

May 29, 1997

P.S. Protest No. 97-09

PAM ASSOCIATES, INC.

Solicitation No. 266351-97-A-0246

DIGEST

Protest of the award of a contract for technical personnel services is dismissed and denied. Challenge to "best value" evaluation scheme is untimely; evaluation of protester's offer was consistent with solicitation and fact that successful offeror's price was higher than protester's did not preclude award.

DECISION

PAM Associates, Inc., (PAM) protests the award of a contract for technical personnel services to Resource Consultants, Inc. (RSI).

Solicitation 266351-97-A-0246 was issued January 10, 1997, by the Minneapolis, MN, Purchasing and Materials Service Center. The positions sought included Acquisition Quality Coordinators, Technical Data Specialists, a Technical Support Specialist, a Technical Support Specialist Senior, and a Technical Librarian. The services were to be provided for a three-year period at the Inventory Management offices in Topeka, KS, except for one position to be located at South River, NJ. Most of the services sought under this solicitation were to follow on to services provided at Topeka under a previous contract which was expiring.

Section A.1 of the solicitation required the contractor to provide:

EXPERIENCED personnel at fixed hourly rates who have DEMONSTRATED their abilities for performing the duties and responsibilities of the positions listed. . . .

[Emphasis in original.]

Section M.1, Contract Award and Proposal Evaluation, provided in part as follows:

a. Award will be made to the responsible offeror whose proposal offers the best value to the Postal Service, (i.e. a combination of price, price-related factors, and/or other factors). The primary areas to be used in determining which proposal offers the best value to the Postal Service are listed below in descending order of importance:

1. EXPERIENCE LEVEL AND DEMONSTRATED SUCCESSFUL PERFORMANCE OF PROPOSED PERSONNEL.
2. EDUCATIONAL BACKGROUND OF THE PROPOSED PERSONNEL.
3. INDUSTRY CERTIFICATION(S) OF THE PROPOSED PERSONNEL.
4. PAST PERFORMANCE OF THE OFFEROR TO INCLUDE THE FOLLOWING:
 - (a) QUALITY (a record of conformance to contract requirements and standards of good workmanship);
 - (b) TIMELINESS OF PERFORMANCE (adherence to contract schedules, including the administrative aspects of performance);
 - (c) BUSINESS RELATIONS (a history of being reasonable and cooperative with customers; commitment to customer satisfaction; integrity and ethics);
 - (d) COST CONTROL (a record of forecasting and containing costs on changes and cost-reimbursement contracts).

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

Three offers were received on February 24. They were evaluated by a technical panel which rated each offer against the four primary evaluation factors recited in section M.1 according to an evaluation scheme which assigned a maximum of 400 points to the first evaluation factor and a maximum of 200 point to each of the three remaining factors.¹

¹ The assignment of equivalent weights to each of the last three evaluation factors was inconsistent with provision M.1's assertion that the factors were listed in "descending order of importance." From the solicitation, offerors reasonably should have expected the second factor to be more important than the third factor, and the third factor to be more important than the fourth. *Kelly Services, P.S. Protest 95-17, October 27, 1995.*

"Where . . . evaluation factors are listed by relative importance but without having specific weights assigned, the difference in weight accorded one factor and that accorded the factor either immediately preceding or
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Following the technical evaluation, deficiencies were discussed with each offeror. Two amendments were issued following the receipt of offers. The first requested a cost breakout of the offers' burdened rates. The second added the Technical Data Specialist Senior position, requested pricing for it, stated that the cost for that position would be included in the cost evaluation, and solicited best and final offers.

The consensus technical score for PAM's proposal was 487 points of the 1000 points possible. RCI's consensus score was 788 points. The third offeror's score fell between those of PAM and RCI. RCI's proposal had the highest cost; PAM's proposal the lowest. Over the three-year contract term, RCI's proposed price was 13.38% more than PAM's price, and 2.46% more than the third offeror's.

Award was made to RCI on March 24, and PAM was notified of the award by letter dated March 27. The letter stated that RCI's technical and price proposals, combined, "offered the best value to the Postal Service." PAM's timely protest followed.

The protest recites the advice given at its debriefing that PAM "was not the successful offeror [because it] was a new firm and did not have any past history" and that PAM "finished last out of three firms and that [its] technical [score] was second to [RCI's]."² The protest questions how a contract costing significantly more than PAM's offer can provide the Postal Service the best value; complains that the solicitation allowed offerors to affect the outcome of the procurement by securing the services of the incumbent's employees, as RCI did by offering higher wages to commit them exclusively to RCI, and objects to the technical evaluation of PAM's offer. In this last regard, focusing on the four subfactors of the final evaluation factor, past performance, PAM's president notes his previous experience as a manager of quality assurance for the Postal Service at its Topeka facility, asserting that he "knows what the Postal Service is after and what they should be given" with respect to quality; "understands [the importance of] adherence to contract schedules" with respect to timely performance; has a "history of being reasonable and cooperative . . . and committed to customer satisfaction" with respect to business relations; and has submitted an offer on this solicitation which reflects his commitment with respect to cost control. The protest also challenges a suggestion made in the debriefing that PAM's "financial history was not the best for a contract of

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immediately following it must be small." *Cohlma Airline, Inc.*, P.S. Protest No. 87-118, April 13, 1988. A previous decision of this office, *TRW Financial Systems, Inc.*, P.S. Protest No. 91-19, May 29, 1991, noted that the General Accounting Office had found "descending order" recitals unacceptable where primary evaluation factors were to receive undisclosed weights of 60 and 72 percent. While the 40% weight here is less than those amounts, the better practice would be for the solicitation to provide a more descriptive explanation of the several factors' relative weights.

² As the discussion above indicates, this assertion is incorrect. PAM was ranked third technically, but was second lowest as to price.

this dollar amount” and contends that a pre-award survey would have shown the adequacy of its financial arrangements.

The contracting officer’s statement responds to the protest as follows:

- Price was not the determining factor for the award. “The award of a best value contract allows the Contracting Officer to make a good business decision that gets the customer the best services available.”
- To the extent that the protest objects to the solicitation’s evaluation scheme, it is untimely.
- The employees of the incumbent contractor were entitled to enter into an exclusive relationship with an individual offeror if they wished. However, the fact that PAM identified three of the incumbent’s personnel in its offer contradicts its assertion that experienced employees were not available.
- PAM was downrated with respect to past performance because its proposal “provided no evidence of the company’s quality, timeliness of performance, business relations or cost control as a company in the business of providing personnel services.”
- The limited financial information submitted by PAM made its proposal one of higher risk; while pre-award surveys may be conducted at the contracting officer’s discretion, there is no requirement that they be used.

The protester submitted additional comments which restate its original objections:

- The more expensive RCI contract cannot be the “best value.”
- While PAM obtained the services of some incumbent employees, by the time it received the solicitation and sought to solicit the incumbents, others among the incumbents had already accepted RCI’s offer.
- The solicitation improperly allowed offerors to control the award by restricting access to incumbent employees; a proper award should have been based only on price and prior experience.
- PAM was more than qualified in terms of past performance by reason of its president’s past postal quality assurance experience.
- A loan which had been authorized by another organization for PAM and the bank line of credit which supported it were sufficient financing for the contract,

because PAM understands that it “would have received prompt payment . . . 15 days after . . . sending in [its] billing.”³

— A pre-award survey would have established PAM’s acceptability at a substantial savings to the Postal Service.

Counsel for the contracting officer submitted additional comments which supported the contracting officer’s statement. Counsel contends that PAM’s protest is essentially a disagreement about the Postal Service’s needs and best interests which is an insufficient basis for a protest.

Counsel for RCI submitted comments concurring with the contracting officer’s statement, and noting that as the protester says that it “finished last out of three firms,” it may not be an interested party to protest the award.⁴

DISCUSSION

To the extent that the protest complains that the solicitation allows an offeror to control the results of the competition by obtaining employment commitments from the incumbent contractor’s personnel), it is, as the contracting officer notes, untimely.

The consequence of which the protester complains was inherent in the solicitation evaluation scheme, which established as its most significant technical evaluation factor the experience of the personnel proposed, and which provided that award would not be solely on the basis of price. It thus was, in the words of the protest regulation, an “alleged impropriety in a solicitation . . . apparent before the date set for the receipt of initial proposals,” which may be timely protested only before initial proposals are due.

³ PAM’s understanding in this regard is optimistic. Procurement Manual (PM) 6.4.3 b. provides in part as follows: “Payment must be made as close as possible to, but not later than, the 30th day after receipt of an invoice” (Emphasis added.)

⁴ As footnote 2, above, indicates, the protester’s statement was incorrect; the file does not indicate whether it was ranked second or third overall. In any event, an offeror may always be an interested party as to the evaluation of its offer regardless of its standing. *Mid Pacific Air Corporation*, P.S. Protest No. 92-62, November 23, 1992.

Purchasing Manual 3.6.4.b.⁵ Cf. *Energy Options Inc.*, P.S. Protest 95-48, January 5, 1996.⁶

PAM also contends that its proposal was improperly evaluated. Our review of technical evaluations is limited:

Our procurement regulations provide that the contracting officer is responsible for trade-off judgments involving cost and other evaluation factors and that his or her selection for award must be based on the proposal most advantageous to the Postal Service. PM 4.1.5 b. There is no requirement in negotiated procurements that awards be made solely on the basis of the lowest price. Moreover, although cost may not totally be ignored, procurement officials have broad discretion in determining the manner and extent to which they will make use of technical and cost evaluation results. A procurement activity may make cost versus technical tradeoffs, and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the established evaluation factors.

The fact that [the protester's] price was lower is not determinative since, under the terms of the solicitation, award was to be made to the offeror who had the best combination of cost and technical proposals.

* * *

[The protester] disagrees with the technical committee's evaluation and argues that its technical proposal does, in fact, meet all the specifications in the solicitation. As is well settled, the determination of the relative merits of proposals is the procuring activity's responsibility, and procuring officials have a reasonable degree of discretion in that regard. Furthermore, this office will not substitute [its] judgment for that of the evaluators or disturb the evaluation unless it is shown to be arbitrary or in violation of procurement regulations. The protester bears the burden of proof of such a showing. Unsupported allegations or mere disagreement with the technical scores given cannot amount to evidence necessary to sustain a protest.

⁵ The Purchasing Manual, issued January 30, 1997, is the successor to the Procurement Manual. During an initial transition period, purchasing organizations may continue to use the Procurement Manual's policies and procedures, but the Purchasing Manual's protest regulations will apply. Purchasing Manual Transmittal Letter Issue 1.

⁶ There is no inherent objection to an evaluation scheme which favors experienced personnel over inexperienced personnel, and no obvious mechanism by which a contracting agency could limit the rights of incumbent contract employees to undertake to secure satisfactory terms with a successor contractor.

Western Coach & Wheel Works, P.S. Protest No. 90-70, November 29, 1990 (citations and internal quotation marks omitted).

In the instant case, PAM's technical proposal was rated less favorably than RCI's because it was a newly formed venture with no previous experience as a contract service provider, and because the personnel it offered were considered less experienced than those offered by others.⁷ Those conclusions were consistent with the evaluation criteria of the solicitation, and the solicitation allowed award to the higher-ranked technical proposal even at a higher price.⁸

PAM's final point is that a pre-award survey should have been conducted to determine its financial responsibility. A pre-award survey is a tool which may be used to determine a prospective contractor's responsibility prior to award. PM 3.3.1.f. Since there is no requirement that such surveys be conducted even with respect to offerors selected for award, there is no basis on which an offeror not selected for award may object to its failure to receive one.

The protest is dismissed in part and denied in part.

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Contract Protests and Polices

⁷ Where a newly organized entity has no previous record, it is appropriate to consider the experience of its officers or employees. *Todd's Letter Carriers, Inc.*, P.S. Protests No. 92-39, -40, & -41, October 21, 1992. However, an organizer's experience as a postal employee, even in an area related to the subject matter of the services sought, is only indirectly evidence of the company's ability to perform, and the company's rating in that regard may appropriately so reflect.

⁸ That result is not affected by the problem identified with respect to the evaluation criteria in footnote 1. Even if those criteria were adjusted to reflect an appropriate descending order ranking, RCI's technical score would remain significantly higher than PAM's and would support the contracting officer's trade-off decision.