

Protest of) Date: September 17, 1991
CADILLAC PRODUCTS, INC.)
Solicitation No. 104230-91-A-0077) P.S. Protest No. 91-44

DECISION

Cadillac Products, Inc., (Cadillac) timely protests the terms of Solicitation No. 104230-91-A-0077 for nestable pallets. The solicitation was issued on June 10, 1991, by the Office of Procurement, Headquarters, with an offer due date of July 10. The solicitation seeks firm-fixed price offers for the purchase of 3,078,000 nestable pallets, with options for an additional 2,387,000 pallets.

According to section 3.2 of the specifications, pallets can be manufactured of "a suitable grade of engineering plastic or a combination of wood, fiber, and synthetic resins. . . ." Under the contract, deliveries in thousand-pallet quantities are to be made monthly to a large number of major mailers. For example, the delivery schedule for December, 1991, identifies 129 separate deliveries. Section M.1 of the solicitation, entitled "Evaluation Criteria," provides that "award will be made to the responsible offeror whose proposal conforms to the solicitation requirements and provides the lowest price to the U.S. Postal Service."

Section A of the solicitation, which contains general information for offerors, states that the "U. S. Postal Service will only accept offers on the quantities and destinations outlined in this solicitation." This statement is followed by a note that "[a]lternate proposals will not be considered." Section J.2 of the solicitation, entitled "Preparation of Proposals," notifies offerors that "[p]roposals for supplies or services other than those specified will not be considered unless authorized by the solicitation." Section C.11, entitled "Warranty", states that the "contractor warrants, [for one year after the date of manufacture] that all supplies furnished under this contract . . . will be free from defects . . . and will conform with the specifications and all other requirements of this contract."

In its protest, received July 10, Cadillac alleges that there are several deficiencies in the solicitation.^{1/} First, Cadillac alleges that by choosing to evaluate the proposals on the basis of unit price, instead of life-cycle costs, the Postal Service is favoring compressed wood pallets over plastic pallets since the initial unit price of plastic pallets is higher than that of compressed wood pallets. Cadillac claims that as structured, the

^{1/} Cadillac's protest incorporates by reference a letter dated June 21, addressed to the Senior Contract Specialist, which explains why Cadillac believes that plastic pallets are better than wood pallets and includes a cost analysis of the overall savings the Postal Service could enjoy by using plastic pallets.

solicitation does not permit consideration of the long term savings that the Postal Service could obtain by buying plastic pallets, which cost more initially, but last far longer than wood pallets.^{1/}

Cadillac next asserts that the solicitation is defective because it prohibits the consideration of alternate proposals, precluding the proper evaluation of all available options and resulting in excess costs. Third, the protester claims that the solicitation fails to take into account the current state of the art which allows the use of materials, such as high density polyethylene, to produce durable light weight plastic pallets.^{1/} Cadillac also faults the solicitation for failing to consider the benefit to the environment of using plastic pallets instead of wood ones.^{1/}

Finally, Cadillac objects to the one year warranty which the solicitation includes, contending that the Postal Service cannot enforce the warranty since the solicitation fails to require suppliers to mark or identify each pallet with the date of manufacture. The protester requests the solicitation be delayed so that its product can be evaluated, or that the solicitation be changed so that 50% of the requirements are purchased in accordance with the current solicitation and 50% of the requirements are satisfied with the plastic pallet.

Commenting on the protest, the contracting officer reports that the solicitation is not unduly restrictive, since it allows offerors to use a wide range of materials and manufacturing processes. She notes that Section 3.2 of the specification permits manufacturers to supply pallets composed of polyethylene as Cadillac proposes. She adds that life-cycle costs were not used as an evaluation factor because life-cycle costs are not the primary concern of the Postal Service. She explains that the Postal Service has established a need for large quantities of pallets delivered to multiple locations. The Postal Service, however, does not have the funds to purchase that quantity of expensive, albeit long-lived, plastic pallets.^{1/}

Concerning environmental issues, the contracting officer asserts that these concerns are outside the protest jurisdiction of this office. She notes, nonetheless, that compressed wood pallets can be recycled, and that the Postal Service has aggressively reviewed methodologies to advance recycling efforts. Finally, with

^{2/} According to the protester, compressed wood pallets average two shipping trips before becoming damaged beyond use. Plastic pallets, on the other hand, last well in excess of fifty trips.

^{3/} Cadillac compares the 18.5 pound weight of its plastic pallet to the 30 pound weight of the wood pallets, alleging that the use of the heavier compressed wood pallets may contribute to Postal Service employee back injury which the use of lighter pallets would reduce.

^{4/} Cadillac asserts that plastic pallets are 100% recyclable, but are also manufactured with up to 50% post-household recycled materials. According to the protester, if the Postal Service purchases Cadillac's all plastic pallet, it will be removing 25,275 tons of waste from the landfill system. If, on the other hand, the Postal Service purchases compressed wood pallets, it will be depositing 81,975 tons of waste into landfill.

^{5/} The contracting officer notes, however, that the Postal Service "has not abandoned its plastic pallet program and intends to continue to purchase plastic pallets in the future."

respect to the protester's concerns about enforcement of the warranty clause, the contracting officer argues that these concerns are matters of contract administration and thus also outside the scope of the protest function.^{1/}

The protester submitted comments in response to the contracting officer's statement. Cadillac states that the provision that "alternate proposals will not be considered" in the solicitation was unclear. Cadillac asserts that it had previously submitted an unsolicited lease-purchase proposal^{1/} which was summarily

rejected. It believes that the solicitation's prohibition against alternate proposals is an attempt by the Postal Service to prevent it from offering such a plan.^{1/} Cadillac states that its lease-purchase agreement would satisfy the Postal Service's need to have a large quantity of nestable pallets delivered to a large number of locations, while allaying the Postal Service's concern over available funds. Cadillac rebuts the contracting officer's statement that life-cycle costs are not a primary concern, quoting an internal Postal Service memorandum it obtained as stating that the Postal Service "is acquiring the [all plastic] pallets with the objective of making them the standard pallets to be provided major customers/mailers. . . ."^{1/}

Responding to the statement that environmental issues are outside the scope of the protest function, Cadillac argues that the environment is "every citizen's concern." The protester notes that the statement that compressed wood pallets can be recycled is not consistent with the Postal Service's actual current practice of disposing of compressed wood pallets. Finally, Cadillac augments its contention that the question of whether the Postal Service will enforce the warranty requirement is a valid protest issue by pointing out that this requirement has a direct impact on a manufacturer's costs.^{1/}

^{6/} Award of this contract has been delayed pending the outcome of this protest.

^{7/} In January, 1991, Cadillac submitted a proposal which offered to lease the costlier plastic pallets to the Postal Service over a period of time, with an option for the Postal Service to purchase the pallets at the end of the lease.

^{8/} To the extent that Cadillac is alleging, in its supplementing comments, that the solicitation is ambiguous, it is raising a new and independent basis for protest which must independently meet the timeliness requirements set out in the protest regulations. Evergreen International Airlines, Inc., P.S. Protest No. 86-07, May 5, 1986, aff'd on reconsideration, June 9, 1986. The Postal Service's regulations require that "[p]rotests 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 of proposals." PM 4.5.4 b. Since Cadillac did not raise its concerns about the ambiguity in the solicitation until August 6, when it filed its comments to the contracting officer's statement, those concerns cannot be considered on their merits. TLT Construction Corp., Inc., P.S. Protest No. 89-75, January 18, 1990.

^{9/} Because the protester has not supplied a copy of this memorandum to us, we are unable to verify its content or accuracy. Accordingly, we afford it no weight.

^{10/} The protester requested a conference. At the conference, the protester reasserted its claim that it would be in the best interests of the Postal Service to allow offerors to submit proposals on a lease-purchase basis and restated its concerns about the effect this procurement will have on the environment.

In response to a request from this office for additional information, the contracting officer addressed Cadillac's perceived inability to submit an alternate lease-purchase proposal. The contracting officer explains that the solicitation did not preclude Cadillac from submitting a lease-purchase agreement since the term "alternate proposals" referred to proposals containing differing quantities or destinations, not to differing materials, fabricating methods or purchasing methods. She points out that if Cadillac was concerned in that regard, it should have written requesting an explanation of the provision. She adds that Cadillac's lease-purchase proposal probably would have been rejected because such an agreement would not have been in the Postal Service's best interests. She explains that the administration of such an agreement would be difficult and costly due to the large quantities of pallets involved and their multiple destinations. She adds that the record keeping, tracing of pallets and accounting would be impossible since they are not used exclusively within the Postal Service, but are supplied to private mailers.

Litco International, a supplier of compressed wood pallets, submitted comments on Cadillac's protest. Litco contends that the protester's environmental analysis is exaggerated. It notes that its compressed wood pallets are recyclable, and that it expects that, by the end of 1992, all of its compressed wood pallets will be made from recycled materials. Litco also describes the deficiencies it perceives in plastic pallets, noting, for example, that excessive heat weakens them. In addition, Litco asserts that the high cost of plastic pallets results in higher losses when the pallets are loaned to outside facilities and not returned.

Discussion

Cadillac contends that the Postal Service should amend the solicitation to include life-cycle costs as part of the evaluation criteria. Our review of the contracting officer's selection of evaluation criteria is narrow. As the Comptroller General has noted:

[W]e will not object to the use of particular evaluation factors so long as they reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests.

Cajar Defense Support Company, Comp. Gen. Dec. B-239217, 90-2 CPD & 74, July 24, 1990. The protester shoulders the burden of proving that the evaluation criteria are irrational. Technical Services Corporation, Comp. Gen. Dec. B-214634, 85-1 CPD & 152, February 7, 1985.

The contracting officer has stated that life-cycle costs and pallet durability are not a primary concern of the Postal Service in this procurement. Rather, the Postal Service requires a large quantity of nestable pallets and has only limited funds available for them. By evaluating the proposals on the basis of initial price, the Postal Service seeks to ensure that it can purchase what it needs. The protester has not met its burden of showing that the contracting officer's choice of unit price as an evaluation factor was irrational. Accordingly, we defer to the contracting officer's decision to use this particular evaluation factor.

We next address Cadillac's claim that the solicitation is defective because it prohibits the consideration of its alternate proposal to offer the Postal Service a lease-purchase

financial arrangement. We interpret this as the contention that the requirements of the solicitation are unduly restrictive. The determination of the government's minimum needs and the method of accommodating these needs are primarily the responsibility of the contracting officials who are most familiar with the conditions under which the supplies and services have been used in the past and will be used in the future. Portion-Pac Chemical Corp., P.S. Protest No. 84-49, August 1, 1984, quoting Amray, Inc., Comp. Gen. Dec. B-208308, 83-1 CPD & 43, January 17, 1983.

When a solicitation has been challenged as unduly restrictive:

[I]t is incumbent upon the procuring agency to establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

Portion-Pac Chemical Corp., supra. The contracting officer has explained that a lease-purchase arrangement would not be feasible in these circumstances, because the Postal Service would have to keep track of the pallets, which would be in and out of its possession. The contracting officer's explanation is prima facie support for the restriction against submitting such a proposal. Since the protester has not shown that the purchase requirement is clearly unreasonable, its challenge fails. In addition, Cadillac's contention that the solicitation does not allow the use of materials such as polyethylene to produce light weight pallets is not supported by the solicitation, which allows manufacturers to submit proposals offering pallets made of "a suitable grade of engineering plastic." This portion of the protest is denied.

The protester next seeks to require the consideration of the environmental aspects of the various types of pallets requested

in this procurement. The environmental impact of the Postal Service's procurement of supplies is a matter of concern for those responsible for the requirement, not this office. See INS Construction & Development Corp., P.S. Protest No. 90-17, July 20, 1990 (a construction performance bond requirement is a policy matter over which this office has no jurisdiction); TLT Construction Corp., Inc., P.S. Protest No. 89-75, January 18, 1990, n.4 (complaint about the Postal Service's switch from sealed bidding to negotiated procurements is beyond the scope of protest procedures).

Although we do not reach the environmental issue and dismiss this portion of the protest, we note that subsequent to the issuance of this solicitation, the Postal Service has issued Handbook AS550, Recycling Guide, which, inter alia, implements postal policy to "include environmental considerations among the criteria by which . . . purchases are evaluated" and "[p]romote the sustainable use of natural resources and protection of the environment through conservation, recycling, and reuse of material . . ."

Finally, Cadillac protests the solicitation to the extent that the warranty provision is rendered unenforceable by the lack of a specification requirement that the date of manufacture be marked on the pallets. While we agree with the contracting officer that the warranty provision and its enforcement are matters of contract administration outside the scope of the bid protest jurisdiction (Grady Stephens Pressure Cleaning,

Inc., P.S. Protest No. 91-22, May 7, 1991), Cadillac appears to have identified a legitimate inconsistency in the solicitation's requirements. On the one hand, the solicitation requires offerors to warrant their goods for a one year period, including the cost of that warranty in their offers.^{1/} On the other hand, the solicitation appears to make the enforcement of the warranty difficult or impossible, since there is no requirement that the pallets be marked so that postal managers will be able to pursue warranty claims within their terms. This inconsistency places prospective offerors in a difficult position, uncertain how to calculate the Postal Service's actual intent or how to meet it.

The inconsistency can be readily resolved by the removal of the warranty or the amendment of the specification to allow the warranty to be enforced. The contracting officer is directed to make an appropriate determination in this regard, revise the solicitation accordingly, and allow the offerors to make any

revisions to their proposals which the revision requires. This portion of the protest is sustained.

Cadillac's protest is sustained to the extent indicated, denied in part, and dismissed in part.

[Signed]

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[Compared to original 5/12/95 WJJ]

^{1/} The decision to include a warranty in a solicitation involves the consideration of many factors, including the cost of the warranty, the administrative cost and difficulty of enforcing the warranty, and the ability to take advantage of the warranty. PM 2.2.4 c.