Protests of	)	Date: January 21, 1992
	)	
SIRCLE SPRING COMPANY	)	
and	)	
PACKAGING ACCESSORIES COMPANY	)	
	)	
Solicitation No. 197101-91-A-0992	)	P.S. Protest Nos. 91-86 &
	)	91-91

DECISION

Sircle Spring Company ("Sircle") and Packaging Accessories Company ("PAC") each protest the award of a contract to RC Products, Inc. to produce wire buckles. Both Sircle and PAC contend that although their products met the basic specifications, they were rejected as being technically unacceptable. They also allege that award was improperly made to a supplier of foreign-made buckles.

Solicitation No. 197101-91-A-0992 was issued by the Contracts Branch of the National Inventory Control Center in Topeka, KS, on July 25, 1991, with a return date for offers of August 16. Using simplified purchasing procedures, the Control Center issued the solicitation which sought approximately 1 million wire buckles made in accordance with the Postal Service drawing package included with the solicitation.

The solicitation drawing reflects that the buckle is made from a piece of .096" low carbon steel wire with a phosphate coating which is twisted into a square shape with two interlocked arms bent to shape above the body of the buckle. The solicitation states that the buckle is used to secure non-metallic strapping. The drawing also identifies two U.S. Patents, No. 3,294,302 and 4,083,088, as applicable to the buckle. RC Products is listed on the drawing as a suggested source of supply, with the caveat that "[i]dentification of the 'suggested source(s) of supply' herein is not to be construed as a guarantee of present or continued availability as a source of supply for the item(s)."

Offerors were warned in Section 3.4 of the solicitation that award might be made without discussions and that therefore, each proposal should contain the offeror's best terms from a cost/ price and technical standpoint. Section 3.12, entitled "Buy American Certificate - Supplies" read:

> The offeror certifies that each end product, except those listed below, is a

> domestic-source end product (as defined in the Preference for Domestic Supplies clause) and that components of unknown origin are considered to have been mined, produced, or manufactured outside the United States. Excluded end products [Offeror show country of origin for each excluded end product]:

Section 3.1 of the solicitation stated that award would go to the responsible offeror whose proposal was most advantageous to the Postal Service considering cost or price "and other factors specified elsewhere in th[e] solicitation." Since no other factors were listed in the solicitation, this was a price-based award.

Twelve offerors were solicited, but only Sircle, PAC and RC Products actually submitted offers. Sircle offered a price of $13,905. Although in its offer, Sircle did not take exception to the solicitation terms, it accompanied its offer with a letter and a sample buckle which indicated that it was proposing to supply a different buckle of its own design. Sircle's buckle is of .105" galvanized wire, and is formed in such a way that the arms which protrude above the body of the buckle are not interlocked.

PAC offered a price of $9,228.80. PAC's offer was accompanied by a letter and drawing which indicated that it was also offering a buckle made out of .105" low carbon steel of its own configuration. Both Sircle and PAC represented that their buckles would perform similarly to the requested items.

Sircle and PAC were each notified, via letter, dated November 5, and via telecon on November 6, that the buckles they offered did not exactly match the Postal Service's drawings and thus could not be considered without technical evaluation. The letter explained that since such an evaluation would unduly delay award, their offers were rejected as unacceptable. The letter further advised that each product would be forwarded to the Engineering Development Center in Virginia for testing and approval for use in future procurements. RC Products offered to supply the specified buckle and was awarded the contract for $15,398.50 on November 7. Sircle and PAC protested to the contracting officer who received the protests on November 15 and November 22, respectively, and forwarded them to this office for resolution.[1/]

<u>The Sircle Protest</u>

In its protest, Sircle contends that its offer did not receive full and fair consideration and that the contracting officer never intended to award to anyone other than RC Products. The protester also contends that the solicitation was unfair because it did not allow offerors to offer items which did not match the exact specifications called for in the drawings. Sircle adds that the requested item is protected by a patent and that a solicitation that contains a drawing that covers a patented item is unfair from its inception.

The protester claims that it was the first manufacturer of wire buckles of the type required and that an offeror who offered an equivalent buckle should have been considered. Sircle argues that its offered buckle was such an equivalent, pointing out

[1/] The contracting officer made the decision to allow performance to continue during the pendency of these protests.

that the only difference between its buckle and the one specified is that its buckle has a different loop. Sircle contends that its buckle will perform the same function as the one listed in the drawings. Sircle claims that it would have protested the solicitation, but determined that its equivalent buckle would be acceptable to the procuring activity.

The protester believes that the facts surrounding this procurement, along with the fact that RC Products, the highest priced offeror of the three won the award, suggest fraud. Finally, Sircle accuses RC Products' offer of being in violation of 18 U.S.C. '1001.[1/] Sircle thinks, due to statements it has received from procurement officials, that RC Products may not have disclosed the true country of origin of the buckle it will supply, in violation of the Buy American requirement in Section 3.12 of the solicitation. The protester asks that if this contract is not awarded to it, it be reimbursed its proposal and protest costs.[1/]

The PAC Protest

PAC asserts in its protest that, while its product does not meet the exact specification drawings, it instead exceeds the specification. In addition, PAC alleges that its product consistently exceeds the performance of the product specified. PAC laments the award of the contract to a foreign supplier, RC Products, in light of the need to rebuild the manufacturing base in the United States.

The Contracting Officer's Statement

The contracting officer submitted a combined statement on the Sircle and PAC protests. He reports that the solicitation did not contain provisions for submitting technical data or samples since the item requested was set forth in an attached drawing and offerors were required to supply that item, without deviations or changes. The contracting officer states that technical review of Sircle's buckle established that it did not match the specified drawing, although the fit and function were equivalent.

Since the item proposed by Sircle did not conform to the item specified, the contracting officer determined that Sircle's proposal was technically unacceptable. Further, the contracting officer notes that Sircle's complaint about the buckle being subject to a patent is a complaint against the terms of the solicitation and therefore untimely raised. The contracting officer denies that either he or his staff made deceptive or unfair actions in this procurement. The contracting officer notes that there are no provisions for reimbursing an offeror for its costs of trying to do business with the Postal Service.

Similarly, the contracting officer asserts that he correctly rejected PAC's offer because it admittedly submitted a product that was not in conformance with the specification drawings. The contracting officer responds to PAC's assertions about RC Products

[2/] 18 U.S.C. '1001 (1988) states, in part, that it is a crime for anyone to make false or fraudulent statements in any matter within the jurisdiction of a government agency.

[3/] This office lacks authority to reimburse Sircle for the cost of preparing and negotiating its proposal and for its protest costs. Cummins-Allison Corporation, P.S. Protest No. 91-18, June 4, 1991; DHL Airways, Inc., P.S. Protest No. 89-36, July 7, 1989.

being a foreign supplier by pointing out that Procurement Manual ("PM") 10.3.2 e.[1/] allows the purchase of a foreign made product, adding that RC Products offered the only technically acceptable product. He also notes that RC Products represented in its proposal that the country of origin of its products is the United States.

Responses and Comments

Sircle responds to the contracting officer's statement, noting that it learned from that statement that PAC was permitted to submit its offer on August 23, one week after the offer due date. Sircle questions the propriety of this late acceptance. The protester contends that PAC's late submission should make it ineligible for award and make Sircle's offer the lowest priced and it the proper awardee.

Sircle points out that the contracting officer was put on notice, prior to the offer due date, that there was a material defect in the solicitation when it was questioned by another prospective offeror concerning the need for the patented item on the buckle. Sircle believes the contracting officer should have withdrawn the solicitation and amended it to allow more than one offeror to submit an offer. Lastly, the protester expresses concern over the continuance of performance of this contract while these protests are pending, stating that continuing performance by the awardee robs it of any potential relief, should its protest be sustained.[1/]

RC Products briefly comments that Sircle could purchase the requested item and supply that buckle to the Postal Service. RC Products suggests that Sircle submit samples and drawings of its buckles for prior approval, as RC Products did in November, 1988.

Sircle comments that PAC's protest was untimely filed, since it was received more than fifteen days after award of the contract and more than ten days after it was notified of the award on November 6.

Discussion

We address PAC's protest first. PM 4.5.4 a. states that "[a] protester must furnish any protest to the contracting officer or the General Counsel in a manner that will ensure its timely receipt." More explicitly, PM 4.5.4 d. states that for protests other than those alleging solicitation deficiencies, "protests must be received not later than ten working days after the information on which they are based is known or should have been

[4/] PM 10.3.2 e. reads: "Each foreign price proposal must be adjusted for purposes of evaluation by adding to the foreign proposal (inclusive of duty) a factor of six percent of that proposal. If a tie results between a foreign proposal and a domestic proposal, the domestic proposal must be selected for award."

[5/] This is not a matter properly before this office. PM 4.5.5 b. states that "[t]he contracting officer, with the advice of assigned counsel, must determine whether it would be in the interest of the Postal Service to allow the contractor to proceed, seek a mutual agreement with the contractor to suspend performance on a no-cost basis, issue a unilateral stop-work order, or take other appropriate action." The decision of whether to suspend award or performance of a contract once a protest has been received is thus clearly within the discretion of the contracting officer.

known. . . ." The general rule is that "[t]he timeliness requirements imposed by our regulations are jurisdictional, and we cannot consider the merits of any issue which has been untimely raised." L & J Transportation Inc., P.S. Protest No. 91-42, August 29, 1991.

According to the contracting officer, PAC received notice, by telephone, on November 6 that its proposal was being rejected as technically unacceptable. The contracting officer received PAC's protest on November 22, more than ten working days after November 6, when it was notified of its proposal's rejection, which was the basis for PAC's protest. Therefore, PAC's protest is un- timely and must be dismissed.

However, PAC's protest raises the same basic issue as Sircle's timely protest - whether the individual proposals were properly rejected. The contracting officer rejected both proposals because neither conformed to the solicitation requirements in the attached drawings. Due to this nonconformity, the contracting officer found both proposals technically unacceptable. The standard of review of such a determination is clear.

> This office will not substitute its judgment for that of the contracting officer or disturb his evaluation of an offer's technical acceptability unless it is shown to be arbitrary or in violation of procurement regulations. Our review of the contracting officer's determination of technical acceptability examines the contracting officer's determination only to ensure it had a reasonable basis.

Doninger Metal Products Corporation, P.S. Protest No. 90-50, October 10, 1990 (citations omitted).

Both Sircle and PAC admit that their offered products did not meet the solicitation drawings. However, they assert that since their buckles met the essential characteristics of the specified item, their products should have been accepted as materially conforming. That view is incorrect. Sircle and PAC's "unmistakable intention to supply something other than the product specified in the solicitation fully supports the contracting officer's conclusion that the offered product was nonconforming and the subsequent rejection of [their] offer[s]." Doninger Metal Products Corporation, supra. Since Sircle and PAC offered an item not described by the solicitation, neither was entitled to award. Doninger Metal Products Corporation, supra; CFI, P.S. Protest No. 88-82, February 17, 1989. "A determination of technical unacceptability based upon patent nonconformity cannot be considered arbitrary." Doninger Metal Products Corporation, supra. We uphold the contracting officer's decisions of technical unacceptability in both cases.[1/] Sircle's protest is denied.[1/]

[6/] Many of the protesters' allegations are, in actuality, a challenge to the solicitation requirements as unduly restrictive. For instance, Sircle states that the requirement of the patented item is a "material defect" in the solicitation. That is incorrect. "The fact that a particular specification . . . requires a patented item or process does not necessarily indicate that the specification is unduly restrictive." Mid-Atlantic Service & Supply Corporation, Comp. Gen. Dec. B-218416, 85-2 CPD &86, July 25, 1985. In any event, these alleged solicitation deficiencies were apparent prior to the offer due date and are, there fore, untimely raised after that date. PM 4.5.4 b.; Hill's Capitol Security, Inc., P.S. Protest No. 90-25, July 20, 1990.

[7/] The availability from Sircle and PAC of standard wire buckles which appear to serve the same purpose

Sircle further alleges that the acceptance of PAC's proposal after the offer due date was improper. That allegation is meritless. 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 PAC's proposal was received prior to award and only a week 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." Office Systems of Florida, Inc., P.S. Protest No. 91-70, December 6, 1991.

Sircle also accuses the contracting officer of committing fraud in the course of the procurement. An allegation of fraud is one that the contracting officer acted in bad faith. "A protester must prove allegations of bad faith or bias by 'well-nigh irrefragable proof' of specific, malicious intent by a contracting officer to harm the protester; without such evidence, there is a presumption that a contracting officer has acted in good faith." Colorado Piping & Mechanical, Inc., P.S. Protest No. 90-23, June 20, 1990. Sircle has presented no evidence to support its claim, let alone evidence rising to this high standard. Absent such evidence, the claim must be rejected.

Finally, we address PAC and Sircle's concerns about the propriety of accepting an offer from an offeror who may obtain the buckle from outside the United States. Sircle alleges that award to RC Products is a violation of the Buy America clause in the solicitation. The contracting officer states that the awardee represented in its proposal that the country of origin of its products is the United States.

"Postal Service policy is to give preference to domestic-source products and materials in purchasing supplies. . . ." PM 10.3.1. Towards that end, the Buy America certification clause is placed in a solicitation to ascertain which offerors will supply domestic-source end products. RC Products typed "United States of America" in Section 3.12, the "Buy America Certificate", of its proposal. The contracting officer accepted that certification.

"The Postal Service's acceptance of [RC Products'] offer obligates [RC Products] to comply with its [Buy America] certification. Whether [RC Products] in fact complies with this obligation is a matter of contract administration, which we will not review." International Business Machines Corporation, P.S. Protest No. 90-66, January 11, 1991. Further, the Postal Service's Buy American policy (PM 10.3.2 et seq.) does not disallow the acceptance of an end product of foreign origin; rather, it directs the use of a six percent evaluation differential on such offers to assist in the stated preference for domestic supplies. PM 10.3.2 e.; see also Tulsa Diamond Manufacturing Corp., et al., P.S. Protest No. 85-18, 85-20 and 85-23, June 20, 1985. The calculation of a price differential was not necessary in this case because RC Products offered the only

as RC Products' wire buckle of different design suggests that it may be appropriate to obtain these items in future procurements by product description rather than by design specifications. See PM 2.3.2 b.

technically acceptable proposal.

PAC's protest is dismissed.

Sircle's protest is denied.

[Signed]

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

[Compared to original 5/18/95 WJJ]