April 10, 1995

P.S. Protest No. 95-09

ABLE COPIER SERVICES, INC.

Solicitation No. 483083-95-A-D110

DIGEST

Protest against the application of solicitation's requirement that photocopier models be no more than three years old is denied; objection to requirement *per se* was untimely raised subsequent to the receipt of offers, and objection to the manner in which age was determined fails to establish the unreasonableness of the method used.

DECISION

Able Copier Services, Inc., protests the rejection of its offer to provide photocopy services under solicitation 483083-95-A-D110 and the award of a contract under that solicitation to Pitney Bowes Inc.

The solicitation, issued January 10, 1995, by the Dallas, TX, Purchasing Service Center (PSC), sought offers for photocopiers to be installed for the use of postal customers in the lobbies of 121 postal facilities in the Dallas, TX, district. The copiers are to vend photocopies at $.25 per copy, and the contractor is to pay the Postal Service a percentage commission on each copy made. Section B of the solicitation, the "specifications/statement of work," set out various requirements for the performance of the contract and for the photocopiers to be supplied. Clause B.3, Photocopier Specifications (Coin-Operated Photocopiers) (Clause OB-507)(July 1990), included the following:

> b. . . . [P]hotocopiers must
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> * * *
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> 2. Be in current production and not be more than three years old at the time of installation. The determination of the age of a photocopier machine will be the introduction year of the model into the market. Any photocopier model . . . introduced into the market more than three years from [sic] the date of contract award will not be accepted. . . .

The solicitation included spaces in which offerors were to identify the make and model of copier offered and the date the model was introduced into the market.

Three offers were received, of which Able's had the most attractive commission rate. Able proposed to furnish new Copystar model CS-1435 copiers, which it indicated were introduced into the market in November, 1992. The offer was accompanied by descriptive literature for model CS-1435 with a 1991 copyright date.

Able had been supplying model CS-1435 copiers satisfactorily under an existing contract. The contracting officer concluded, however, that the copiers would not meet the requirements for the new contract because model CS-1435 had been introduced into the market in 1991. This conclusion apparently was drawn in part from the copyright date on the descriptive literature, and in part from information on a specification sheet prepared by Dataquest Incorporated[1] which described model CS-1435's "U.S. Availability Date" as "September, 1991."[2]

The contracting officer accepted the offer of Pitney Bowes to supply its model 9023 copiers, which it stated had been introduced into the market in November, 1992. Award occurred on February 10, and Able was advised of the award by letter of that date. The letter provided no information about the copiers which Pitney Bowes had offered, nor did it discuss the rejection of Able's more favorable offer because of the age of its offered

[1] Dataquest is a subsidiary of Dunn & Bradstreet which provides information about photocopiers to commercial users of those machines.

[2] A sheet entitled "Evaluation of Proposal - Able Copier Service," signed on February 9 by the contract specialist and on February 10 by the contracting officer, states, in part:

> Based on the specification sheet provided by Able Copier with their offer, the CS-1435 was introduced in 1991.

The copyright date was the only date on the specification sheet.

The sheet also related a discussion held with a regional representative of Copystar, who asserted "that . . . the SC-1435 was really not available in the US until the spring of 1992, [although the representative] could not provide any documentation to prove it." The representative is quoted as stating that "it was common knowledge in the industry that it was not unusual for it to take from 6 to 8 months *after* the introduction date published by the manufacture[r] for copiers to be available to distributors in the US."

copiers.

Able's protest dated February 16 was received by this office February 17. The protest sets out various concerns arising out of the lack of information in the notice of award and the difficulty experienced by Able in attempting to obtain that information.[3] On the merits, Able asserts that it should have received the award because "it is the responsible bidder which offered . . . a responsive bid providing the highest monthly income . . . under this solicitation" and that award to Pitney Bowes "is contrary to the United States Postal Service's policy and its congressional mandate re small business." It contends that it is "more responsible" than Pitney Bowes because of various problems experienced by Pitney Bowes in its performance of an earlier photocopy services contract in San Antonio.[4]

With respect to the age of its offered copiers, Able makes two arguments in the alternative. First, it offers the advice of a Copystar distributor that the model CS-1435, which was manufactured in Japan, "was not available for United States consumption for at least '9 months to 1 year' [after] its introduction date" as reported by Dataquest. Second, it contends that the use of any introduction date later than the original date of introduction by the manufacturer is unfair.[5] Able contends that only the "in current production" aspect of

[3] Perhaps as evidence of this difficulty, the protest avers that it was advised that the machine which Pitney Bowes was offering was model 9032, not model 9023.

The contracting officer's statement defends the omission of some of the requested information from the notice of award, citing the requirements for such notices at Procurement Manual (PM) 4.1.5 i., and the PSC's advice to the protester that that information should be the subject of a written request which would be reviewed to determine whether the requested disclosure would be appropriate, citing PM 4.1.5 j.4. (discussing categories of offeror's proprietary business information not to be disclosed in the course of debriefings).

While detailed information on an awardee's proposal need not be set out in the notice of award, information concerning the copier model which Pitney Bowes offered to supply should have been promptly furnished in response to Able's oral request. Nothing in Pitney Bowes' proposal restricted the Postal Service's use or release of that information as PM 4.1.2 k.3.(c) allows offerors to do, and since it would be immediately obvious in the course of Pitney Bowes' contract performance, it could not be considered proprietary once award had occurred.

[4] To the extent that Able's protest challenges the correctness of the contracting officer's affirmative determination of Pitney Bowes' responsibility, it raises an issue within the broad discretion of the contracting officer which is not subject to being overturned by this office in the course of a protest absent fraud, abuse of discretion, or failure to apply definitive responsibility criteria. *C E W Manufacturing Co., Inc.*, P.S. Protest No. 93-08, June 8, 1993. Because Able alleges no such failing in the determination, this aspect of its protest must be denied.

[5] For example, Able notes that Dataquest identifies several different machines, including the Copystar 1435, Gestetner 2302Z (U.S. availability date: June, 1992) and Pitney Bowes 9014, as the same copier as the Mita DC/1415 copier (U.S. availability date: June, 1991), stating that the Mita unit is also distributed under those model numbers. Able contends that it makes no sense to allow the provision of the more expensive Gestetner model because of its later availability date while disallowing the provision of the earlier-available Mita or Copystar models, which are less expensive because they are purchased directly from the manufacturer. (Copystar is a subsidiary of Mita.)

the specification should be relevant to the evaluation of the suitability of the copiers offered, and that to apply the introduction date with respect to copiers offered by firms, like Pitney Bowes, which do not manufacture their own machines but market the machines of others, is a violation of postal policy, law, and the Postal Service's best interest.

The contracting officer's statement in response to the protest sets out the circumstances of the solicitation and award of the photocopy contract. The contracting officer makes the following points with respect to specific aspects of Able's protest, including the following:

-- Neither postal policy nor congressional mandate requires award to small or woman-owned businesses. Postal policy only requires the provision of opportunity for the participation of such entities.

-- The advice provided by Copystar's representatives with respect to the date of model CS-1435's actual availability was unsupported by any documentation, and was inconsistent with Dataquest's introduction date. Dataquest's information is relied on in the industry, and provided the only available verifiable date.

-- To the extent that Able is objecting to the 3 year requirement itself, its protest is untimely raised, since the requirement was evident on the face of the solicitation, and should have been raised prior to the date set for the receipt of proposals.

Pitney Bowes submitted comments supporting the contracting officer's position and objecting to the protester's characterization of Pitney Bowes' relationships with copier manufacturers. According to Pitney Bowes, it "contracts with [the copier manufacturers] to build machines in [its] name and to [its] specifications."

The protester has not replied to the contracting officer's statement.

DISCUSSION

The solicitation established two requirements for the photocopy machines to be offered; they must be in current production, and they must have been "introduced into the market" within three years before the date of contract award. The contracting officer is correct that Able's protest against the inclusion of the second requirement is : a challenge to terms of the solicitation apparent on its face, and thus untimely raised following the receipt of offers. PM 4.5.4 b.

The contracting officer established the date Able's offered copier was introduced into the market from information published by Dataquest as its "U.S. availability date" despite representations by Able and its supplier that a later date was appropriate. The contracting officer's reliance on the published date was reasonable. The solicitation requirement does not limit the market into which the copier has been introduced to the U.S. market; the contracting officer could have used an earlier date if an offered model had first been introduced into a foreign market. Both Able and its supplier acknowledge Dataquest as a standard reference for copier information, and their assertions against it, both unsupported by documentation and self-serving, were contradicted by the descriptive literature of the American distributor accompanying Able's offer which had a copyright date consistent with

Dataquest's information.

Able's contention that the requirement treats manufacturers and third-party distributors unfairly is also unavailing in the circumstances of this procurement. The solicitation's language referring to the introduction date of the "photocopier model" certainly allows the consideration of different introduction dates for different distributors' versions of the same or similar machines.[6] To measure the age of a distributor's model from the date that the model's manufacturer introduced any earlier version of the same machine would require different solicitation language than was used here.

More significantly, while Able posits a situation in which a distributor might obtain an advantage *vis a vis* a manufacturer from its subsequent introduction of a newly-labeled model of the manufacturer's earlier machine, it has not alleged that such advantage occurred here. While its protest describes various versions of copiers with different introduction dates, none of the described versions include the model Pitney Bowes offered here, and Able makes no argument that Pitney Bowes' model benefits in that regard.

Further, while a manufacturer, bound by its earlier introduction date, might have standing to contest the reasonableness of the application of the provision in the circumstance which Able posits, Able is not a manufacturer. It was free to select a copier to offer from the universe of copiers, including later-introduced versions of the copier which it chose. Its contention that it did not do so because those versions would be more expensive reflects nothing more than the cost of undertaking to comply with the solicitation's requirements, and fails to support its case.

The protest is dismissed in part and denied in part.

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Contract Protests and Policies

[6] Nor is that interpretation necessarily unreasonable. A later-introduced model might be viewed as having benefits such as incremental improvements made in the course of production or the likelihood of the distributor's increased support of the recently-introduced version.