

Protest of	) Date: November 23, 1992
	)
LESLIE-, INC.	)
	)
Telephone Solicitation	) P.S. Protest No. 92-50

DECISION

Leslie-Locke, Inc. (Leslie-Locke) timely protests the award of a contract for Neighborhood Delivery and Collection Box Units (NDCBU) to Florence Corp. (Florence), claiming that the award was not in accordance with the solicitation requirements and applicable regulations.

On May 12, 1992, the Los Angeles Procurement Services Office orally solicited the four approved sources for NDBCUs by telephone. The solicitation requested quotes on 10,200 units; 3,000 Type I, 2,500 Type II, and 4,700 Type III. Quotes were requested on three bases: FOB Origin, palletized; FOB Origin, non-palletized, and FOB Destination, palletized, and that delivery was required within 90 days of award. Offerors were advised that award would be made on an item-by-item basis in lots of 100 or in the aggregate. Three quotations within the competitive range were received; a fourth offeror was determined to be outside the competitive range for all prices it quoted:

	Type I		
	FOB Origin palletized	FOB Origin non-palletized	FOB Destination palletized <sup>1/</sup>
Cutler Mfg.	\$146.50	\$145.00	\$154.43
Florence	\$163.03	\$162.03	\$173.03
Leslie-Locke	\$162.66	\$162.34	\$171.14

<sup>1/</sup> Both Cutler and Florence quoted prices on FOB Destination, non-palletized, but the contracting officer appears to have assumed that any FOB Destination delivery would include palletization of the units.

Type II

	FOB Origin palletized	FOB Origin non-palletized	FOB Destination palletized
Cutler Mfg.	\$176.68	\$174.46	\$185.44
Florence	\$205.52	\$204.52	\$215.52
Leslie-Locke	\$198.30	\$198.06	\$206.86

Type III

	FOB Origin palletized	FOB Origin non-palletized	FOB Destination palletized
Cutler Mfg.	\$202.90	\$201.20	\$214.18
Florence	\$240.45	\$238.95	\$250.45
Leslie-Locke	\$243.27	\$243.03	\$251.83

The aggregate FOB Origin quotes were evaluated for palletizing and transportation costs by adding \$18,156 to all non-palletized quotes and adding appropriate transportation costs from the quoter's plant to Hermiston, CA. As evaluated, the aggregate evaluated quotes were as follows:

	FOB Origin palletized	FOB Origin non-palletized	FOB Destination palletized
Cutler Mfg.	\$1,831,540	\$1,958,546	\$1,933,536
Florence	\$2,133,005	\$2,221,095	\$2,235,005
Leslie-Locke	\$2,127,099	\$2,215,189	\$2,214,171

In late May, the Office of Material Management notified the procurement office that Cutler was the apparent low offeror on the basis of the aggregate quotes. On June 1, the contracting officer received a directive from the regional office indicating that the preferred delivery terms for NDCBUs was FOB Origin, non-palletized. Thereafter, the contracting officer concentrated on that delivery method in determining which offeror should receive award.

Pre-award surveys were conducted of all three quoters. These surveys led the contracting officer to conclude that Cutler had the capacity to manufacture only 4,000 units within the 90 day delivery schedule, while Florence had a capacity of 8,000 units, and Leslie-Locke had the capacity to produce the entire quantity. The contracting officer states that "[t]o maximize the total number of units within approved funding," agreement was reached with the requiring activity to order a mix of units in such a way

that each end user would receive all three types of units (Types I, II, and III) from the same manufacturer. The mix agreed to was 30% Type I, 25% Type II and 40% Type III.

Due to a limitation in the available funding to \$1,963,975.00, the total number of NDCBUs was reduced from 10,200 to 10,000. On June 22, split awards were made to Cutler and Florence on an FOB Origin, non-palletized basis with Cutler receiving an award for 1,100 Type I, 900 Type II, and 1,800 Type III units, and Florence receiving award for 1,900 Type I, 1,500 Type II, and 2,800 Type III units. Leslie-Locke's timely protest followed.<sup>1/</sup>

Leslie-Locke notes that the telephone solicitation did not mention any evaluation factors other than price, and, that, therefore, award had to be made to the offerors quoting the lowest price. Leslie-Locke argues that its unit price quote on Type II NDCBUs was \$6.46 per unit lower than any other offeror's, and that it was entitled, at the very least, to this portion of the award. Leslie-Locke contrasts its excellent performance record with the prior performance record of "the successful bidder" and alleges that the failure to take such information into account is erroneous and an abuse of discretion.<sup>1/</sup>

Leslie-Locke also argues that its aggregate quote was substantially similar to that of Florence, differing in aggregate price by only 0.18%. Leslie-Locke contends that the two quotes should have been treated as equal quotations, pursuant to PM 4.2.3 c.,<sup>1/</sup> so that award would have been made to Leslie-Locke based on its superior performance record. Leslie-Locke concludes that the award to Florence was erroneous and that it is entitled to award of a contract for NDCBUs.

In his report to this office, the contracting officer states that the oral solicitation informed all offerors that award would be made on an item by item basis in lots of 100 units each or in the aggregate and notes that all vendors received identical solicitation information. He claims that, as to FOB Origin, non-palletized delivery terms, Cutler was

<sup>2/</sup> Upon receipt of the protest, and after consultation with assigned counsel, the contracting officer issued a stop work order on the Type II NDCBUs awarded to Florence, while allowing ordered performance to continue on the remaining awarded quantities. Performance is substantially complete on the Type I and Type III NDCBUs to be delivered by Florence. Performance on the Cutler contract was halted when Cutler was removed from the approved sources list on August 31. An undetermined number of units remain undelivered by Cutler.

<sup>3/</sup> Leslie-Locke notes that Procurement Manual (PM) 3.1.6 c. provides that offers from prequalified vendors may be considered based primarily on price without undue performance risk. It adds, without citation of authority, that the "ability to perform and prior performance is always a consideration in evaluation of contract proposals," by which we understand the protester to be suggesting that Cutler and Florence's unsatisfactory past performance should have been taken into account in evaluating their quotations.

<sup>4/</sup> This section provides that "[w]hen two or more offerors meeting the requirements of the solicitation are evaluated as equally low, the contracting officer must select between them on the basis of performance record, experience, or other factors in the Postal Service's interest. Award may be determined by drawing lots only if there is no other basis for selection."

the lowest offeror, item by item or in the aggregate, Florence was the second low in the aggregate for all three types and for Types I and III, and Leslie-Locke was second low only for Type II.

The contracting officer further states that, based on the pre-award surveys, Cutler was found to lack the capacity to produce the entire quantity within the required delivery schedule. Based on his decision to award the procurement in the aggregate, the contracting officer views his determination to award to Florence the portion of the contract remaining after the award to Cutler as reasonable. He quotes Procurement Handbook (PH) 4.2.1 e-30: "It is solely the responsibility of the contracting officer to exercise business judgment and make any required trade-offs between price and other factors," and argues that the protest should be denied as obviously without merit.

Florence has submitted comments indicating that award of the contract to it was correct because its quote was lower in the aggregate than that of Leslie-Locke and that its past delivery performance has been satisfactory. It further notes that it had made substantial commitments to perform the contract it was awarded, and that cancellation of that contract would cause it financial hardship.

### Discussion

Leslie-Locke's protest must be sustained, as the procurement suffered from several serious irregularities which violated applicable regulatory provisions and precedents.

The LOCKE solicitation provided that award would be made on an item-by-item basis in lots of 100 units or in the aggregate. This was the only evaluation criteria set forth in the solicitation. The record discloses that no evaluation was made of any of the quotes on an item-by-item basis, although offerors had been told that that was a possible method of award. The contracting officer's failure to compare evaluated prices on an item-by-item basis to determine whether award by item would be less costly than award in the aggregate was improper. Cf. Domino Amjet, Inc., P.S. Protest No. 91-54, October 8, 1991.

The solicitation requested quotes on three FOB bases. However, apparently because of an intervening directive from the procurement office's supervising entity, the contracting officer reviewed and examined only FOB Origin non-palletized prices. To do so was improper, because the quoters had a right to expect award to be made to the lowest priced quoter as evaluated among the three FOB types on which they had quoted. A change in the manner in which offers would be evaluated as occurred here is sufficiently significant to require amendment of the solicitation and a new round of quotes. See POVECO, Inc., P.S. Protest No. 85-9, May 21, 1985; PAE GmbH, Comp. Gen. Dec B-212403.3 et al., July 24, 1984, 84-2 CPD & 93.

The contracting officer also impermissibly imposed a restriction by requiring award to be made by fixed proportions of Type I, Type II, and Type III NDCBUs in making partial award to Cutler. The solicitation did not provide for award to be made based on a mix of NDCBU types, but rather provided that award would be made to the lowest priced quoter. Therefore, award of an NDCBU "mix" was incorrect and not in accordance with the solicitation requirements; if this was to be a solicitation requirement, it was necessary for the solicitation to make the requirement explicit.

The contracting officer further erred in making partial awards on the basis of the aggregate price. If award was not to be made in the aggregate, the item prices had to apply and award had to be made on the basis of those prices, rather than the aggregate prices.

For the above reason, Leslie-Locke's protest must be sustained.<sup>1/</sup> We now come to the issue of remedy. The relief we can order may include an order to terminate for the convenience of the Postal Service the improperly awarded contract. C.J.M. Construction, Inc., P.S. Protest No. 91-74, December 9, 1991. We use a balancing test to determine the appropriateness of a particular remedy, or, indeed, whether any remedy is called for in a particular case:

Whether to require termination in a given case depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the requirement, and the impact of termination on the accomplishment of the agency's mission. Honeywell Information Systems, Inc., Comp. Gen. Dec. B-186313 (April 13, 1977), 77-1

<sup>5/</sup> Because of the procurement deficiencies we have noted above, we do not find it necessary to address the protester's additional reasons why this procurement was flawed, such as the contracting officer's unilateral reduction in the number of NDCBUs and award based on that reduced number in the absence of any advice that the Postal Service reserved the right to do so. We note, however, that we do not find persuasive Leslie-Locke's contention that its offer was substantially equal to Florence's offer, so as to call into play the tied-offer provision of 4.2.3 c. That provision applies only when offers are "evaluated as equally low," which was not the case here.

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C.D.E. Air Conditioning Company, Inc. and Coastal Mechanical Corporation, P.S. Protest Nos. 92-11, 92-18, April 2, 1992 (quoting TPI International Airways, Inc., P.S. Protest No. 87-40, October 30, 1987). In this case, we note that contract performance has been substantially completed on the Type I and Type III NDCBUs awarded to Florence. Substantial completion of contract performance is a condition that obviates granting any relief. See, e.g., Kisco Company, Inc., P.S. Protest Nos. 83-58 and 83-60, December 19, 1983; Rentco Division, Fruehauf Rental Equipment, Inc., P.S. Protest No. 75-74, December 19, 1975.

However, as to the Type II NDCBUs awarded to Florence which was the subject of a stop work order soon after award and on which performance has been minimal, as well as the award to Cutler, on which performance was halted once Cutler was decertified as an approved source for NDCBUs, we may grant relief. The procurement deficiencies are very serious in nature, Leslie-Locke has been significantly prejudiced by them, and the integrity of the competitive procurement process has been damaged. The cost to the Postal Service of termination of these improperly awarded contracts is likely to be minimal and the impact on the Postal Service's mission is, likewise, small. Therefore, the Type II portion of Florence's contract and all of Cutler's contract which has not been delivered should be terminated for the convenience of the Postal Service. If the quotes can be evaluated in a manner in keeping with the solicitation requirements, award is to be made on the quotes received, as properly evaluated. If the quotes cannot be so evaluated, the contracting officer may request a new round of quotes, accompanied with explicit provisions on how the quotes will be evaluated, and make award on that basis.

The protest is sustained.

For the General Counsel:

William J. Jones