

December 17, 1997

P.S. Protest No. 97-20

ROYAL LOCK CORPORATION

Solicitation No. 266351-96-A-0746

DIGEST

Protest against the award of a contract for the purchase of keylocks is sustained. Determination of offeror's technical unacceptability because of offeror's lack of quality control system at time of preaward survey was unreasonable; proper test involved question of offeror's responsibility and its ability to obtain the necessary system, which need not have been in place at pre-award survey.

DECISION

Royal Lock Corporation (Royal) protests the award of a contract for keylocks to Ilco Unican Corp. (Ilco).

Solicitation 266351-96-A-0746, for the purchase of 95,000 keylocks, was issued by the Minneapolis Purchasing and Materials Service Center on September 18, 1996, with a due date for offers of October 21.

The following provisions were included in the solicitation:

Section M.1, Proposal Evaluation, which stated that award would be made to "the lowest-priced, responsible offeror whose offer/proposal is technically acceptable."

Section E.4, Quality Assurance, which required that the contractor's inspection system be in accordance with Specification MIL-I-45208, Inspection System Requirements, ("MIL spec") as in effect on the solicitation date. Section 3.1 of the MIL Spec required that "[t]he contractor shall provide and maintain an inspection system [and,] shall perform or have performed the inspections and tests required to substantiate product performance" The inspection system "shall be documented and shall be available for review by the Government Representative prior to the initiation of production."

Section K.5 NOTICE OF INTENT TO AWARD WITHOUT DISCUSSIONS, which advised offerors that award would be made on the basis of the initial proposals received.

Section K.7 NOTICE OF PREAWARD SURVEY, which advised prospective contractors that they may be visited and/or requested to provide information about a number of areas of interest, one of which was quality control plans.

While the solicitation stated that award would be made to an offeror whose proposal was technically acceptable, the solicitation contained no evaluation factors that addressed how that determination would be made.

Seven proposals received on October 21. In December, an amendment was issued and revised proposals were requested, at which point two offerors withdrew. A third offeror subsequently withdrew. Pre-award surveys were conducted in January, March, and April on three of the remaining offerors in ascending order of price, and the fourth offeror was found nonresponsible without an on-site survey because of problems with keylock quality and delivery on a previous contract.

Royal had previously furnished keylocks under postal contracts, and proposed to use the same foreign subcontractor that it previously used to supply the locks. Royal was advise by a March 5 letter that a preaward survey would be conducted at its facility and that it would include a review of quality assurance capability. The survey was conducted on March 18. The March 21 report on that survey included the following:

Quality Assurance Capability

Royal Lock does not have a quality system that meets the requirements of the solicitation. They do not have a person designated in a Quality Assurance position. [Their representative] stated that if a first article is required, he would send it to Bobier Tool Supply . . . for inspection. There would be no inspections for the remainder of deliveries, rather

Royal Lock would assume that the [subcontractor] would be doing the inspections.

Royal Lock has no Quality Assurance plan. The [subcontractor's] quality plans could not be verified. [N]o copies of daily inspection reports or quality control records were provided.

* * *

Based on the information obtained . . . , I find Royal Lock Corp. to be a non-responsible vendor. Royal Lock has not established and does not plan to establish, any control over their subcontractor's quality. Royal Lock does not have, and does not plan to establish [,] a quality system of its own. Section E.4 of the solicitation, Quality Assurance, requires the prime contractor to provide objective evidence that the locks would meet technical requirements. No evidence has been presented indicating means of complying with Section E.4.

The record contains no suggestion that the contracting officer sought or that Royal provided any additional information regarding a quality assurance program subsequent to the preaward survey.

In May, the solicitation was amended to include an option for an additional quantity of locks and to amend the destination and delivery schedule.¹ The offerors, including Royal, were asked to revise their offers by June 6. Award in the amount of \$332,500 for 95,000 units was made to Ilco, the only offeror found responsible and technically acceptable, on July 11. Royal was advised of the award and that its proposal had not been considered by a letter of that date. The letter stated that offers had to be technically acceptable to be considered for award, that Section E.4 required "an inspection system in accordance with [the MIL spec]," and that "the pre-award survey . . . revealed that you do not have a quality system in place that the requirements specified in the solicitation."

Royal protested the award in a letter dated July 23, and sent by facsimile on that same day. It averred that the contracting officer's letter of July 11 was received on Monday, July 14, and its protest was delivered to the General Counsel within 10 days thereof, and, therefore, was timely.

¹ The original schedule had been expressed in terms of calendar dates, and the delay in award had made the schedule obsolete. The revised schedule was expressed in terms of days after contract award.

While Royal presented various contentions in the course of the protest, at its protest conference it withdrew all of its contentions other than that the contracting officer's determination that Royal's quality system did not meet the requirements of the solicitation was contrary to law, regulation, and the specific requirements of the solicitation because the MIL Spec does not require that a quality system be in place at the time of the preaward survey; rather, it requires only that "the contractor's inspection system shall be documented and shall be available for review prior to the initiation of production and throughout the life of the contract."

In his statement, the contracting officer responded to that ground of the protest as follows:

— Royal presented no evidence to show how it would comply with the solicitation's quality requirements, and, according to the preaward survey report, stated that Royal did not have a person designated in a quality assurance position or have a person so qualified.

— Royal's proposal was not technically acceptable, because Royal failed to have a quality system in place that met the requirements of Section E.4 of the solicitation.

In an affidavit that accompanied a subsequent submission, Royal's president declared that Royal had maintained a quality system which remains in place and which resulted in the supply of more than 1,100,000 locks in its earlier contracts with the Postal Service. The required testing and inspection are performed by Bobier Tool Supply, an independent testing firm used by Royal, which had been contacted by the Postal Service during a preaward survey for one of its four prior Postal Service contracts, and found to be acceptable to the Postal Service.

DISCUSSION

The sole issue in this protest is Royal's claim that the contracting officer erroneously determined its offer was technically unacceptable because it lacked a quality system in place at the time of the preaward survey.

Royal contended that in rejecting its proposal the contracting officer's reliance on the MIL Spec was misplaced, pointing out that Section 3.1 of the MIL Spec permits inspections and tests to be performed for the contractor, and that a documented inspection plan is not required until prior to initiation of production.

As provision M.1 of the solicitation notes, technical acceptability is a quality properly attributable to a proposal in response to a solicitation. As such, it is measured in the course of proposal evaluation, as FM 4.2.4.a provides:

Proposal evaluation is an assessment of both the proposal and the offeror's ability, *as demonstrated by the proposal*, to perform the contract successfully. Proposals must be evaluated in accordance with procedures established in the source selection plan . . . and the evaluation factors specified in the solicitation. [Emphasis supplied.]

Here, however, the solicitation contained no evaluation factors other than price, and the solicitation required no submission of information relevant to the determination of the offeror's ability to perform. As a result, the question of the offeror's ability to perform was not a matter of technical acceptability, but rather one of responsibility, governed by FM 3.2.1.²

The standard by which we review a contracting officer's determination that an offeror is nonresponsible is as follows:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement with available information about the contractor's resources and record. We will recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based upon substantial information.

Automated Business Products, Inc., P.S. Protest No. 91-16, June 12, 1991.

Among the general standards used in determining responsibility are requirements that the prospective offeror must:

2. Be able to comply with the required or proposed delivery or performance schedule . . . ;

3. Have a good performance record;

* * *

4. Have a sound quality control program that complies with solicitation requirements *or the ability to obtain one.*

² Pre-award surveys are a tool used when "available information does not provide an adequate basis for determining the responsibility or nonresponsibility of a prospective contractor." FM 3.3.1.f. 5.(a). As noted above, the pre-award survey of Royal included findings phrased in terms of responsibility.

PM 3.3.1 b. (Emphasis added.)

Automated Business Products, Inc., supra, involved the question of an offeror's compliance with the Inspection -- Fixed Price clause, which, like the Quality Assurance clause at issue here, imposes certain inspection requirements as to the contractor. There, as here, the contracting officer sought to find the protester nonresponsible because of deficiencies perceived in its inspection and quality assurance as of the time of a pre-award survey. The decision discussed this finding as follows:

[R]eliance on the offeror's purported nonconformity with the inspection clause was erroneous. It is not a provision applicable to offerors. It is instead a clause applicable to the eventual contractor. See *C.R. Daniels, Inc.*, P.S. Protest No. 90-62, December 21, 1990. Absent a provision making current possession of an acceptable quality control process a special criterion of responsibility, not present here, [the offeror] did not have to demonstrate current compliance with the clause to be determined responsible. It instead had to demonstrate the ability to obtain adequate quality controls.

As the requirement for a quality control program applied to the eventual contractor, not to an offeror, the contracting officer's reliance on the pre-award survey's conclusion that Royal did not have a quality assurance system in place as a basis for the rejection of its offer was arbitrary and capricious.³

Because Royal was not the low offeror, and the low offeror was similarly improperly faulted for a current lack of a MIL Spec quality assurance system, Royal would not have been in line for award, the relief that it sought. Further, it appears that contract performance is well underway, a circumstance which often precludes such a remedy. See, e.g., *Domino Amjet, Inc.*, P.S. Protest No. 91-54, October 8, 1991. As the contract contains an option for 95,000 additional keylocks which has not yet been exercised, the contracting officer is hereby directed not to exercise the option, and to resolicit for the additional locks. *System Advantage, Inc.*, P.S. Protest No. 95-08, April 19, 1995.

The protest is sustained to the extent indicated.

³ In the course of the protest, Royal took strenuous objection to other of the preaward survey conclusions which we need not address further here, except to note that nothing in the record suggests that Royal lacked the ability to obtain, whether by subcontract or otherwise, an adequate quality control system.

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