Protest of	)	Date: December 6, 1991
	)	
OFFICE SYSTEMS OF FLORIDA, INC.	)	
	)	
Solicitation No. 115850-91-A-0049	)	P.S. Protest No. 91-70

DECISION

Office Systems of Florida, Inc. ("Office Systems") timely protests the award of a contract to White Storage & Retrieval Systems, Inc. ("White Storage") to provide five automatic filing systems. The protester claims that White Storage was allowed to offer an item that did not meet the brand name or equal solicitation requirement.

The Miami, FL, division procurement office issued Solicitation No. 115850-91-A-0049 on July 3, 1991, using simplified purchasing procedures. Offers were due on July 23. The solicitation requested five units of three differently configured Lektriever Series 80 devices,[1/] identified as items 01, 04, and 07. Items 02, 03, 05, 06, 08, 09 and 10 requested delivery and installation charges for each of the units. The items were described as follows:

> Item 01 Lektriever Series 80 complete with 112 steel trays with followers for letter size filing. (3 items requested.)
>
> Item 04 Lektriever Series 80 complete with 308 steel trays with followers for 7" x 3" filing and 36 steel trays with followers for 8 1/2" x 4" filing. (1 item requested.)
>
> Item 07 Lektriever Series 80 Automated file unit with 154 metal trays for letter size filing, 141time " height x 102" width x 59 3/4" depth. (1 item requested.)

Section 3.8 of the solicitation, entitled, "Brand Name or Equal," stated, in part, that:

> One or more items called for by this solicitation have been identified in the Schedule by a brand-name-or-equal product description. Proposals offering

[1/] A cover letter to the solicitation generally described the requirement as "aLektriever Series 80, Model 7560190 or equal." As discussedinfra, this description was inexact.

> equal products will be considered for award if these products are clearly identified and are determined by the Postal Service to be equal in all material respects to the brand-name products referenced in the solicitation.

The solicitation stated that award would be made to the responsible offeror whose proposal was most advantageous to the Postal Service. Since no price-related or evaluation factors were outlined in the solicitation, the basis of award was price.

Office Systems quoted a price of $68,803.20 for the brand-name items while White Storage quoted $68,385.22 for equal items.[1/] A third offeror's quoted price was higher. A purchase order was issued to White Storage on August 20. Office Systems timely protested to the contracting officer on August 28. The contracting officer denied that protest by letter dated September 12. This office received Office Systems' protest of that decision on September 23. Performance continued while the protest was under consideration, and the systems were delivered on October 31.

Office Systems' initial protest contended that White Storage's equipment was not equal to the items specified. Referring to the descriptions which White Storage offered of its products (as set out in footnote 2, infra) it specifically noted the provision of plastic, rather than steel, trays for item 04, and the provision of a unit incorporating letter size hanging trays instead of the required "steel trays with followers." for item 01.[1/] Further, the protest contends that hanging trays are not standard features of the White Storage units offered, and that White Storage has not provided information on modifications to its standard units as paragraph d. of the "Brand Name or Equal" clause required.[1/]

[2/] White's offer described its equal items as follows:

> Item 01 White #72160 letter hanging metal tray unit with 112 trays.
>
> Item 04 White #72160 - 16 carrier mix and match unit with 14 carriers of tab size high impact plastic trays -- 308 trays -- and 2 carriers of 8 3/4 x 4 high impact plastic trays -- 36 trays.
>
> Item 07 White 72220 letter metal tray unit with 154 trays. As to item 7, White substituted the dimensions "143 1/2" height x 106" wide x 62 1/4" deep" for the dimensions stated for the Lektriever item.

[3/] As Office Systems explains it, the two systems require the use of different types of folders, such that the substitution would result in a diminution of file capacity and an additional cost for new hanging folders. It supplies a White price list for various models of files, highlighting the entry for model 72160X in the Series 36X, which the price list describes as "Letter Hanging."

[4/] The provision states:

> d. If the offeror proposes to modify a product so as to make it conform to the requirements of the solicitation, the offeror must -
>
> 1. Include in the proposal a clear description of the proposed modifications; and
>
> 2. Clearly mark any descriptive material to show the proposed modifications.

Office Systems further asserts that White Storage's standard product, unlike Office Systems', lacks a steel dust cover and a front access hand crank. Finally, Office Systems states that White Storage's proposal does not mention a warranty and therefore assumes that one was not offered. The protester remarks that beside offering a very attractive warranty, it offered to provide the brand name for only $417.98 more than what White Storage offered. The protester asks that White Storage's proposal be disqualified as not meeting the specification requirements and a stop-work order be issued. Office Systems also requests that a purchase order be issued to Kardex.[1/]

In initially denying the protest, the contracting officer concluded that the plastic trays offered by White Storage for item 04 were functionally equivalent to the steel trays described; that the offered equipment was compliant with the requirement for trays (noting in passing that White Storage Series 36 equipment was not offered); and that while the White Storage units would include dust covers, front hand cranks, and warranties, none of these was a requirement of the solicitation.

Office System's protest to this office did no more than forward its initial protest with a request that performance be suspended pending its resolution.[1/] The contracting officer's statement similarly repeats the grounds cited in her initial denial. The report does, however, describe some of the circumstances surrounding the solicitation.

Notice of the solicitation was printed in the Commerce Business Daily of July 12. By letter dated July 18 which referenced the notice, White Storage requested a copy of the solicitation, which was faxed to it on July 23, the date set for the receipt of quotes. By letter faxed to the procurement office later that day, White Storage noted what it viewed as discrepancies in the solicitation package[1/] and requested that the solicitation be canceled, corrected, and reissued.

The contracting officer's report reflects that on July 24, information was telefaxed to White Storage to clarify the intent of the solicitation. The clarification identified the three requested items as follows:

Item 01 Model 7560190B, w/112 steel trays with followers for letter size filing.

[5/] Office Systems quoted on behalf of its principal, Kardex Systems, Inc. ("Kardex"), the manufacturer of Lektrievers. In its cover letter with its proposal, Office Systems stated that it would "be responsible for receiving, inspection, delivery, installation and warranty of these five (5) units."

[6/] The decision whether to allow contract performance to continue during the pendency of a protest received after award is left to the discretion of the contracting officer. PM 4.5.5 b.

[7/] White's comments note that none of the units fall within the designation of Lektriever Series 80, Model 7560190 as noted in the transmittal to the solicitation, and describe the Lektriever models that they assume are intended. Further, as to item 07, White notes its confusion whether a Model 7560810, which it describes as providing 154 "standard letter trays," or a Model 7568050, which includes 132 "letter hanging trays," is intended. The letter notes White's intention to provide a unit with plastic trays for item 04, and to provide units with metal trays for items 01 and 07, whether standard or hanging trays are required.

> Item 04 Mix-N-Match, 308 steel trays with followers for 7"x 3" filing. 36 steel trays with followers for 8 1/2" x 4" filing.
>
> Item 07 Model 7560810B, w/154 steel trays with followers for letter size filing.

White Storage's quotation, described above, was dated July 26. The of its receipt is not stated in the file. The contracting officer's statement advises that offers were not opened until August 20, which was also the date of award.

Office Systems submitted a response to the contracting officer's statement. It notes that although it submitted its proposal before the 3:00 p.m. July 23 due date, White Storage did not raise its concerns about the solicitation until after 4:00 p.m. on that date, and did not prepare its quotation until July 26, making it nonresponsive[1/] and untimely. The protester further notes that the communications with White Storage concerning the requirement suggest that the procurement office held regular conversations with White Storage between the offer due date and award, which led to White Storage changing its product from that it originally submitted.[1/]

Office Systems' concludes its comments by reiterating its principal objections: White Storage's late quotation should not have been considered, the items it offered were not equal to the ones required, and it improperly changed its offer as the result of inappropriate conversations with the procuring officials. It continues to seek award of the contract.

Discussion

We first address the protester's concern about the propriety of the contracting officer accepting White Storage's proposal after the stated offer due date. Procurement Manual ("PM") 4.2.3 a.2. states that for simplified purchases:

> Late proposals and quotations in response to written or oral solicitations may be considered when an award has not yet been made, if the contracting officer determines that doing so is in the Postal Service's interest.

Since White Storage's proposal was received prior to award and only three days after the stated offer due date, it was within the contracting officer's discretion to conclude that it was in the Postal Service's interest to consider the lower priced proposal. We will not disturb the action. We would note, however, that in circumstances such as were present here, when an offeror requests additional information on the date set for

[8/] The term "nonresponsive" is a term relevant to sealed-bid solicitations and is not properly used under Postal Service negotiated procurements. Dawson Construction Co., Inc., P.S. Protest No. 91-47, September 25, 1991.

[9/] The protester also notes circumstances which cause it to doubt the contracting officer's advice that the quotations were not opened until August 20, including the fact that its inquiries on the status of award in early August were met with replies that the quotations were being evaluated, and that sometime in early August Office Systems was asked to verify that it had not included any price in the delivery portion of its quotation.

the receipt of offers, the better practice would be to postpone by amendment the date for the receipt of offers.

Office Systems' main contention is that White Storage did not offer an equal product and that therefore its proposal does not meet the specification requirements. We do not reach that issue, but note, instead, the existence of serious deficiencies in the solicitation with respect to the use of the brand-name or equal purchase description. PM 2.3.3 c. requires that:

> [I]f fewer than three acceptable brand-name products are specified, or if proposals for products other than those specified will be considered:
>
> 1. The product description must include a description of the item's essential characteristics, such as kind of material, size or capacity, equipment with which the items is to be used, and restrictive operating environmental conditions;
>
> 2. The brand names in the product description must be followed by the words "or equal";
>
> 3. Spaces must be provided for offerors to identify the manufacturer's brand names and model or catalog numbers proposed (see A.2.3.b.8);
>
> 4. the solicitation must include Provision 2-4, Brand Name or Equal; and
>
> 5. If the requirement is estimated to exceed $50,000, the product description must be approved by the General Manager, Technical Review Division, Procurement and Supply Department, before the solicitation is issued.

Because this solicitation identified an individual brand-name product for each item, PM 2.3.3 c. applied. However, it was not fully complied with. Nowhere did the solicitation specifically identify the "essential characteristics" of the various Lektriever units.[1/] In short, the solicitation failed to describe the product adequately so that an offeror could know what was being requested and could submit a meaningful quote without further information.

Other errors included the fact that the brand name was not followed by the words "or equal" and space was not provided for offerors to identify the manufacturer's product

[10/] The recitation in the item description of features such as "steel trays with followers" and (in one case) the dimensions of the specified unit, does not necessarily satisfy that requirement. If the recital was intended to comprise the essential characteristics, it was seriously flawed. If we accept the contracting officer's conclusions that the units which White offered met the needs of the Postal Service, the recitation was unduly restrictive, since it required trays of a specific composition when trays of other composition would serve the purpose. Similarly, item 07 included a size requirement associated with it, but White's substitute, larger in all three dimensions, was found acceptable. Once the contracting officer was put on notice (by White's July 23 inquiry) that trays of other composition were to be offered, she should have amended the requirement to allow trays of other suitable materials and then requested another round of quotes. See Automotive Service Equipment, On Reconsideration, P.S. Protest No. 87-74, November 10, 1987; PM 4.1.2 i.1.

information for the product proposed. It also does not appear from the file that the Technical Review Division of the Procurement and Supply Department approved the product description for this procurement prior to solicitation issuance, as required for a purchase of this dollar value.

Office Systems also alleges that the contracting officer improperly held conversations with White Storage during the time between the offer due date and the submission of White Storage's offer, which allowed White Storage to change its proposal. The conversations of which Office Systems complains appear to be of two sorts. The first were the conversations that accompanied White Storage's requests for clarification of the solicitation and the contracting officer's response. While, as noted above, we believe the better course would have been to postpone the receipt of quotations and amend the solicitation in response to White Storage's inquiries, we find nothing inherently improper in these communications.

The second type of conversations involves those held after the quotations were opened. As to these, PM 4.2.3 provides that under the simplified purchasing procedures used here, the contracting officer "may negotiate with offerors when necessary to ensure that prices are reasonable or to ensure that Postal Service requirements will be met" (PM 4.2.3 d.) and "must make a determination of responsibility for purchases over $50,000" (PM 4.2.3 e.). Conversations with respect to either of these approaches would not be inappropriate. In any event, there is nothing in the record to suggest that the units which White Storage furnished were not the units identified in its quotation.

Although the brand name aspects of this procurement were improperly handled, there is no basis on which we can conclude that the items which White Storage quoted did not meet the Postal Service's needs.

The protest is denied.

[Signed]

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

[Compared to original 5/17/95]