

October 20, 1997

P.S. Protest No. 97-19

SISU OTTAWA TRUCK DIVISION

Solicitation No. 102590-97-A-0049

DIGEST

Protest against award of contract for spotter tractors is sustained in part; determination of competitive range on the basis of advantages in obtaining additional tractors similar to those previously purchased was improper because the solicitation's stated evaluation scheme did not provide for their consideration.

Decision

Sisu Ottawa Truck Division (Ottawa Truck) protests the award of a contract for spotter tractors to Capacity of Texas.

Solicitation No. 102590-97-A-0049 for spotter tractors was issued April 8, 1997, by Operational Equipment Purchasing, USPS Headquarters. It requested pricing for 11 line items, of which line items 1, 2, and 5 were, respectively, a first article spotter tractor, 74 production tractors, and 4 "spotter truck tractors for use in training classes." All were to be "4 by 2 truck tractor[s]" with diesel engine, remote controlled fifth-wheel, and a tilt-type cab as described in a postal specification.¹ The remaining line items comprised owners and repair manuals, manual update services, training materials and equipment, additional training (an optional item) and freight

¹ As the contracting officer's statement notes, "[s]potter tractors are specialized vehicles designed to move semi-trailers efficiently and safely in very restrictive 'parking lot' environments."

costs. The solicitation's stated evaluation criteria are set out in the margin.² The solicitation incorporates by reference Provision A-8, Contract Award (February 1992),

² M.1. TECHNICAL/COST TRADE-OFF

The contract will be awarded to the responsible Offeror whose offer . . . is evaluated as being the best value to the Postal Service, cost and other factors considered. Award will not be determined by numerical calculation or formula relationship between cost and technical merit. For this solicitation, price is more important than technical merit. Therefore, the price proposal is of substantially greater importance than the technical proposal.

To the extent that a proposal is considered to offer the lowest price, that offeror's ranking after technical evaluation scoring will become more important. Cost/price is a significant consideration in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price. The Contracting Officer (CO) will assess what trade-off between technical merit and price provides the greatest value to the Postal Service.

M.2 METHOD OF SELECTION

After the initial technical/management and price evaluations, a competitive range determination will be made. Discussions may be held with those offerors in the competitive range, although the Postal Service reserves the right to award a contract without holding discussions.

If necessary, offerors in the competitive range will be given the opportunity to submit best and final offers (BAFOs), which will be evaluated. Any changes identified in the subsequent evaluation of the BAFO will be the basis of the final technical scoring and proposal analysis. The technical evaluation panel will then submit a final report of its finding to the contracting officer.

The Contracting Officer, based on the results of the technical evaluation, cost analysis, discussions/negotiations and Best and Final Offers (BAFOs), will select the prospective contractor who has submitted the proposal that offers the best value to the Postal Service for the products and services described in this solicitation.

M.3 CONTRACT AWARD

The Postal Service may reject any or all proposals, and may waive informalities and minor irregularities in proposals received. . . .

M.4 TECHNICAL EVALUATION OF PROPOSALS

The offeror's proposal will be evaluated to determine whether the Offeror will be able to satisfy the requirements as described in the solicitation and whether award to the Offeror will be in the best interest of the Postal Service, cost and other factors considered.

To be acceptable and eligible for evaluation, proposals must (1) be prepared in accordance with and comply with the instructions given in this document, and (2) have addressed in a credible way all the requirements set forth in the solicitation. Technical

(Footnote cont. on next page.)

which provides, *inter alia*, that “[t]he Postal Service may accept any item or group of items of a proposal, unless the offeror qualifies the proposal by specific limitations.”

Amendment 01 to the solicitation answered five questions submitted by offerors, including the following:

1. Does the incumbent contractor have an approximate \$200,000 edge on the competition by virtue of the fact that he already has produced six training tractors from his current contract while a new vendor will have to provide four new training vehicles?^[3]

RESPONSE: The Postal Service requires training on all purchased vehicles, including those to be delivered under this solicitation. We know of no way to change the reality of the situation described in this question.

2. . . . How many tractors are up for bid?

(Cont. from previous page.)

scoring will be based on an Offeror's ability to satisfy the evaluation elements and sub-factors of each technical factor.

M.4.2 Evaluation Factors

There are four evaluation factors that the technical evaluation team will use to evaluate Offerors' proposals. These are described in the sub-sections below. The factors are listed in descending order of importance.

Each of the technical evaluation factors consists of several sub-factors and each sub-factor contains evaluation elements that the technical evaluation team will assess. Each factor carries a designated maximum possible score. The evaluation elements comprising each sub-factor will be used as a guide (i.e., scored but not weighted) to determine each Offeror's score for that sub-factor.

The maximum score an Offeror's proposal can receive in the technical evaluation is 100 points. Maximum point values for each of the three evaluation factors are:

Factor 1 -- Technical Approach	45
Factor 2 -- Services	30
Factor 3 -- Delivery Schedule	15
Factor 4 -- Organization/Past Performance	10

The factors and their subfactors were further elucidated in two and one-half pages of the solicitation.

³ The incumbent contractor was Capacity of Texas, which was completing a contract for the delivery of 270 spotter tractors under a previous version of the spotter tractor specification.

RESPONSE: 79. See the attached revision to page 2 [of the solicitation].^[4]

Three offers were received and evaluated. Ottawa Truck's offer, which was lowest-priced at \$4.305 million, received a technical score of 17.10 of the 100 possible points. Capacity of Texas's offer, second-low at \$4.553, received a score of 34.3. The proposal of Crane Carrier Company, which was highest-priced, was ranked between the other two offers technically.

The contracting officer's July 1 memorandum which served as the memorandum of negotiation, determination of responsibility, determination of reasonableness of price, and best value decision included the following recital:

Obviously, none of the offerors submitted a superior technical proposal. The major reason for such low scores is that [each] offeror failed to address a specific factor in its proposal and thus received a zero score for that factor. I believe the scoring is more indicative of the companies' naiveté about preparing technical proposals and is not a reflection of their ability to produce spotter tractors since all three companies are known to be fully capable producers in the industry.

The July 1 memorandum states that the contracting officer determined that the competitive range consisted only of Capacity of Texas, and accordingly conducted negotiations only with that offeror.⁵ In the course of discussions, it was agreed to eliminate the requirement for first article test and include the first article unit within the production quantity, to reduce the production vehicle unit cost by \$2,000, and to remove the requirements for training vehicles and for training from this contract.⁶ The additional training vehicles were not required since training could be accomplished using the similar training vehicles delivered under the previous contract; while some training services and materials were still needed, fewer technicians required training than would need training were a new contractor selected, and that training could be obtained under

⁴ The attachment corrected an inconsistency between the total number of tractors recited in an introductory sentence and the quantities recited in items numbers 1, 2, and 5.

⁵ This determination, which apparently was made shortly after offers were received in late May, was not separately memorialized. The offerors excluded from the competitive range do not appear to have been provided the "prompt written notification" of their exclusion which Procurement Manual (PM) 4.2.5.g requires.

⁶ The memorandum includes the first question and answer from Amendment O1, asserting that it "put all competitors on notice that the incumbent contractor, Capacity, may have a competitive advantage over them."

the old contract at a lower price than here offered.⁷ Capacity of Texas' revised offer was \$4.139 million; it received the award on June 26.

Ottawa Truck's protest asserts that it was improperly denied the award despite its lower price, and contends that it was improper to award a contract for less than the total quantity of 79 vehicles. Citing various decisions of the Comptroller General, it asserts that the award was not "based on the requirements stated in the solicitation" and that "the integrity of the competitive bidding system precludes [the Postal Service] from awarding a contract on terms that are at variance with the specifications under which the competition was conducted." The protest goes on to recite the protester's capability to perform as required, and requests that Capacity of Texas be directed to stop work while the protest is pending.

Following a debriefing which occurred subsequent to the initial protest, Ottawa Truck supplemented its protest with an objection to the revision of Capacity of Texas' unit price, asserting that "[a]ward at a price different from the amount of the offer was improper."

The contracting officer's statement contends that the award was appropriate because Capacity of Texas' offer gave the Postal Service the best value consistent with the solicitation's selection criteria.

Ottawa Truck submitted comments on the contracting officer's statement which took exception to its characterization of Ottawa Truck's debriefing, but which did not comment on the substance of the statement.

Crane Carrier Company submitted comments which concurred generally with the protester's position.

DISCUSSION

Ottawa truck's contention that it was improper to award on the basis of a unit price which was lowered in the course of negotiations is clearly incorrect. In a negotiated purchase such as this, offerors are free to revise their offers in the course of the negotiation process (*Fort Lincoln New Town Corporation*, P. S. Protest No. 83-53, October 19, 1983).

The protester also objects to the consideration of these elements which arise from Capacity of Texas' position as the previous supplier of similar spotter tractors.

⁷ The contracting officer advises that the cost of the required training under the prior contract will be \$20,600.

As a general rule, the competitive range in a negotiated procurement consists of all proposals having a reasonable chance of being selected for award, including deficient proposals that are reasonably susceptible of being made acceptable through negotiations. However, even if a proposal is capable of being made acceptable, it need not be included in the competitive range when the contracting officer determines that it has no reasonable chance of being selected for award. . . .

Dwight Foote, Inc., P.S. Protest No. 87-90: September 28, 1987 (citations omitted).

In reaching the determination that the competitive range was comprised only of Capacity of Texas, the previous incumbent, the contracting officer appears to have taken into account all of the factors subsequently cited in his July 1 memorandum, which we paraphrase as follows:

- Capacity's experience as demonstrated by its performance under its prior contract;
- The lack of need to stock parts for two different types of vehicles;
- The reduced need for training due to training previously provided and the need to train as to only one vehicle type;
- The cost savings associated with the provision of additional models of the same vehicle, including the lack of need for a first article and for additional training vehicles.

In general, there is no objection to consideration of such elements. Advantages frequently accrue to incumbent contractors by reason of their previous contract experience with a contracting entity. "Insofar as such advantage exists only because of its incumbency, it is not objectionable. The Postal Service need not equalize an incumbent contractor's competitive advantage unless it was responsible for creation of that advantage by means of preferred treatment or other unfair action." *Contract Business Services, Inc.*, P.S. Protest No. 84-61, September 25, 1984 (citations and internal quotations omitted).⁸ Here, the protester has not claimed, and the record does not sug-

⁸ The Comptroller General has discussed the tension between incumbency and innovation:

Incumbency frequently, but not always, confers certain competitive advantages upon an incumbent contractor. Obviously, if those advantages routinely are taken into account in proposal evaluation and source selection, incumbent contractors usually will have an edge over their competitors, with the consequence that the fresh approaches and new ideas proposed by non-incumbents may be lost to the Government and something less than maximum competition will be realized. . . . Because of the possible detrimental ef-

(Footnote cont. on next page.)

gest, that any inappropriate action by the Postal Service led to the incumbent's advantage.

Advantages associated with obtaining additional quantities of similar equipment, instead of acquiring quantities of different equipment, such as the avoidance of training costs (including the lack of need for additional training vehicles) are matters which need not be equalized in the competitive process. *Domino Amjet, Inc.* P.S. Protest No. 91-54, October 8, 1991. ("If, as asserted, the Postal Service had already absorbed the cost of training personnel to use the [incumbent's] printers, and need not incur additional training costs if additional [incumbent's] units were added, training costs need not be added to the [incumbent's price].") Cf. *Universal Technologies Inc.*, Comp. Gen. Dec. B-231738, 88-2 CPD ¶ 217, September 7, 1988 (cost of diagnostic software required to be obtained by vendors other than vendor which had developed it); *Halifax Engineering, Inc.*, Comp. Gen. Dec. B-219178.2, 85-2 CPD ¶ 559, September 30, 1985 (costs associated with conversion of software).⁹ The cost advantage associated with the elimination of first article testing similarly need not be equalized. *Homexx International Corporation*, Comp. Gen. Dec. B-192034, 78-2 CPD ¶ 219, September 22, 1978.¹⁰

(Cont. from previous page.)

fect on competition an undue concern with incumbency can have, contracting agencies do, at times, attempt to avoid evaluation results which reflect such concern. . . . However, because incumbents often can offer real advantages to the Government, those advantages are often taken into account in proposal evaluation, and we have uniformly held that such action is proper since the Government is not required to equalize the "natural" advantages arising out of incumbency.

Group Hospital Service, Inc. (Blue Cross of Texas), Comp. Gen. Dec. B-190401, 79-1 CPD ¶ 245, February 6, 1979 (citations omitted).

Of course, the advantages of incumbency are not automatic. "An incumbent cannot receive a technical scoring advantage because of incumbency if the record does not indicate that the incumbent's proposal demonstrated any real technical superiority." *Cohlma Airline, Inc.*, P.S. Protest No. 87-118, April 13, 1988.

⁹ However, when costs are not avoided, but merely transferred to another contract, they should be included in the cost evaluation. *Domino Amjet, Inc.*, *supra*. (cost of consumable supplies must be included even though they have been obtained separately). Here the training to be acquired under the earlier Capacity of Texas contract are such transferred costs.

¹⁰ PM 2.2.2.c. expressly permits the waiver of first article approval "if the required supplies are identical or similar to those previously provided by a supplier." It further states that "[w]hen the contracting officer considers waiving first article approval, to ensure proper evaluation of the proposals, the solicitation may permit submission of alternate proposals . . . with and without first article testing." This solicitation contained no such permission.

However, the issue remains whether the consideration of the advantages of award to the incumbent was consistent with the evaluation scheme set out in the solicitation. Those advantages are, in the context of the PM, price factors to the extent that they relate to the price offered in a proposal and price-related factors to the extent that they involve other costs associated with the award.¹¹ Prior decisions have noted that evaluations based on unstated price-related factors were improper. See, e.g., *Patriot Airlines, Inc.*, P.S. Protest No. 93-27, January 5, 1994 (excise tax); *Cleve's Sporting Goods and Apparel*, P.S. Protest No. 96-09, July 22, 1996 (shipping costs).

The evaluation scheme was silent with respect to the evaluation of any of the savings associated with the acquisition of spotter tractors of the sort previously acquired. Question and Answer 1 of Amendment A01 may be read to put offerors on notice of the incumbent's advantage with respect to the need for the four training vehicles,¹² but it affords no guidance on the additional price and price-related considerations which informed the contracting officer's subsequent determination of the competitive range. That silence made that determination inappropriate.

A comparison of the initial offers of Ottawa Truck and Capacity of Texas which took into account only the disclosed evaluation factor involving the cost of training vehicles would have yielded two offers separated in price by less than 0.6 per cent in Ottawa Truck's favor, but separated more substantially in technical ranking, with Capacity's

¹¹ PM 4.2.5.b 1 provides:

The contract will be awarded to the offeror whose proposal offers the best value to the Postal Service, considering the price, price-related and other evaluation factors *identified in the solicitation*.

(Emphasis added.)

Price-related factors are best defined at PM 4.2.1 e., a section not directly involved with the subject procurement because it deals with simplified purchases. It provides:

Awards based on price and price-related factors are made to the responsible proposer . . . whose submitted price, after taking into account *stated* price-related factors such as transportation charges . . . , administrative costs associated with multiple awards, life cycle utility costs, etc., yields the lowest evaluated price.

(Emphasis added.)

¹² The question assumed what eventually became the case, that the Postal Service would not require Capacity of Texas to supply the four training vehicles because it already had sufficient training vehicles on hand. The first sentence of the answer, which stated that the Postal Service needed training on "all purchased vehicles," was not responsive to the inquiry, but the second sentence, which acknowledges "the reality of the situation described in [the] question," confirms the question's assumption.

proposal scored slightly more than twice as favorably as Ottawa Trucks', although neither proposal was highly scored in relationship to the total points available.¹³ As noted above, the contracting officer concluded that neither offeror's score was indicative of its ability to perform. Accordingly, it appears that Ottawa Truck's proposal was sufficiently close to Capacity of Texas' offer to be included within the competitive range if both offers had been evaluated in accordance with the solicitation's stated evaluation criteria. Accordingly, we sustain the protest.

The protester seeks termination of the existing contract and the reopening of the solicitation or the resolicitation of the requirement.

When, as here, termination of the awarded contract would be necessary to provide full relief to a successful protester, we have cited the following standard:

Whether to require termination action 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; followed in, e.g., *Zenith Data Systems, Inc.*; *Falcon Microsystems, Inc.*, P.S. Protest Nos. 95-19; 95-20, November 22, 1995.

Under that standard, we believe that the improper determination of the competitive range is serious. On the other hand, the prejudice to the protester was slight, since, as discussed above, the unstated evaluation factors could have been considered had they been set out in the solicitation. Since the omission could have been corrected by amendment in the course of the solicitation, cf. *Zenith Data Systems, Inc.*; *Falcon Microsystems, Inc.*, *supra*, the error did not affect the ultimate result.

Accordingly, we conclude that no relief is appropriate. However, as we have previously noted, "the degree of prejudice to the integrity of the competitive procurement system will prove not to have been great provided that the lessons of this procurement are observed in future . . . procurements." *Dwight Foote, Inc.*, *supra*.

¹³ The evaluation scheme contains a logical inconsistency: Since price was said to be "of significantly greater importance than the technical proposal," an "offeror's ranking after technical scoring" should *not* "become more important" if that offeror's "proposal is considered to offer the lowest price." The converse should be true; differences in the quality of technical scores should become a more significant discriminator with respect to offers which do not differ substantially as to price.

The protest is sustained to the extent indicated.

William J. Jones
Senior Counsel
Contract Protests and Policies