

**October 21, 1993**

**P.S. Protest No. 93-20**

## **NEW BREED CORPORATIONS**

**Solicitation No. 059990-93-A-L006**

### **DIGEST**

Protest against the exclusion of an offer from the competitive range is denied where protester fails to establish that the determination that its higher priced offer lacked real chance of award was unreasonable.

### **DECISION**

New Breed Corporations protests the exclusion of its offer from the competitive range under solicitation 059990-93-A-L006 for warehouse and distribution services in Indianapolis, IN.

The solicitation was issued April 16, 1993, by the Purchasing Service Center, San Bruno, CA, seeking 24-hour commercial warehouse services at a site in Indianapolis to be provided by the Postal Service. At the site, the contractor was to "pick and pack" orders for consumable repair parts for postal facilities throughout the country and to deliver and receive shipments of repairable items. The contractor was to provide a computer database consistent with the Postal Service's Depot Parts System to track inventory levels for the parts maintained.

The initial term of the contract was to be forty postal accounting periods (approximately forty months) with unevaluated options for additional periods. Offerors were to price various elements of service for each fiscal year for which service was to be provided. Some elements were to be priced on a transaction basis (e.g., the fulfillment of orders for pick and pack consumables and for repairable items). In addition, three levels of test technicians were to be reimbursed on an hourly basis, as special services.

Offerors were to provide a technical proposal consisting of an executive overview, a statement of the solicitation's mission, a discussion of how the contractor will perform the

warehousing and distribution system on a day-to-day basis, an implementation plan for the initial phase of the contract from contract award to operational readiness, and a discussion of the offeror's management experience. According to section M.1 of the solicitation, award would be made to the proposal offering

the best value to the Postal Service (i.e., a combination of price, price-related factors, and other factors). The primary areas to be used in determining which proposal offers the best value to the Postal Service are listed below in . . . de[s]cending order of importance.

EXECUTIVE OVERVIEW, MISSION STATEMENT AND  
WAREHOUSE AND DISTRIBUTION (45 POINTS)

IMPLEMENTATION PLAN (30 POINTS)

MANAGEMENT EXPERIENCE (25 POINTS)

The provision also noted that "[c]ost/price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price."

Six offers were received June 18. As the solicitation had provided,<sup>1</sup> each offeror's facility was visited by the technical evaluation team. The technical evaluation team then reached a consensus technical score for each offeror. The technical scores ranged from 69.1 to 87.9 points. New Breed's technical score was below the middle of the range of technical scores, but its evaluated price was significantly higher than the prices of the other proposals. On July 30, the contracting officer determined "[b]ased on the technical scores and price, . . . to eliminate New Breed from the competitive range because of [its] high price."<sup>2</sup> The other five offerors remained in the competitive range and their offers were the subject of written discussions.

By letter dated July 30, New Breed was notified of its exclusion from the competitive range and was advised that its offer would not be considered for award. The letter gave no reason for the exclusion. By letter dated August 13, New Breed replied to the contracting

<sup>1</sup> Solicitation provision M.3 stated:

VISIT TO CONTRACTOR'S FACILITY

As part of the evaluation process, USPS representatives will visit the contractor's facility/facilities which is/are identified in the proposal as a representation of relative experience.

<sup>2</sup> The document which sets out this determination recites the technical scores and prices of the six offerors, and also identifies the degree of risk (ranging from low to medium) assigned to each offer, apparently in the course of technical evaluation. We note that nothing in the solicitation suggested that risk would be a factor in the evaluation of offers. Since New Breed was not excluded on that basis, we need not go beyond that observation.

officer, expressing surprise at its exclusion and explaining various aspects of its proposal in light of the requirements of the solicitation. The letter also characterized various elements of New Breed's discussions with the evaluation team in the course of its visit to New Breed's facility as relaxing the requirements of the solicitation.<sup>3</sup>

According to its letter, New Breed viewed the discussions at the site visit as discussions for the purposes of Procurement Manual (PM) 4.1.5 g.1., which provides for written or oral discussions with offerors within the competitive range, and concluded accordingly that it had been included within the competitive range. The letter ended with a request for the opportunity to submit a best and final offer.

The contracting officer replied to New Breed's letter by letter on August 19, stating that the site visit to New Breed's facility did not constitute discussions, but rather was part of the evaluation process. The letter explained that "New Breed was eliminated from the competitive range primarily because of price," and that the Postal Service could not accept a best and final offer from New Breed. This protest followed.

New Breed's protest, addressed to the contracting officer and dated August 27, was received by the contracting officer by facsimile on that date. The protest objects to the contracting officer's characterization of the site visit meeting, contending that it clearly constituted discussions as described by PM 4.1.5 g.3., restates New Breed's assertions that the relaxation of the Postal Service's requirements reflected in those discussions would "drastically reduce" New Breed's price, and contends that since all of the evaluation points set out in the solicitation related to technical factors, price should not have been a factor in determining the competitive range. The protest complains about the cost to New Breed associated with the site visit and contends that the exclusion of New Breed from the competitive range deprives it of fair consideration in the procurement process.

The contracting officer forwarded the protest to this office for consideration pursuant to PM 4.5.6. c.1. by memorandum dated September 1. The memorandum contended that New Breed's protest was untimely, since it knew that it had been excluded from the competitive

<sup>3</sup> For example, New Breed notes:

At our Discussion Meeting . . . , it was stated by the USPS Team that it was not really a requirement that 100% of the orders associated with each day's work be completed each day and at 100% accuracy. . . . This was significant additional information for us to receive and we were expecting a written modification to the solicitation. If, in fact, the requirement is for less than 100% accuracy, then our company would have modified its approach.

New Breed's proposal contained significant automation and computerization addressing the requirements of the statement of work and evaluation criteria of the solicitation. During the discussion meeting we were informed by the USPS that the Postal Service had antiquated systems and only wanted to moderately enhance them and not progress to state of the art technology in one big jump. . . . Again, this is an area which requires considerable cost to meet the requirements of the USPS solicitation. We did not learn that this level of sophistication was not required until this meeting.

range on August 6, when it received the contracting officer's letter of July 30.<sup>4</sup> We deferred the question of timeliness until after the receipt of the contracting officer's report.

The contracting officer's statement recites the history of the procurement, restates his understanding that the protest is untimely, and replies to the specific aspects of New Breed's protest as follows:

The contracting officer characterizes New Breed's technical score as "low," and notes that its price was 40% higher than that of the next highest offeror. New Breed's technical score did not justify its price, and "[i]t was unlikely that New Breed could improve [its] technical score while reducing [its] price in the magnitude needed to stay in the competition."

The evaluation team's meeting with New Breed followed the same format as its meetings with the other offerors; the team took questions from the offerors, but did not take questions concerning the adequacy of the offeror's proposal or regarding other proposals received. While the team tried to understand uncertainties in the offeror's proposal, it did not discuss how to resolve them.

The evaluation team "did not relax any [statement of work] or solicitation requirements for New Breed or any other offeror. Offerors were not advised of their deficiencies or suspected mistakes."

Even if the meeting with the evaluation team constituted discussions, New Breed would not have been eligible to submit a best and final offer, since PM 4.1.5 g.4.(a) provides for the consideration of best and final offers from offerors remaining in the competitive range after discussions, and New Breed was not in the competitive range at that point.

Responding to the contracting officer's contention that the protest is untimely, New Breed submits that its protest was timely since it was only after its receipt of the contracting officer's August 19 letter that it was advised of the reason for its exclusion from the competitive range, its excessive price. The protester asserts that its protest also identifies a deficiency in the solicitation which is timely raised prior to the time set for the receipt of best and final offers. Although the protester does not identify the deficiency, it appears the reference is to New Breed's contention that the specification is unduly restrictive.

Several interested parties have submitted comments on the protest. One offeror asserts that it was not led to believe that the accuracy and performance requirements of the solicitation were relaxed, but suggests that the implementation period requirements were effectively "relaxed" when Amendment 01 eliminated liquidated damages associated with the implementation period, and notes that the statement of work indicated that a ten-week implementation period was "planned," rather than "required." The offeror suggests that an

<sup>4</sup> The memorandum did not explicitly state which timeliness standard the contracting officer was applying; the appropriate standard appears to be that of PM 4.5.4 d. Protests other than those alleging defects in a solicitation "must be received not later than ten working days after the information on which they are based is known or should have been known, whichever is earlier. . . ."

offeror of New Breed's experience should have known to submit an alternative offer with different pricing.

Another offeror asserts that none of the performance criteria were relaxed in the course of its site visit, in which the evaluation team "reemphasized the need to strictly adhere to the performance criteria contained in the Statement of Work." This offeror also states its understanding, from the pre-proposal conference held in Indianapolis in May, that price as well as technical factors would be considered in the determination of the competitive range, although "primary emphasis would be given to evaluation of the Technical Proposals."

A third offeror also asserts that no relaxation of the solicitation requirements occurred during its site visit, nor did the postal representatives comment on deficiencies in its proposal. This offeror understood that the site visit would be considered in determining the competitive range, and asserts that the meeting was "professionally conducted according to the required procedures."

## **DISCUSSION**

We first address the issue of the protest's timeliness. The Postal Service has adopted a view of the timeliness issue similar to that of the General Accounting Office, which has noted that

[o]fferors who are rejected from the competitive range usually are not provided detailed reasons for that action at the time they are furnished notice of rejection; for that reason, we have long recognized that the basis for protest in such cases will arise when the reasons are made known to the offeror, usually through a debriefing. Where, however, an offeror is provided the detailed basis for proposal rejection, a protest of the rejection must be filed within 10 days thereof, rather than 10 days after any subsequent debriefing.

*ANEFCO, Inc.*, Comp. Gen. Dec. B-225502, 87-1 CPD 304, March 18, 1987, citations omitted, cited in *Travelco, Inc.*, P. S. Protest No. 91-10, March 21, 1991. *Accord, QMC, Inc.*, P.S. Protest No. 91-52, December 27, 1991; *Interlog, Inc.*, P. S. Protest No. 92-32, September 3, 1992. Because the July 30 letter did not disclose the basis on which New Breed had been excluded from the competitive range, its subsequent protest is timely as measured from its receipt of that reason.

On the merits, we note that this office will not substitute its judgment for that of the technical evaluators, nor will we disturb the evaluation unless it is shown to be arbitrary or in violation of procurement regulations.

The determination of the relative merits of technical proposals is the responsibility of the contracting office, which has considerable discretion in making that determination. It is not the function of our office to evaluate technical proposals or resolve disputes on the scoring of technical proposals. In reviewing a technical evaluation, we will not evaluate the proposal *de novo*, but instead will only examine the contracting officer's evaluation to ensure that it had a reasonable basis. The protester bears the burden of

showing that the technical evaluation was unreasonable. A protester's mere disagreement with the contracting officer's judgment does not meet its burden of proving that the technical evaluation was unreasonable.

*Computer Systems & Resources, Inc.*, P.S. Protest No. 86-4, March 27, 1986, citations omitted.

Contrary to New Breed's contentions, the solicitation clearly contemplates that price was to be a factor in the evaluation of offers. Accordingly, it was appropriate for New Breed's high price to be considered in deciding that "relative to other proposals, it ha[d] no real chance of selection for award" (PM 4.1.5 g.2.(b)) and thus was not within the competitive range.<sup>5</sup> *Crane National Vendors*, P.S. Protest No. 92-12, July 22, 1992.

The contracting officer's conclusion that New Breed's price was sufficiently high that its offer was not within the competitive range was well within his discretion under the standard explained above. New Breed's technical proposal was fourth highest of the six evaluated, and its numerical score was below the mid-point of the range of technical scores. Its price, on the other hand, was significantly higher than the other prices offered, and those prices (with one low exception) were reasonably grouped. The contracting officer reasonably concluded that New Breed could not reduce its price while maintaining a competitive technical score.<sup>6</sup> New Breed's effort to encourage us to conclude otherwise impermissibly seeks the substitution of our judgment for his, a substitution we decline to make.

The protest is denied.

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<sup>5</sup> This conclusion is not dependent on the preaward site visits occurring before the start of initial negotiations. Even if the site visits were "discussions" for the purpose of PM 4.1.6 g.1. (requiring discussions with all offerors within the competitive range), "[a]n offeror once placed in the competitive range may be eliminated from the competitive range when further review indicates that it has no substantial chance of receiving award." *Korby Construction Company*, P.S. Protest No. 89-79, February 2, 1990.

<sup>6</sup> New Breed's argument to the contrary is unpersuasive, since it requires adopting its conclusion that the Postal Service relaxed its requirements despite the contracting officer's denial that any relaxation occurred.