Protest of	)	
	)	
INTERNATIONAL TECHNOLOGY CORPORATION	)	DATE: May 8, 1989
	)	
Solicitation No. 104230-89-A-0020	)	P.S. Protest No. 89-21

DECISION

International Technology Corporation (ITC) has timely protested the terms of Solicitation No. 104230-89-A-0020 for microcomputer systems. ITC contends that the specifications are unduly restrictive and additionally asserts that the evaluation scheme is flawed.

Background

Solicitation No. 104230-89-A-0020 was issued by the Office of Procurement, Headquarters, on December 12, 1988, with an offer due date of February 27, 1989, as extended by Amendment A04.[1/] It sought proposals for an estimated 15,000 microcomputers and associated peripherals for use by postal employees nationwide and required proposals to include pricing for both Maintenance Option A, monthly maintenance, and Maintenance Option B, hourly rate for on-site repairs, as follows:

> Section A-3, Maintenance Prices - Offerors must propose maintenance on those items listed in Table A-3, Section 1 . . . corresponding to those items proposed in Table A-2 . . . .
>
> Option A must be priced on a monthly basis by item.
>
> Maintenance Option B (B.3.12.5.1.2) must be proposed as an hourly labor rate. . . . With the exercise of Option B, replacement parts will be charged at the same (or lower) price as quoted in Table A-2 herein, when applicable.

[1/]Amendments A01 through A04 corrected and classified various solicitation requirements, and additionally included responses to vendors questions. Amendment A05, dated March 10, 1989, was issued in response to a protest filed by WIN Laboratories, Ltd. (WIN). The contracting officer determined WIN's protest to be meritorious and pursuant to Procurement Manual (PM) 4.5.6 issued the amendment to correct technical matters noted in the protest.

> Section B.3.12.5.1.1 - Under Option A, Postal Service representatives will mail-in any malfunctioning equipment to the facility(s) identified by the contractor. The contractor shall repair or replace, and return any malfunctioning equipment within three (3) working days, excluding Postal Service holidays, following receipt by the contractor.
>
> Section B.3.12.5.1.2 - Under Option B, the contractor shall respond to calls from Postal Service representatives and exchange/repair any equipment determined to be defective . . . within eight (8) hours of receipt of a call.

The solicitation also included the following provisions at issue in this protest: Section C.8, Liquidated Damages ($100 for each calendar day of delay for each system order); Section E.6, Inspection and Acceptance (Postal Service Testing); and Section G.20, Warranty of Repair, which provided, in pertinent part, that all items replaced or repaired due to failure would be warranted for sixty days from completion of the original repair. If a repaired item failed within this period, the contractor would replace or repair the defective part, at no cost, and restart the required warranty of repair period from the beginning.

The evaluation criteria, defined in Section M - Evaluation and Award Factors, and also at issue, stated that award would be made to the responsible offeror who submitted the best combination of technical and pricing proposals and also included the following provisions:

> Section M.3.b, Contract Award and Proposal Evaluation - Cost/Price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price.
>
> Section M.4.1.c, Evaluation Process - The technical proposals will be evaluated on the basis of a total score of 1000. This evaluation will be used to determine technical acceptability and to establish a competitive range. . . . For those technically acceptable offers within the competitive range, cost realism will then be assessed. . . . Technical superiority will be the governing factor in award. . . .

ITC filed its protest in a letter received by the contracting officer on February 24.

The Protest

ITC asserts that the maintenance, liquidated damages, inspection and testing, and warranty provisions of the solicitation are unduly restrictive and prevent offerors from responding to these requirements in a reasonable manner. It further objects to the solicitation's evaluation criteria. The specific contentions of the protester as to each of these sections are set out below, followed by the contracting officer's responses.

1. Section B.3.12.5.1.1 Maintenance Option A - The protester asserts that under Option A, the contractor is required to provide mail-in/mail-back facilities to accommodate a turnaround time of three working days following receipt by the

contractor. It contends that this requirement should state the type of delivery service that is required, e.g., Express Mail service or the like, and is unreasonable because the turnaround time is too short and there is no guarantee that a repaired item could be mailed by regular mail service and be received by the Postal Service within three days. It further argues that both Options A and B require the contractor to maintain a spare parts inventory of all of the items, which, it maintains would be an inordinate expense.

The contracting officer states that the three day turnaround time is independent of transit time, as was explained in the responses to vendors questions in Amendment A01. The type of service was intentionally not specified to allow contractors an opportunity to tailor the requirement to the geographical locations of the repair facilities. Prospective contractors should consider cost effective means of transportation on an individual on-going basis. She notes that pricing for Option A, as stated in Section A-3, is a monthly charge per item, which should include all costs, including labor and overhead.

2. Section B.3.12.5.1.2 Maintenance Option B - ITC states that under this option a contractor is required to repair or replace any inoperative equipment within eight hours following the receipt of a call, and must arrive on-site within four hours from receipt of call. It asserts that these time periods are unreasonable given the requirement that the items may be located at all postal facilities throughout the United States. The protester further urges that this provision is in violation of the Federal Acquisition Regulations (FAR) " 12.101, 12.102, and 12.103.

The contracting officer states that the requirements of Options A and B were predicated on a detailed analysis of the Postal Service's actual minimum needs, and were carefully considered based on up-time requirements. The time periods are reasonable. If the requirements impact cost proposals, all offerors should be equally impacted and, therefore, equally evaluated. Since Option B is separately priced, the contractor may charge costs to the Postal Service. The cost for replacement parts may be charged at the price quoted by the offeror in its proposal in Schedule A-2. The contracting officer notes that the FAR is not applicable to the Postal Service.

3. Section C.8 Liquidated Damages - ITC asserts that this provision is, on its face, unduly restrictive. It claims that the clause is in violation of the FAR and the Competition in Contracting Act (CICA) of 1984.

This provision, the contracting officer maintains, was determined to be appropriate under Procurement Manual (PM) 2.2.6 on the basis that once the order was placed, delivery would be imperative, and the amount of loss or damages for failure to deliver would be, at best, difficult to establish.[1/] She states that CICA, like FAR, is not

[2/]PM 2.2.6 provides in pertinent part as follows:
Liquidated damages must be provided for in every construction contract over $100,000. They must be provided for in other contracts when—

1. The Postal Service may suffer substantial damages in the form of financial loss or disruption to the mail service because of delay;
2. Delivery or performance is so imperative that a probable increase in contract cost is justified; and
3. The amount of these damages would be difficult or impossible to prove.

applicable to the Postal Service.

4. Section E.6 Inspection And Acceptance - The protester objects to this provision on two grounds. First, the first article test should be conducted by the contractor rather than inexperienced postal personnel. Second, under this section payment will be delayed until an item meets the 30 day standard of performance test, as defined in Section E.6; if an item fails during the 30 day period, the test would be extended.[1/] The protester maintains that pricing would be impossible due to the uncertainty when payment would be made.

The contracting officer responds that all items delivered under the contract will be properly tested by postal personnel. The performance test begins when the equipment is delivered and ends when the equipment has completed the test. Payment on the invoices will be requested on the day of acceptance. Contrary to ITC's assertion, the provision is fair and reasonable to all offerors.

5. Section G.20 Warranty And Repair - This provision requires that all hardware that is replaced or repaired be warranted for an additional sixty days; if the item fails again within this period, the contractor must repair or replace the part at no cost to the Postal Service and restart the warranty period. ITC submits that the net result of this provision is to provide the Postal Service with an open-ended warranty that could extend beyond the original warranty period.

The contracting officer asserts that the warranty clause, like the other objected-to provisions, represents only the actual minimum needs of the Postal Service. She states that the technical mandatory requirements for the equipment itself, including the Mean Time Between Failure (MTBF), exceed the warranty requirements.

6. Section M Evaluation And Award Criteria - ITC contends that price, rather than the technical superiority, should be the governing criteria for award. It asserts that points should have been assigned to the pricing proposal similarly to the technical proposal (1000 points total). As structured, the solicitation gives the contracting officer unreasonable discretion in determining the value of the offeror's price in the award process.

The contracting officer states that although price will be considered, technical superiority is the most important criteria for award. The purchased items must meet the technical requirements of the solicitation. She maintains also that the trade-off, technical versus price, is specifically permitted under PM 4.1.5.b.2.[1/] The selection will be made in accordance with the stated evaluation factors.

[3/]Section E.6.b.2. provides that if the item fails during the initial 30 days, the test must continue on a day-by-day basis until the standard of performance is met for a total of 30 consecutive calendar days.

[4/]PM 4.1.5.b.2 states that the contracting officer "is responsible for trade-off judgments involving cost and other evaluation factors."

Supplemental Arguments of the Parties

ITC submitted additional arguments in rebuttal to the contracting officer's report, and also participated in a protest conference with this office pursuant to PM 4.5.7.j. In these comments, ITC notes that although the contracting officer's statement concerning the turnaround time of Option A attempted to clarify the matter, several responses to vendors questions in Amendment A01 appeared to be contradictory. It asks that an amendment be issued to clarify any ambiguities. It also asks that the solicitation be amended to require the use of Express Mail service for the return of all repair items and to permit a total 72 hour period for the repair of parts, including transit time.

Concerning Option B, the protester states that Section F.3[1/] of the solicitation provides that the Postal Service will pay the contractor an hourly rate set forth in the "schedule;" however, there is no schedule in the solicitation. Further, under Option B costs for spare parts would be paid according to prices offered in A-2. However, Section G-7 provides that there be no additional charge for replacement parts.[1/]

In its supplemental remarks, the protester repeats its contention that the liquidated damages provision is unreasonable and further argues that the solicitation does not refer to the qualifications of the Postal employees who will install and test the equipment under the inspection and testing clause. Thus, there is no assurance that tests will be conducted in a professional manner.
Sysorex Information Systems, Inc. (Sysorex) and the C3 Company (C3) submitted comments in response to the protest.[1/] Sysorex, through counsel, asserts that the various sections objected to by the protester are in line with standard procurement practices. It states that the requirements are clearly defined in the solicitation; vendors must simply meet these requirements. Sysorex maintains that if ITC is not confident of its own
ability, it should withdraw from the competition. Sysorex agrees that FAR and CICA are not applicable to the Postal Service. C3 also supports the contracting officer's position. It asserts that the solicitation's provisions are reasonable, and that it has the capability to comply fully with the specified requirements.

[5/]This provision, entitled "Payment (Time-and-Materials and Labor-Hour Contracts)," (October 1987) (PM Clause 5-16), provides the hourly rate will be computed by multiplying the hourly rates "prescribed in the schedule" by the number of direct labor hours performed. The hourly rate includes "wages, indirect costs, general and administrative expenses, and profit."

[6/]The contracting officer, in apparent agreement with the protester in this regard, issued an amendment (A06), dated April 21, 1989, which deleted section G-7. The protester's contentions regarding this conflict is therefore moot. Amendment A06 also corrected and replaced a number of pages in the solicitation and allowed offerors until April 28 to make any necessary revisions in their proposals.

[7/]Two additional firms submitted comments. They asked, however, that their letters not be disclosed. Since the letters raised no specific complaint, we will honor the requests.

Discussion

The determination of the procuring activity's minimum needs, and the technical judgments upon which those determinations are based, are primarily the responsibility of the contracting officials who are most familiar with the conditions under which the supplies and services have been used in the past and will be used in the future. T.J. O'Brien Company, Inc., et al., P.S. Protest No. 87-83, September 17, 1987; S.H. Demarest, P.S. Protest No. 84-1, February 9, 1984; Doehler-Jarvis Division of N.L. Industries, P.S. Protest No. 77-19, July 22, 1977. Accordingly, we will not disturb the requirements of a specification unless they are clearly shown to be without a reasonable basis. Portion-Pac Chemical Corp., P.S. Protest No. 84-49, August 1, 1984; S.H. Demarest, supra. Moreover, 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. See Willard Company, Inc., Comp. Gen. Dec. B-187628, February 18, 1977, 77-1 CPD & 121; Illinois Bell Telephone Company, Comp. Gen. Dec. B-202238, October 20, 1981, 81-2 CPD & 320.

Applying these standards, the protester's challenges to the various solicitation provisions as unduly unrestrictive or unreasonable fail. The contracting officer has explained, and Amendment A01 reasonably establishes, that the three day turnaround time of Option A is independent of transit time. An amendment stating this fact is not necessary. The protester's assertion that the three day turnaround is too short is unsupported and, therefore, provides no basis to sustain the protest. See Edsal Machine Products, Inc., P.S. Protest No. 85-84, January 29, 1986; Concept Office Furnishings, Inc., P.S. Protest No. 85-59, November 18, 1985. Further, ITC has neither provided evidence, nor otherwise explained, why the solicitation should be amended to require Express Mail service for returned items and a total 72 hour turnaround period. The solicitation as structured permits offerors to consider various types of mail service for repaired items. Such matters are business judgments well within the discretion of the contracting officer. Southwest Bell Telephone, Inc., P.S. Protest No. 89-23, April 19, 1989. No abuse of that discretion has been shown here.

The protester also contends that the pricing methods of Options A and B are unreasonable. We disagree. The total monthly charge per item under Option A as well as the hourly rate plus parts under Option B are similar to standard commercial maintenance agreements offered by business concerns and are reasonably related to the needs of the Postal Service. Cf. Illinois Bell Telephone Co., supra. All costs under the option provisions, such as labor or overhead, may be properly charged to the Postal Service.[1/]

[8/]In these arguments, the protester also urges that the time periods under Option B, like those of Option A, are unreasonable. In support of this contention, the protester cites FAR " 12.101, 12.102 AND 12.103. The FAR is inapplicable to Postal Service procurements, which are governed by the Procurement Manual (PM). See PM 1.1.1.b. The protester has failed to show that the time restrictions are clearly unreasonable. CICA, cited by the protester, also does not apply to the Postal Service. U.S. v. Electronic Data Systems Federal Corporation, 857 F.2d 1444 (Fed. Cir. 1988); Motorola, Inc., P.S. Protest No. 86-93, December 22, 1986; Falcon Systems, Inc., Comp. Gen. Dec. B-222549.2, June 5, 1986, 86-1 CPD & 526.

The protester's arguments concerning the liquidated damages provision, Section C.8, are also unpersuasive. Liquidated damages serve a useful function when actual damages are uncertain in nature or amount. See United States v. Bethlehem Steel Co., 205 U.S. 105 (1907); United States v. Walkof, 144 F.2d 75 (2d Cir. 1944). There is no legal objection where, as here, liquidated damages are stated in terms of a given sum per day. Phoenix Iron Co. v. United States, 39 Ct. Cl. 526 (1904). The contracting officer has explained that her determination was in accordance with the requirements of PM 2.2.6. That determination is reasonably supported by the record. Moreover, a protester bears the burden to show that the liquidated damages provision is restrictive or that the measure of damages is unreasonable, Kime-Plus, Comp. Gen. Dec. B-215979, February 27, 1985, 85-1 CPD & 244. Here, ITC has submitted no evidence, other than its bare allegations, that the liquidated damages clause is unreasonable. We, therefore, have no reason to question the inclusion of the provision. See Larson Building Care, Inc., Comp. Gen. Dec. B-209837, B-209761, June 20, 1983, 83-1 CPD & 671. The protester's contentions that the delivery provisions are so indefinite as to make it impossible to determine when liquidated damages would begin are incorrect. Section C-8 provides for liquidated damages for "each calendar day of delay for each order." The time of delivery is within 30 days from the receipt of the order, Section C.17, Time of Delivery, at page 121.

The protester's contentions that the contractor, rather then the Postal Service, should conduct the inspections under Section E.6 are also unavailing. PM 2.2.3.b. provides as follows:

> Delayed Acceptance. Contracting officers should consider using a special testing program after delivery and before acceptance for purchases of computer and telecommunications equipment, mail-handling equipment, and building systems. Test programs of this sort should be carefully designed to try out the equipment fully, and the program should be described in the solicitation. [Emphasis added.]

Section E.6 is in accordance with the mandate of this regulation. Testing by postal personnel is proper in these circumstances. There is no ambiguity with respect to the time of delivery, acceptance, or the standard of performance that the items must meet to be approved.

ITC also complains that Section G.20 gives the Postal Service an "open ended" warranty should an item repeatedly fail within a 60 day period after the repair or replacement of that item. Although reasonable minds could differ as to the optimum specifications for a given requirement, drafting of specifications is the responsibility of the procuring activity. We will not substitute our judgment for that of the procuring activity unless the protester shows by clear and convincing evidence that the objected-to provision is unduly restrictive of competition. See The Ellis Company, Comp. Gen. Dec. B-189390, B-189937, January 27, 1978, 78-1 CPD & 70 (5 year warranty not unduly restrictive where evidence fails to show that offeror could not estimate the cost of warranty compliance when preparing offer).

Finally, ITC states that the evaluation and award criteria are defective. Specifically, the

evaluation factors are said to be deficient because the solicitation states that technical considerations would be given more weight than price. ITC contends that price should be the governing factor. The protester also argues that points or numerical scores should have been assigned to the pricing proposal.

In this regard, it is well established that in negotiated procurements, awards are not required to be made solely on the basis of the lowest price. AHJ Transportation, Inc., P.S. Protest No. 88-81, February 27, 1989; Blurton, Banks & Associates, Inc., Comp. Gen. Dec. B-206429, September 20, 1982, 82-2 CPD & 238. Moreover, procurement officials have broad latitude in determining the particular method of evaluation to be used. The evaluation and award factors in the solicitation need only fairly advise prospective offerors of the basis on which their offers will be considered for award. Rohr-Plessey Corporation, P.S. Protest No. 74-19, September 23, 1974; Wang Laboratories, Inc., On Reconsideration, Comp. Gen. Dec. B-215589.2, December 10, 1984, 84-2 CPD & 642.

Here, the evaluation criteria clearly state that technical considerations are more important than price and will be the governing factor in award. Under the evaluation scheme, the technical proposals will first be evaluated on the basis of a total score of 1000. The assessment of pricing will then be made. As to the assignment of points to the pricing, price may be considered without scoring that factor even though various other evaluation factors are scored. PM 2.1.6.c.3, see also Marine Management Systems, Inc., Comp. Gen. Dec. B-185860, September 14, 1976, 76-2 CPD & 241.

The protest is denied.

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

[checked against original JLS 5/20/93]