

Protest of) February 4, 1992
P.O. BOXES, INC.)
Solicitation No. 119986-91-A-0023) P.S. Protest No. 91-84

DECISION

P.O. Boxes, Inc. (P.O. Boxes), timely protests the award of a contract for asbestos abatement at the Tampa, FL, General Mail Facility (GMF), to Gibbs Construction Co., Inc. (Gibbs).

The Tampa Facilities Service Office issued Solicitation No. 119986-91-A-0023 on July 29, 1991, seeking offers to perform asbestos abatement at the GMF, including the removal of asbestos-containing duct work, pipe insulation, chiller insulation, decontamination of air handlers and installation of new duct work insulation, pipe insulation, chiller insulation, refurbishment of the air handling system, and replacement of four air handling units. The core requirements of the solicitation were demolition and disposal of existing duct work and installation of new duct work. The solicitation further provides, in Addendum 1, that the "contractor shall not use sandblasting, cutting or torching methods for cleaning or disassembling any mechanical component." Prices for two "alternates" were required: an additive alternate to replace eight air handling units, with proper disposal of the removed units; and a deductive alternate to remove and dispose of identified coils and air handling units.^{1/}

Three proposals were received by the offer due date of August 28, 1991, including the proposals of P.O. Boxes and Gibbs. Both alternates were utilized in evaluating and awarding the contract, resulting in a \$1,069,900 offer from P.O. Boxes, a \$1,452,000 offer from Gibbs, and a third, higher, offer, by Shamblin and Franks Construction, Inc. P.O. Boxes' offer was rejected as technically unacceptable. Gibbs was awarded the contract on October 9, 1991, as the lowest priced technically acceptable offer. The notice to proceed was issued to Gibbs on October 31, and work has been proceeding.

^{1/} The solicitation provided, at section M.1, that award would be made to the responsible offeror whose proposal conforming to the solicitation is most advantageous to the Postal Service, cost or price and other factors specified elsewhere in this solicitation considered. Section K.1 provided that the Postal Service may award a contract on the basis of initial proposals received without discussions. Section J.1(c) provided that proposals for services other than those specified will not be considered unless authorized by the solicitation.

In its October 20, 1991, protest, P.O. Boxes argues that it should have been awarded the contract because it offered the lowest price and price was the basis of the evaluations. It alleges that at the pre-award conference, it was informed by unnamed postal representatives that "amendments or qualifiers" could be added to its proposal. If its qualifiers were considered unacceptable, P.O. Boxes asserts that the contracting officer should have resolved the problem through discussions held with it.

P.O. Boxes alleges discrimination and collusion in the award to Gibbs because it was denied information pertaining to the other offers. P.O. Boxes also urges that collusion is evidenced by award to Gibbs which allegedly is not properly licensed to perform the asbestos abatement work and has not obtained necessary permits.

The contracting officer, in his report, received January 8, 1992,^{1/} states that P.O. Boxes' proposal was technically unacceptable and therefore was excluded from the competitive range and further consideration. He states that the protester's qualifiers, on which its offer was based, proposed to remove the asbestos by sandblasting, a method that could not work due to the deteriorated condition of the materials in question. In essence, P.O. Boxes proposed decontamination and re-use of duct work and unit panels rather than demolition and disposal as required by the solicitation. The contracting officer also cites safety and health concerns related to sandblasting asbestos containing materials. Since P.O. Boxes did not present an alternative which complied with the requirements of the solicitation, the contracting officer found the proposal technically unacceptable.

The contracting officer asserts that discussions were not held because the proposal's deficiency was not a minor irregularity. Finally, the contracting officer presents statements from several witnesses present at the pre-award conference who state that nothing was said at that time from which P.O. Boxes reasonably could conclude that the alternative methodology it proposed would be acceptable. The contracting officer denies the allegations of discrimination and collusion. The protester has not responded to the contracting officer's statement despite an opportunity to do so.

Discussion

The standard of review of a contracting officer's determination that a proposal was technically unacceptable is as follows:

The determinations of a contracting officer will not be overturned unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence. When such a determination rests upon the judgment of

^{2/} The contracting officer has not explained the reasons for his delay from October 20 until November 12 to transmit the protest to this office. Procurement Manual (PM) 4.5.6 requires referral within ten working days. Nor has the contracting officer explained his delay from that date until January 7, 1992, to transmit his statement to this office. PM 4.5.7.e requires the statement to be sent within ten working days of referral of the protest to this office. We note that such delays will not be allowed to work to the detriment of the protester. See C.D.E. Air Conditioning Co., Inc., Coastal Mechanical Corp, P.S. Protest Nos. 91-80, 91-83, January 16, 1992.

technical personnel, we will not substitute our views for their considered judgment in the absence of fraud, prejudice, or arbitrary and capricious action. The protester bears the burden of affirmatively proving its case. This burden must take into account the "presumption of correctness" which accompanies the statements of the contracting officer, and if such allegations do not overcome the presumption of correctness, we will not overturn the contracting officer's position. [Citations omitted.]

N.R.F. Enterprises, Inc., P.S. Protest No. 90-13, April 24, 1990, quoting POVECO, Inc., et al., P.S. Protest No. 85-43, October 30, 1985.

Award in this case was made without discussions, a permissible course where the existence of adequate competition or price analysis makes it clear that acceptance of the most favorable initial proposal will result in a reasonable price. PM 4.1.5.f.1.

A proposal must be examined to determine whether it meets the requirements of the solicitation, and a proposal that does not is technically unacceptable. T&S Products, P.S. Protest No. 90-12, May 30, 1990. The contracting officer determined that P.O. Boxes' proposal, although lowest in price, was technically unacceptable. Our review reveals that this decision was not arbitrary and was supported by substantial evidence, as the proposal did not meet the requirements of the solicitation. P.O. Boxes' offer was expressly conditioned "On Attached Qualifications." Those qualifications indicate that the protester proposed to decontaminate duct work and unit panels in lieu of demolition and disposal, as required by the solicitation.

The contracting officer has presented uncontroverted evidence that this qualification, if accepted, would result in removal of the unit panels, which would then be cleaned, sandblasted and reinsulated, and that this was inferior to the methodology required by the solicitation and is potentially unsafe.^{1/} The protester has presented no argument to the contrary. Because the protester has presented no evidence that its proposed methodology, which does not comply with the requirements of the solicitation, should be acceptable to the Postal Service, the determination that its proposal is technically unacceptable must be upheld.

Moreover, the solicitation's provision, in Addendum 1, that the "contractor shall not use sandblasting, cutting or torching methods for cleaning or disassembling any mechanical component" is significant. The protester's qualifier specifically contradicts this provision. A determination of technical unacceptability based upon a patent nonconformity with the solicitation cannot be considered arbitrary. Doninger Metal Products Corporation, P.S. Protest No. 90-50, October 10, 1990.

Concerning P.O. Boxes' argument that its proposal should have been corrected through discussions, there is no requirement for discussions to be held with an offeror whose proposal is technically unacceptable, unless it is reasonably susceptible of being made technically acceptable. Lazerdata Corporation, P.S. Protest No. 89-60, September 29, 1989. Considering the nonconforming and unacceptable methodology

^{3/} The GMF would continue to be occupied during the asbestos abatement.

proposed, the contracting officer was justified in concluding that the proposal could not be made acceptable without major revisions, id., and that it was "so deficient that an entirely new proposal would be needed." C.D.E. Air Conditioning, et al., supra. Therefore, discussions were not required in this instance.

Finally, the protester alleges bad faith on the part of the contracting officer.^{4/} "Allegations of bad faith must be shown by virtually irrefutable proof of malicious and specific intent to harm the protester, not merely by inference or supposition. Otherwise, contracting officers are presumed to act in good faith." Larse Corporation, P.S. Protest No. 90-48, October 18, 1990, quoting Peritek Corporation, P.S. Protest No. 90-27, July 3, 1990. Here, P.O. Boxes has presented no evidence of bad faith and its allegations, refuted by the contracting officer, are supported by nothing more than inference and supposition. As such, they must be rejected.

The protest is denied.

[Signed]

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[Compared to original 5/18/95 WJJ]

^{4/} P.O. Boxes' allegations that it was misled at the pre-award conference into submitting this alternative methodology is unsupported and is contradicted by the written statements of several attendees at the conference. P.O. Boxes' allegations concerning Gibbs not being properly licensed and not having obtained necessary permits are matters of contract administration not properly raised or resolved in a bid protest. See C.R. Daniels, Inc., P.S. Protest No. 90-62, December 21, 1990.