Protest of	)	Date: October 9, 1991
	)	
ENPRO CORPORATION	)	
	)	
Solicitation No. 104230-91-A-0048	)	P.S. Protest No. 91-48

DECISION

EnPro Corporation ("EnPro") timely protests the award of a contract to The Osterneck Company ("Osterneck") under Solicitation No. 104230-91-A-0048 for the supply of domestic mailbags. The solicitation was issued by the Office of Procurement, Headquarters, on April 25, 1991, with an original offer due date of May 16, amended to May 28. The awardee was to supply 480,000 brown and 500,000 white domestic mailbags, with options for 500,000 brown and one million white mailbags.

The solicitation, at Section M.1 a. provided:

> The Postal Service will award a contract resulting from this solicitation to the responsible offeror whose proposal conforming to the solicitation will be most advantageous to the Postal Service, cost or price and other factors specified elsewhere in this solicitation considered.

The only factors specified elsewhere in the solicitation related to price. At M.2 a., the solicitation stated:

> The Postal Service will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate the Postal Service to exercise the option(s).

Also, Section M.3 b. stated that "[t]o determine the evaluated total price, the Postal Service will add transportation costs to each offeror's item prices, computed as the cost to transport the mailbags to the destinations and in the quantities set forth at Section C.1, Delivery Schedule, from each offeror's shipping point(s)."

Finally, Section J.5 of the solicitation stated in pertinent part:

> Any proposal or modification of a proposal received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and . . . [c]onsideration of the proposal is determined by the contracting officer to be in the Postal Service's interest.

Eighteen proposals were received, including that of EnPro. After initial evaluation, EnPro was found to propose the lowest total price and Osterneck the second lowest. Before a decision was reached, however, two companies, Osterneck and Tennessee Apparel Corporation, submitted modifications to their proposals. The contracting officer determined that Osterneck's proposal, as modified, was the lowest priced proposal.

She awarded the contract to Osterneck on July 22.

On July 26, EnPro submitted its protest to this office, in which it alleges that the Postal Service made several errors in this procurement. Specifically, the protester asserts that the Postal Service misled EnPro regarding past procurements for these mailbags, which caused EnPro to propose higher prices[1/], and that the Postal Service failed to consider evidence of EnPro's financial ability, thereby improperly downgrading EnPro's responsibility. The protester asserts that the Postal Service improperly based its award on Osterneck's late proposal modification, submitted after the closing date for receipt of offers, in which Osterneck lowered its price.[1/] EnPro claims that as a result, it was improperly displaced as the low offeror. "This suspicion is bolstered by the fact that a full preaward survey was conducted of EnPro. This would not have been necessary, and indeed would have been wasteful of Postal Service resources, if EnPro were not the low bidder [sic]." EnPro concludes that if the Postal Service solicited a price reduction from Osterneck or allowed Osterneck to offer a late modification, with no corresponding opportunity for EnPro to lower its offer price, then the Postal Service violated its procurement regulations. EnPro asks that the contract with Osterneck be terminated and award made to EnPro.

The contracting officer replies that preaward surveys were performed simultaneously on the two lowest offerors, EnPro and Osterneck, in order to expedite the award process. She states that it is not unusual for the Postal Service to perform two preaward surveys so that award will not be delayed if one offeror is found to be nonresponsible.

The contracting officer states that Osterneck did indeed submit a modified proposal on June 21, which reduced its price, as did Tennessee Apparel Corporation. She asserts that the Postal Service did not solicit either of the late proposals. The contracting officer points to Section J.5 of the solicitation, which specifically allows for consideration of late proposals. She also cites Procurement Manual ("PM") 4.1.3 d.2, which allows consideration of late proposals and modifications when doing so is in the interest of the Postal Service and the evaluation process will not be delayed. The contracting officer states that she considered both of the late modifications because she determined that it would cause no delay in the evaluation process. Also, in the case of Osterneck, she thought that the cost savings would be in the best interest of the Postal Service. She concludes that her actions were valid pursuant to regulations.

Regarding EnPro's assertion that relevant procurement history was withheld, the contracting officer states that in 1989, two contracts were commenced that included mailbags. One of those contracts was awarded to Osterneck. She asserts, however, that there were many differences between the 1989 requirements and those for the

[1/] The solicitation, at Section 6(c) of the cover pages, lists as "procurement history" a 1990 contract awarded to Osterneck for $6.15 a bag. EnPro claims that a similar contract had been awarded in 1989 at $5.25 a bag but that EnPro "only found out about it later." EnPro claims that had it known of this 1989 contract, its price would have been lower.

[2/] EnPro also claims that it received no written notice of the award to Osterneck, contrary to PM 4.1.5 i.1. The record shows that the written notification was sent by certified mail and its delivery accepted by EnPro's agent on August 5.

currently procured product, and that therefore, "the 1989 contracts were not at all comparable to the instant procurement and would have probably misled offerors who relied on that for pricing information."[1/] Finally, the contracting

officer states that EnPro was never determined to be nonresponsble and that questions about its responsibility therefore played no part in the award decision.

In reply to the contracting officer's statement, EnPro asserts that Osterneck's modified proposal did not conform exactly to Section J.9 of the solicitation,[1/] in that it lacked "vertical lines adjacent to the change" and the "date of the amendment" in the corner; therefore, it was "nonresponsive" and should not have become the basis for award. As to the propriety of allowing late proposals, EnPro contends that Section 4.1.3 d.2 and Section J.5 of the solicitation both "were an open invitation to fraud and abuse of the procurement system. At best, they create an appearance of impropriety, leading offerors to question the integrity of the entire procurement process." EnPro asserts that the regulations "allow for the possibility that confidential data may be revealed, and used to the prejudice of other offerors." EnPro states that the fact that approximately one month passed between the closing date for receipt of proposals and Osterneck's modification suggests that Osterneck "became aware of pricing information which should have been held in strict confidence." EnPro concludes that it was not in the best interests of the Postal Service to accept Osterneck's late modification because the "appearance of impropriety, and the resulting harm to offerors' confidence in the system, is too great a price to pay to save a few dollars."

Osterneck submitted comments to this protest, in which it states that if the Postal Service had included the pricing information about its 1989 mailbag contract, "it would have been totally misleading and misrepresentative to all concerned." Osterneck cites what it terms significant labor and material cost differences between the two types of mailbags, which also differ in size.

Discussion

[3/]According to the contracting officer, some differences between the 1989 and 1991 requirements were:

1989	1991
25" material, 84" cut	25" material, 89" cut
No rings on the eyelets	Rings on the eyelets
No washer on grommets	Two piece grommets
Rolled seam at top	Two inch hem at top
Single seam on body	Double seam on body

[4/]Section J.9 of the solicitation provided:

> Any changes to a proposal made by the offeror after its initial submittal must be accomplished by replacement pages. Changes from the original page must be indicated on the outside margin by vertical lines adjacent to the change. The offeror must include the date of the amendment on the lower right corner of the changed pages.

EnPro alleges that it was misled by the solicitation because Osterneck's 1989 contract was not included in the procurement history. The selection of information to include in a solicitation constitutes a business judgment that is the responsibility of the procuring officials. This office will not substitute its judgment for that of the contracting officials or overturn a contracting officer's business decision unless the record clearly shows an abuse of discretion. See, e.g., Georgia Power Company, P.S. Protest No. 90-01, February 14, 1990. The record in this instance shows several differences between the mailbags sought in the current solicitation and those procured in 1989, which suggests that there was at least an equal chance of misleading offerors by including the 1989 history as in omitting it. We therefore cannot conclude that it was an abuse of discretion for the contracting officer to omit it from the procurement history.

The remaining question is whether the contracting officer erred in accepting Osterneck's late proposal modification.[1/] PM 4.1.3 d.2 states:

> Late proposals and modifications may be considered in accordance with Provision A-4, Late Submissions and Modifications of Proposals. It is normally in the interest of the Postal Service to consider a late proposal when doing so would cause no delay in the evaluation process, or the proposal was late because of mishandling after receipt, or the proposal offers a significant cost, quality, or technical benefit. It is not in the interest of the Postal Service to consider any proposal received so late that consideration of the proposal would jeopardize, or give the appearance of jeopardizing, the integrity of the competitive process.

The contracting officer determined that accepting the proposal would not delay the evaluation process because the award decision had not yet been made. she also concluded that Osterneck's modified proposal offered a significant cost benefit. Again, in order for our office to overturn this discretionary business decision, the record must show a clear abuse of that discretion. Georgia Power Company, supra.

EnPro argues that acceptance of Osterneck's modified proposal was not in the interest of the Postal Service because an appearance of impropriety was created by the date of Osterneck's modified proposal (June 21) compared with the date for receipt of proposals (May 28). According to EnPro, this "increases the possibility that Osterneck became aware of pricing information which should have been held in strict confidence." EnPro bases its allegation of possible improper communication between the Postal Service and Osterneck and disclosure of confidential pricing information on the assumption that it "is not reasonable or usual for an offeror to reduce its price, absent a mistake in preparing its bid." The protester concludes, "[W]e can only surmise that Osterneck had reason to believe (or was led to believe that) it was not the low offeror and had to improve its position if it were to receive the award."

Assumptions and suppositions are not enough to support allegations of impropriety or abuse of discretion. Five Star Catering, P.S. Protest No. 88-68, January 31, 1989; see generally, Thermico, Inc. P.S. Protest No. 90-71, December 21, 1990 (a protester must offer specific proof of allegations of bad faith, bias or unfairness); COR Inc., P.S.

[5/] A contracting officer is not required to reject a proposal because of minor irregularities such as Osterneck's failure to adhere exactly to the form set out in Section J.9 of the solicitation.

Protest No. 90-16, June 22, 1990 (prejudicial motives will not be attributed to individuals on the basis of inference or supposition). However, since under PM 4.1.3 d.2 it would not have been in the interest of the Postal Service to consider the late proposal if in so doing it would have given the appearance of jeopardizing the integrity of the procurement process, we did examine the record for evidence that could support EnPro's specific allegation of impropriety, improper communication or disclosure of information. Since EnPro suggests that Osterneck reduced its price because it received confidential information about other offerors' prices, we viewed in camera the cover letter to Osterneck's modification.[1/] After examining this letter, which contained Osterneck's explanation of the reasoning behind its price reduction, we are satisfied that Osterneck's reduced proposal price resulted from a business decision unrelated to an improper disclosure of confidential price information.

The contracting officer kept detailed communications logs of her telephone conversations with offerors. These logs indicate that care was taken that only the status of the award process was

discussed with the offerors.[1/] There is no support in the record for EnPro's assumptions and allegations. Without proof, the protester's allegations fail. Five Star Catering, supra.

Finally, EnPro contends that accepting the late proposal was not in the interest of the Postal Service because the PM provisions that allow it "are an open invitation to fraud and abuse of the procurement system" and "[a]t best, they create an appearance of impropriety . . . ." To the extent that EnPro is challenging the PM for allowing consideration of late proposals, and alleging that any action taken pursuant to this regulation will automatically create an appearance of impropriety, its challenge is beyond the bid protest jurisdiction of this office. See Cor, Inc., supra; TLT Construction Corp., Inc., P.S. Protest No. 89- 75, January 18, 1990. Accordingly, we will not consider the protester's arguments that the PM provision itself jeopardizes the integrity of the procurement process.

This protest is dismissed in part and deified in part.

[Signed]

William J. Jones
Associate General Counsel

[6/] In response to a request for information, the contracting officer furnished EnPro with a copy of Osterneck's price proposal, other offerors' proposed prices, and Osterneck's modification, including its cover letter, with the reason for its price reduction blackened out pursuant to PM 4.1.5 j.4.(b).

[7/] When, as was the case here, price and pricerelated factors provide the basis for evaluation of proposals, award often is made without discussions or negotiations. There is nothing in the record to contradict the contracting officer's assertion that the Postal Service did not solicit either of the two late proposal modifications that were submitted. Thus, there was no requirement that the contracting officer provide EnPro or any of the offerors with the opportunity to discuss and revise their proposals in light of the receipt of the two modified proposals.

Office of Contracts and Property Law

[Compared to the original 5/12/95 WJJ]