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| Protest of | ) | |
| | ) | Date: June 20, 1989 |
| PITNEY BOWES, INC. | ) | |
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| Solicitation No. | ) | P.S. Protest No. 89-24 |
| 059991-89-A-0122 | ) | |

DECISION

Pitney Bowes, Inc., has filed a timely protest against the terms of Solicitation No. 059991-89-A-0122, issued March 30, 1989, by the Procurement & Materiel Management Service Office, Bell, CA, for coin operated photo-copiers to be located at fifty postal facilities in Los Angeles, CA.

The solicitation is set out on PS Form 7481, September, 1983. The first section, "Solicitation," was completed by the contracting officer to indicate that any contract awarded would be under service plan 1 as described on page two of the form,[1/] that offers would be evaluated on the basis of a monthly volume of 1000 copies per machine, and that copies would be vended at a price of $.20 per copy. The second section, "Offer," includes spaces in which the offeror is to indicate the percentage commission offered the Postal Service for various monthly copy volumes. The contracting officer made no modifications to this portion of the form.

The remainder of the form, entitled "Contract," contains the various terms of the contract, which includes the following provisions relevant to this protest: Paragraph 4, copier specifications, requires the copiers furnished to use either plain or treated paper, to "[c]opy all types of material in accordance with industry standards for console copiers"; and to have a paper size indicator. The contracting officer made no additions, deletions or changes to these requirements.

Pitney Bowes protests several of the solicitation terms. First, asserting that since a prior protest decision involving photocopier services, E-Z Copy, Inc., P.S. Protest No. 88-61, December 22, 1988, found a contracting officer's choice of service plan 3 reasonable, "it is now unreasonable for the Postal Service to require bidders to comply with the requirement for Service Plan 1." Second, the protester contends that since

[1/] The portion of the form entitled "Contract" describes three services plans. Under service plan 1, the Postal Service provides electrical power and space for the copier, while the contractor provides all other necessary services. Under service plan 2, in addition to providing power and space, the Postal Service loads the copiers with paper and clears jams when they occur. Under service plan 3, the Postal Service provides the services of plan 2 and collects and accounts for the coins collected by the machines.

prior decisions have found it was reasonable for a contracting officer to preclude the acceptance of copiers using coated paper, citing Omnicopy, Inc., P.S. Protest No. 84-24, fn.3, June 25, 1984; E-Z Copy, Inc., supra., and to reject a bid which offered the Postal Service commissions at rates in excess of 100% for certain levels of copy volume, VNP Vending Corporation, P.S. Protest No. 87-107, February 4, 1988, it is unreasonable for this solicitation not to contain similar provisions. Third, the protester contends that the specification provisions requiring copiers to copy all types of material and to have a paper size indicator are ambiguous as indications of the Postal Service's requirements because they do not clearly indicate whether more than one paper size is required or whether the copier must be capable of copying book material. Pitney Bowes requests that the specification be reformed to require the ability to copy both letter-sized and legal-sized documents and books. Fourth, the protester alleges that the $.20 per copy vend rate is unreasonable. It states that there are two major purposes for the coin-operated copier program; providing a convenient location to postal customers for copying materials, and generating revenue. It reasons that the $.20 vend rate diminishes revenue projections for vendors, thus diminishing competition to the detriment of the Postal Service. It urges a $.25 vend rate.

In comments on the protest, the contracting officer states that the requiring activity has the option of choosing which of the three listed service plans best meets its needs. Service plan 1 relieves the Postal Service of expending workhours to perform the contract. With respect to the specification's requirements for copiers, the contracting officer states that it is not the Western Region's policy to deviate from required or established contractual formats.

The contracting officer finds no fault with the commission percentage provision provided by the standard form, stating a belief that arbitrarily limiting the commission percentage rate might limit competitiveness. Finally, he notes that the Los Angeles Division conducted an informal telephone survey on the $.20 per copy charge which showed it to be consistent with local market conditions.

Several interested parties submitted comments in response to the protest. E-Z Copy, Inc., notes service plan 1 represents the most advantageous option for the Postal Service, since, in its experience, the other plans have created problems in the past in the areas of copy quality and downtime. E-Z Copy submits that there is no factual basis for limiting the solicitation to plain paper copiers, noting that copiers using electronically treated paper satisfy the requirements of the specification, have a greater paper capacity, and are easier for consumers to use. In addition, it notes that most machines using treated paper are more energy efficient than plain paper copiers because unlike those copiers they automatically shut off when not in use. In E-Z Copy's view, restricting offerors to plain paper copiers would limit competition. On the matter of limitations of commissions, E-Z Copy maintains that failing to limit the amount of a commission is not improper, although the Postal Service may reject any individual materially unbalanced offer. E-Z Copy submits that the copier specification is not vague or ambiguous about the paper size specifications and that the vend rate of $.20 is proper.

Advanced Vending Systems, another interested party, contends that while service plan 1 increases vendor's costs because it requires the greatest number of service calls,

that effect is amplified with respect to copiers using plain cut sheet paper, which have a smaller paper capacity than coated paper units. Advanced Vending does not favor limiting the commission percentage rate and finds no ambiguities in the specifications. In its opinion, the prevailing average price for copies in Southern California is $.15 and raising the charge to $.25 would be unwarranted. In its experience, when the vend rate was raised from $.20 to $.25 in post offices, copy sales dropped enough to offset the income which had been formerly generated at the $.20 rate.

APS Affiliates, Inc., a third interested party, agrees with the protester that the Postal Service's choice of service plan 1 is inadvisable, but states that it is a valid option under the terms of the solicitation. It also agrees that a 100% commission limit should be used and that treated paper copiers should be eliminated from the solicitation. It finds no ambiguity in the solicitation terms and states that the average copy price in the area is less than $.20.

Pitney Bowes submitted comments in response to the contracting officer's report, restating its general position and responding point by point. It states that the choice of service plan 1 is not in the best interest of the Postal Service, even given the workhour savings, because when maximum responsibility for operation and maintenance is placed on the contractor, the extra expense created reduces competition and Postal Service revenues. It contends that prior decisions have determined that it was not in the Postal Service's best interest to "permit vendors to bid obsolete copiers using wet toner and treated paper." Further, the protester maintains that, with respect to the lack of a commission percentage limitation, it is not in the Postal Service's best interest to create a situation that may result in unbalanced bidding.

The protester contends that the contracting officer's response to the alleged ambiguity in the specification concerning materials to be copied sheds no light on the issue and questions the validity of the informal telephone survey cited by the contracting officer in defense of the $.20 per copy charge, citing a $.25 charge in all other postal regions, and requests that a more thorough survey be conducted.

Discussion

We deal with the issues raised in the order presented, addressing first the choice of service plan, the coated-paper specification, and the lack of a ceiling on commissions.

To the extent that the protester contends that the solicitation is improper for failing to follow the guidance of prior decisions of this office, it is incorrect. The protester misreads the holdings of those decisions. E-Z Copy held that in that case the protester had not sustained its burden of demonstrating that the terms to which it objected as unduly restrictive of competition were clearly unreasonable. It did not prescribe a contracting officer, in another circumstance, from reaching a different conclusion. The burden which the decision in E-Z Copy identified as borne by the protester applies equally to the protester here, who, like E-Z Copy there, has failed to meet it.[1/]

[2/]The protester also misstates the holding in Omnicopy, Inc., supra. The portion of the protest which was against the term of the solicitation limiting offerors to plain paper copiers was found to be untimely, so

Similarly, VNP Vending, supra, did not mandate the inclusion in copier solicitations of ceilings on commissions. That decision involved a protest against the contracting officer's decision to cancel a solicitation, not a protest against a solicitation's terms. The protester's bid was found to be unbalanced. As we stated in VNP Vending Corporation, On Reconsideration, P.S. Protest No. 87-107, March 31, 1988, the decision "merely holds that, when a bid can be calculated to result in substantial, ongoing losses to the bidder under a realistic set of factual assumptions, the contracting officer is justified in rejecting that bid."

If Pitney Bowes is also complaining that the three provisions are not in the best interest of the Postal Service, or are unduly restrictive, the following analysis applies.

> 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.

Crown Industries, Inc., P.S. Protest No. 82-83, January 6, 1983, citations omitted; see also Portion-Pac Chemical Corp., P.S. Protest No. 84-49, August 1, 1984; S.H. Demarest, P.S. Protest No. 84-1, February 9, 1984.

In order to show that a provision 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.

Portion-Pac Chemical Corp., supra, quoting Amray, Inc., Comp. Gen. Dec. B-208308, January 17, 1983, 83-1 CPD & 43.

The solicitation allows the contracting officer to choose among three service plans. Pitney Bowes' argument that if the choice of Service Plan 3 is reasonable, any other choice is automatically unreasonable, is not tenable. The contracting officer here has identified concern about postal workhours to explain the preference for service plan 1. That the contracting officer in E-Z Copy identified the Postal Service's interest in greater accountability to justify service plan 3 does not suggest that that rationale must thereafter preclude any other choice by any other office.

the decision did not reach the merits on that issue. The footnote in that decision which the protester cites merely notes that the record before us suggested the existence of a reasonable basis for the limitation to plain paper copiers there. In the context of the decision, the footnote is clearly dicta.

> We cannot conclude that the requiring activity's bases for its desire for equipment of the types specified are unreasonable, and thus cannot overturn it. This is the case even though [another purchasing office], following similar objections, revised its solicitation. ... In the absence of a nationwide policy issued by the Postal Service's national management, the determination of minimum need clearly is a matter left to the discretion of [local] requiring activities.

Crown Industries, supra. Where, as here, the protester is objecting to standard solicitation provisions which contemplate the selection of an appropriate service plan and which otherwise maximize competition rather than restricting it, its burden is heavy indeed.

Permitting the provision of machines using treated paper copiers is not necessarily a clearly unreasonable decision. Two commenters note that treated paper copiers help mitigate the contractor's maintenance costs under service plan 1 because their much greater paper capacity, over that of plain paper copiers, reduces the number of service calls.[1/]

The decision to limit the commission percentage is similarly within the discretion of the contracting officer. In VNP Vending, the decision to limit the percentage was a direct reaction to VNP Vending having submitted an unbalanced bid. A bid may be rejected if it is defectively unbalanced. VNP Vending, supra; see also E-Z Copy, Inc. and Hawaii Copico, P.S. Protest Nos. 86-48, 86-50, August 1, 1986; Howell Construction, Inc., Comp. Gen. Dec. B-225766, April 30, 1987, 87-1 CPD & 455. It was not unreasonable for the contracting officer in VNP Vending to limit the commission percentage as a means of prospectively avoiding unbalanced bidding. Although arguments can be made about the benefits of taking preventive measures over remedial ones, the choice is a business judgment well within the discretion of the contracting officer. International Technology Corporation, P.S. Protest No. 89-21, May 8, 1989; Southwest Bell Telephone, Inc., P.S. Protest No. 89-23, April 19, 1989. If the contracting officer has not encountered problems with unbalanced bidding in past solicitations, he may not perceive any need to take preventive measures in this case. If, on the other hand, a defectively unbalanced offer should be submitted, the contracting officer could properly reject it, thereby protecting the interests of the Postal Service. VNP Vending, supra. Pitney Bowes has failed to meet its burden of showing that the provisions concerning the service plan, type of paper, or commission percentage are clearly unreasonable and therefore, cannot show that they are either not in the best interest of the Postal Service, or unduly restrictive.

Turning to issues beyond those addressed in our previous decisions, the protester contends that the specification is ambiguous as to copy size. Specifications must be "sufficiently definite and free from ambiguity to permit competition on a common basis," Bru Construction Co., Inc., Comp. Gen. Dec. B-228206, November 10, 1987, 87-2 CPD

[3/]During a protest conference, Pitney Bowes mentioned that most plain paper copiers have a small paper capacity (200-250 sheets), which would cause more downtime under service plan 1.

& 476, and an ambiguity exists if the specifications are "susceptible to two reasonable interpretations." Nasuf Construction Corporation -- Reconsideration, Comp. Gen. Dec. B-219733.2, March 18, 1986, 86-1 CPD & 263. "To be reasonable, an interpretation must be consistent with the solicitation read as a whole." Tek-Lite, Inc., Comp. Gen. Dec. B-225747.2, September 4, 1987, 87-2 CPD & 223.

Pitney Bowes alleges that the specification requiring the copiers to be capable of copying "all types of material in accordance with industry standards for console copiers" does not clearly state the requirements, claiming that the offeror is not told whether the copier should accommodate more than one paper size and be capable of copying book material. At the outset, we note that, although this specification has been used since 1983, the ambiguity suggested by Pitney Bowes has never previously been an issue. Pitney Bowes has itself submitted offers on solicitations using the identical specifications without any apparent problem with this provision. See, e.g., E-Z Copy, supra; VNP Vending, supra. Paragraph 18 of the solicitation, entitled "Questions," allows offerors the opportunity to seek clarification of "anything in this solicitation," but Pitney Bowes has not sought clarification. Moreover, Pitney Bowes' own interpretation of the provision appears consistent with that of the contracting officer and the other commenters. Since the provision does not appear to be susceptible to two reasonable interpretations, Pitney Bowes has failed to demonstrate the existence of an ambiguity.

Finally, Pitney Bowes contends that the $.20 per copy vend rate is unreasonable and restrictive of competition, stating that even a $.25 rate is only marginally profitable. The vend rate is a term of the contract within the discretion of the Postal Service, which has established its basis for that rate. There is no evidence supporting the contention that the $.20 charge is unreasonable.

This protest is denied.

William J. Jones
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Office of Contracts and Property Law

**[checked against original JLS 5/21/93]**