officer, had only someone "bothered" to retrieve it from the file, or contacted Fagan regarding the omission. Fagan notes the prequalification statement was in the possession of the Postal Service during the debriefing. Fagan also claims that not all of the other five offerors presented their technical information on the forms provided in Section M of the solicitation. Fagan states that it has received a technical evaluation on two previous projects.¹⁴

There is controversy over whether the envelope submitted under the earlier solicitation containing the prequalification statement included any reference to the East Olathe Station solicitation. Fagan claims the envelope cannot now be produced to show that it did not reference the East Olathe Station solicitation. It contends that the envelope was apparently destroyed between the debriefing on May 24, and a request by Fagan to view the envelope on May 29. However, Fagan does not state affirmatively that the envelope did display such a reference. The contracting officer states that any claim that the envelope did reference the East Olathe Station project is inconsistent with Fagan's position during the debriefing, in that Fagan did not suggest during the debriefing that it had referenced the East Olathe Station solicitation on the envelope conveying its previous week's submission.

The contracting officer submitted a report detailing the circumstances surrounding evaluation of the six proposals submitted under the solicitation. The contracting officer takes issue with Fagan's contention that it did not receive an evaluation, since it was given a total score of "zero" on technical factors, and ranked sixth of six offerors when technical factors and price were combined.¹⁵

The contracting officer states that Fagan's cover letter did not sufficiently indicate that its technical submittal under another solicitation was to be incorporated into the East Olathe Station solicitation. The contracting officer had no recollection, during the evaluation, that Fagan had been evaluated for technical qualification on two previous projects.

The contracting officer contends that he has no responsibility to search out materials which were not included with the proposal, even if the materials may be in the custody of the Postal Service in connection with another solicitation. While some of the proposals received may have used different forms to provide the technical information, the contracting officer states that the information supplied by all of the other proposals complied substantially with the requirements of the solicitation. The contracting officer has no knowledge of anyone leading any offeror to believe that the prequalification solicitation package in connection with Solicitation No. 199986-91-A-0029 was required

¹⁴According to the contracting officer's statement, proposals on both of these projects were opened in August 1989.

¹⁵The contracting officer's statement that Fagan ranked sixth when price and technical factors were combined conflicts with a memorandum for the record, Contracting Officer's Evaluation of Proposals and Selection of Prospective Contractor, dated May 1, which shows Fagan tied for third place.

to be completed prior to the award of the East Olathe Station Solicitation No. 199986-91-A-0038; the requirements for furnishing technical information under the two solicitations were completely separate.

Fagan responded to the contracting officer's report, reiterating that it was informed it would be necessary to submit the technical information required by Solicitation No. 199986-91-A-0029 to be considered for award under Solicitation No. 199986-91-A-0038. Fagan contends that technical information in proposals submitted by two of the offerors was incomplete, and that one of the offerors used its own forms in submitting the technical information. It states that since these proposals received a technical ranking, it should also still receive a fair technical ranking. No other party submitted comments regarding this protest.

DISCUSSION

Fagan's assertion that the contracting officer was required to retrieve and incorporate the technical information submitted in response to a separate solicitation is incorrect.^{1/} "It is the offeror's responsibility to place before the contracting officer information necessary to permit evaluation of its proposal." Thermico, Inc., P.S. Protest No. 90-71, December 21, 1990 ("there is no merit to Thermico's assertions that the contracting officer should have obtained the required information from other Postal Service records. . .").^{1/} No matter how capable an offeror may be, it runs the risk of losing the competition if its proposal does not include the information necessary to evaluate this capability. Huntington Laboratories, Inc., P.S. Protest No. 89-46, November 15, 1989; H & B Telephone Systems, P.S. Protest No. 83-61, February 6, 1984.

We credit the contracting officer's statement that the cover letter did not clearly indicate that the technical information required under Section M was submitted under the pre-qualification solicitation and should be incorporated into the East Olathe Station proposal.^{1/} The cover letter did not state that the technical information required by

^{8/}There is a dispute as to whether Fagan was informed that the prequalification solicitation and the East Olathe Station solicitation were connected. In disputes of fact we adopt the contracting officer's version absent sufficient evidence to overcome the presumption of correctness which attaches to that position. Cohlma Airline, Inc., P.S. Protest No. 87-118, April 13, 1988; Edsal Machine Products, Inc., P.S. Protest No. 85-84, January 29, 1986. Fagan has made only a bald allegation, which is insufficient.

^{9/}See also Southern Air Transport, P.S. Protest No. 89-56, October 3, 1989 ("The offeror is responsible for any omissions or errors in its proposal"); Lazerdata Corporation, P.S. Protest No. 89-60, September 29, 1989 ("An agency's technical evaluation is dependent on the information furnished in the proposal and the burden is upon the offeror to submit an initial proposal that is adequately written").

^{10/}Even if the envelope containing the prequalification statement did reference the East Olathe Station solicitation, that is not sufficient to meet Fagan's responsibility to place a complete proposal before the contracting officer. To the extent Fagan alleges bad faith by the contracting officer in that the envelope was apparently destroyed after the debriefing, it has failed to present substantial evidence to support its contention. "Allegations of bad faith must be shown by virtually irrefutable proof of malicious and specific intent to harm the protester, not merely by inference or supposition." Graphic Technology, Inc., P.S. Protest No. 85-66, December 30, 1985.

Section M.2 in its entirety had been provided under separate cover, it referred only to financial statements required by Section J. Further, it did not identify the solicitation number to which it sought to direct the evaluator. The contracting officer would have been required, first, to determine to which previously submitted proposal Fagan referred, and second, what information included in the prequalification statement was intended to be included in the East Olathe Station proposal. While in hindsight, it appears that the prequalification statement could have provided technical data relevant to evaluation of the East Olathe Station proposal,^{11/} we cannot find the contracting officer's actions to have been inappropriate under the circumstances.

Fagan's assertion that the contracting officer should have contacted Fagan regarding the omission of the technical data is also without merit. Nothing in postal procurement regulations requires the contracting officer to pursue from the offeror "the submission of portions of a proposal that were . . . subject to the requirement of timely receipt established by the solicitation itself." Thermico, Inc., supra.^{11/} While information regarding the responsibility of an offeror may be obtained after proposals are due and before award, Comcorps, P.S. Protest No. 82-48, September 15, 1982, the information required under Section M.2 was required to be part of the offeror's initial submission, and it was clear that this information would be significant in the evaluation of the proposals. Thermico, Inc., supra.^{11/}

Had the contracting officer determined that discussions were necessary or desirable, Fagan could have been permitted to submit its technical information in order to correct this deficiency in its proposal. However, the contracting officer reasonably determined that award without discussions was appropriate, see Procurement Manual ("PM") 4.1.5 f.1, and the solicitation provisions clearly stated that the Postal Service may award a contract on the basis of initial proposals received.^{11/}

^{11/}While the material submitted in response to Solicitation No. 199986-91-A-0029 is before us, we have not reviewed it to determine its adequacy against the requirements of Solicitation No. 199986-91-A-0038.

^{12/}Fagan's claim that other offerors did not provide either all the technical information required, or did not provide it on the Section M form, is irrelevant. Where information was not provided, an offeror received a score of "zero" for that factor evaluated. Furthermore, there is no impropriety in the contracting officer's decision that technical information provided on a form other than the one requested could satisfy the requirements, provided the appropriate information was included.

^{13/} An offeror's technical score is based upon an evaluation of the technical proposal submitted. See Five Star Catering, [P.S. Protest No. 88-68, January 31, 1989]. An offeror's responsibility is a judgment as to its capacity and capability of performing in accordance with the technical proposal it has submitted. L.P. Fleming, Jr. Hauling, Inc., P.S. Protest No. 83-64, December 19, 1983. While, in practice, these concepts may blend together, they are analytically distinct.

Southern Air Transport supra.

^{14/}PM 4.1.5 f.2, which states that where there is uncertainty as to pricing or technical aspects of the most favorable initial proposal, award may not be made without discussions, does not apply to this situation where Fagan's proposal, unaccompanied by technical data, was not the most favorable initial proposal.

The protest is denied.

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Office of Contracts and Property Law

[checked against original JLS 8/11/93]