

Protest of) Date: January 17, 1992
PENDA CORPORATION)
Solicitation No. 104230-91-A-0077) P.S. Protest No. 91-81

DECISION

Penda Corporation (Penda) protests the award of a contract for 3,078,000 nestable pallets to Litco International, Inc. (Litco). Penda argues that Litco's offer was not the most advantageous to the Postal Service, and, therefore, award to Litco was erroneous.

Solicitation No. 104230-91-A-0077 was issued by the Office of Procurement, Headquarters, on June 10, 1991, with an offer due date of July 10. The solicitation provided, at Section M.1, that award would be made to the "responsible offeror whose proposal conforms to the solicitation requirements and provides the lowest price to the U.S. Postal Service." Section M.3 a. provided that award would be made to the "responsible offeror whose proposal conforming to the solicitation will be most advantageous to the Postal Service, cost or price and other factors specified elsewhere in this solicitation considered." The solicitation did not elsewhere set forth any "other factors." Section C.11 set forth the standard Postal Service warranty of supplies clause, whereby the offeror undertakes to warrant that the supplies furnished would be free from all defects and would conform to the specifications and all other contract requirements for one year after the date of manufacture. Finally, the specification stated, at Section 3.2, that the pallets were to be manufactured of "a suitable grade of engineering plastic or a combination of wood, fiber, and synthetic resins."

Nine offers were received. After rejection of the lowest priced offeror as nonresponsible and receipt of best and final offers, Litco was found to be the lowest priced, technically acceptable, responsible offeror. Award was made to Litco on October 25, 1991, and Penda's protest followed.

Penda asserts that the award is defective because Litco's proposal was not the most advantageous to the Postal Service, cost or price and other factors specified in the solicitation considered. Penda presents documentary and testimonial evidence^{1/} that the plastic pallet offered by Penda is superior in all ways to the pressed fiberboard pallet proposed by Litco: the plastic pallets are said to have much longer useful lives,

^{1/} This evidence consists of internal Postal Service memoranda from 1988 - 1990, and three depositions of Postal Service employees taken in May - June, 1991. This material appears to be part of discovery in a pending U.S. Claims Court case which Penda currently has against the Postal Service for alleged patent infringement.

become damaged or deformed much less often, and are easy to use and safe. Penda concludes that the contracting officer's fixation on the lowest priced pallet has led to an award on a pallet that, while nominally cheaper, will have a much higher cost per trip because pressed fiberboard pallets only are good for two or three trips, at best.^{1/}

Penda alleges that the rationale of buying the "cheapest" pallets available because many pallets are lost or stolen and therefore unavailable is defective on three counts: the Postal Service would need only a few trips out of each plastic pallet to make them cost-effective; some Penda pallets purchased by the Postal Service in December 1987 are still in service; and the real answer to the problem is for the Postal Service to tighten up the control and retention of pallets within its system. Penda also concludes that plastic pallets are much more recyclable and environmentally friendly than pressed fiberboard pallets, which should play a role in Postal Service procurement decisions. Since plastic pallets represent such an incredible cost savings to the Postal Service, the award to Litco should be canceled.

As an initial matter, the contracting officer raises several jurisdictional hurdles to Penda's protest. First, she claims that the solicitation clearly did not include consideration of life cycle costs or environmental concerns, and, therefore, Penda's protest is untimely pursuant to PM 4.5.5 b because it was apparent on the face of the solicitation that these elements were not part of the evaluation process. Second, she states that the environmental issues presented by Penda are outside to purview of our protest function, citing Cadillac Products, Inc., P.S. Protest No. 91-44, September 17, 1991.^{1/} Finally, the contracting officer alleges that Penda lacks standing to protest the award to Litco because Penda was not next in line to receive award after Litco.

As to the merits of Penda's protest, the contracting officer notes that the Postal Service has made a business decision to purchase pallets as specified in the solicitation and evaluation criteria, and that, while the Postal Service remains committed to its plastic pallet program, it does not have the funds necessary to purchase plastic pallets in the large number currently required. She notes that the solicitation is not unduly restrictive, as it allows proposals based on plastic pallets as well as pallets made out of other material. Finally, she notes that pressed fiberboard pallets are manufactured from a natural, replenishable material and can be recycled.

Penda responds that it has standing because it is an offeror on the solicitation and will be financially harmed if it does not receive award. It does not understand from where the contracting officer has derived her analysis of the standing requirement, and notes that its protest would apply to all pressed fiberboard offerors, and that, because of certain unspecified patent rights, it has an interest in any award to a plastic pallet manufacturer that offered a price lower than Penda's.

Penda also argues that its protest is timely, because it is not protesting that the solicitation was inherently flawed, but that the award was not the most advantageous to

^{2/} Penda also notes that it offered to replace any pallets damaged outside the warranty period for a reduced price, which represents additional value to the Postal Service.

^{3/} Cadillac protested the same solicitation which is the subject of the instant protest.

the Postal Service, cost or price and other factors specified elsewhere considered. It argues that the Postal Service could not make award to Litco, knowing, as it does, that the Litco pallets will not meet the requirement of the warranty of supplies clause. The needs of the Postal Service for pallets, the warranty requirements, and environmental and recycling concerns are all more directly and efficiently met by the purchase of plastic pallets. While plastic pallets represent a slightly higher purchase price, they represent exceptional value over the long term. Penda suggests that under Section M.3 a, the Postal Service could consider total life cycle cost and the ability of the pallet to meet the warranty requirements, along with other items required by the solicitation. When the correct standard is used, based on "value" to the Postal Service, award to Litco can clearly be seen to be erroneous.

Litco has submitted comments indicating that it has observed numerous instances in which plastic pallets have deformed or otherwise become unusable, and that when this occurs, it is more beneficial for a less expensive pallet to be used. Litco also details that it is taking substantial steps to increase the environmental acceptability and recycling of pressed fiberboard pallets. Litco emphasizes the substantially lower purchase price of pressed fiberboard pallets as advantageous to the Postal Service, which must employ millions of pallets throughout the postal system at any particular time.

After a protest conference, Penda submitted additional comments. It reiterates its argument that Section M.3 a of the solicitation required the contracting officer to evaluate proposals based on all the terms and conditions set forth in the solicitation, and because Litco cannot meet the requirement for a one-year warranty of its pallets, its proposal cannot be the most advantageous to the Postal Service. As to the question of whether the Postal Service would be adequately protected by the inclusion of the warranty clause in the contract against any defective Litco pallets,^{4/} Penda reads the inclusion of the warranty clause in the solicitation as an indication of the Postal Service's intent to procure a supply of pallets which would last for at least one year. The presence of the warranty provision belies the assertion that life cycle costs and pallet durability are of secondary importance. According to Penda, inclusion of the warranty provision effectively excluded all offers based on pallets which the Postal Service knew could not possibly meet that provision, *i.e.*, the Litco pressed fiberboard pallet. Therefore, Penda assumed during the solicitation process that the Postal Service had limited itself to purchasing a durable pallet which would last at least one year, which is why Penda did not consider the solicitation, as issued, to be defective.

Penda claims that Litco's proposal was not "responsive"^{5/} to the solicitation, as Litco offered a pallet which could not meet the warranty requirements of the solicitation. It asserts that award to Litco was improper if the Postal Service does not intend to enforce the warranty against Litco or if the contracting officer relied on its rights under

^{4/} See *e.g.*, Norwood Manufacturing, Inc. v. United States 21 Ct. Cl. 300 (1990); *aff'd*, ___ F.2d ___ (Fed. Cir. 1991).

^{5/} Since, this is a negotiated procurement, use of the term "responsive" is inappropriate; the correct term of art would be technically acceptable. See Thermico, Inc., P.S. Protest No. 90-71, December 21, 1990; CFI, P.S. Protest No. 88-82, February 17, 1989.

the warranty provision to protect against any erosion of the Postal Service's pallet inventory after award. The Postal Service should be able to determine, based on its past experience, that the Litco pallet would not meet the performance and warranty requirements for one year. Penda further argues that Sections M.1 and M.3 are not in conflict so long as durability is included as a part of the evaluation of what proposal is most advantageous to the Postal Service. Penda disputes Litco's comments as to the price of plastic pallets and the comparative environmental advantages of pressed fiberboard versus plastic pallets, and notes that the needs of the Postal Service, not the needs of a supplier such as Litco should determine how a solicitation's evaluation process is structured.

As Penda admits, a protest filed now, after contract award, which would allege that durability or life cycle costs should have been taken into account in the evaluation and award of this solicitation would be untimely since protests against alleged deficiencies in a solicitation apparent before the date set for the receipt of proposals must be filed prior to that date. Procurement Manual (PM) 4.5.4 b.^{6/} Penda, therefore, argues that Section M permits the contracting officer to use the warranty provision to disqualify Litco, whose pallets allegedly do not meet its requirements. Penda is mistaken.

First, Section M.3 a. only permits the contracting officer to award to a "reasonable offeror whose proposal conforming to the solicitation will be most advantageous to the Postal Service, cost or price and other factors specified elsewhere in the solicitation considered." (Emphasis added). This section expresses the requirement that, for a factor other than price to be considered in making an award determination, that factor must be set out specifically in the solicitation. Contrary to Penda's position, the contracting officer is not free to roam about the solicitation at will, choosing whatever she wants to provide a basis for evaluation of proposals.

In the solicitation at issue, there is no indication that the warranty provision was to be used in determining the most advantageous offer. The only provision of the solicitation which addressed how award would be made was Section M.1 a., which established, in the absence of any other factors stated in the solicitation, that award would be based on price. The contracting officer was correct in evaluating Litco's offer solely on price.

Of course, to be eligible for award, a proposal had to meet two other requirements. First, it had to conform to the solicitation requirements. Penda has not alleged, and the record does not suggest, that Litco's proposal took exception to any part of the solicitation requirements, including the warranty of supplies. Litco's proposal conformed to the solicitation and thus, Litco is bound to perform the contract in accordance with its terms and conditions, including the warranty provision.

Second, the offeror must be responsible, that is, capable of performing the contract in accordance with the terms and conditions set out therein. See PM 3.3.1. As we understand it, this is the real gist of Penda's protest - an allegation that Litco cannot provide a pallet which meets the performance and warranty requirements of the contract and the Postal Service knows this. However, the contracting officer has found

^{6/} As was held in Cadillac Products, Inc., supra failure to include life cycle costs in the evaluation factors did not render the solicitation unduly restrictive of competition or otherwise flawed.

Litco to be responsible.^{1/} We overturn affirmative determinations of responsibility only upon a showing of fraud, bad faith, or a failure to apply definite responsibility criteria. EDI Corporation, P.S. Protest No. 83-51, January 26, 1984; National Controls, Inc., P.S. Protest No. 80-32, July 16, 1980; American Chain & Cable Company, Inc., P.S. Protest No. 76-27, September 20, 1976. None of these items are even alleged by Penda, much less proven. Therefore, we cannot overturn the award to Litco.

As to the issue of the environmental impact of purchasing pressed fiberboard pallets, we adhere to our recent holding in Cadillac Products, Inc., supra, that such concerns are outside the jurisdiction of this office's protest function.

The protest is dismissed in part and denied in part.^{1/}

[Signed]

William J. Jones
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Office of Contracts and Property Law

[Compared to original 5/18/95 WJJ]

^{1/} While the protest file does not contain a formal determination of Litco's responsibility, the contracting officer's signature on a contract suffices as such a determination. See Shygul Cleaning Company and H&S Contracting Company, Inc., P.S. Protest No. 78-13, April 10, 1978.

^{2/} In view of this disposition, we need not reach the contracting officer's argument about Penda's standing.