December 24, 1997

P.S. Protest No. 97-33

PARAMOUNT MECHANICAL CORPORATION

Solicitation No. 232092-97-A-0031

DIGEST

Protest against award of a contract for the replacement of HVAC systems is sustained. Circumstances of communications between Postal Service and protester after submission of alternate offer constituted discussions which were not conducted as procurement regulations required; protester's late revisions to alternate offer were not properly handled under contracting officer's alternative theories that they were unsolicited revisions or reflected the offeror's claim of mistake.

DECISION

Paramount Mechanical Corporation (Paramount) protests the award of a contract for the replacement of HVAC systems at the Washington, D.C., Processing and Distribution Center.

The D.C. Metro Facilities Services Office issued Solicitation 232092-97-A-0031 on July 24, 1997, with an offer due date of August 14. Section M.1 of the solicitation provided in part as follows:

> M.1 Contract Award And Proposal Evaluation (Provision OA-16)(June 1988)
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> a. Award will be made to the responsible offeror who submits the best combination of Technical Proposal, Business Proposal (cost/price), Busi-

ness/Management Proposal (if applicable), and other factors considered. The primary areas to be used in determining which proposal is most advantageous to the Postal Service are listed below in descending order of importance:

[No areas were listed.]

b. Cost/Price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest cost.

(Where no factors other than price are set out for consideration in the award decision, award is to be made to the lowest-priced offer from a responsible offeror. *Bell & Howell Federal Government Sales*, P.S. Protest No. 91-24, April 15, 1991.)

As originally issued, the work included the provision of two new 200 ton centrifugal chillers and cooling towers, and the conversion of three existing 300 ton York centrifugal chillers from R-11 coolant to R-123 coolant.[1]

Eight offers were received. Paramount's offer was the fourth lowest. Because all eight offers were substantially below the Postal Service's estimate, "the Project Manager determined that it would be in the best interest of the Postal Service to replace all chillers rather than replacing two chillers and retrofitting the remaining three . . . ." Accordingly, by memorandum dated August 20, all "bidders [*sic*]" were asked to submit "an alternate bid [*sic*] . . . for replacement of the existing York chillers with new chillers having similar load characteristics to the proposed retrofitted chillers." The memorandum also added Carrier to the list of "[acc]ptable manufacturers," which previously had included only York and Trane. Alternate prices were due August 22. Seven alternate offers were received from the original offerors. That of Paramount was the lowest, at $1.7 million, an amount less than its original offer.

The contracting officer and the protester have offered differing versions of the events which followed the receipt of the August 22 alternate prices. In the recital which follows, the main text recites the contracting officer's account, while Paramount's account is shown in parentheses.

[1] Although the solicitation was silent as to the refrigerant for the two replacement chillers, they would require the same R-123 refrigerant specified for the three retrofitted chillers since "the industry standard is not to mix refrigerant types between units."

The project manager perceived Paramount's offer as reflecting a "dramatic decrease" in Paramount's offer, presenting the possibility of a mistake, and he called Paramount's president on August 22 seeking verification of its offer, and "[s]pecifically . . . that Paramount verify the price in its offer." (The call was made to Paramount's estimator and it did not include a request for verification of Paramount's price, but only of the proposed chiller manufacturer. The Postal Service never "requested or allowed Paramount to verify or confirm its August 22 price.")

Paramount transmitted a letter by facsimile on the afternoon of August 22 which confirmed that its proposal included two York 200 ton chillers and three York 300 ton chillers. The letter made no reference to its price. The project manager found the letter an incomplete response to the request for confirmation, but he took no action to follow it up.

Paramount called the project manager on August 23 "to clarify that the intent of the [August 20] addendum was not to rule out the use of an alternate refrigerant"[2] and to inquire "if the Postal Service would accept another configuration than [three 300 ton and two 200 ton] chillers," to which the project manager replied "that the solicitation had not asked for a specific configuration, only a performance criteri[on] on the addendum." (August 23 was a Saturday; and Paramount did not do business on that day. Paramount never initiated any inquiry concerning alternative refrigerants. "During the period from [August 22 to August 28, Paramount] had numerous telephone conversations with the USPS contract manager. . . . The USPS was attempting to match our proposal with AMS[s] proposal [for] Carrier chillers [with] H-134A refrigerant.")

(The Postal Service contacted Paramount by telephone twice on Monday, August 25. The first call inquired why Paramount's August 22 alternate offer was so low and requested verification of the intended refrigerant. Paramount explained that competition was the basis for its low price. The second call requested an alternate proposal substituting H-134A refrigerant for R-123 refrigerant because "the end user . . . preferred [it]," and asked for "a rapid response . . . [because] they wanted to make award on 8/25/97 if possible.")

By letter dated August 25 transmitted by facsimile at 4:28 p.m., Paramount submitted two revised offers. The first offered to supply chillers using H-134A refrigerant, "in lieu of the specified R-123" for $1.8 million and noted that the "200 ton

[2] Paramount's August 22 offer did not specify its proposed refrigerant. The Postal Service assumed that it intended to supply R-123 refrigerant, an assumption confirmed by Paramount's subsequent correspondence.

chillers will have 5% reduced capacity"; while the second offered three 500 ton York chillers, using H-134A, in lieu of the five chillers requested, for $1.78 million. The contracting officer characterizes these as "two unsolicited alternate proposals." The 4:28 p.m. letter was followed by a letter transmitted by facsimile at 6:23 p.m., repeating the two alternate offers and their prices, but including the following additional text:

> Clarification/Correction - our corrected alternative bid price, submitted 8-22-97, for supplying (5) R-123 York chillers is $1,765,000.

The 6:23 p.m. letter was viewed as responding further to the August 22 request for verification, and as acknowledging that Paramount's August 22 had been in error. As revised to $1.765 million, that offer was no longer low. Paramount called the project manager on August 25 seeking to elicit reaction to its revised proposals.

(The revision of the August 22 price in the 6:23 p.m. letter "was provided as a corrected . . . price after USPS provided verbal clarification that the tonnage of the (3) new chillers was to be nominal 300 tons, and not the [lesser] tonnage" that the retrofitted chillers would have produced "once R-123 refrigerant had been substituted for R-11 refrigerant. Paramount called the Postal Service on August 26 to inquire whether it could substitute one of the other approved manufacturers for the manufacturer it had proposed in its August 22 proposal. It was told that it could.)

By letter dated August 27, Paramount revised the price of its first alternate offer of August 23, to "$1,733,500.00 for furnishing (5) H-134A chillers . . . ." By memorandum dated August 27, the project manager asked the contract specialist to prepare a letter of intent to award the contract to American Mechanical Services (AMS), then the low offeror, at $1.712 million. The memorandum makes reference to Paramount's August 25 revision "to $1,780,000, using a chiller providing R-123 refrigerant,"[8] and to its "second price revision [which] was accepted using H-134A refrigerant at $1,733[,]500," and notes that AMS's "initial bid was $1,712,000, also using H-134A refrigerant."

(Paramount's August 28 letter was a "best and final price verbally requested by USPS," and followed its negotiations with York and Carrier which became possible

[3] This reference was incorrect. As noted above, Paramount's two alternates of August 25, of which the first had a $1.78 million price, both involved H-134A refrigerant. A reference to R-123 refrigerant appears only in Paramount's second August 25 letter, and has to do with its August 22 offer at a corrected price of $1.765 million.

after the Postal Service allowed it to change its listed manufacturer. Paramount "verbally advised" the Postal Service on August 27 that it could offer a system with H-134A refrigerant for $1.7 million, and confirmed that price with a fax on August 28.)

The August 28 letter stated:

> We wish to confirm our original 8/22/97 bid day price of $1,700,000 for furnishing (5) chillers with H-134A refrigeration per your verbal request. Chiller load characteristics to match the originally proposed retrofitted chillers per USPS 8-20-97 alternate bid request and the original equipment schedule. This letter of confirmation shall supersede the previously submitted prices.

This letter was received at 2 p.m. on August 28, after the contracting officer had signed the intent to award letter and it had been sent to AMS.[4] The Postal Service awarded AMS the contract on September 23, after it received the appropriate documentation from AMS, and then notified the unsuccessful offerors of the award.

Paramount's protest to the General Counsel was received on September 29. The protest contends that it was entitled to the award on the basis of its lower price, as reflected in its letter of August 28. While the protest acknowledges that "there were several prices submitted between [August 23] and [August 27]," it attributes that to "confusion" arising out of the "lack of any formal documentation or information identifying the basis of bid award and the equipment performance characteristics required under the various bid alternatives and the oral revisions to the alternate bid requested after the formally submitted [August 22] bid."

The contracting officer characterizes the award as having occurred without discussions, a procedure authorized by PM 4.2.1.f.[5] He concedes that Paramount's

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[4] An intent to award letter advises an offeror that award will be made to it upon receipt from the offeror of appropriate documentation, such as payment and performance bonds. Procurement Manual (PM) 11.5.1 p.1.

[5] That section provides:

> Award may be made without discussion of proposals whenever the existence of adequate competition or price analysis . . . makes it clear that acceptance of the most favorable initial proposal will result in a reasonable price [as long as the provision "Award Without Discussion" was included in the solicitation, as it was here.]

However, PM 4.2.1 f2. further provides:

(Footnote continued on next page.)

initial alternate $1.7 million offer of August 22 was low, but contends that it was clarified or corrected to $1.765 million on August 25, when it no longer remained low. He contends that the Postal Service could not consider any of Paramount's "four unsolicited alternative proposals of varying scope and price after the proposal due date . . . because other offerors were not given the same opportunity [to revise their offers]," and that of Paramount's revised offers, only the last, that of August 28, was low, and that was received after the intent to award letter was issued.

Responding, Paramount takes exception to the contracting officer's statement, principally disputing the timing, number and content of its telephone conversations with the Postal Service as set out in the recital above.

Paramount also appears to assert that offers for coolers using H-134A coolant should not have been acceptable in response to the August 20 revision, since "the bad characteristics of the new [300 ton] chillers [were to be] similar to the bad characteristics of the retrofitted chillers [which were] based on refrigerant R-123 per the contract documents." Paramount also criticizes the Postal Service for failing to establish "a cut-off date for best and final pricing on their numerous verbal requests."[6]

Asked to respond to the protester's assertions, the contracting officer contends that the bad characteristics requested in the August 20 memorandum were not related to R-123 refrigerant, and that "[a]ny refrigerant would yield the performance criteria requested." With respect to conversations with Paramount, the con-

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> Whenever there is uncertainty as to the pricing, technical, or other aspects of the most favorable initial proposal, award may not be made without discussions, unless the uncertainty can be resolved by clarification.

PM 4.2.5 c.3. provides that the decision whether to award with or without discussions "must be made by the contracting officer."

Clarification is "[c]ommunication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in [a] proposal," while discussion is "[a]ny oral or written communication between the Postal Service and an offeror [other than clarification] that is initiated by the Postal Service and (a) involves information essential for determining the acceptability of a proposal or (b) provides the offeror an opportunity to revise its proposal." PM 4.2.5 a.2., 3.

[6] PM 4.2.5 g.4.(a) and (b) provide, *inter alia*, that "[u]pon completion of discussions, the contracting officer must issue to all offerors still in the competitive range a request for best and final offers. Oral request[s] for best and final offers must be confirmed in writing" and that "the request must include . . . [a] common cutoff date and time."

tracting officer recites the project manager's recollections of only the conversations of August 22, 23, and 25 recited above, of which only that of the 22nd was initiated by the Postal Service.

The protester submitted final comments responding to the contracting officer's submission. The comments were accompanied by Paramount's long-distance telephone statement reflecting various calls to the Metro FSO's voice, facsimile, and beeper numbers during the August 22 - 28 time period. While Paramount does not associate any of the listed calls with the calls recited in its chronology, the listing is consistent with its contention that it made more calls than the project manager's account reflects.

DISCUSSION

The foregoing recital reflects significant differences as to the facts giving rise to this dispute. As we have noted, "our protest forum does not provide a mechanism for formal discovery or other adversarial methods of resolving factual disputes," *Patriot Airlines, Inc.,* P.S. Protest No. 94-05, March 30, 1994, and that, instead, we afford a "presumption of correctness" to the contracting officer's account, which the protester has the burden of overcoming. *Ibid.*

In this case, the contracting officer's account is internally inconsistent. Items included in the contracting officer's documentation contradict his view that Paramount's revisions of its offers subsequent to August 22 could not be accepted (*e.g.,* the project manager's August 26 memorandum reflecting that Paramount's revised offer incorporating H-134A refrigerant "was accepted") and that those revisions were unsolicited (*e.g.*, the August 28 letter's statement that it was submitted "per your verbal request"). Further, Paramount's version of the events of August 22 - 28 seems more consistent with its written submissions included in the record than the contracting officer's account, and, as noted above, with its telephone records. For example, the August 22 confirmation of its choice of manufacturer is supports its contention that only verification of the identity of the supplier was sought, rather than with the project manager's view that both price and manufacturer were to be verified, since it is silent as to price. Similarly, Paramount's recital that the Postal Service initiated a call on August 25 requesting that Paramount explain it seems more consistent with the project manager's stated concern about its price than the contracting officer's assertion that no action was taken to follow up on the matter.[7]

[7] Paramount's account fails to discuss or firmly deny the project manager's assertion that it inquired about the reconfiguration of the chiller mix and quantity. It offered such a reconfiguration in its let-

(Footnote continued on next page.)

Adopting a view consistent with the documents makes it clear that Paramount's revised offers of August 25 and 28 were not "unsolicited," but instead responded to Postal Service requests. The solicitation of these revisions, particularly those seeking the substitution of H-134A refrigerant for R-123 refrigerant, constituted "discussions," since they were "initiated by the Postal Service" and "provid[ed] the offeror an opportunity to revise its proposal." As such, the discussions should have been accomplished as PM 4.2.5 g.3. and 4. direct, including a request for best and final offers. Paramount, which was constantly attempting to revise its offer from August 25 through August 28, was clearly prejudiced by the Postal Service's proceeding to award without having established and communicated a common cutoff date.[8]

The contracting officer has proposed two alternative views of the situation presented by Paramount's revised proposals. Neither is consistent with the procedures governing negotiated procurement.

The view that it would have been unfair to the other offerors to consider Paramount's various revisions of and alternatives to its August 22 proposal as unsolicited modifications to its offer of August 22 (and the implied suggestion that it was improper for Paramount to make them) is incorrect.

A significant difference between a negotiated procurement such as this and a procurement using formal advertising techniques (the procedure to which the terms "bids" and "bidding," misapplied here by both parties, correctly apply) is that in negotiation, an offeror has the right to withdraw or revise its offer at any time before the Postal Service accepts it. *See* PM 4.3.2.c ("Proposals may be modified or withdrawn by written or telegraphic notice. . . . . Notice of withdrawal of a proposal must be received before award."); 4.3.2.d.1 ("[M]odifications of proposals

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ters of August 25, but if it did not inquire about the possibility on August 23 as the project manager asserts (a Saturday, as Paramount notes, and thus a day on which postal personnel would not likely be available), it is not clear when it could have inquired.

(The project manager's assertion that an offer reflecting a reconfiguration would be acceptable was almost certainly incorrect. Because the August 20 memorandum requested "replacement . . . chillers having similar load characteristics to *the existing retrofitted chillers*" (emphasis added), it could have related only to the three 300 ton chillers, not to all five chillers, and to the replacement of the three chillers one-for-one.

[8] While requests for best and final offers may be made orally, if subsequently confirmed in writing, (4.2.5 g.4.(a)), a request for revisions "as soon as possible" such as Paramount recites would not establish the required common cutoff date.

are late if received after the date and time established . . . for the receipt of proposals.")[9], and 4.2.3.d.2 ("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 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."

Under such a view, only Paramount's initial price of August 22 and its final price of August 28 would be relevant, since its other revisions were at prices higher than AMS's price. The August 22 price was withdrawn by the second letter of August 25; accordingly, it was not available for acceptance after that letter was received. The August 28 revision was received too late, following the issuance of the intent to award letter, but even if it had been received prior to that issuance, its consideration would not have been in the Postal Service's interest, because it would have come so close to the proposed award as to give the appearance of compromising the integrity of the competitive process.

The second alternative view is that Paramount's second letter of August 25 involved a claim of mistake with respect to its offer of August 22, in addition to restating the two additional alternate proposals presented in its first letter of that date. (The contracting officer sees the change as a delayed reaction to the request for verification, while the protester sees it as occasioned by the Postal Service's subsequent clarification of August 25 of what it meant by "similar load characteristics.") If it was a claim of mistake in the course of an award without discussions, it was mishandled, since the procedure of PM 4.2.5 f. was not followed. Under that procedure, correction of the offer to the August 25 price would not have been an appropriate result, since the offer, as corrected, would no longer have been in line for consideration, and correction would not have been allowed. In any event, neither the existence of the mistake nor the amount actually intended were evident from the solicitation and the offer, a necessary precondition to correction under 4.2.5 f. Under PM 4.2.5 f.5.(c) Paramount should have been advised that its offer could not be corrected as requested, and that it had the option of withdrawing its offer or allowing its offer to be considered as submitted. It was not appropriate to do nothing with Paramount's attempted correction of its price.

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[9] However, "normal revisions of proposals made during negotiations by the offerors selected for discussions" are not late modifications. *Ibid.*

Remaining in this case is the question of remedy. Relief may include an order to terminate for the convenience of the Postal Service the improperly awarded contract. The factors that have been regularly used in determining whether to order termination are as follows:

> Whether to require termination in a given case depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the requirement, and the impact of termination on the accomplishment of the agency's mission.

TPI International Airways, Inc., P.S. Protest No. 87-40, October 30, 1987.

The degree of prejudice to the protester and to the integrity of the procurement process in this case are high. On the other hand, the file does not suggest bad faith on the part of either the project manager or the contracting officer, and the remaining factors militate against termination. We are advised that contract performance has continued while this protest has been pending, that substantial demolition of the existing chillers has occurred, and that the replacement chillers have been delivered on-site.

In another case involving ongoing performance of an HVAC renovation contract while a protest was pending, in which the errors in the course of contractor selection were arguably more egregious than the errors here, the decision noted:

> [W]e cannot lightly dismiss the mission of the Postal Service to provide prompt, reliable and efficient postal services and to provide safe and healthful working conditions for its employees. . . . [P]erformance of this contract is well underway and significant delay in its completion could have a serious negative impact on working conditions and employee morale upon the arrival of warm weather, with resultant damage to the Postal Service's mission of providing efficient postal services. Accordingly, it is not in the best interest of the Postal Service to make relief available to the protesters. However, the degree of prejudice to the competitive procurement system can be mitigated, provided the lessons of this procurement are observed in future procurements.

C.D.E. Air Conditioning Company, Inc.; Coastal Mechanical Corporation, P.S. Protest Nos. 92-11 and 92-18, April 2, 1992 (citations omitted).

A similar result must obtain here. The protest is sustained to the extent indicated.

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