

Protest of) Date: August 29, 1991
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MISSOULA SHEET METAL)
)
Solicitation No. 497786-91-A-0032) P.S. Protest No. 91-38

DECISION

Missoula Sheet Metal (Missoula) protests the award of a contract to Empire Heating and Cooling (Empire) for the reroofing of the Laurel, MT post office. Missoula alleges that its offer was improperly rejected as being not equal to the brand-name systems identified in the specification.

Solicitation No. 497786-91-A-0032 was issued by the Procurement & Materiel Management Office in Salt Lake City on April 12, 1991, seeking offers for the removal of an existing roofing system at the Laurel post office and the supply and installation of an insulated, flexible, membrane sheet roofing system assembly. Offers were due on May 17, 1991.

As amended by Amendment A01 the solicitation required the contractor to furnish a roofing system produced by one of three designated manufacturers:

- A. Furnish and install one of the following, pre-approved, mechanically attached, scrim reinforced, 45 mil. Hypalon roofing systems:
 - 1. HI-TUFF PLUS SYSTEM by J.P. Stevens and Co.; or
 - 2. BURKELINE ROOFING SYSTEM by Burke Rubber Co.; or
 - 3. HyChoice GOLDEN SEAL SYSTEM by CarlisleSynTec Systems;
 - 4. Or equal.

Section 2.1 D. of the specifications described the fascia^{1/} component of the roofing system:

FASCIA SYSTEM: shall be roofing system manufacturer[-] and Contracting Officer[-] approved system equal to Metal- Era "Anchor-Tite" #AF-45 (4.5" high, MINIMUM) fascia system with extruded aluminum anchor bar and .040"

^{1/}The fascia is the aluminum border surrounding the perimeter of and supporting the sheet encompassing the roof.

aluminum snap-on cover. Snap-on cover finish to be Light Bronze anodized.

Section 1.4 A. of the specifications set forth the requirements of the warranty:

The Contractor shall provide and pay for, as a condition of project acceptance, a fifteen (15) year, 'Total System' labor and material Warranty,[sic]. 'Total System' includes all components of the system from the steel deck, upwards and includes fascia system. Wind speed covered by warranty shall be winds of peak gust speed of 70[]mph measured 35 feet above the ground.

Section 3.15 of the solicitation provided:

- a. One or more items called for by this solicitation have been identified in the Schedule by a brand-name-or-equal product description. Proposals offering equal products will be considered for award if these products are clearly identified and are determined by the Postal Service to be equal in all material respects to the brand-name products referenced in the solicitation.

* * *

- c. The purchasing activity is not responsible for locating or obtaining any information not identified in the proposal and reasonably available to the purchasing activity. . . Accordingly, . . . the offeror must furnish as a part of the proposal -

1. All descriptive material . . . or;
2. Specific references to information previously furnished or to information otherwise available to the purchasing activity to permit a determination as to equality of the product offered.

The solicitation also provided, in Sections 3.8 and 3.9, that the contracting officer was not obligated to conduct discussions prior to award, and that

The Postal Service intends to award a contract to the responsible offeror whose proposal will be most advantageous to the Postal Service, considering cost or price and other factors specified elsewhere in this solicitation.

Provision A-9 advised: "each initial proposal should contain the offeror's best terms from a cost or price and technical standpoint."

Section 1.3 A., Submittals, of the technical specification (Attachment A to the solicitation), required that offerors submit the following with their offers:

1. Materials list of items proposed to be provided . . . ;

2. Manufacturer's specifications and other data needed to prove compliance with the specified requirements;
3. Manufacturer's recommended installation procedures . . . ;
4. Submit roof plan showing all conditions with details of all field and perimeter conditions approved by the roofing manufacturer for warranty[; and]
5. Warranty form.

The contracting officer received eight offers on the due date. Of the eight offers, only Missoula offered an "equal" roofing system, the Tremply HP4510 manufactured by Tremco, Inc. The protester responded to the requirements of Attachment A as follows:

1. Materials List
 - A. BILCO S-20 Roof Hatch With model #1 ladder-up.
 - B. One roof ladder as specified.
2. RHOLFLEX Polyisocyanurate roof insulation
2 layers of 1 1/2" in larger area and 3/4" in smaller area (brochure attached).
3. Tremline - facia [sic] gravel stop system (brochure attached).
4. Tremply HP 4510 mechanically fastened single-ply roofing system (specification attached).
5. Proof of UL and FM requirements attached.
6. All roofing details are the same as these drawn on the roof plan EXCEPT for the facia [sic] system and those details are enclosed.
7. Warranty form (attached).

The Tremco warranty limits liability as follows: "This warranty does not cover any damage or failure of the [Tremco Roofing System] or existing roofing membrane or any part thereof as a result of . . . [l]ack of proper drainage."

Upon discovering that Missoula offered a roofing system not among those listed in the specification, the contracting officer immediately sent Missoula's offer to the architect/engineer by facsimile. The architect/engineer, by facsimile transmission a short time later, identified three major deficiencies in Missoula's proposal. First, the architect/engineer concluded that the warranty of the roofing system manufactured by Tremco was not equal to those of the systems listed in the specifications. In particular, according to the architect/engineer's report, the Tremco warranty did not cover leaks or damage resulting from a lack of proper drainage on the roof. Furthermore, the architect/engineer reported that Tremco limited its liability on its warranty to the extent

of the installed contract price of the unit, unlike the warranty forms associated with the specified systems which warranted the replacement cost of the roof.

Second, the architect/engineer noted that the Tremco descriptive literature concerning the fascia insufficiently conveyed whether it was equal to the Metal-Era "Anchor-Tite" #AF-45 fascia system identified in the specifications. In particular, the height, thickness and metal finish of the offered fascia were not specified, leaving the architect/engineer to speculate whether the contractor intended to supply an equal fascia. In addition, the architect/engineer was not sure whether the fascia would work without additional modification.

Third, the architect/engineer found that Missoula insufficiently conveyed whether the hypalon sheet portion of the roofing system was equal to the brands in the solicitation. In particular, the installation procedures for the hypalon sheet required by Section 1.3 A.3. of Attachment A of the solicitation were not included for review. Furthermore, the architect/engineer determined that the submitted physical property specifications for the Tremco system were insufficient for comparison to the three specified systems. Moreover, the project specifications for the proposed equal roof did not clearly convey whether the existing sheet would be removed. Consequently, the architect/engineer could not determine whether the removal of the existing sheet was included in the contractor's proposal. Although Missoula submitted the lowest offer at \$36,895, the contracting officer, relying on the architect/engineer's evaluation of Missoula's proposal, found the system proposed by Missoula not equal to those specified and awarded the contract to Empire Heating and Cooling, the second low offeror at \$38,674.

The contracting officer notified Empire of its award and Missoula of its rejection by letters dated May 28, 1991. On May 29, the contracting officer informed Missoula by telephone that its price was the lowest offered. On the same date, Missoula requested, and evidently received, a copy of the architect/engineer's evaluation.

By letter dated May 30, 1991, Missoula informed the contracting officer that upon review of the architect/engineer's evaluation, it was formally protesting the award to Empire. Explaining that Missoula's May 30 letter inadequately communicated the grounds of its protest, the contracting officer permitted Missoula, at its option, to supply by June 11 additional information to supplement its initial protest.

Missoula timely responded to the contracting officer's request for additional information by letter dated June 6, 1991.^{2/} In its letter, Missoula conceded that its proposal lacked specificity, but stated its assumption that "if more information was needed it would have been requested." Missoula then addressed each of the architect/engineer's technical findings.

By letter dated June 12, the contracting officer denied Missoula's protest as obviously

^{2/}We note that the June 6 submittal was within ten working days of Missoula's receipt of information on which it based its protest. Therefore, the issue of whether the contracting officer can extend the period provided in Procurement Manual ("PM") 4.5.6 for protesting is not before us.

without merit pursuant to PM 4.5.6 c.2. His stated bases for the denial were the lack of warranty coverage absent proper roof drainage and the absence of information in Missoula's original proposal sufficient for the contracting officer to determine whether the Tremco system was "equal."

Missoula subsequently filed a protest with this office, where it was received on June 25. Missoula contends it is entitled to award because it submitted the lowest price. Missoula first argues that the contracting officer's denial of award to Missoula was primarily based on an arbitrary and capricious comparison of the Tremco warranty with the warranties of the three specified systems. Missoula submitted copies of the warranties for two of the listed roof systems. The J.P. Stevens' "Request for Warranty" form accompanying the Hi-Tuff roofing system expressly provides that a fifteen year "Hi-Tuff Plus" warranty covers only roofs having "positive drainage." Similarly, the "Design Specifications" brochure accompanying the Carlisle HyChoice roofing system expressly requires positive drainage: "For 15 year Golden Seal~ Total Roofing System Warranty projects (which incorporate all Carlisle products), the following is required[:]) . . . the deck slope must be a minimum of 1/4 inch per horizontal foot."^{1/} Missoula noted that the J.P. Stevens and Carlisle systems have warranties that require positive drainage, which it asserts is similar to Missoula's proposed Tremco system warranty. Moreover, Missoula insists that the roof already does and will continue to have proper drainage, and thus Tremco's exclusion of coverage for roofs lacking proper drainage is irrelevant. Missoula emphasizes that the Tremco warranty satisfied all of the specified coverage requirements set forth in Section 1.4 A. of Attachment A to the solicitation. In particular, the Tremco warranty provided 'total coverage' for a fifteen year term and it included a seventy mile per hour wind exclusion. In this regard, Missoula argues that the contracting officer imposed on Missoula additional requirements beyond the terms of the solicitation.

Second, Missoula contends that the information in its proposal was not, as the contracting officer concludes, incomplete. Rather, Missoula contends that it did indeed provide "sufficient facts to prove without doubt the equality of the systems." Missoula notes that it followed the requirements of the solicitation by completing all portions of the standard form solicitation and then enclosed on a separate piece of paper information required by Section 1.3 A. of Attachment A.

Third, Missoula suggests that the contracting officer hastily rejected its proposal without due consideration. It notes that the architect/engineer completed his evaluation of Missoula's offer by 2:44 p.m. on May 17, less than two hours after offers were due. Missoula expresses doubt that the architect/engineer could possibly have considered proposals submitted by eight offerors within that time frame. Thus, Missoula concludes that the architect/engineer did not "have or take the proper amount of time required to evaluate the proposal."

In his report, the contracting officer concedes that the Tremco warranty did in fact equal

^{3/}This requirement is not located in the chapter titled "Warranty" of the Carlisle brochure, but in chapter B, titled "Applicability and Restrictions."

those of the specified systems with respect to the dollar limit of liability. However, the contracting officer notes that the liability limitation was not the primary reason for rejecting Missoula's offer; rather, the "dollar limitation was only one of several reasons why the submittal was rejected" The contracting officer contends that he justifiably rejected Missoula's offer because the Tremco warranty was conditioned on the roof having proper drainage. Relying on information from the architect/engineer, the contracting officer concluded that Tremco's exclusion of coverage for roofs without proper drainage was too subjective a standard to make the warranty meaningful. He contends that any limitations in the J.P. Stevens and the Carlisle system warranties that require a one-quarter-inch-per-foot drainage requirement are objective standards while "the definition of what constitutes 'Lack of Proper Drainage' in the Tremco warranty appears to be solely at the discretion of Tremco. It does not state in the warranty the parameters or definition thereof."

Second, the contracting officer states that the Tremco fascia is not equal to the specified systems: "The Tremco system uses small deck brackets located forty inches on center instead of the specified system's continuous anchor bar."

Third, the contracting officer notes that Provision 1.3. A. of Attachment A of the solicitation requires the contractor to "prove compliance with the specified requirements." In particular, the contracting officer notes the following: the finish, height and weight of the fascia were not specified; Missoula's proposed modifications of the fascia should have been furnished to assure compliance with the specifications; and no data were submitted to prove Tremco's equality to the minimum values of nine physical properties of the specified sheets. Accordingly, the contracting officer concludes that he justifiably rejected Missoula's offer because Missoula "left the responsibility with the Postal Service to request additional information."

Finally, the contracting officer contends that the architect/ engineer did in fact give Missoula's submittal due consideration. The contracting officer explains that only Missoula proposed an "equal" system. As such, the contracting officer asserts Missoula's proposal was the only one requiring further evaluation by the architect/engineer.

In a brief reply to the contracting officer's report, Missoula reaffirms that it complied with the requirements to prove the equality of the Tremco system. It also notes that it is a responsible contractor and its long-standing business relationship with the Postal Service has been flawless.

Discussion

Missoula initially filed a protest with the contracting officer. Upon the contracting officer's denial of Missoula's first protest, Missoula subsequently filed a protest with this office. Under PM 4.5.4 e., this office will consider a protest filed within "ten working days of the protester's formal notification of, actual knowledge of, or constructive knowledge of initial adverse action by the contracting officer . . . , provided the initial protest was [timely] received" In this case, Missoula's protest was timely filed because the initial protest was received by the contracting officer within ten working days of Missoula's notification of its rejection and it protested to this office within ten

days of being advised by the contracting officer of his denial of the protest.

The contracting officer concluded the warranty on Missoula's system was not equal to those of the specified systems. Our standard of review of the contracting officer's technical evaluations is narrow. "This office will not substitute its judgment for that of the contracting officer or disturb his evaluation of an offer's technical acceptability unless it is shown to be arbitrary or in violation of procurement regulations." TLT Construction Corp., Inc., P.S. Protest No. 89-75, January 18, 1990.

The contracting officer concludes that because the Tremco warranty does not contain an objective standard limiting the applicability of the "proper drainage" exclusion, the Tremco roofing system is not equal to the brand names specified in the solicitation. "[A]n item offered as an 'equal' to a specified brand name in a 'brand name or equal' procurement need not meet the unique features of the brand name so long as the salient characteristics listed in the IFB are met." Business Equipment Center, Ltd., Comp. Gen. Dec. B-208607, February 14, 1983, 83-1 CPD & 153. In this case Section 1.4 A. of the specifications sets forth the minimum requirements of the warranty. There is no dispute that the Tremco warranty met the requirements of section 1.4 A: the Tremco warranty provided "total system" coverage for a fifteen year term, and also met wind speed coverage requirements, as required by Section 1.4 A. The contracting officer's requirement that the Tremco warranty match each aspect of those of the specified systems exceeded the scope of the appropriate "or equal" comparison. Requiring that Missoula prove the equality of its system's proposed warranty as compared with the unique characteristics of the brand-name systems specified in the solicitation was unnecessary, given that the specifications set forth the minimum requirements of warranty coverage. "The evaluation of proposals must be made in accordance with the criteria stated in the solicitation." Aloha Airlines, P.S. Protest No. 90-20, July 11, 1990.

We do not conclude, however, that the protester has successfully proved the equality of the fascia system. The contracting officer observed that the Tremco system uses small deck brackets located forty inches on center while the specifications (Section 2.1 D.) call for an Anchor-Tite model with a continuous anchor bar and a snap-on cover. Additionally, the Tremco specifications provide for a mill finish of metal with anodizing available at an additional cost while Specification 2.1 D. required a Light Bronze anodized finish to the fascia snap-on cover. While the contracting officer does not identify the significance of these differences, the protester does not appear to dispute that the differences exist. As we attach a presumption of correctness to the contracting officer's technical evaluation absent compelling evidence to the contrary, (Southern Air Transport, P.S. Protest No. 89-56, October 3, 1989), the protester shoulders the burden of proving the equality of its system. (See TLT Construction, *supra*; Aztek, Inc., Comp. Gen. Dec. B-229897, March 25, 1988, 88-1 CPD & 308.) The protester's failure to supply information concerning the equality of the fascia justified the contracting officer's rejection of Missoula's proposal.

Missoula argues that the contracting officer should have requested further information if required documentation was not enclosed in its proposal. Generally, a contractor is responsible for ensuring compliance with solicitation requirements: "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;

see Southern Air Transport, supra ("The offeror is responsible for any omissions or errors in its proposal"); Minnesota Vikings Food Service, P.S. Protest No. 86-86, October 31, 1986 ("[t]he burden is clearly on an offeror to submit an adequately written proposal" (quoting Chamberlain Manufacturing Corporation, P.S. Protest No. 85-83, February 14, 1986)); H & B Telephone Systems, P.S. Protest No. 83-61, February 6, 1984 ("An offeror must demonstrate affirmatively the merits of its proposal and runs the risk of proposal rejection if it fails to do so clearly"); ATI Industries, Comp. Gen. Dec. B-215933, November 19, 1984, 84-2 CPD & 540.

Nevertheless, the Procurement Manual recognizes an important exception:

Whenever there is uncertainty as to the pricing or technical aspects of the most favorable initial proposal, award may not be made without discussions,^{4/} unless the uncertainty can be resolved by clarification.^{4/} Discussions must be held under such circumstance even if the solicitation contains Provision A-19, Notice of Intent to Award Without Discussions.

P.M. 4.1.5 f.2.^{1/} Thus, a contracting officer may be obligated to conduct discussions notwithstanding an "award without discussions" provision in the solicitation if there is uncertainty in the most favorable initial proposal. However, the contracting officer need not conduct discussions under PM 4.1.5 f.2. if the technical proposal does not conform to the specification requirements:

the contracting officer [is] under no obligation to conduct discussions with [the protester] concerning roof requirements, since PM 4.1.5 f.2. requires discussions to be held only when "there is uncertainty as to the pricing or technical aspects of the most favorable initial proposal "

TLT Construction, supra.

^{4/}The Procurement Manual defines "discussion" as:

[a]ny oral or written communication between the Postal Service and an offeror (other than communications conducted for the purpose of clarification) that is initiated by the Postal Service and (a) involves information essential for determining the acceptability of a proposal or (b) provides the offeror an opportunity to revise its proposal.

PM 4.1.5 a.3.

^{5/}The Procurement Manual defines "clarification" as:

[c]ommunication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in [a] proposal.

P.M. 4.1.5. a.2.

^{6/}For a discussion of the applicability of 4.1.5 f.2., see TLT Construction, supra; Handling Systems, Inc., P.S. Protest No. 89-70, December 19, 1989, n.4.

Although Missoula's proposal was the most favorable in terms of price, there was no uncertainty as to whether the offered fascia system met the specifications; it did not. Accordingly, following TLT Construction, because the fascia system was not equal to that specified, the contracting officer was not obligated to conduct discussions under 4.1.5 f.2.

The protest is denied.

William J. Jones
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Office of Contracts and Property Law

[checked against original JLS 8/12/93]