

Protest of) Date: October 10, 1990
DONINGER METAL PRODUCTS CORPORATION)
Solicitation No. 104230-90-A-0100) P.S. Protest No. 90-50

DECISION

Doninger Metal Products Corporation ("Doninger") protests the contracting officer's decision to reject its proposal for the supply of large canvas hampers. The protester alleges that the rejection was arbitrary, capricious and an abuse of discretion and that if Doninger's hamper did not meet the solicitation requirements, those requirements are restrictive of competition.

Solicitation No. 104230-90-A-0100 was issued by the Office of Procurement, Headquarters, on June 12, 1990, with an offer due date of July 11, 1990. The solicitation sought fixed-price offers for approximately 44,000 large canvas hampers with safety lift kit (P.S. Item 1046), with an option for an additional 25,000 hampers. According to section B.1 of the solicitation, the hampers were to be manufactured according to Postal Service specification USPS-B-965B(ESC) and a drawing set consisting of 35 sheets incorporated into the solicitation. Section M.1 of the solicitation, Evaluation Criteria, provided: "Award will be made to the responsible offeror whose proposal conforms to the solicitation requirements and provides the lowest price."

Doninger submitted a proposal. At section A.2, where the unit and extended prices for the offered items were to be inserted, Doninger qualified its offer with the note: "See attached letter." The letter, dated July 10, stated, in pertinent part:

Please accept this letter as an integral part of our offer. Our offer is based on supplying the JD 1801 Canvas Hamper. We are offering our patented JD 1801 Canvas hamper as being equal to or better than the USPS Item 1046 in every regard. It will be supplied with the liner and lift platform per specifications. Only the frame will differ. We have enclosed copies of our promotional literature which pictorially describes the advantages of the JD 1801 over the USPS 1046.

The accompanying descriptive literature set out a comparison of JD series hampers to others. Chief among the asserted advantages of the JD hamper are its all-steel construction and its capability of folding for shipment when empty. The descriptive literature does not describe particular models by number.

By letter dated July 30, the contracting officer responded to Doninger's proposal:

The subject solicitation requested Large Canvas Hampers to be manufactured in accordance with USPS Specifications and drawings; however, your offer was based on supplying the JD 1801 Canvas Hamper.

Since your proposal is not in conformance with the requirements of the solicitation, it will not be considered for award.

Doninger's protest was delivered to this office on August 20. Doninger claims that the rejection of the JD 1801 canvas hamper it proposed was arbitrary, capricious and an abuse of discretion since that hamper is equal to or superior to the PS 1046 canvas hamper. The protester asserts that its hamper substantially conforms to the solicitation requirements and would satisfy all of the solicitation's testing and performance requirements.^{1/}

The protester argues that even if its proposal did not meet the specification requirements, it should not have been rejected. Doninger contends that since its proposal was the most advantageous to the Postal Service,^{2/} the contracting officer should have permitted offerors to submit new or revised proposals, according to PM 4.1.5 f.3.^{3/}

Finally, Doninger states that if the rejection of its proposal is upheld, the solicitation requirements have been applied in a manner unduly restrictive of competition because the drawings and specifications for the PS 1046 Canvas Hamper are not reasonably related to the Postal Service's minimum needs. In the protester's view, those minimum needs could be better met through the use of a product description containing testing requirements, salient characteristics and performance criteria.

Doninger also notes that it is unable to fully respond to the rejection of its proposal

^{1/}For instance, Doninger states that its hamper is identical in size and function to the one specified in the solicitation.

^{2/}Based on the advantages it cites for its hamper.

^{3/}PM 4.1.5 f.3. provides, in part:

f. Award Without Discussions

3. If the proposal most advantageous to the Postal Service involves a significant departure from the solicitation requirements, all offerors must be given an opportunity to submit new or revised proposals on a comparable basis, but only if that can be done without disclosing the solution proposed in the departure

because the contracting officer did not explain how Doninger's proposal failed to respond to the solicitation requirements. The protester speculates that the contracting officer rejected its proposal based upon a technical evaluation conducted according to PM 4.1.4 c.^{4/} Doninger contends that if its proposal was rejected on the basis of such an evaluation, the contracting officer should furnish it with that evaluation. Alternatively, the protester asserts that if the contracting officer rejected its proposal without conducting the required technical evaluation, she is in violation of the procurement regulations.

The contracting officer's statement replies to the various points raised in the protest. She asserts that Section A.1.5 of the solicitation made it clear that alternate proposals would not be considered.^{4/} After reviewing Doninger's proposal, it was clear that its offer was to provide the Postal Service with a JD 1801 canvas hamper as an equal to the PS 1046 Canvas Hamper required by the solicitation.

Regarding Doninger's second assertion, the contracting officer states that Doninger's proposal could not have been the most advantageous since it did not meet the specifications and drawings and the solicitation did not allow alternate proposals. Concerning Doninger's allegation that its hamper design would promote competition, the contracting officer notes that use of the JD 1801 canvas hamper design would instead give Doninger a significant competitive advantage. As evidence of the adequacy of competition, she advises that the Postal Service received five proposals to manufacture the hampers in accordance with the solicitation requirements.

Finally, the contracting officer addresses Doninger's contention that it is entitled to documentation of its technical evaluation by stating that the solicitation did not require offerors to submit technical proposals. Thus, the contracting officer asserts that no PM 4.1.4 c. evaluation was necessary under this solicitation.

Several of the other offerors submitted comments. D.V. Industries suggests that Doninger should have submitted its new design concept before the solicitation and bidding process began. It adds that there appears to be no monopoly on the manufacture of the PS 1046 hampers and disagrees that competition is somehow

^{4/}PM 4.1.4 c. reads:

- c. Technical Evaluation.** Each proposal must be examined to determine whether it meets the requirements of the solicitation. ... The technical evaluation must be documented to include -
1. The basis for evaluation;
 2. An analysis of the technically acceptable and unacceptable proposals . . .;
 3. A narrative statement of the major strengths and weaknesses of the various proposals;
 4. A summary, matrix, or quantitative ranking of each technical proposal in relation to the best rating possible; and
 5. A summary of findings, as well as each evaluator's independent findings.

^{5/}The subsection 5 provided: "The U.S. Postal Service will only accept offers on the quantities and destinations outlined in this solicitation. Alternate proposals will not be considered."

restricted for this basic product.

C.R. Daniels, Inc., through counsel, alleges that Doninger's protest is untimely as Doninger's protest is basically that the solicitation terms are unduly restrictive. According to the timeliness requirements of PM 4.5.4 b.,^{1/} such an argument cannot be made after the receipt of offers.

In reply to the various comments, , Doninger restates its earlier arguments and contests the suggestion that its protest is untimely, emphasizing that the contracting officer agrees with Doninger that the protest was timely filed. Doninger states that PM 4.5.4. b. is inapplicable here, since its protest was not based upon alleged deficiencies in the solicitation that were apparent before the date set for receipt of proposals. Lastly, Doninger again argues that it believed its proposal substantially conformed to the requirements and that it attached the letter to its offer pointing out that it was offering an "equal product" merely to alert the Postal Service to the minor physical difference in its product, not to confess that its product was nonconforming.

The contract was awarded, pending the resolution of this protest, on October 3.

Decision

The issue is whether Doninger's proposal was properly rejected. The contracting officer rejected Doninger's proposal because it was not in conformance with the solicitation requirements. This is the equivalent of stating that Doninger's proposal was technically unacceptable. See T&S Products, P.S. Protest No. 90-12, May 30, 1990. "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." Lista International Corporation, P.S. Protest No. 90-47, September 11, 1990. Our review of the contracting officer's determination of technical acceptability examines the contracting officer's evaluation only to ensure it had a reasonable basis. TLT Construction Corp. Inc., P.S. Protest No. 89-75, January 18, 1990; Cohlma Airline, Inc., P.S. Protest No. 87-41, October 30, 1987; accord B&D Supply Company of Arizona, Inc., Comp. Gen. Dec. B-210023, 83-2 CPD &50, July 1, 1983.

The evaluation criteria at Section M listed two prerequisites to award: the proposal must 1) conform to the solicitation requirements and 2) provide the lowest price. The contracting officer rejected Doninger's proposal because it did not conform to the solicitation requirements. Although Doninger argues to the contrary, its cover letter to the proposal, which was "an integral part of [its] offer," states otherwise. That letter offered an equal product, not the P.S Item 1046 required by the solicitation.

Doninger's unmistakable intention to supply something other than the product specified

^{6/}PM 4.5.4 b. provides: "Protests 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."

in the solicitation, fully supports the contracting officer's conclusion that the offered product was nonconforming and the subsequent rejection of Doninger's offer. "Since [Doninger] offered [an] item[] not described by the solicitation, it was not entitled to award." CFI, P.S. Protest No. 88-82, February 17, 1989. A determination of technical unacceptability based upon patent nonconformity cannot be considered arbitrary.

We next address Doninger's contention that if the contracting officer's decision to reject its proposal is upheld, the solicitation requirements were unduly restrictive. A challenge that specifications are unduly restrictive is a protest against the terms of the solicitation. Lista International Corporation, supra. PM 4.5.4 b. requires that such challenges, when apparent before the offer due date, must be made prior to that date. Colorado Piping & Mechanical, Inc., P.S. Protest No. 90-23, June 20, 1990.

Although Doninger contends that the alleged solicitation deficiencies were not apparent until after its proposal was rejected, a look at the protester's argument shows that it is merely challenging the failure of the Postal Service to establish support for its "minimum needs [for] a strong, safe, dependable, and economical canvas hamper." These alleged solicitation deficiencies were apparent prior to the date and time set for receipt of proposals. The solicitation as issued on June 12 required a specific design manufactured in accordance with particular specifications listed and made a part of the solicitation. At that time, Doninger could have protest the need for that particular specification, arguing, as it does now, that the solicitation overstated the needs of the Postal Service. See Pitney Bowes, Inc., P.S. Protest Nos. 90-38 through 90-45, September 4, 1990. Doninger did not do so and its argument to that effect is now untimely and must be dismissed. Colorado Piping & Mechanical, Inc., supra.

The protester also alleges that the contracting officer violated certain sections of the Procurement Manual in rejecting its proposal. Doninger first argues that PM 4.1.4 c. mandates that the contracting officer perform a formal technical evaluation on its proposal. Since the contracting officer reveals that she did not perform such an evaluation in Doninger's case, the protester views that omission as a violation.

The protester is correct that PM 4.1.4 c requires that "[e]ach proposal must be examined to determine whether it meets the requirements of the solicitation." See T&S Products, supra. However, the extent of that examination will depend on the circumstances of the solicitation. In this solicitation, no technical evaluation of the offered product was contemplated; competition was limited to price and no technical proposals or samples were required to be submitted with the offers. Thus there was no submission upon which to conduct a technical evaluation as contemplated by PM 4.1.4 c. 1-5.

The contracting officer was required to make an examination of the technical acceptability or unacceptability of Doninger's proposal. Such an examination was by the contracting officer in this case. Upon the conclusion of that review, the contracting officer reasonably determined that Doninger's proposal was technically unacceptable due to its nonconformity.¹¹

¹¹Contrary to Doninger's assertion, we know of no requirement that the results of technical evaluations be

Doninger also alleges that the contracting officer violated PM 4.1.5 f.3. We disagree. That section is for the benefit of the Postal Service should the contracting officer decide to accept an advantageous proposal which involves a significant departure from the requirements. That section does not direct contracting officers to accept an advantageous but nonconforming proposal. In any event, the protester here offers nothing but its assumptions to assert the advantageous nature of its proposal, and has not explained how its solution could have been communicated to the other offerors without the sort of technical transfusion which the section on which it relies seeks to avoid.

The protest is dismissed in part and denied in part.

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[checked against original JLS 6/21/93]

furnished to unsuccessful offerors. Instead, such offerors are entitled to debriefing on the evaluation of their proposals. PM 4.1.5 j.