

March 21, 1996

P.S. Protest No. 95-49

ROTH BROS., INC.

Solicitation No. 415046-95-A-0405

DIGEST

Protest against evaluation of proposals on a solicitation for roof repair is dismissed in part and denied in part where contracting officer's decision to award was supported by substantial evidence showing that awardee met evaluation criteria involving previous experience and solicitation did not prohibit the use of subcontractor experience to meet experience evaluation criteria.

DECISION

Roth Bros., Inc., protests the award of a contract for roof repair Frankin Roofing Company.

Solicitation 415046-95-A-0405 was issued June 19, 1995, by the Facilities Service Office, Philadelphia, PA, seeking a contractor for roof replacement/asbestos abatement at a postal facility in Cleveland, OH. Following one amendment, the offer due date was July 21.

The solicitation stated on page 1 ("General Description of Requirement") that the " will perform all work called for under this contract including furnishing all labor, material, equipment and services required for roof replacement/asbestos abatement at [the facility]."

Section G.3, Performance of Work by Contractor, provided:

The contractor must perform on the site, with its own organization, work equivalent to at least 12 percent . . . of the total amount of work to be performed under this contract. The percentage of work required to be

performed by the contractor may be reduced with written approval of the contracting officer.

Section M.2 1. (a) stated that award would be made "to the responsible offeror whose proposal offers the best value to the Postal Service, price and other factors specified below considered." Section M.2 1.(b) stated that price would be "considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price" and went on to state:

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[d] offer unless another proposal would yield a significant benefit to the Postal Service.

Section M.2 2. listed the non-price evaluation factors in descending order of importance:

- Factor 1. Offeror must have a minimum of five (5) years experience in roofing and asbestos abatement and must have satisfactorily completed at least three (3) projects of similar size and scope.
- Factor 2. References: U.S. Postal Service, other Government Agencies and others.
- Factor 3. Financial stability.
- Factor 4. Management to plan and key personnel: Superintendent.
- Factor 5: Firm's capacity and current workload.

Four offers were reviewed by the project manager. Franklin submitted the lowest-priced proposal, at contractor \$3,625,000. Roth's was second lowest at \$3,947,000. The contracting officer was satisfied that Franklin met the non-price-related criteria as well as Roth with the advantage of a lower price. Accordingly, award was made to Franklin Roofing Company on September 18, although the protester was not notified of the award until it received a letter dated October 20 from the contracting officer.

The protest contends first that the general description quoted above requires the contractor to perform itself all the work "called for under [the] contract," and that Franklin's proposal indicated that Franklin would not do so.¹ Roth's proposal, on the other hand, provides for the prime contractor to perform all the work.

¹ The protester claims that Franklin will perform no more than 12% of the work, subcontracting the remainder.

Second, the protest contends that Franklin has failed to demonstrate that it has the requisite roofing experience required by the solicitation. Roth contends that since the solicitation requires the contractor itself to perform the roof replacement and the asbestos removal, it is the contractor, and not the subcontractor, who must demonstrate satisfactory prior experience.²

In response to the protest, the contracting officer states that Franklin does have five years of experience in roofing construction--"mainly, single ply rubber roofing, some built-up roofing." In addition, Franklin's subcontractor "has five years of experience in built-up roofing and has completed projects of similar size." The contracting officer also states that Franklin will do "at least 55 percent of the work" itself, which is more than the solicitation requires.

In reply to the contracting officer's statement, the protester complains that the contracting officer did not address the substance of its protest. The protester questions why Section G.3 "sets forth a general requirement of at least a twelve percent . . . work by the general contractor, but fails to explain or address why the specific contract terms require[] the contractor to perform all (and certainly at least the roofing portion of the work) for the Project."³ The protester also questions the propriety of awarding the contract September 18 and issuing a notice to proceed on October 2, when "Roth, as an interested party in these proceedings, was not notified of the foregoing facts until October 20." The protester asserts that "[i]n view of the foregoing sequence and timing of Notices, the propriety of the USPS procedures seems to preclude unsuccessful bidders the opportunity to submit

² Roth refers to the experience requirement as relating to "built-up roofing systems." As quoted above, section M.2.2 required only "experience in roofing." Paragraph 1.04 of the technical specifications states that the roofing installer shall be a firm "with not less than five (5) years of successful experience in installation of asphalt modified built-up roofing systems." The specification's requirement is a performance requirement unrelated to the evaluation criteria of section M. *Cf. Restore Specialties, Inc.*, P.S. Protest No. 88-13, June 21, 1988.

³ To the extent that Roth's protest is that the solicitation's cover page and section G.3 conflict as to the percentage of work required to be performed by the contractor's forces, it is untimely. A protest alleging that solicitation provisions are in conflict or are ambiguous is a protest against the terms of a solicitation. PM 4.6.4 b. states 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." Accordingly, this portion of Roth's protest is dismissed.

A reasonable understanding of the cover page's statement is that it binds the contractor to perform all the work as required by the contract. The solicitation provisions support that interpretation by further distinguishing between work required to be performed by the prime contractor and that performed by subcontractors. The requirement that the prime contractor perform a certain percentage of the work itself is a subsidiary performance requirement of the contract, not necessarily a matter for consideration in offer evaluation. *Restore Specialties, Inc., supra.*; *Cf.* 41 Comp. Gen. 555, February 23, 1962 (where standard bid form sets out bidder's obligation "to perform all work 'in strict accordance' with the 'specifications' and 'conditions,'" including requirement that certain percentage be performed by the contractor's own organization, the percentage requirement could be enforced even if bidder failed to specify in its bid the percentage of work it would perform itself).

pertinent information regarding proposed contract awards before a contract is awarded and notice to proceed issued."

In response to this office's request for more information on the evaluation process, the contracting officer submitted a supplemental statement, which included the following:

In the proposal evaluation process the Postal Service was able to confirm that Franklin had 16 years of experience in the roofing industry. Franklin also provided a list of completed roofing projects. . . . The three largest projects had an average dollar value of approximately \$1,395,000 and were considered as comparable completed projects satisfying the experience qualification factor of the solicitation. Roth's proposal also included a list of completed roofing projects. . . . The three largest projects submitted by Roth for consideration were of similar size to Franklin's projects, and had an average dollar value of approximately \$1,267,000.

The contracting officer concluded that although Roth was considered to be responsible, Franklin's "considerable and favorable price advantage of \$322,000" clinched the award for Franklin.

Roth submitted a reply to the contracting officer's supplemental statement in which it reiterated its position that the contracting officer improperly interpreted the solicitation provisions and the "requisite experience of the [offeror]. . . ."

DISCUSSION

There is an initial issue of the timeliness of the protest. While we have no general authority to consider protests received more than fifteen working days after award, PM 4.6.4 d.,⁴ a recognized exception occurs when the contracting officer makes the filing of a timely protest impossible. In that case, "the timeliness period is tolled until the protester knows or should have known of the award." *Flamenco Airways, Inc.*, P.S. Protest No. 91-21, May 21, 1991. Here, the protester could not have known of the award until it received the contracting officer's belated notification dated October 20, 23 working days after the award.⁵ The November 2 protest, submitted within ten working days of October 20, was timely filed. PM 4.6.4 d.

The protester alleges that the proposals were improperly evaluated, that the contracting officer did not analyze the proposals in accordance with solicitation section M.2's primary non-price evaluation factors:⁶

This office plays a limited role in reviewing the technical evaluation of prequalification or similar information submitted by a potential offeror. The technical determinations of a contracting officer will not be overturned unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence. The protester bears the burden of overcoming the "presumption of correctness" which accompanies the statements of contracting officers. Accordingly, we must determine if [the protester has] met this burden and shown that the contracting officer's decision was arbitrary or not supported by substantial evidence.

Davco Corporation, P.S. Protest No. 95-28, August 30, 1995; *Daniel J. Keating Construction Company*, P.S. Protest No. 89-92, March 1, 1990.

The record contains the evidence which the contracting officer used in his determination. It indicates that Franklin, together with its subcontractor, meets the experience criteria of the

⁴ That section states that protests other than protests against alleged deficiencies 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; provided that no protest will be considered if received more than 15 working days after award of the contract in question."

⁵ PM 4.2.5 i. requires contracting officers to notify offerors that award was made "[p]romptly after award. . ."

⁶ The experience factors of section M.2 are neither definitive responsibility criteria (specific characteristics required of the offeror to be considered responsible to receive award), nor performance requirements which the offeror could obtain in the course of performing the contract. See *RKM Construction Company, Inc.*, P.S. Protest No. 94-04, March 18, 1994. Rather, they are "primary factors" which the solicitation indicated would be considered, in addition to price, in determining which of the offers provided the best value. *Id.*; see also, *Transnorm System, Inc.*, P.S. Protest No. 90-58, October 26, 1990 (examples of definitive responsibility criteria and performance requirements).

solicitation. Subcontractors' experience counts for evaluation purposes, unless the solicitation specifically prohibits it. See, e.g., *Commercial Building Service, Inc.*, Comp. Gen. Dec. B-237865.3, B-237865.2, May 16, 1990, 90-1 CPD 473; *AeroVironment, Inc.*, Comp. Gen. Dec. B-233712, April 3, 1989, 89-1 CPD 343. Since the solicitation in this case had no such prohibition, the contracting officer properly relied on subcontractor experience in evaluating Franklin's proposal.

In comparing Roth's proposal to Franklin's, the contracting officer found that the two offerors had similar experience, having completed projects of comparable size and dollar value, and that both had good references, stable finances, adequate plans and capacity. Our review of the protest file supports his conclusion that the two offerors were technically equivalent. Accordingly, awarding the contract to Franklin on the basis of its price advantage was consistent with the solicitation's evaluation scheme. See, e.g., *Kelly Services, Inc.*, P.S. Protest No. 95-17, October 27, 1995; *Transportation Research Corporation*, Comp. Gen. Dec. B-231914, September 27, 1988, 88-2 CPD 290 (where selection officials reasonably regard technical proposals as being essentially equal, cost may become the determinative factor in making an award, even where the RFP evaluation scheme assigns cost less importance than technical factors).

The protest is dismissed in part and denied in part.

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