

December 2, 1994

P.S. Protest No. 94-43

DONINGER METAL PRODUCTS CORPORATION

Solicitation 052684-94-A-M405

DIGEST

Protest against terms of solicitation is dismissed in part and denied in part; contention that solicitation is not restrictive enough because an allowed chemical finishing process will not meet Postal Service's need presents issue not for review, while contention that solicitation is unduly restrictive, although reviewable, fails because decision not to allow another finishing process is not shown to be clearly unreasonable.

DECISION

Doninger Metal Products Corporation protests the terms of solicitation 052684-94-A-M405 for certain Series 2900 post office lockboxes, issued August 31, 1994, by the San Bruno Purchasing Service Center.

The solicitation incorporates USPS Specifications for Lockboxes, Postal Module 1800 and 2900 Series, USPS-L-421H, dated 5/13/91, and a number of USPS drawings.¹ The lockbox specifications and drawings provide for the aluminum lockbox nests to be finished using a process referred to as chemical conversion coating.² The solicitation provides, however,

¹ The specification describes modules of post office boxes by PSINs (Postal Service Item Numbers). A module consists of a frame or "nest" into which individual lockbox doors are set. The protest here involves the finish of the lockbox nest. The solicitation seeks only PSIN 2902 modules, an eight-door assembly.

² A typical direction concerning the finish of a portion of the lockbox nest reads as follows:

Finish: Apply chemical film in accordance with MIL-C-5541, Class 1A.

The specification referenced is MIL-C-5541E, Chemical Conversion Coatings on Aluminum and

for an optional method of finishing the lockbox nest not contemplated by the lockbox specifications and drawings, incorporating a second USPS specification, USPS-P-1170A, Dry Powder Coating, January 28, 1991.³

Aluminum Alloys, 30 November 1990. That specification does not identify the chemicals used in such coatings, referring instead to a separate specification, MIL-C-81706, as establishing the standards for such materials.

Paragraph 3.2 of MIL-C-81706 describes the chemical conversion coating material as "formulated from chromates, other inorganic salts such as phosphates or fluorides, catalysts, activators, and accelerators."

Products tested and approved pursuant to that specification are listed in a qualified products list, OP-81706-15, 31 August 1992, and a 31 May 1993 amendment. The products are listed by their manufacturers' designations, which are trade names. Paragraph 6.3 of MIL-C-81706 notes that "[t]he various products approved under this specification . . . are not interchangeable from a chemical standpoint," and that "[a]s the chemical film materials are proprietary products, the ingredients . . . vary with the different products."

The protester refers to the MIL-C-5541E as involving chromate conversion coatings, and the contracting officer confirms that all of the products set out on the qualified products lists include chromates.

³ Because that specification contemplated the use of dry powder coatings on iron or steel surfaces, and not on the aluminum surfaces required by the lockbox specification, the solicitation includes a provision, B.4., noting the difference and stating that "[t]he dry powder coating will apply [sic] to aluminum surfaces, if contractor elects to use dry powder coating."

Section M of the solicitation lists three technical factors which will be used in the evaluation of offers,⁴ and provides that "[c]ost/price will be considered in the award decision, although the award will not necessarily be made to that offeror submitting the lowest price."

Doninger is a current manufacturer of Series 2900 lockboxes for the Postal Service. In a September 20 letter from its president to the contracting officer Doninger contends that the specification unfairly allows the use of chromate conversion coating. The letter cites the following reasons for this assertion:

-- Chromate conversion coating presents both health and environmental hazards. Chrome is a known carcinogen which will unnecessarily endanger Postal Service employees and customers and contractor employees. Use of the process also generates hazardous wastes. These concerns would preclude Doninger from using a chromate conversion coating process.⁵

-- Based on its experience producing lockboxes under its current contract, Doninger understands the Postal Service to be seeking "a more decorative finish . . . including color consistency, no scratches, and corrosion resistance." The specification for chromate conversion coating does not enunciate these criteria objectively, making the inspection of boxes so coated too subjective. While the dry powder coating specification contains satisfactory objective criteria, that coating is a much more expensive alternative to chromate conversion.

The letter requested the elimination of chromate conversion coating as an alternative, and the postponement of the procurement until the matter was resolved.⁶

⁴ Specifically, "Production Capacity" and "Ability to Meet Delivery Schedule" are assigned 40 points each, while "Adequate Quality Assurance Procedures" is assigned 20 points. These factors are said to be the "primary areas to be used in determining which proposal offers the best value to the Postal Service."

⁵ Various papers and articles dealing with environmental concerns about the use of chromium in metal finishing accompanied the letter.

⁶ The lockboxes Doninger is currently furnishing are finished using a dry powder coating.

In comments filed in the course of the protest, Doninger states that "[a]t the outset of [its] current lock box contract, the Postal Service agreed that, in lieu of a chromate conversion coating, [Doninger] could use a non-chromate conversion coating that perform[ed] according to the . . . specifications set forth in MIL-C-5541E," but that "[a]fter accepting countless . . . lock boxes" with that finish, the Postal Service expressed its desire for "a more decorative finish," and Doninger undertook to provide the dry powder finish, subject to a price adjustment.

Replying to these comments, the contracting officer states that although Doninger had submitted test panels to the Postal Service which "passed the performance requirements of MIL-C-5541E, . . . the use of the non-chromate finish produced great variation in the visual appearance of the lockboxes. . . ." A second set of test panels failed to pass the salt spray test of MIL-C-5541E.

According to the contracting officer, the substitution of the dry powder finish for the non-chromate finish was proposed by Doninger and accepted by the Postal Service, not directed unilaterally by the Postal Service.

A subsequent September 26 letter from Doninger's counsel to the contracting officer contended that the solicitation is defective in the following respects:

- It specifies alternative finishes that differ significantly in performance, cost, and overall quality without setting forth any minimum performance standards for the finishes or criteria pursuant to which alternative proposals would be selected.
- It fails to set forth expressly the more stringent specifications and quality assurance standards for finishes which have been imposed under Doninger's current contract.
- It fails to provide for an alternative non-chromate conversion process to avoid the environmental concerns associated with chromate conversion; and
- It fails to state expressly minimum performance or appearance standards for lockbox nest finishes.

Viewing the letters as a protest which she could not resolve, the contracting officer forwarded them to this office pursuant to Procurement Manual (PM) 4.5.6 c.1.⁷

The contracting officer's statement responds to the allegations of the protest as follows:

- The solicitation incorporates adequate standards for the alternative finishes which it specifies; those standards are set out in the military specifications, incorporated by reference in the solicitation and in the USPS dry powder coating specification.
- In order to eliminate possible ambiguity, the contracting officer offers a proposed solicitation amendment identifying acceptable finishes. The proposed amendment provides for a third alternative finish, anodic coating using a non-chromate sealer.⁸

⁷ At the same time that she forwarded the protest to this office, the contracting officer replied to Doninger by memorandum with respect to some of the issues raised in its protest. Points similar to those in that response were included in the contracting officer's statement.

⁸ The relevant portion of the proposed amendment provides as follows:

U.S. Postal Service will accept, without preference, the finishes as specified on the drawings or the following alternative finishes:

* * *

- Dry Powder Coatings which meet or exceed the Requirements for Type I coatings, as specified in USPS-P-1170A, may be used as an alternative finish where drawings specify a chemical conversion coating per MIL-C-5541.
- Anodic Coatings in accordance with MIL-A-8625, type IC, II or IIB, Class 1 or 2, using a non-chromate sealer, may be used as an alternative finish where drawings

-- This solicitation "is not subject to the requirements of" Doninger's current contract. "The successful contractor will be required to perform in accordance with the specification and the quality assurance requirements" of the solicitation.

-- Products finished with chromate conversion do not offer a hazard to postal employees or customers. They may offer a hazard to the manufacturer's employees if proper safety, health, and environmental procedures are not followed. Such hazards are inherent in any procedures involving chemicals.

-- The generation of hazardous waste in the chromate conversion process and the need to dispose of such wastes are ordinary costs of doing business; there is no regulatory prohibition on the generation of such wastes, and the Postal Service is not precluded from requiring products which meet its needs because hazardous wastes may be involved in their production.

The contracting officer's statement concludes by asserting that the protest should be denied because the solicitation adequately sets out the Postal Service's requirements.

The contracting officer's report includes various additional materials including the following:

-- A letter from the Postal Service's Senior Counsel, Environmental Law, noting that the protest "may raise some internal policy issues in that the Postal Service may be specifying a process which is more polluting than something else . . . [but t]hat decision is left to the business judgment of the requiring activity and Engineering. . . . There is no requirement to modify the solicitation from a legal perspective on environmental issues. [The Senior Counsel] would encourage review for the future to see if the [specification] is in concert with our environmental policy concerning pollution prevention."

-- A letter from the Postal Service's office of Safety and Risk Management, Employee Relations, noting in part that according to an industrial hygienist, "the chrome finishings on lockbox nests would not pose a health hazard to postal employees and customers in normal use -- the hazards associated with chrome originate with the coating process or welding or cutting. The Postal Service is, however, committed to pollution prevention and chromium is a targeted substance." Accordingly, coordination with the Postal Service's office of Environmental Policy is

specify a chemical conversion coating per MIL-C-5541. The anodic coating shall have a total thickness consistent with the ranges specified in MIL-A-8625.

Note that although the specification for Dry Powder Coating is for iron or steel equipment surfaces, our requirement and specifications are for aluminum, therefore the contractor will be required to use aluminum.

MIL-A-8625F, Anodic Coatings for Aluminum and Aluminum Alloys, 10 September 93, provides for anodizing using chromic acid, non-chromic acid, or sulfuric acid. "Non-chromic acid" is further described as "mineral or mixed mineral/organic acids."

recommended.

-- Three memoranda from the Program Engineer, Engineering, Delivery and Customer Service Equipment, which provide the basis for the contracting officer's statements about the minimum standards for the various finishes specified or proposed to be specified in the solicitation.

Through counsel, Doninger has commented on the contracting officer's statement, reiterating points previously raised and additional matters as follows:

-- The protester continues to fault the solicitation for failing to explain how offers will be evaluated based on which of the three proposed finishes is proposed. Because chromate conversion finish "is simply not in the same class" with the other two finishes, "to say that no preference will be given to any of the three finishes . . . is arbitrary and capricious," rendering any best value analysis meaningless.⁹

-- As written, the solicitation's best value analysis does not cure this defect. The evaluation factors specified in the solicitation do not include consideration of the finish material. Various cited Comptroller General decisions stand for the proposition that "technical merit or quality of the item or service sought is an ever-present factor . . . critical in determining best value."

-- The solicitation does not adequately establish the standard by which accomplishment of satisfactory performance using a dry powder coating will be measured.

-- The dry powder coating and non-chromate anodized finishes are not satisfactory substitutes for a non-chromate conversion finish because they are not conversion finishes, and it is arbitrary for the Postal Service not to accept a non-chromate conversion finish under this solicitation, having accepted such a finish under its previous contract.

-- Contrary to the contracting officer's representations, chromate conversion finishes do present a hazard to postal employees and customers because exposure to chromium occurs if the non-durable chromate conversion finish becomes scratched.

This office requested the contracting officer's response to various questions raised by the protester's further comments. That response notes that there is no current specification for a non-chromate chemical conversion process and includes the following:

[F]urther qualification testing and the need for constant monitoring . . . of the

⁹ According to Doninger, a chromate conversion finish "can vary from light to dark," has less corrosion resistance and durability than the other finishes, and can "significantly deteriorate over a relatively short period of time." The protester notes that MIL-C-5541E states that the process "is not intended as a general purpose coating for commercial and decorative applications," and that its requirement for coatings of uniform appearance is qualified by the provision that they be "as uniform as practical." (Doninger's emphasis.)

non-chromate process is an unnecessary costly burden that the Postal Service does not wish to undertake in a new contract for lockboxes. Even if a non-chromate chemical conversion coating met the performance requirements of MIL-C-5541E, the ability to meet the appearance requirements [is] very much in question. . . . In the current solicitation, two additional proven finishes, powder coating and anodic coating, have been included as acceptable alternatives for the MIL-C-5541 chemical conversion coating. Acceptance of a non-chromate finish in addition . . . would require extensive testing and would only further delay procurement activities and could jeopardize the overall quality and performance of the final product.

Al's Tool and Die Enterprises, Inc., an interested party, submitted comments in general support of the contracting officer's position.

DISCUSSION

The protester seeks either the exclusion of chromate conversion finishing from the solicitation or the inclusion of non-chromate conversion finishing in addition to it. It also seeks differentiation in the evaluation scheme affording additional credit to offers proposing finishing methods other than chemical conversion finishing (*i.e.*, dry powder coating or anodizing).

To the extent that it seeks to exclude chromate conversion finishing from the requirement, it is undertaking to make the specification more restrictive.

The Comptroller General has stated that where a protester argues that a less restrictive requirement be changed to a more restrictive one, the protest will not be considered, specifically stating:

In general, we will not consider such protests where as here they are based on the argument that the less restrictive requirement is contrary to the protester's business interest or contrary to the protester's view of what is best for the agency.

Matanuska Maid, Comp. Gen. Dec. B-235607.2, June 30, 1989, 89-2 CPD 18.

Telesec Temporary Services, P.S. Protest No. 92-05, March 16, 1992.¹⁰ Under that

¹⁰ *Accord, Simula, Inc.*, Comp. Gen. Dec. B-251749, February 1, 1993, 93-1 CPD 86:

Without a showing that competition is restricted, agencies are permitted to determine how best to accommodate their needs, and are entitled to use relaxed specifications when they reasonably conclude that they can increase competition and meet their needs at the same time. Our Office will not consider contentions that specifications should be made more restrictive, particularly where, as here, they are based on the argument that the less restrictive requirement is contrary to the protester's view of what is best for the agency. Our role in reviewing bid protests is to ensure that the statutory requirements for full and open competition are met, not to consider a protester's assertions that the needs of the agency can only be satisfied under a more restrictive specification than the

standard, Doninger's objection to the inclusion of the option for chemical conversion coating is not appropriate for our review.

The protester's contention, on the other hand, that the specification is too restrictive because it does not provide for a non-chromate chemical conversion finish is subject to our limited review:

When a protester has alleged that a specification is restrictive of competition, contracting officials must establish *prima facie* support that the restrictions are reasonably related to the Postal Service's needs. Once established, however, the protester must show that the requirements complained of are clearly unreasonable. If a specification is reasonable, it is not unduly restrictive simply because a particular bidder is unable to meet it.

Express One International, Inc., P.S. Protest Nos. 92-28;30;35, July 15, 1992 (citations omitted). Here, the contracting officer has adequately explained the basis for the conclusion that a non-chromate chemical conversion finish does not meet the Postal Service's needs, and the protester has not demonstrated that her conclusion is clearly unreasonable. Contrary to the protester's contentions, the Postal Service may conclude that an alternative previously allowed no longer meets its needs. *Cf. Viereck Company, Comp. Gen. Decs. B-227089; B-227105*, August 14, 1987, 87-2 CPD 157.

Similarly, the protester has not persuasively demonstrated that the allowed alternatives to chromate chemical conversion are so more attractive alternatives that they must be afforded more credit in the evaluation of offers. This, again, is a matter within the contracting officer's province, and we will not interfere with that determination absent a clear abuse of discretion. Mere disagreement with the agency's determination of its needs does not make that determination unreasonable. *Enstrom Helicopter Corporation, Comp. Gen. Dec. B-253014*, August 13, 1993, 93-2 CPD 189.

Further, the suggestion that the various specifications incorporated into the solicitation do not adequately establish the requirements which the contractor must meet is incorrect. The specifications include performance requirements. Whether subsequent inspections during contract performance are in accordance with those requirements will be a matter for resolution in the course of contract administration, and not for resolution here. *Martin Widerker, Engineer, B-219872*, November 20, 1985, 85-2 CPD 571.

We do conclude, however, that there is a fault in the solicitation's evaluation scheme other than the one which the protester asserts. PM 2.1.7 c.7 provides as follows:

So that offerors may prepare proposals responsive to Postal Service needs, solicitations must indicate the relative importance of the evaluation factors *and their overall relation to price*. [Emphasis supplied.]

As noted above, the solicitation provides only 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." In our view, that guidance is not sufficient to inform offerors of the "overall

agency believes necessary.

relationship" of the technical evaluation factors to price. Because it does not explain how cost/price will be considered, offerors are unable to determine whether a more attractive technical proposal at a higher price would be more favorably considered than a less attractive (but acceptable) technical proposal at a lower price.

The contracting officer has already noted the need to amend the solicitation to incorporate revisions with respect to the acceptability of the alternative finishes; that amendment should contain appropriate guidance on the relationship of technical factors to price.

The protest is dismissed in part and denied in part.

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