

Protest of) Date: August 9, 1991
SERV-O-MATIC, INC.)
Solicitation No. 479990-91-A-D022) P.S. Protest No. 91-32

DECISION

Serv-O-Matic, Inc. timely protests the award of a contract for food vending services to Tennessee Business Enterprises, Department of Human Services ("TBE"). TBE has been designated by the United States Department of Education as the State Licensing Agency for Tennessee under the Randolph-Sheppard Act. (20 U.S.C " 107-107f (1988)).^{1/}

Solicitation No. 479990-91-A-D022 was issued on November 28, 1990, by the Southern Procurement & Materiel Management Service Center to provide cafeteria vending services at the Memphis Bulk Mail Center. Serv-O-Matic had been the incumbent contractor providing services at this facility.

Section nine of the Solicitation Instructions and Conditions stated that "[a]ward will be made to the responsible offeror whose proposal (price and other factors considered) is most advantageous to the Postal Service." The Instructions also provided:

(d) The right is reserved to accept other than the lowest offer and to reject any or all offers. However, if the State agency is in the competitive range and priority has been assigned, award will be made to the State agency.

(e) The Postal Service may award a contract, based on initial offers received, without discussion of such offers. Accordingly, each initial offer should be submitted on the most favorable terms from a price and technical standpoint which the offeror can submit to the Postal Service.

^{1/}The Randolph-Sheppard Act ("Act"), as amended, provides blind persons with paying jobs and the opportunity to be self-supporting. In the context of this solicitation, the regulations implementing the Act require the contracting officer to award the contract to the State Licensing Agency if the proposal submitted by the State Licensing Agency is in the competitive range and the Secretary of Education has issued a determination of priority. See 34 C.F.R. ' 395.33 (1990).

The solicitation further stated on page 30 that offers would be evaluated on the basis of six evaluation criteria, with the following point allocation:

1. Reputation, Experience, and Resources	100
2. Sanitation Practices	100
3. Personnel Staffing and Management	100
4. Menu Prices, Portion Sizes, and Management Controls	300
5. Menu Variety	250
6. Budget (<u>pro forma</u>), Accounting System, and Controls	<u>150</u>
	1,000 Total Points

Three proposals were received in response to the solicitation. The evaluation committee, consisting of three Postal Service representatives from the Bulk Mail Center, reviewed the proposals and provided their evaluations.

The "Evaluation Summary" completed by the evaluation committee shows that although the three offerors were evaluated on the basis of the six evaluation criteria set out in the solicitation, their proposals were not evaluated in accordance with the point allocation established in the solicitation. Instead, the proposals were evaluated on the basis of the following point allocation:

1. Reputation, Experience, and Resources	200
2. Sanitation Practices	150
3. Personnel Staffing and Management	200
4. Menu Prices, Portion Sizes, and Management Controls	200
5. Menu Variety	200
6. Budget (<u>pro forma</u>), Accounting System, and Controls	<u>50</u>
	1,000 Total Points

Serv-O-Matic received 730 points while TBE received 843 points. The third offeror received 272 points. Since the proposal submitted by the State Licensing Agency was acceptable and had received the highest number of points in its technical proposal, the contracting officer concluded that he need not request a determination of priority from the Secretary of Education in order to award to TBE. That award was made on April 23, 1991. The unsuccessful offerors were notified on April 26. Serv-O-Matic sent a letter of protest to the contracting officer, who received it on May 10. The contracting officer denied Serv-O-Matic's protest on May 24 noting in his decision that "[t]he Department of Human Services received the highest overall score and was determined responsible for performing under the terms and conditions of [the] contract." Serv-O-Matic appealed the contracting officer's decision to the the Postal Service Board of Contract Appeals ("PSBCA").^{1/}

^{2/}The PSBCA does not have jurisdiction over protests. Ronald E. Scurlock, P.S. Protest No. 91-12,

In its protest, Serv-O-Matic states that it should have received award of the contract since it "not only presented the best overall bid but also has the financial, operational and facility capability to out-perform any food and vending contractor in the Mid-South; including the Tennessee Business Enterprises." Serv-O-Matic also asserts that it has provided outstanding service and high quality products in the many years in which it has serviced the Bulk Mail Center.

The contracting officer's report notes that since TBE's proposal was determined acceptable, a decision was made not to hold discussions or request best and final offers. TBE was selected for award and negotiations were held with TBE to reach agreement on final contract terms and conditions.

The contracting officer reports that a debriefing was held with the protester on May 22. At that time, the contracting officer discussed with the protester the deficiencies found in its proposal with respect to each of the six evaluation factors. The contracting officer states that he pointed out to the protester that in many cases the technical responses in the protester's proposal were insufficient to satisfy the requirements of each evaluation factor.^{1/}

The protester submitted comments reasserting its claim that Serv-O-Matic has serviced the Bulk Mail Center in Memphis for many years, providing quality products, excellent service, and state-of-the-art equipment. Serv-O-Matic notes that the members of the local evaluation committee have first-hand knowledge of its experience, qualifications, and ability to perform.

Serv-O-Matic adds that the solicitation for full-line vending was inappropriate since it contains several references, in the section entitled "Guidelines for Preparation of Food Service Proposal (Cafeteria)," which apply only to a full-service cafeteria serving food items that are prepared on-site. Serv-O-Matic concludes that a fair evaluation of vending proposals cannot be made by employing a strict interpretation of the language found in the "Preparation Guidelines" section of the solicitation.^{1/}

March 19, 1991. It referred Serv-O-Matic's protest to our office, which received it on June 5. We consider the protest pursuant to Procurement Manual (PM) 4.5.4 e.

^{3/}The contracting officer has made a determination that it is in the best interests of the Postal Service to allow the contractor to proceed with performance on the contract pending a decision on this protest.

^{4/}As Serv-O-Matic first raises this issue in its comments to the contracting officer's report, and it is against the terms of the solicitation, it is 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 for proposals." PM 4.5.4 b. "This timeliness requirement is jurisdictional and cannot be waived." TLT Construction Corp., Inc., P.S. Protest No. 89-75, January 18, 1990. Therefore, this part of the protest is dismissed as untimely.

Discussion

Serv-O-Matic's claim that it should have received award of the contract since it offered the best proposal is, in essence, an allegation that its proposal was not evaluated in accordance with the solicitation's stated evaluation criteria. It is well settled that when evaluation factors are set out in a solicitation, they must be followed. Daniel J. Keating Construction Company, P.S. Protest No. 89-92, March 1, 1990; Cohlmlia Airline, Inc., P.S. Protest No. 87-118, April 13, 1988. "Once offerors are informed of evaluation criteria, the procuring agency must adhere to those criteria or inform all offerors of any changes made in the evaluation scheme." TRW Financial Systems, Inc., P.S. Protest No. 91-19, May 29, 1991, quoting POVECO, Inc., P.S. Protest No. 85-9, May 21, 1985.

In this case, the evaluation committee evaluated the proposals using the criteria outlined in the solicitation. However, the committee, without informing the offerors, improperly changed the allocation of points, thereby changing the weight that each of the criteria was accorded. Although the contracting officer based her decision of who should receive award on this flawed evaluation, it did not result in any prejudice to Serv-O-Matic.

As the regulations promulgated under the Act (34 C.F.R. ' 395.33) and our regulations (Handbook AS-707H ' 334.1) clearly state, a state licensing agency for the blind is to be given award in competitive procurements if the agency's proposal is within the competitive range, and the Secretary of Education has issued a determination of priority. See Automatique, Inc., P.S. Protest No. 84-7, February 6, 1984. Consistent with the Act and our regulations, the Solicitation Instructions advised offerors that award would be made to the state agency "if the State agency [was] in the competitive range and priority [had] been assigned. . . ."

Our review of the record indicates that TBE would have been in the competitive range even if the proposals had been evaluated according to the point allocation set out in the solicitation. We also have no reason to doubt that TBE would have received priority from the Secretary of Education if the contracting officer had requested it. Therefore, although improper weights were given to the criteria enumerated in the solicitation, no prejudice to Serv-O-Matic has resulted since TBE would have received award even if the proper point allocation had been used. See Cohlmlia Airline, Inc., supra (although the contracting officer's evaluation of pricing proposals was flawed, no prejudice resulted to the protester since it would not have received award even if solicitation was evaluated properly).

We next address the protester's assertion that the evaluation committee should have recognized its position as the incumbent during the evaluation of its technical proposal. This assertion is legally untenable. It is well settled that "an 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." Sheldon Transfer & Storage Co., P.S. Protest No. 91-08, March 13, 1991, quoting Associated Aircraft Manufacturing and Sales, Inc., Comp. Gen. Dec. B-241639, 90-2 CPD & 366, November 5, 1990.

This protest is denied.

[DDAnna for:]

William J. Jones

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Office of Contracts and Property Law

[checked against original JLS 8/11/93]