

June 8, 1993

P.S. Protest No. 93-08

C E W MANUFACTURING CO., INC.

Solicitation No. 104230-93-A-0020

DIGEST

Protest against award to lowest priced offeror is dismissed where protester would not be in line for award if protest were sustained. Interested parties' objection to the acceptance of an offer proposing to use reprocessed plastic materials is untimely raised.

DECISION

C E W Manufacturing Co., Inc., (CEW) protests the award of a contract for label holders for plastic mail sacks to Stellar Plastics Corporation (Stellar) under solicitation 104230-93-A-0020. CEW, a previous supplier of the label holders, contends that Stellar cannot produce the label holders economically for the price it offers.

The Office of Procurement at Postal Service headquarters issued the solicitation February 3, 1993, seeking offers for the manufacture of two label holder molds and the delivery of a basic quantity of 15 million label holders, with options for 20 million additional label holders and two additional molds. Award was to be made on the basis of lowest price. Offers were due March 4.

Stellar submitted the lowest priced proposal of twenty-four offers received. Following the completion of a successful preaward survey, award was made to Stellar on April 8, in the total amount of \$764,000 (\$37,000 for each mold and \$.046 (4.6 cents) for each label

holder). CEW's protest dated April 22 was received by this office April 26.¹

In its protest, CEW sets out its estimates of the prorated unit costs for the various raw materials (label holder material, shipping cartons, and skids) and transportation costs associated with the production of the labels, and deducts these from Stellar's unit price, concluding that too little remains to cover Stellar's other costs, such as labor, utilities, overhead, miscellaneous costs, and mold maintenance.² Citing a classified advertisement in a plastics trade publication which indicates that Stellar has injection molding facilities in Mexico,³ CEW contends that these label holders will be manufactured there and not in the United States.

Several other offerors on the solicitation have submitted comments on CEW's protest. One, Reedco, Inc., supports CEW's concern that Stellar plans foreign production, noting other instances of production being shifted to Mexico. Four offerors, Advanced Custom Molders Inc. (ACM), Streamline Technology Group, Bri-Sun Industries, and Process Quality Consultants (PQC), focus on another aspect of CEW's protest, noting that in its cost breakdown CEW assumed that the label holders would be made of "Reprocess Lexan 141 Polycarbonate." ACM, Streamline, and Bri-Sun assert that the specification required virgin polycarbonate materials. PQC recites its understanding, based on alleged conversations with the contracting officer and with the requiring activity's technical representative, that "re-process material could only be used from Virgin Lexan regenerated through the associated manufacturing process."⁴ These offerors seek clarification of this point and, if reprocess material may be used, resolicitation of the requirement.

Stellar also has commented on the protest, asserting that it will produce the label holders in the U.S. of domestic material, that it has no connection to any Mexican supplier or manufacturer,⁵ and that its usual machine-hour rate is well under the average reflected in

¹ The protest file contains letters to Stellar (advising it of the award) and to CEW (advising of the award to Stellar) dated April 4, but the contracting officer explains that that date (a Sunday) was incorrect, and that the letters were mailed April 8. To be timely, CEW's protest would have to have been received "not later than ten working days after the information on which [it] is 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." Procurement Manual (PM) 4.5.4 d. The contracting officer makes no contention that CEW's protest is untimely, noting that CEW called to inquire about the status of the award on April 19 and indicated that it had not received its copy of the notice of award.

² CEW notes that a Spring, 1992, survey of national molding machine hourly rates reflects a \$31.00 rate for machines of the type likely to be used.

³ Although the advertisement does not identify the advertiser by name, it includes Stellar's telephone number.

⁴ We understand this to mean that the contractor would start with new (virgin) material, but could reprocess scrap material produced in the course of production.

⁵ Stellar appears to disclaim the advertisement cited by CEW, asserting that it was placed by a sales representative.

CEW's submission.⁶

The contracting officer's statement on the protest recites the circumstances leading up to the award to Stellar, including the satisfactory findings of an on-site preaward survey and an analysis of Stellar's financial condition. The contracting officer states that Stellar indicated in its offer that performance would occur at Wood Dale, IL, and did not identify any non-domestic-source end products in the Buy American certificate in the solicitation.⁷ The contracting officer notes that previous decisions of this office have concluded that such a certificate commits the offeror to provide domestic items. However, the contracting officer also suggests that under Clause 10-17, Preference for Domestic Supplies (January 1991), set out at H. 25 of the solicitation, Stellar would have been eligible for award even if it had offered an end product of foreign manufacture because its price was more than six percent less than the next lowest offered price for a domestic item.

The contracting officer also notes that CEW lacks standing to challenge the award to Stellar because it was not next in line for consideration for award, and had failed to challenge the consideration of the intervening offers. According to the contracting officer, there were three offerors whose prices fell between those of Stellar and CEW.

In supplemental comments, the contracting officer has replied to the concerns of the interested parties who raised questions about the material specification. The contracting officer states that neither she nor the procurement specialist discussed the material specification with any vendor in the course of the procurement, and that while the requiring activity's technical representative recalled such an inquiry, he asserts that he was unable to comment on it at the time because he did not have the specification at hand. The contracting officer also notes that the solicitation advised prospective offerors that questions concerning the solicitation should be submitted in writing for a written response, and that oral explanations would not be binding.

The contracting officer states that while the drawing incorporated into the solicitation identifies the label holder material as "[p]olycarbonate manufactured by General Electric as Lexan 141, Color No. 803," and establishes various physical characteristics for it, the drawing does not require the use of virgin material. She further advises that Stellar has indicated its intention to use both reprocessed and virgin material, and that CEW used reprocessed material without difficulty in its previous contract.

Responding to the contracting officer's initial statement, CEW objects to not having been furnished the attachments to the contracting officer's statement, contends that Stellar's eligibility for award under the six percent Buy American differential is not relevant since Stellar did not offer a foreign product, and notes its good faith in protesting because it had

⁶ Stellar submits a recent survey which shows machine-hour rates in the North Central U.S. for the machine in question, including an operator, ranging from a high of \$100 to a low of \$15.32, with an average of \$32.73. Stellar notes that its production of label holders will not require an operator.

⁷ The Buy American certificate provides that by submitting its offer, the offeror certifies that each end product, other than any listed in the certificate by the offeror, is a domestic-source end product. Provision 10-7, Buy American Certificate.

no way of knowing its relative standing with respect to any intervening offers. Raising a new point, CEW objects to the contracting officer's consideration of Stellar's option prices.⁸

Stellar had proposed the same unit prices for the option quantities of label holders as for the basic quantities; CEW contends that these prices are unreasonably low because they fail to take into account the likelihood of increases in various costs associated with production over time.

Replying to CEW's comments, the contracting officer asserts that the documents not furnished were properly withheld from the protester because they contained commercially sensitive information obtained from the other offerors. She also notes that CEW's concern about Stellar's possible plans for Mexican production are speculative, and notes that Stellar's option prices are fixed, so that any subsequent increases will not affect the Postal Service's price.⁹

DISCUSSION

The contracting officer is correct in asserting that previous decisions of this office have noted that offerors lack standing to protest an award if they are not in line to receive the award if their protest is successful. See, e.g., *Rickenbacker Port Authority and the Turner Corporation*, P.S. Protest No. 91-78, February 10, 1992. While such circumstances are most commonly evident in the case of advertised contracts, in which all bids are exposed and the rank order of the bidders is known at the time of bid opening, the rule also is applicable to negotiated procurements such as this, where the protester may be unaware of its relative standing *vis a vis* the successful offeror. See *Advanced Health Systems -- Reconsideration*, Comp. Gen. Dec. B-246793.2, February 21, 1992, 92-1 CPD 214. We will, however, comment briefly on the points raised in CEW's protest.¹⁰

⁸ The contracting officer's statement had noted that Stellar's prices were lowest both for the base quantity for which award was made and also for all option quantities.

⁹ This last comment suggests that the contracting officer misunderstands the thrust of CEW's concern. As we understand it, CEW is not contending that future price increases will increase the cost of the label holders to the Postal Service, but rather that the possibility of those increases makes Stellar's option prices unrealistically low, so that Stellar will be unable to perform. The strength of CEW's argument is undercut by the fact (which CEW has no reason to know) that nineteen of the offerors proposed option prices which were the same as their prices for the base quantity, and two proposed option prices which were lower than their base prices.

¹⁰ We also address CEW's complaint that it failed to receive various documents contained in the contracting officer's report. Of the ten omitted documents, four (the solicitation, CEW's offer, the notice to CEW of the award, and CEW's protest) should have been available to CEW from its own files. Three (an abstract of the offers received, Stellar's preaward survey, and its financial assessment) contained information appropriately withheld for the reasons of business confidentiality cited by the contracting officer. One document, the recommendation for award and determination of responsibility and reasonableness of price, contains some proprietary information, but also contains nonproprietary information useful to the protester, and might well have been furnished in appropriately redacted form. The two remaining documents, the letter of award to Stellar and Stellar's contract, appear to contain no proprietary information not otherwise disclosed to the protester, and should have been furnished. In view of our disposition of the protest, however, the failure to provide this information is inconsequential.

CEW's contention that Stellar may be planning to perform the contract in Mexico is not a sufficient basis on which to sustain its protest not only because its concern is the product of speculation unsupported by fact (and negated both by the preaward survey and Stellar's representations in the course of the protest), but also because Stellar's failure to identify any foreign end products in its offer requires it to deliver domestic-source end products under its contract. *Lamination Services, Inc.*, P.S. Protest No. 92-96, February 8, 1993.¹¹

CEW's further contention is that because of its unreasonably low price, Stellar may not be able to perform the contract according to its terms. Such a contention challenges the contracting officer's affirmative determination of Stellar's responsibility, that is, its ability to perform the contract.

It is well settled that:

An affirmative determination of responsibility is a matter within the broad discretion of the contracting officer and is not subject to being overturned by this office in the course of a protest absent fraud, abuse of discretion, or failure to apply definitive responsibility criteria.

Lynden Transport Inc., P.S. Protest No. 91-85, February 7, 1992, quoting *C.R. Daniels, Inc.*, P.S. Protest No. 90-62, December 21, 1990. Here, none of the requisite elements have been established. As we have noted,

[t]he fact that the awardee may have proposed a price below its apparent cost of performing the contract is not grounds for rejection of the offer. See *Lightron of Cornwall, Inc.*, P.S. Protest No. 84-6, February 27, 1984; accord *Shirley J. Slusher*, P.S. Protest No. 84-60, July 30, 1984. . . . There is no legal basis to object to even a below-cost award if the offeror is otherwise responsible. *United HealthServ Inc.*, Comp. Gen. Dec. B-232640, B-232642, B-232643, 89-1 CPD 43, January 18, 1989.

Perino's Truck & Auto Body, Inc., P.S. Protest No. 91-93, January 24, 1992 (footnote omitted).

The interested parties' objections to Stellar's use of reprocessed polycarbonate material were raised in letters dated May 10, 11, and 12 and received by this office more than fifteen working days after the April 8 date of contract award, and thus are untimely under PM 4.5.4 d.'s provision (see footnote 1, *supra*) that protests must be filed within fifteen working days after the date of contract award. In any event, we agree with the contracting officer that the specification did not require the use of virgin polycarbonate, and that even if PQC did receive the oral advice which the contracting officer contends was not given, that advice

¹¹ Had Stellar offered a foreign end product, its offer would have been eligible for award under clause H. 25 of the solicitation, as the contracting officer suggested.

would have been ineffective to establish such a requirement. *Owens Roofing, Inc.*, P.S.
Protest No. 91-75, December 3, 1991.

The protest is dismissed.

For the General Counsel:

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