Protest of	)	
	)	Date: December 20, 1989
PITNEY BOWES, INC.	)	
	)	P.S. Protest No. 89-86
Solicitation Nos. 11990-89-A-0144,	)	
-0145	)	

DECISION

Pitney Bowes, Inc. ("Pitney Bowes") protests the award of two contracts for coin-operated photocopying services in the Tampa and Jacksonville, Florida divisions, under Solicitations 11990-89-A-0144 and -0145 to Compu-Copy, contending that Compu-Copy's equipment does not meet one of the requirements of the specification.

The solicitations were originally issued by the Procurement and Material Management Service Office ("P&MMSO"), Tampa, Florida, on February 24, 1989, with an amended due date of March 27. Bids were received from Compu-Copy, Pitney Bowes, Omni Copy, and EMCC. The contracting officer rejected all offers received as nonresponsive and concurrently cancelled the solicitations. Subsequent protests by Equipment Marketing Consultants Corporation ("EMCC") and Pitney Bowes[1/] resulted in the reinstatement of the solicitations on August 14. After reexamining the original bids, the contracting officer awarded both contracts to Compu-Copy on October 19, 1989.

The solicitations were identical except for the areas being served, and were issued under standard PS Form 7481, dated 1983, for coin operated copier services. The specifications at paragraph 4f stated that the copiers offered must "[c]opy all types of material in accordance with industry standards for console copiers." Paragraph 14c of the solicitation required bidders to "[a]ttach detailed information which clearly shows how your copiers meet each of USPS's requirements . . ." and paragraph 18 allowed bidders the opportunity to seek clarification of "anything in this solicitation."

In its protest, Pitney Bowes claims that Compu-Copy's offer is nonresponsive, since the equipment offered by Compu-Copy copies only three sizes of material, 8 1/2" x 11", 8 1/2" x 14", and 10" x 14", and, thus, does not meet the industry standards, which Pitney Bowes claims include the capability of copying 11" x 17" ledger size material. In support of its allegation, Pitney Bowes attaches excerpts from an abstract of office equipment specifications for several brands of console copiers, prepared by Dataquest, an independent company. Pitney Bowes claims that of the 81 commercially available

[1/] Equipment Marketing Consultants Corporation and Pitney Bowes, Inc., P.S. Protest Nos. 89-34, 89-42, July 27, 1989.

console copier specifications listed in the report, 79 are capable of copying all four paper sizes, thus defining the industry standard. The protester contends that without the capability of copying ledger size originals, the Postal Service will not be able to meet the objectives of its coin-operated copier program, i.e., to provide convenient economical copier service to Postal customers and to raise revenue. Pitney Bowes also suggests that the Postal Service's ability to compete will suffer unless it offers copiers similar to equipment available to the public elsewhere.

Finally, Pitney Bowes alleges that had it and the other vendors known that the Postal Service would be willing to accept copiers incapable of copying ledger size materials, it and the other vendors would have offered less expensive equipment at greater commissions to the Postal Service.

In his report, the contracting officer states that the solicitations did not define the industry standard and his determination that Compu-Copy's offer was responsive was properly made at the discretion of the contracting officer, based on the requirements of the Postal Service. He disputes Pitney Bowes' interpretation of what the industry standard is with respect to the types of materials the proposed equipment must be capable of copying. He also notes that Pitney Bowes, the incumbent contractor, has supplied coin operated copiers in the Tampa area for the past five years under contracts with specifications identical to those at issue here. Those copiers, although capable of copying ledger size paper, were modified before installation so as to restrict actual copy sizes to a maximum of 8 1/2" x 14". He states that this effectively discredits Pitney Bowes' contention that the capability of copying ledger size material is necessary to provide convenient economical copier services, raise revenue, and provide a service generally available to the public elsewhere.

Next, the contracting officer interprets Pitney Bowes' claim that copiers must be capable of copying ledger size material as an assertion of an ambiguity in the solicitation. The contracting officer notes that Pitney Bowes did not seek clarification of the specification before the offer due date. He refutes Pitney Bowes' contention that it and other offerors would have proposed less expensive machines, had the Postal Service's willingness to accept copiers incapable of copying ledger size materials been apparent, stating that the assertion is speculative and there is no evidence to support it. Finally, he asserts that Pitney Bowes' own present practice of limiting copying capability to legal size materials belies its position in this protest.

Responding to the contracting officer's report, Pitney Bowes submitted further comments. It reasserts that the "objective industry standard for console copiers" includes the capability of copying ledger size originals and argues that the contracting officer cannot ignore it. In support of its position, Pitney Bowes relies on Aeroflow Industries, Inc., B-197628, 80-1 CPD & 399, contending that it stands for the proposition that "if the Government refers to industry terms or standards in a solicitation, without further clarification, it must comply with industry interpretation of those standards". Accordingly, Pitney Bowes concludes that the contracting officer's exercise of discretion with respect to Compu-Copy's offer was improper.

Next, Pitney Bowes acknowledges that, as the incumbent contractor in the Tampa area, it supplies the Postal Service with copiers pursuant to an identical solicitation. It

contends that, although currently only letter and legal size copy services may be available, this is due to "the unwillingness of USPS personnel to make oversize copying available to customers, not the inability of Pitney Bowes' equipment to copy up to 11 x 17 inch material." It suggests that the reason for this is that, under Service Plan 3, in which Postal Service employees are responsible for copier operations, Postal Service personnel are reluctant to offer oversize copying services because they do not want to have to load computer form or ledger size paper into the machines. Pitney Bowes asserts that if there were not a market for copying oversize materials, the industry standard would not include the capability and suggests that it is ridiculous for the contracting officer to argue that machines with this capability would not get more usage, and, thus, enhance revenues.

Finally, Pitney Bowes states unequivocally that it is not alleging an ambiguity in the specifications, contending that the decision in Pitney Bowes, Inc., P.S. Protest No. 89-24, June 20, 1989, firmly established that oversize copying capability was required by the solicitation. For this reason, it asserts it would have had no reason to seek clarification before the offer due date.

Compu-Copy, through its counsel, submitted comments on the protest. It challenges Pitney Bowes' allegations, stating that its proposed equipment meets all the requirements of the solicitation. In support of its argument, it offers evidence showing that the proposed Sharp Model 7300 was thoroughly examined by postal officials in order to ascertain whether it met
the requirements of the specifications. It disagrees with Pitney Bowes' definition of the industry standard in question, stating that the specification refers to types of original materials, such as sheets, books, and three-dimensional objects, not the size of the original. It suggests that the specification was originally included in the mid 1970's in order to prohibit bids offering out-dated equipment which required a single sheet of original material to be fed into the copier. It argues that the evidence Pitney Bowes presented in support of its position is misleading. Furthermore, it submits that it would not be in the best interest of the Postal Service to require copiers to reproduce ledger size materials, as this would allow a customer to copy two 8 1/2 x 11 sheets in a single transaction, thus lowering the revenue producing capabilities of the copiers.

Compu-Copy also questions the timeliness of Pitney Bowes' protest, as it relates to any issue of ambiguity in the specifications, stating that Postal Service Regulations require a protest against the sufficiency of the solicitation terms to be filed before the bid opening date. It contends that Pitney Bowes' claim that it would have offered a less expensive copier is without merit, as the specific Pitney Bowes model suggested would not meet many of the other requirements of the solicitation.

Discussion

Despite Pitney Bowes' emphatic statement to the contrary, we view its protest to be an allegation of an ambiguity in the specification. 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 & 476. As such, Pitney Bowes' protest is untimely. The Postal Contracting Manual ("PCM") continues to control coin-operated copier solicitations and states that "[w]ritten

protests based upon alleged deficiencies in a solicitation which are apparent before the date set for receipt of offers must be received by the date and time set for receipt of offers . . ." PCM 2-407.8(d)(1). "Untimely protests cannot be considered on their merits. The requirement that a protest be timely filed is jurisdictional; we cannot proceed to a discussion of the merits of any issue which has been untimely raised." BFI Waste Systems, Browning-Ferris Industries, P.S. Protest No. 88-42, July 29, 1988.

In Pitney Bowes, Inc., supra, an ambiguity in the same specification was alleged in a timely manner. There, Pitney Bowes suggested that the specification was unclear as to whether it required copiers to be capable of copying book material and materials up to 8 1/2" x 14". Pitney Bowes did not raise any issue regarding ledger size copying capability at that time. There, under the facts presented and the limited issues raised, no ambiguity was found because both the parties and the commenters concurred in their interpretations of the specification, i.e. that both 8 1/2" x 14" and book material copying capabilities were required. Here, although the parties differ as to their interpretation of the industry standard on the issue of ledger size copying capability, that issue should have been apparent to Pitney Bowes before the bid opening date, especially in light of its prior protest involving the same specification. Again, Pitney Bowes failed to seek clarification, despite an opportunity to do so. Accordingly, its protest is untimely.

Furthermore, even if Pitney Bowes' protest was not an allegation of a deficiency in the specification, its protest is still untimely. Protests "must be received no later than 10 working days after the information on which they are 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." PCM 2-407.8(d). The bids were originally opened on March 27, 1989. The information upon which Pitney Bowes' protest is based should have been known to it on that date. Since the protest was received by this office several months after the bid opening date, the protest is untimely.

Nevertheless, for purposes of clarification, we will address the issue presented by Pitney Bowes, i.e., the contention that Compu-Copy's bid is nonresponsive. To be responsive, a bid must unequivocally offer to meet the solicitation's material terms at the bid price. Toledo Scale Corporation, P.S. Protest No. 87-127, December 11, 1987; Southwood Builders, Inc., P.S. Protest No. 87-44, June 3, 1987.

We disagree with Pitney Bowes that the facts here should lead to the same result as that in Aeroflow. In that case, the Invitation for Bids issued by the Coast Guard called for air compressors capable of delivering "80 cfm (cubic feet per minute) at 175-200 p.s.i. (pounds per square inch)." A bidder's offer of a compressor capable of delivering a maximum of 175 p.s.i. was found to be nonresponsive. The Comptroller General stated that "[f]rom the descriptive literature submitted, as well as from various comments made by the parties involved, it is clear that it is common commercial practice for pressure levels to be stated in terms of a range such as 140-175 p.s.i. or 175-200 p.s.i." The conclusion was that "it was generally understood that the specification called for a pressure range of 175-200 p.s.i." The bidder's offer of a compressor with a range of 140-175 p.s.i. was, therefore, nonresponsive. The

Comptroller General stated:

> Although the drafting of specifications to meet the Government's needs and the determination whether the items offered meet the specifications are properly the functions of the procuring agency, our Office will determine whether the interpretation of a specification is reasonable where, as here, the procuring agency and the protester reach different interpretations of the same specification. Picker Corporation; Ohio-Nuclear, Inc., B-192565, January 19, 1979, 79-1 CPD 31. Id. In that case, the Comptroller General found the Coast Guard's interpretation to be unreasonable.

Unlike Aeroflow, it is by no means clear that Pitney Bowes' interpretation of the industry standard is definitive and the term was not defined in the solicitation. The Comptroller General has held that "where there is some uncertainty as to the precise definition of a term used in a solicitation's specifications, the application by agency evaluators of a common sense definition based on its general needs, as reflected in the solicitation, is reasonable." Anadigicom Corporation, B-235349, August 18, 1989, 89-2 CPD & 151; Herman Miller, Inc., B-232839, January 26, 1989, 89-1 CPD & 79. Both the contracting officer and the commenter disagree with Pitney Bowes that the industry standard for console copiers must include the capability of copying ledger size materials. Unlike the facts in Aeroflow, here, neither the comments of the interested parties nor the descriptive literature submitted with Compu-Copy's bids clearly delineate an industry standard. Both the contracting officer and the commenter give valid reasons for rejecting Pitney Bowes' interpretation, such as the fact that the feature is not necessary to fulfill the requirements of the Postal Service and the suggestion that ledger size copying capabilities, by allowing a customer to copy two standard size sheets in one transaction, would lower revenues, rather than raise them.

Furthermore, the Dataquest information does not clearly resolve the issue, as Pitney Bowes suggests. The many potential features differ among the various machines. For example, although most of the copiers in the Dataquest report do list ledger size copying capabilities, less than half of those copiers have the capability of copying book materials. In Pitney Bowes, supra, the consensus was that the specification required copiers capable of copying book materials.[1/] Thus, the industry standard is not clearly defined by either Pitney Bowes or the solicitation and the contracting officer's interpretation based on the requirements of the Postal Service was proper. See Anadigicom Corporation, supra.

Pitney Bowes and the contracting officer also disagree as to who is responsible for limiting the copying capabilities of equipment under existing contracts. "In resolving factual conflicts between the protester and the contracting officer, the statements of the contracting officer are given a 'presumption of correctness' which the protester bears the burden of overcoming." Fairfield Stamping Corporation, P.S. Protest No. 88-04,

[2/]In fact, according to specifications submitted by Pitney Bowes, the less expensive machine that it suggests it would have offered, had it known that ledger size copying capability was not required, does not have book material copying capability.

June 3, 1988. Here the contracting officer states that examination of copiers in postal facilities shows that they are installed with the paten screened so as to limit the copying capability to 8 1/2" x 14". Although Pitney Bowes suggests that the limiting factor is due to the unwillingness of postal employees to provide oversize copying service, it offers no evidence to support its allegation and is thus unable to overcome the "presumption of correctness" of the contracting officer's statement.

Regardless of which party is responsible for limiting the copying capabilities to 8 1/2" x 14", this present practice, familiar to both parties, tends to show that the requirements of the Postal Service are being met without ledger size copying capabilities and to augment the reasonableness of the contracting officer's interpretation of the specification.[1/]

The contracting officer's interpretation of the specification was reasonable, in that it reflects the general needs of the Postal Service and is in accordance with present practice. Therefore, since nothing on the face of Compu-Copy's bids suggest anything other than an unqualified commitment to supply photocopiers which will meet the requirements of the solicitations, its bids were responsive.

The protest is untimely, but Pitney Bowes would not prevail even if its protest were timely, as the contracting officer's interpretation of the specification at issue is reasonable.

This protest is dismissed.

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

[checked against original JLS 5/26/93]

[3/]Were we to reach the merits on the issue of ambiguity, Pitney Bowes would have to meet a similar standard by showing that an ambiguity existed and that its interpretation was reasonable, as the following illustrates:

> 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, Inc., supra.