

**April 29, 1996**

**P.S. Protest No. 95-47**

**CIR INDUSTRIAL AUTOMATION, INC.**

**Solicitation No. 415046-95-A-0507**

**DIGEST**

Protest against award of contract to furnish overhead conveyor system is denied where contracting officer's determination that protester's proposal was technically unacceptable was reasonable; other allegations are dismissed as untimely.

**DECISION**

CIR Industrial Automation, Inc., (CIR) protests the award of a contract for the fabrication and installation of an overhead conveyor system to BMCO.

Solicitation 415046-95-A-0507 was issued on July 10, 1995, by the Philadelphia Facilities Service Office (FSO), seeking offers for a conveyor system to be installed in the Springfield, MA, bulk mail facility. Offers were due August 25.

Section M, Evaluation and Award Factors, included the following:

**M.1 Contract Award (Provision A-8) (February 1992)**

a. The Postal Service will award a contract resulting from this solicitation to the responsible offeror whose proposal conforming to the solicitation offers the best value to the Postal Service, considering price, price-related factors, and/or other evaluation factors specified elsewhere in this solicitation.

\* \* \*

**M.2 Contract Award and Proposal Evaluation**

## 1. Method of Award

(a) Award will be made to the responsible offeror whose proposal offers the best value to the Postal Service, price and other factors specified below considered.

(b) Price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price. Proposals not deemed capable of providing the quality of the construction, repair or alterations or service specified will not be considered for award, regardless of price. Although price will not necessarily be a deciding factor in the decision to award, price will become relatively more important in discriminating among high quality proposals. If an award decision must be made among closely-ranked, acceptable proposals, award will be made to the lowest price offer unless another proposal would yield a significant benefit to the Postal Service. . . .

(c) The other evaluation factors listed in paragraph 2 are not directly related to the price. These factors are listed in their order of importance: that is, Factor 1 is the most important, followed by 2 and so on. A failure to completely address any of them may eliminated your proposal from consideration for award. . . .

## 2. Other Evaluation Factors

Factor 1. Offeror must have a minimum of five (5) years experience in fixed mechanization work and must have satisfactorily completed at least three (3) projects of similar size and scope.<sup>[1]</sup>

Factor 2. References: U.S. Postal Service, other Government Agencies and others.

Factor 3. Financial stability.

Factor 4. Management plan and key personnel: Superintendent.

Factor 5. Firm's capacity and current workload.

Provision K.1, Award Without Discussions (Provision A-9) (October 1987), stated:

The Postal Service may award a contract on the basis of initial proposals received, without discussions. Therefore, each initial proposal should contain the offeror's best terms from a cost or price and technical standpoint.

Six offers were received and evaluated. CIR's proposal, which offered the lowest price of the six offerors, was rejected as technically unacceptable.<sup>2</sup> Award was made without

---

<sup>1</sup> This sentence was also included in a portion of the solicitation entitled Scope of Work, which also included an estimated price for the work of "between \$1,700,000.00 and \$1,900,000.00."

<sup>2</sup> CIR's proposal listed the following five largest projects:

discussion to BMCO on October 6, at \$2,137,175, the second lowest offered price.

Following the award, the protester was notified that its proposal had been rejected in a letter which stated:

After review, it was determined that your proposal did not satisfy the requirements outlined in the Evaluation and Award Factors, Section M, of the solicitation, as your firm has not completed five years of experience in fixed mechanization work nor have you completed three projects of similar size and scope.

The protest asserts that the award to BMCO was improper as not comprising the best value because "the contracting officer did not comply with [Procurement Manual (PM)] 4.2.5" because no discussions were held;<sup>3</sup> "CIR did meet all of the evaluation factors set forth in  
(..continued)

A USPS 010 Loose Mail System contract in the amount of \$282,938;

A USPS 010 Loose Mail System contract at three locations valued at \$108,471, \$108,471 and \$96,690;

A non-postal contract for plating line retrofit worth \$119,952;

A non-postal contract for electrical control panels worth \$207,391.96; and

A non-postal contract for engineering services worth \$150,240.22.

As current active projects, CIR listed four non-postal projects of unspecified dollar values.

The record contains an evaluation memorandum dated September 1, in which the project manager stated that he found CIR "nonresponsive" [sic] because it has "not completed five years of experience in fixed mechanization work nor . . . three projects of similar size and scope." The memorandum included the following:

Since [CIR lists] no Postal projects of this type in their submittal, their ability to perform has not been proven.

CIR is in the business of [i]ndustrial controls. They design and fabricate control systems. It is not clear if they install these systems or if their parent company, CIR Electrical Construction, does. The CIR proposal lists seven projects with an average value of \$148,000. On five of these projects they were not the prime contractor. This hardly qualifies them for a bulk mechanization conveyor project valued at \$2,000,000.

[CIR's \$1,846,247 price is nearly \$291,000 lower than the next proposal,] reducing their credibility even further. [Other offerors are] experienced in bulk [i]ndustrial work.

<sup>3</sup> PM 4.2.5, Contractor Selection [for] Award, sets out the procedure for the evaluation of offers and the selection of an offer for award in a negotiated procurement. The following portions of PM 4.5.1 are of particular relevance to this protest:

4.2.5 c Discussions

the solicitation"; and "the practice of the U.S.P.S. in the award of other contracts has been such to give little weight to the evaluation factors cited by the contracting officer herein as the basis of award." According to the protester, "award without discussion could have been made in this case only if the award had been made to CIR," which submitted the most favorable initial proposal. CIR asserts that the contracting officer was required to hold discussions with it because there was uncertainty about non-price aspects of its proposal and that such discussions would have yielded the information which the contracting officer states was missing from the proposal.

CIR claims that it contacted the FSO before award was made, offering to "supply any evidence they might deem necessary to establish our competence and readiness to perform the work." The protester complains that the Postal Service made no attempt to "discover information about CIR and our sub-contractors by direct discussion with us."

CIR claims that other Postal Service offices have awarded major contracts to newly-formed companies and to offerors "new . . . to the USPS arena" and asserts that if "the experience issue refers to just USPS work then these awards were not correctly evaluated[,] however[] if the evaluation refers to all work then CIR's credentials would comply with the 5 years experience criteria."

(..continued)

1. A contractor may be selected and award made with or without discussing proposals with the offerors, depending upon the circumstances of the purchase, such as the complexity of the requirement, the extent of competition and the quality of the proposals received. . . .
2. Whenever price or price-related factors are the most important or the only evaluation factors, award will normally be made without discussions if adequate competition exists, to ensure that offerors submit their most favorable proposals at the outset. However, even when award will be based on price alone, discussions may be held as necessary to determine that the price is fair and reasonable.
3. The decision to make an award without discussions, based on initial proposals, or to make an award based on revised proposals following written or oral discussions, must be made by the contracting officer.

\* \* \*

#### 4.2.5 f Award without Discussions

1. Award may be made without discussion . . . whenever the existence of adequate competition . . . makes it clear that acceptance of the most favorable initial proposal will result in a reasonable price.
2. Whenever there is uncertainty as to pricing, technical, or other aspects of the most favorable initial proposal, award may not be made without discussions, unless the uncertainty can be resolved by clarification. . . .

Finally, the protester asserts that on the "other three most recent solicitations that we participated in, the low bidder was awarded the work in every case. It is certainly the norm in these bids to award to the lowest priced proposal."

With its protest, CIR has submitted letters from subcontractors and lists of projects and references of those subcontractors, including CIR Electrical Construction Corp., an "associated company" with "common stockholders." CIR describes its history, stating that it has completed five Postal Service jobs since 1992, and states that "the combined experience of our sub-contractors in mechanization work is in excess of 40 years." The protester also submitted a memorandum of a telephone conversation dated October 16, after award, with the project manager, in which the president of CIR suggested that CIR's "extremely successful" experience with "010 Loose Mail Systems," although "small in contrast[,] should be strong evidence in favor of making a decision in our favor when compared with just dollar volume."

The contracting officer has responded to the protest's allegations as follows:

- The evaluation of offers was made in accordance with PM 4.2.5. "The protester's proposal was evaluated and found to be deficient in content and quality."
- PM 4.2.5 c. allows an award to be made without discussions, and it is the contracting officer's decision whether discussions will be held. The protester's "nonresponsiveness"<sup>4</sup> and "the quality of the protester's proposal" made it unnecessary to conduct discussions with it.
- CIR's proposal evidenced no experience with projects similar to that solicited here. "Their postal experience consists of performing as an electrical subcontractor on several loose letter mail systems. The Springfield project is for bulk sack and tray mail conveyors and is a totally different application. Nothing in the CIR proposal has prepared them for this type of work."
- The protester's proposal neglected to mention the potential subcontractors to which CIR refers in its protest, "allowing the assumption that CIR was planning on performing all of the work with their own limited experience forces [sic]."

With regard to CIR's allegation that the "practice" of the Postal Service has been to give "little weight to the evaluation factors" used here, the contracting officer states that "[w]e are not in a position to comment on other USPS awards" and that this contract "was awarded in strict conformance with the [PM]." The contracting officer asks that the protest be denied.

---

<sup>4</sup> When, as here, solicitations are conducted on a negotiated basis, they are evaluated to determine technical acceptability or unacceptability. See PM 4.2.4. "Responsiveness" and "nonresponsiveness," "bid" and "bidders," are not proper terms to use with respect to negotiated procurements. See, e.g., *TLT Construction Corp., Inc.*, P.S. Protest No. 89-75, January 18, 1990.

The protester's reply to the contracting officer's statement was submitted by counsel,<sup>5</sup> who summarizes CIR's arguments by contending that "although [he] concedes that CIR was the most favorable initial proposal, [and] that there was some confusion concerning the application of Section M.2 of the Solicitation to CIR's proposal,"<sup>6</sup> the contracting officer did not comply with PM 4.2.5 f. because he failed to engage in discussions to resolve uncertainties in the most favorable initial proposal.

CIR asserts that the contracting officer "apparently rejected CIR's proposal because (1) CIR did not qualify pursuant to Section M.2 of the Solicitation, (2) it was not clear from CIR's proposal what entity would be undertaking the various tasks required to perform the contract and (3) CIR's proposal lacked credibility because it was \$291,000 lower than BMCO's proposal," and replies to the three alleged reasons as follows:

-- CIR does qualify and the contracting officer should and could have found that out.

-- The problems "concerning the relative responsibilities of the CIR team noted by the Project Manager are issues that should have been dealt with during the discussion phase, particularly where, as here, there was some perceived confusion by the Contracting Officer on this issue." CIR proceeds to explain that it "intended to enter into subcontracts with [two firms]" and would have acted as the "controls integrator."

-- Discussions would have clarified any confusion surrounding the price offered. The substantial difference in price between CIR and BMCO for mechanical installation and demolition should have caused the contracting officer "to make a critical ." comparison of the difference between the two bids" and made "the need for discussions . . . paramount."

Finally, the protester argues that the contracting officer's improper delay in notifying CIR that its proposal was not acceptable, and his notice of intention to award the contract to BMCO, which, according to CIR, was improperly sent on September 18 before BMCO's responsibility was determined on September 20, raise questions about the credibility of the contracting officer's statements and actions.<sup>7</sup>

---

<sup>5</sup> CIR's original protest letter was submitted by its president.

<sup>6</sup> Counsel appears to overstate the extent to which the contracting officer makes the "concessions" attributed to him.

<sup>7</sup> These allegations raised for the first time in counsel's November 27 submission are untimely. PM 4.6.4 d. states:

In all . . . cases [other than protests against the terms of a solicitation], protests 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; provided that no protest will be considered if received more than 15 working days after award of the contract in question.

Newly raised grounds for protest are measured from the date they are presented; they do not "relate

In response to our request for additional information, the contracting officer submitted a memorandum making the following points:

-- "In order to meet the minimum requirements for fixed mechanization experience . . . similar in size and scope, offerors had to demonstrate that they had successfully completed fixed mechanization project(s) that had a contract value in excess of \$500,000.00 where the offeror acted as the prime fabrication and erection contractor."

-- CIR's list of five completed contracts showed an average contract value of \$215,000.00. The largest one was valued at \$313,632.00, and "was comprised of three separate projects."<sup>8</sup> CIR "performed work in these contracts as an electrical subcontractor, industrial controls subcontractor, or engineering consultant. CIR did not perform work as the prime contractor for the fabrication and erection of the mechanized conveyor systems on these projects

-- Unlike BMCO, which met the experience requirements of the solicitation as a prime contractor, "CIR presented only limited scope experience in completed fixed mechanization projects that were not of similar size. This limited experience was considered a fatal flaw in CIR's proposal . . . which no further discussions could remedy."

We asked the contracting officer to reply to the contention that CIR attempted to submit information before award showing that its subcontractor(s) had the requisite experience. The contracting officer wrote:

In response to CIR's contention that it attempted to provide me with additional information concerning subcontractors, I can only state that I have found no record in the files to substantiate [the] statement and I have no personal recollection of any communications with representatives of CIR. In questioning my staff, I was informed CIR had made telephone contacts to both my Project Manager and Procurement Specialist in attempts to obtain status of the solicitation and evaluation process. No conversations concerning qualification of CIR or any subcontractors took place and . . . only routine inquiry responses were provided to CIR which did not constitute clarifications or discussions.

The protester has submitted final comments stating that the solicitation did not call for experience with contracts worth more than \$500,000, nor did it state that the experience had to be as a prime contractor. CIR reiterates its complaint that the project manager and the procurement specialist "made no effort to obtain the additional information, despite CIR's offer to provide such information."

(..continued)

back" to the initial protest. *Cordant, Inc.*, P.S. Protest No. 94-08, June 23, 1994.

<sup>8</sup> The contracting officer's calculation of the projects' average cost is higher than the project manager's (footnote 2, *supra*) because he counted the three-part contract as one contract, rather than three.

## DISCUSSION

When reviewing a determination that a proposal was technically unacceptable, 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." *Government Contract Advisory Services, Inc.; B & B General Contracting, Inc.*, P.S. Protest Nos. 93-21; 93-25, December 16, 1993; *Federal Properties of Rhode Island, Inc.*, P.S. Protest No. 93-02, May 20, 1993. The purpose of our review is to ensure that the determination of technical unacceptability has a reasonable basis. *Id.*; *accord, Cohlmia Airline, Inc.*, P.S. Protest No. 87-41, October 30, 1987.

To be considered for award, offerors had to furnish sufficient information to allow their proposals to be evaluated under the criteria listed in Section M.2. CIR was rejected because its proposal failed to demonstrate its experience in fixed mechanization work and its completion of three projects of similar size and scope.<sup>9</sup> Even given the contracting officer's liberal understanding that \$500,000 projects would be of similar size and scope to this \$2 million one, protester's cited projects failed to measure up. In addition, "similar scope" reasonably includes projects in the nature of a "bulk mechanization conveyor project" (footnote 2, *supra*) for which the offeror had served as a prime contractor. Since the solicitation set out the documentation requirements and sufficient warning of the consequences of not meeting them, the protester has no basis to complain about being rejected. *Hill's Capitol Security, Inc.*, P.S. Protest No. 90-25, July 20, 1990; *Sea-Land Service, Inc.*, P.S. Protest No. 77-28, August 18, 1977.

The contracting officer was not obligated to seek out information that should have been in the proposal. The burden to submit an adequately written and complete proposal was the protester's. *Service America Corporation*, P.S. Protest No. 91-56, October 30, 1991 "Any reduction in the evaluation scoring that results from an incomplete proposal is attributable only to the offeror." *Id.*; *see also, Hill's Capitol Security, Inc., supra; accord, ATI Industries, Comp. Gen. Dec. B-215933, November 19, 1984, 84-2 CPD 540.* A technically unacceptable proposal cannot be the "most favorable" even if it has the lowest price. *Government Contract Advisory Services, Inc.; B & B General Contracting, Inc., supra.* Discussions are not required to point out deficiencies "resulting from the offeror's lack of diligence." PM 4.2.5 g.3.(a)(1).

The protest is dismissed in part and denied in part.

William J. Jones  
Senior Counsel  
Contract Protests and Policies

---

<sup>9</sup> The contracting officer disputes that CIR attempted to submit the missing information prior to award, and there is no evidence on the record to the contrary.