

March 21, 1995

P.S. Protest No. 95-07

MODAGRAPHERICS

Request for Quotations -- PS Label 55A

DIGEST

Protest contending that specification for mail collection box labels is unduly restrictive is denied where the contracting officer establishes a *prima facie* case for the requirement and protester's objections do not establish that the requirement is clearly unreasonable.

DECISION

Modagraphics protests the terms of a request for quotations (RFQ) for the printing of PS Label 55A, depicting the Postal Service's eagle logo and intended for installation on postal mail collection boxes.

The RFQ was issued by facsimile on January 17 by Printing Purchasing at U. S. Postal Service headquarters as a simplified purchase, a form of procurement authorized by Procurement Manual (PM) 4.2.1. On January 24 that office issued a revised specification which sought quotations for the production of 400,000 labels. It identified the stock for the labels as "3M Scotchlite Reflective Steeting [sic] with Controltac Adhesive 680 Series" (hereafter "3M 680"). Quotations were due January 26. Modagraphics' protest was received January 25.

The protest contends that the specification is unduly restrictive in limiting the label stock to 3M 680. It notes that a 1994 specification for these labels called for either 3M 680 or Avery R 100 stock ("Avery stock") and that both Modagraphics and the eventual awardee, Signature, quoted on the basis of Avery stock. Further, it notes that Modagraphics has recently delivered similar labels using the Avery stock for application to Postal Service vehicles. The protester also asserts that a postal representative advised it that the basis for preferring 3M 680 stock to Avery stock is that the former was less susceptible to removal after application. According to the protester, there is no evidence to support that conclusion.

Finally, the protester asserts that 3M has advised it that "for business reasons" 3M is

unwilling to supply it with 3M 680 stock, denying it the opportunity to participate in this procurement. The protester seeks amendment of the RFQ to allow the provision of the Avery stock or cancellation and resolicitation on a similar basis.

The contracting officer's statement responding to the protest asserts that Controltac adhesive is a patented 3M product with a feature which allows the adhesive label, once applied, to be repositioned an indefinite number of times under a wide range of temperature conditions. When the label is correctly positioned, the application of heavier pressure to it releases a catalyst which activates a stronger adhesive to create the permanent bond. This feature, not shared by the Avery stock, which cures more quickly in warmer temperatures, is desirable for the collection box labels "because Postal Service employees with no particular training" can correctly position the labels on the boxes *in situ* under a wide range of temperature conditions. The contracting officer distinguishes the application of labels to collection boxes from the application of labels to delivery vehicles by noting that the latter are applied by "experienced professionals" (often inside Vehicle Maintenance Facilities) to vehicles which are cooler than collection boxes could be.

According to the contracting officer, the requirement for 3M 680 stock is not improperly restrictive because no other product will satisfy the Postal Service's needs, citing *Express One International, Inc.*, P.S. Protest Nos. 92-28;30;35, July 15, 1992.

The protester has replied to the contracting officer's statement raising several issues. Noting that PM 4.2.1 limits the use of the simplified purchase process to purchases of \$100,000 or less (absent higher level approval), the protester faults the contracting officer's statement for failing to address the basis on which that process was chosen for this procurement (in excess of \$100,000), and challenges the propriety of the purchase on that basis.¹

The reply challenges the contracting officer's technical knowledge, contending that "his claim [in his statement] that the 3M product retains its repositioning capabilities in temperatures up to 100 degrees F" is contradicted by warnings in 3M's literature that repositionability is jeopardized at temperatures above 100 degrees. The protester also challenges the assertion that repositionability is more significant for the collection box labels than for the vehicle labels, noting the larger sizes of the latter, and the contention that the applicators of the vehicle labels are more skilled than the applicators of the collection box labels.

The reply notes the failure of the contracting officer's statement to respond to the fact that Avery stock was specified in a previous purchase of these labels, and inquires what, if anything, has changed with respect which to the Postal Service's requirements. Finally, the reply notes that Avery's patented Place Rite adhesive allows for the placed label to be repositioned, and has been available since 1989.

Responding to the protester's reply, the contracting officer acknowledges that the previous solicitation allowed the provision of Avery R 100 stock, but contends that that solicitation was "issued in error" without his review and that the supplier utilized 3M 680 in performing

¹ We need not reach this issue, apparent on the face of the solicitation and thus now untimely raised. PM 4.5.4 b., *Dattel Realty Company*, P.S. Protest No. 95-01, March 1, 1995.

the contract. The contracting officer also takes exception to the protester's contentions that he is technically unqualified or unaware of the requirements for collection box or vehicle labels. Finally, expressing unfamiliarity with Avery's Place Rite adhesive, the contracting officer notes that that adhesive is not used on Avery's R 100 stock, was not submitted by Avery for testing for use on postal labels in response to a 1990 Postal Service request, and that only subsequent to this protest has Avery asked for an evaluation of its suitability for postal purposes. Such an evaluation is being arranged.

The protester submitted further comments on the contracting officer's response questioned various aspects of the contracting officer's reasons not to accept Avery stock for the collection box labels, reasserted the impropriety of the use of the simplified procedure process, and provided additional information about Avery's Place Rite adhesive.

Various other suppliers of labels have submitted comments on the protest as interested parties; the comments supported the contracting officer's position.

DISCUSSION

Where a protester alleges that a solicitation is unduly restrictive, it is incumbent upon the procuring agency to establish *prima facie* support for its contention that the restrictions it imposes are reasonably related to its needs.

But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

Once the Postal Service establishes *prima facie* support for the allegedly restrictive requirements, the protester must present an extremely high level of proof to show that those restrictions are clearly unreasonable.

The determination of what constitutes the Postal Service's minimum needs is properly to be made by the requiring activity, and is not subject to being overturned in the absence of a clear showing that the determination lacks a reasonable basis. If a specification is otherwise reasonable, the fact that one or more potential offerors may be precluded from participating in the solicitation does not render its terms restrictive if they reflect the legitimate needs of the procuring activity.

This office will not substitute its judgment for that of the technical personnel absent "fraud, prejudice, or arbitrary and capricious action."

Memorex Telex Corporation, P.S. Protest No. 92-73, January 8, 1993 (citations and internal quotations omitted); *accord, Interleaf, Inc.*, P.S. Protest No. 94-15, August 4, 1994.

Here, the record clearly establishes a *prima facie* need for a label stock with the capability of being repositioned, and that 3M 680 meets that requirement, while the Avery stock which the protester initially proposed as an acceptable substitute does not. The distinction between the circumstances involved in the application of labels to collection boxes and to postal vehicles is sufficient to justify different standards for collection box labels and vehicle labels. The reasons which the protester cites for disagreeing with the contracting officer's

justification are insufficient to meet its burden of proof in this regard. That a different solicitation made no such distinction does not preclude the distinction here. *Baker Masterlift*, P.S. Protest No. 86-21, April 18, 1986; *Crown Industries, Inc.*, P.S. Protest No. 82-83, January 6, 1983.

The protester's further submissions also contend, in the alternative, that the specification is unduly restrictive because it does not allow the use of a second Avery stock which has the capability to allow repositioning. Since the determination of the suitability of the material remains, in the first instance, for the requiring activity, we will not undertake to opine on the matter. As noted above, the contracting officer intends to make such a determination, and we are confident that his finding will be reflected in future procurements for this item.

The protest is dismissed in part and denied in part.

William J. Jones
Senior Counsel
Contract Protests and Policies