Protest of	)	
	)	Date: July 29, 1988
E-Z COPY, INC.	)	
	)	
Solicitation Nos. 389990-88-A-0279, -0281, -0283, -0285, -0287	)	P.S. Protest No. 88-28
	)	

DECISION

E-Z Copy Inc. of California protests the rejection of its bids for coin-operated photocopying services under Solicitation Nos. 389990-88-A-0279, -0281, -0283, -0285, and -0287 alleging that its bids were responsive.

The solicitations were issued by the Columbus, OH, Procurement and Materiel Management Service Office on March 14, 1988, with an offer due date of April 14. The solicitations provided that bids would be evaluated by multiplying the commission offered by the vendor by the copy price ($0.25) times an estimated number of copies per location (1,000 for all solicitations).[1/] Bidders were instructed to bid a specific commission percentage per copy, but the solicitations contemplated that copies within different quantity ranges could earn different commissions.

As to each solicitation, E-Z Copy bid a 5 percent commission on copies 1-940, varied percentages in excess of 1000% on copies 941-1,000,[1/] and 0% on all copies over 1,000. Pitney Bowes bid 62% on all copies, Denis Copy bid 46% on all copies, and (as to solicitations -0279 and -0285 only) Scot Business bid 31% on all copies up to 10,000. Copy Corp., bidding only on solicitation -0287, bid 80% on the first 800 copies, 0% on copies 801-1,500, and 80% on all copies over 1,500.

[1/]Although the solicitations provided for evaluation of bids on the basis of 1,000 copies per month, each solicitation included a location-by-location listing of average copies per month. These quantities varied greatly. For example, solicitation -0279 listed 95 locations with volumes ranging from 100 to 1800 copies per month.

[2/]It bid 1,585% on Solicitation -0279, 1,590% on Solicitations -0281, -0283 and -0285, and 1,100% on Solicitation -0287.

The contracting officer evaluated the bids based on the copier volumes set out in Attachment A of the solicitations by comparing the bids' proposed commissions to the number of copiers with actual copy volumes in that range.[1/] Although according to this evaluation, Pitney Bowes' bids appeared to be the most advantageous to the Postal Service, the contracting officer rejected E-Z Copy's bids as nonresponsive.[1/] This protest followed. Award of these solicitations has not yet been made.

E-Z Copy contends that its bids are in full compliance with the terms of the solicitation and the Postal Contracting Manual (PCM). E-Z Copy states that the solicitations contained no express limitations on commission rates and that the rates it bid do not exceed the actual revenues to be earned from the MSCs. E-Z Copy alleges that it received assurances from the contracting officer that there was no limitation on the commission rate that could be bid, and modified its bids based on that assurance. E-Z Copy also claims that, although the bids were to be evaluated based on 1,000 copies, the 1,000 figure is unrealistic based upon the actual average copier volumes stated in Attachment A. E-Z Copy states that it used the actual copy volumes in preparing its bids.

The contracting officer states that E-Z Copy's bids "appear to provide the greatest revenue to the Postal Service." However, he found E-Z Copy's bids to be unbalanced because they are structured so that the commission rate bid has no relationship to the costs of the copies. The extremely high percentage of commission offered over a very narrow band of copies places substantial risk on the Postal Service, and is not in its best interest. Therefore, he concludes, E-Z Copy's bids are nonresponsive and should be rejected.

In response to a request from this office, the contracting officer explains that the 1,000 copies per copier figure upon which the evaluations were to be made was a "ballpark figure" which was used by other postal purchasing offices. He states that the estimates set out in Attachment A were, in many cases, unreliable and "literally pulled out of thin air," and that an average of these figures would not have resulted in a realistic

[3/]For example, E-Z Copy's bid on Solicitation -0279, the Cincinnati, OH MSC, was 5% for 0-940 copies, 1,585% for 941-1,000 copies and 0% for all copies over 1,000. The contracting officer calculated that all of the MSC's 95 offices had actual copy volumes totaling 54,960 copies in the 0-940 range and 24 of the offices had actual copy volumes totaling 1,390 copies in the 941-1,000 range. Seventy-one offices had copy volumes at or below 940 copies and the remaining 24 locations had volumes greater than 940 copies. The contracting officer multiplied 54,960 by 5% and 1,390 by 1,585%, and multiplied the total by $0.25 to arrive at the total revenue to be derived from the bid.

[4/]The contracting officer does not explain why he evaluated the offers on a different basis from that stated in the solicitations or why he rejected E-Z Copy's bids when Pitney Bowes' bids appeared to be the most advantageous. It is clear that when evaluated on the solicitations' stated formula, assuming 1,000 copies per month per machine, E-Z Copy's bids appeared to return the greatest revenue to the Postal Service.

estimate. The contracting officer also recalculates E-Z Copy's bids to show that, while E-Z Copy did not bid over 100% of the total estimated revenue, it bid over 99% of such revenue, and did not leave sufficient funds to cover the costs which were its responsibility under the contract. Finally, he notes that while a procurement specialist did tell E-Z Copy that there were no restrictions on the bids, there is an implied requirement that E-Z Copy not lose money on the contract, since "[i]t is the USPS policy not to award a contract to a company that will lose money or not make a reasonable profit."[1/]

E-Z Copy has responded to the contracting officer's statements. It states that its bids are responsive because it does not take exception to any terms of the solicitation. E-Z Copy acknowledges that its bids are mathematically unbalanced, but claims that they are not materially unbalanced because it bears "the substantial cost of performance from the commencement of each contract to its termination," because its bids will not result in a return to the Postal Service of more than 100 percent of the estimated revenues, and because the existence of a performance bond as well as the minor Postal Service costs of performance sufficiently protect the Postal Service. E-Z Copy alleges that our decision in VNP Vending Corporation, P.S. Protest No. 87-107, February 4, 1988, aff'd on reconsideration, March 31, 1988, is distinguishable because the contracting officer here has admitted that the estimates were merely guesses, whereas in VNP Vending, the estimates were reasonably accurate.[1/] E-Z Copy argues that a bid cannot be found to be materially unbalanced unless the estimates are reasonably accurate, citing E-Z Copy, Inc. and Hawaii Copico, P.S. Protest Nos. 86-48, 86-50, August 1, 1986.

E-Z Copy also contends that the contracting officer is equitably stopped from asserting the non-responsiveness of its bids because of the representation made by a postal employee that there were no limitations on the amount which could be offered as commissions. While it contends that its bids are responsive and that cancellation and resolicitation would be unfair to it and create an auction, E-Z Copy states that cancellation is required if award is not made to it because of the significant errors in this procurement.

Pitney Bowes, Inc. has commented on the protest. Pitney Bowes supports the contracting officer's position that E-Z Copy's protest is nonresponsive because it is

[5/]This last statement is incorrect. There is no prohibition on award of a contract to a bidder whose bid is below the cost of contract performance and who may suffer a loss if awarded the contract. See Lightron of Cornwall, Inc., P.S. Protest No. 84-6, February 27, 1984; Leewen Mechanical Corporation, P.S. Protest No. 83-70, January 19, 1984.

[6/]The VNP Vending decision involved a protest over the Postal Service's decision to cancel copier solicitations very similar to those in this protest. VNP's bids provided little to no commission for the first several hundred copies, and then very high commissions (750%, for example) for any further copies made at a location. Ruling that such "grossly unbalanced" bids were materially unbalanced and thus nonresponsive, we found the contracting officer could properly reject VNP's bids.

fatally unbalanced. It states that the issue is not whether a bidder can "skew" its bid, but rather whether the Postal Service will be negatively affected by E-Z Copy's right to terminate the contract at any time with 60 days notice. Pitney Bowes notes that E-Z Copy will not bear any risk in performance because of the service option chosen and that the Postal Service will receive very little remuneration for copies 1-940 and no remuneration for copies over 1,000. More importantly, it notes that the Postal Service will have lost the opportunity cost of locating profitable copying machines on its premises if E-Z Copy's bids are accepted. Pitney Bowes suggests that VNP Vending is directly on point in this case and, under the rule there enunciated, E-Z Copy's bid must be deemed nonresponsive. Finally, it claims that the inaccuracy of the 1,000 copy estimate does not mandate cancellation of the solicitation because all bidders were on notice of and bid on the same number, because there was unreliable or no past performance data on which to compute a reasonably accurate estimate, because the estimate has been successfully used by other postal facilities, and because improving the accuracy of the estimate would be difficult and costly.

A bid may be rejected as nonresponsive if the contracting officer determines it to be defectively unbalanced. A defectively unbalanced bid is (1) one which is mathematically unbalanced and (2) one which causes reasonable doubt that award to the bidder would result in the greatest return to the Postal Service, and is therefore materially unbalanced. See E-Z Copy, Inc. and Hawaii Copico, supra; Howell Construction, Inc., Comp. Gen. Dec. B-225766, April 30, 1987, 87-1 CPD & 455. E-Z Copy admits that its bids are mathematically unbalanced, so the only issue is whether they are materially unbalanced.[1/]

E-Z Copy's bids are materially unbalanced, since the highly loaded nature of its bids provided the contracting officer with a reasonable doubt that award to E-Z would result in the best return for the Postal Service. Cf. Howell Construction, Inc., supra (such reasonable doubt hinges on a "factual determination which varies depending upon the particular circumstances of the procurement"). E-Z Copy has misconstrued our decision in E-Z Copy, Inc. and Hawaii Copico, supra, concerning materially unbalanced bids.[1/] E-Z Copy contends that a contracting officer cannot make a factual determination of a bid's possible imbalance if the estimates upon which bids are

[7/]The Postal Service is not stopped by the statements of its procurement employees that there was no limitation on the amount of commission which could be bid. E-Z Copy was on notice that it could not place any reliance on the contracting personnel's oral statements; the solicitation specifically provided, at clause 18, that "[a]ny verbal explanations are not binding." See De Santis Industries, Inc., P.S. Protest No. 84-27, May 2, 1984, aff'd on reconsideration, June 11, 1984; Jet Hardware Manufacturing Corporation, P.S. Protest No. 82-62, November 8, 1982.

[8/]The decision in VNP Vending Corporation, supra, is not directly on point in this case, because in that case the estimates were clearly reasonably accurate, unlike the estimates at issue here. The correct standard for this case is that of Integrity Management International, Inc., discussed infra.

evaluated are not reasonably accurate. This is incorrect. When the estimates used in an advertised procurement are subject to doubt, a mathematically unbalanced bid may be rejected when there is reasonable doubt that the bid will result in the lowest ultimate cost to the government. Integrity Management International, Inc., Comp. Gen. Dec. B-217016, December 11, 1984, 84-2 CPD & 654. Here, there is doubt as to both the IFB's estimates and the excessively skewed nature of E-Z Copy's bids. Thus, the contracting officer could properly reject E-Z Copy's bid as materially unbalanced. Award cannot be made on a materially unbalanced bid. E-Z Copy, Inc. and Hawaii Copico, supra; Reliable Trash Service, Comp. Gen. Dec. B-194760, August 9, 1979, 79-2 CPD & 107.

We are troubled by the basis on which the solicitations were structured for evaluation. The contract is in the nature of a requirements contract, as to which the Postal Service's obligation is to present its best estimate of the quantities it will require during the contract term. Chemical Technology, Inc. v. United States, 227 Ct. Cl. 121 (1981); Womack v. United States, 182 Ct. Cl. 399 (1968). Here, however, the solicitations set out two estimates; the general 1,000 copy per month figure used for evaluation, and the location-by-location estimates given in Attachment A. The contracting officer's explanation for the use of the differing estimates is less than satisfying. As noted above, it is the Postal Service's obligation to provide bidders with the best possible estimate. If the figures set out in Attachment A were not sufficiently reliable to be used in the calculation of an estimate, they should not have been offered in the solicitations. The contracting officer's explanation suffers from a further logical flaw; even assuming the unreliability of the individual calculations, nothing in the file explains why the substitution of the arbitrary figure of 1,000 copies per month per machine leads to a more satisfactory result.

Having expressed these concerns, however, we need not disturb the competition. With the exception of E-Z Copy's unbalanced bids, none of the bid rankings turn on the use of either figure. Therefore, no party has been prejudiced by the conjunction of these figures. See Garden State Copy Company; Southern California Copico, Inc., P.S. Protest No. 82-84, September 1, 1983. Furthermore, the inconsistency was apparent on the face of the solicitation and no prospective bidder filed a timely protest concerning it. Objections raised after bid opening are untimely. See PCM 2-407.8 d. (1); Artech Corporation, P.S. Protest No. 84-58, October 5, 1984; EIS Division/Parker Hannifin Corporation, P.S. Protest No. 84-76, November 16, 1984.

The protest is denied.

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[checked against original JLS 2/24/93]