Protest of	)	Date: August 27, 1992
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RHODE ISLAND CONTROL EQUIPMENT CO.	)	
	)	
Solicitation No. 104230-92-A-0070	)	P.S. Protest No. 92-21

DECISION

Rhode Island Control Equipment Co. (Rhode Island) protests the award of a contract to compile and tabulate responses received from a national poll[1/] to Bruskin Goldring Research (Bruskin). Rhode Island alleges that its proposal, rather than Bruskin's, should have received award under the solicitation.

Solicitation No. 104230-92-A-0070 was issued by the Office of Procurement, Headquarters, on February 26, 1992, with a proposal due date of March 10. The solicitation consisted of a two-page letter accompanied by a two-page statement of work. The letter requested information on five areas: a listing of previous data entry experience; a statement that the offeror agrees with all the terms of the solicitation; a price for each response card tabulated; a detailed travel schedule and cost for required travel expenses; and the categories of data which the offeror could retrieve. The solicitation specified that the proposals would be evaluated based on the five categories of information, and noted that price "will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price." The solicitation also provided that the contract resulting from this solicitation would contain the standard Postal Service clauses for a fixed-price contract.

Five proposals were received and evaluated by an evaluation committee. The committee found two offerors, Bruskin and AUS Consultants, to be equally qualified, receiving evaluated scores of 325 and 353, respectively and assessments that no risk was posed by award to either. Rhode Island received a score of 190 and a high risk assessment. The evaluators noted that Rhode Island's proposal "does not indicate performance periods, number of year['']s experience on each data entry program or a concise description. The [proposal] does not provide clear information to evaluate [its] ability to meet all contract requirements."

[1/] The national poll was conducted by the Postal Service to determine which of two Elvis Presley stamp designs was preferred: a design depicting Elvis at the start of his career or a design depicting Elvis at the height of his popularity. The design which received the greater number of votes is to be one of a series of stamps commemorating rock and roll singers. As was publicly announced on June 4, 1992, the "young Elvis" design received significantly more votes than the other design.

The contract specialist reviewed the proposals for consistency with the evaluation criteria and the report of the evaluation committee. Based on this analysis, the contracting officer requested best and final offers, limited to price, from Bruskin and AUS. Both offerors proposed a sliding scale of prices, based on the number of response cards received, with Bruskin's price varying between 11.8 and 11.6 cents and AUS' between 12.5 and 12 cents. The contracting officer determined that Bruskin's proposal represented the best value to the Postal Service based on the combination of its technical proposal and price, and awarded a contract to Bruskin on March 26. Rhode Island's protest followed.

Rhode Island claims that it is entitled to award because it was a "responsible offeror having submitted a responsive proposal which on its face meets or exceeds all" of the solicitation requirements and is priced lower than Bruskin's proposal. Rhode Island states that Postal Service policy is to award contracts to the lowest priced, responsive offer submitted by a responsible offeror, and that the contracting officer's failure to award it the contract was due to an improper application of the evaluation criteria.[1/] It alleges that its proposal met or exceeded all technical requirements and was, indisputably, much superior in price to that of Bruskin. Rhode Island argues that any decision by the contracting officer that its proposal was nonresponsive or it was nonresponsible is arbitrary and capricious and that its past performance record conclusively indicates it could successfully perform the required tasks. Finally, it claims that it was not given the preferential consideration it was entitled to as a woman-owned small business located in a labor surplus area.[1/]

The contracting officer's statement indicates that Rhode Island's use of the term "responsive" throughout its protest is mistaken, as that term applies only to the sealed bidding procurement method, which is not used by the Postal Service.[1/] This solicitation used negotiated procurement procedures, by which award was to be made to the offeror whose proposal offered the best value to the Postal Service based on price, price-related evaluation factors, and other evaluation factors specified elsewhere in the solicitation. The contracting officer notes that the solicitation specified five factors which would be used to evaluate proposals, only one of which was price,[1/] and that the solicitation specifically informed offerors that price would be considered in the award decision, but that award may be made to other than the lowed priced offeror. The contracting officer further argues that the evaluation criteria were reasonably related to the Postal Service's needs and that Rhode Island bears the burden of proving otherwise, citing Cadillac Products, Inc., P.S. Protest No. 91-44, September 17, 1991.

[2/] Rhode Island argues briefly that, insofar as the contracting officer used evaluation criteria which mandated award to other than the lowest cost, responsive proposal, use of such criteria was unreasonable and erroneous.

[3/] Rhode Island further notes that the contracting officer's delay in furnishing it with a debriefing disadvantaged it in its protest because it substantially increased the difficulty of formulating the issues which are the basis of the protest and especially where, as here, the delivery schedule is short and accelerated, such delay may well result in making meaningful relief impossible.

[4/] This statement is overbroad. One type of postal procurement, mail transportation services, uses a form of sealed bidding in specific situations. See Procurement Manual (PM) 12.7.1 et seq.

[5/] One evaluation factor, the cost for travel expenses, was a price-related evaluation factor.

As to the proposal evaluation itself, the contracting officer notes that Rhode Island's proposal was downgraded because of specific weaknesses in the proposal, as well as a general lack of clarity. Bruskin's proposal, on the other hand, contained no deficiencies and met all the requirements of the solicitation. He argues that this technical evaluation was correct and reasonable and that the determination that Bruskin's proposal was superior to Rhode Island's was not in any manner flawed or mistaken, citing TRW Financial Systems, Inc., P.S. Protest No. 91-19, May 29, 1991. Although Rhode Island's price was, indeed, lower than Bruskin's,[1/] Bruskin's proposal offered the best value to the Postal Service based on the evaluation criteria set forth in the solicitation. He notes that Rhode Island's statements concerning its ability to perform the contract requirements confuses the questions of whether a proposal is technically acceptable and most advantageous with that of whether an offeror is responsible.

Finally, the contracting officer addresses two minor points. He notes that, while Rhode Island's debriefing may have been delayed, this did not in any way hurt its ability to file its protest in a timely manner. He also asserts that, while the Postal Service does encourage the participation of small, minority-owned and woman-owned businesses, pursuant to PM 10.1.2, there is no requirement in the PM that preference be given in postal procurements to such businesses. The contracting officer recommends that the protest be denied as without merit.[1/]

Rhode Island comments that the contracting officer has inadequately addressed the main issues it raises.[1/] It alleges that the contracting officer provided no description of the criteria used to arrive at the point scores and risk assessments, which makes objection to the score and assessment it received impossible. Rhode Island further claims that the solicitation's maximum quantity of four million cards conflicted with the nine million cards in circulation and that this conflict tainted the award, which reflected the incorrect solicitation amount. Rhode Island further notes that there are material differences between the postcard ballot sample transmitted with the solicitation and the ballot actually distributed, in that the latter, but not the former contained a space for the voter's gender and were readable by optical character reader. Rhode Island states that it relied to its detriment on the statements of a postal employee (not in the Procurement

[6/] Rhode Island proposed a flat rate price of 9.999 cents for each response card tabulated. Bruskin's initial proposed price was 12.5 cents per card, which it reduced in its best and final offer to a sliding scale of between 11.8 and 11.6 cents per card, depending on the number of cards tabulated. Rhode Island was not the lowest priced proposal, however, as another offeror, Analytical Computer Service, Inc., proposed a sliding scale price of between 8 and 7.61 cents per card tabulated.

[7/] Another offeror, Analytical Computer Services, Inc., (ACS) submitted copies of its post-award correspondence with the contracting officer. This correspondence shows that, initially, ACS questioned the award to Bruskin because ACS had proposed prices substantially below that of Bruskin, but that, after its debriefing, ACS appeared to accept the decision of the evaluation committee as to the scoring of its technical proposal.

[8/] The source of this allegation stems from its claim that it did not receive a copy of the contracting officer's statement in accordance with the requirements of the Procurement Manual (PM). When the statement was provided to Rhode Island, it did not submit any comments directly addressing the statement.

Department) that these changes would not be made. It claims that the award of the contract and acceptance of performance which materially differs from that set forth in the solicitation vitiates the propriety of the award.

Rhode Island further notes that none of its references were checked, despite the contract specialist's statement that they had been. It cannot understand how it was found to be incapable of performing this relatively simple tabulation work, as it clearly had the experience and tools necessary to perform acceptably. Rhode Island also faults the contracting officer's failure to give it preference because of its status as a small, woman-owned company and his failure to contact the Postal Service's Socioeconomic Business Coordinator as evidence of the contracting officer's indifference towards small and disadvantaged businesses in blatant disregard of the Postal Service's own regulations. It reiterates its belief in its ability to perform the required contractual tasks satisfactorily.

The contracting officer responds that Rhode Island's protest contains the usual "lamentations of a disappointed offeror." He reiterates that Rhode Island was informed in the solicitation of the factors on which its proposal would be evaluated, and that its proposal was evaluated in accordance with that solicitation and with applicable regulations. The contracting officer notes that he has given Rhode Island sufficient information to inform it as to why its proposal was downgraded and he has not received any data which would raise doubts about the evaluation committee's report. He states that regardless of what any unauthorized postal employee may have said to Rhode Island, it never contacted him for a binding response to any questions or concerns. The contracting officer further asserts that Rhode Island is confused as to several aspects of the solicitation's requirements, such as the fact that evaluation would be made based on the number of ballots tabulated, not printed, and that the Postal Service was not required by the contract to make announcements of the tabulations as the work progressed.

As to Rhode Island's charge that the work performed by the successful offeror differs materially from the work set forth in the solicitation, the contracting officer notes that a) evaluation of all offerors was based on the factors set forth in the solicitation; b) Rhode Island's obligation was to address the solicitation's stated evaluation factors, unless such factors were changed in writing by the contracting officer; and c) the Postal Service reserves the right in all contracts to change the contract requirements within the scope of the contract, pursuant to the clause of the contract entitled "Changes." He affirms that Rhode Island's proposal was deficient as to the stated evaluation criteria and that examination of Rhode Island's references were unnecessary because its proposal was technically unacceptable.

Rhode Island has submitted final comments which emphasize its inability to understand how award could be properly made to the offeror of a higher cost proposal. It claims that the contracting officer's snide, sarcastic tone evidences the bias he has against it. Rhode Island strongly expresses its disagreement with the conclusion that its proposal was technically unacceptable, and alleges that the contracting officer impermissibly delegated his discretion to the head of the evaluation committee.

The crux of Rhode Island's protest concerns whether its proposal was properly

evaluated.[1/] Our prior decisions have established the limited scope of review of our office over such claims:

> We will not substitute our judgment for that of the evaluators or disturb the evaluation unless it is shown to be arbitrary or in violation of procurement regulations. The evaluation of technical proposals is a matter within the discretion of the procuring activity, since that activity is responsible for identifying its needs and the best method of accommodating them. Our review of the evaluation of technical proposals is thus necessarily limited -- we do not make our own determination as to their acceptability. Moreover, a technical evaluation is based upon the information contained in the proposal, so that no matter how capable an offeror may be, it runs the risk of losing the competition if its proposal does not include the information necessary to evaluate this capability.

Rickenbacker Port Authority and The Turner Corporation, P.S. Protest No. 91-78, February 10, 1992, quoting H & B Telephone Systems, P.S. Protest No. 83-61, February 6, 1984 (citations omitted).

Two main aspects of the evaluation of the protester's proposal require comment. First, it is clear that its proposal did not fully comply with one of the stated evaluation criteria, namely, the listing of previous data entry experience. Rhode Island's protestations that it showed it could perform adequately belies the fact that the list it submitted was incomplete.[1/] Rhode Island confuses the technical acceptability of a proposal with the responsibility of an offeror.[1/] Just because it could have, perhaps, performed the contract requirements acceptably does not, in and of itself, remedy omissions in its proposal. Such omissions did exist here, and the points deducted for the omission are not so clearly unreasonable as to cause us to overturn the evaluation committee's considered judgment. Given the extremely tight time frame for evaluation and award of this contract, the evaluation conducted was appropriate.

[9/] Rhode Island's assertion that the evaluation criteria were flawed because they did not mandate award to the lowest priced, responsive offer is untimely raised, as protests against terms of a solicitation which are apparent on the face of the solicitation must be protested prior to the date and time set for the receipt of proposals. Procurement Manual (PM) 4.5.4 b.; see Blackhorse Services Corp. d/b/a Maaco Auto Painting and Bodyworks, P.S. Protest No. 91-71, December 3, 1991.

[10/] The solicitation specifically required offerors to list their previous data entry experience, including the period of performance for each contract listed. Rhode Island's proposal contained no listed contracts, but rather included a list of references and possible subcontractors. In fact, Rhode Island's proposal stated that it "has no direct experience in data entry."

[11/] We have recently restated this distinction:

> A proposal is technically unacceptable when it does not meet the requirements of the solicitation. An offeror is nonresponsible when, in the contracting officer's judgment, it does not have the capacity nor the capability to perform the solicitation requirements in accordance with the proposal it has submitted.

Rita Dwight, P.S. Protest No. 92-15, July 14, 1992 (citations omitted). We also note that use of the term "responsive" by Rhode Island throughout its protest is incorrect. Responsiveness is a term of art relevant to sealed bid procedures, and does not apply to negotiated procurements, such as the present case. See Weber's White Trucks, Inc., P.S. Protest No. 91-63, December 16, 1991.

Second, Rhode Island believes that it should have received award solely on the basis that it submitted the lowest cost proposal. However, price comprised only one of the five evaluation criteria, and the solicitation specifically warned offerors that, while cost would be considered in making award, award would not necessarily be made to the lowest priced offeror. Given these provisions, any expectation that award would be made solely on the basis of price was illogical. Rhode Island has not shown that award was made in contravention of the evaluation factors set forth in the solicitation.

Rhode Island's remaining issues may be dealt with briefly. Its alleged reliance upon the oral statements of a postal employee outside the Office of Procurement[1/] contravene the requirements that all amendments to a solicitation must be in writing to bind the Postal Service. Cf., Friendswood Building Company, Inc., P.S. Protest No. 83-11, June 20, 1983. Rhode Island also has not established that any other offeror relied on these representations or that it was entitled to rely on them. There is no evidence that the changes that were made after award affected in any manner the evaluation and award process.

While the Postal Service does encourage award to small, minority, and woman-owned businesses, nothing in the PM or in the solicitation indicated that a business belonging to one of these classes would receive an advantage or preference in the evaluation of offers. See Executone Telecom, Inc., P.S. Protest No. 83-52, October 24, 1983. Rhode Island's vague and unsubstantiated allegations of bias fall far short of the proof necessary to sustain such a charge against postal employees. See Penny H. Clusker, P.S. Protest No. 80-37, August 27, 1980.

We are unable to discern, based on the protest file before us, any disadvantage which Rhode Island received due to delay in receiving documents; indeed, it failed to comment on the contracting officer's statement after it received it. Rhode Island's argument that the contracting officer was required to disclose the criteria for the point scores and the risk assessment ratings is without basis in fact or law. Finally, even if the contract did differ in some ways from the solicitation, these differences did not affect the validity of the evaluation, which was, as stated above, in accordance with the criteria set forth in the solicitation.

The protest is denied.

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[12/] This employee was employed in the requiring activity and was the chair of the evaluation committee.