

January 11, 1999

P.S. Protest No. 98-24

RAF TECHNOLOGIES, INC.

Solicitation No. 102590-98-A-0140

DIGEST

Protest against award of optical character reader contract is denied. Contentions about awardee's principal are unsupported; terms of protester's licenses of software to Postal Service do not provide basis to challenge award; determination of awardee's capability is not for review; and fact that awardee was not incorporated when offer was submitted does not preclude award.

DECISION

RAF Technologies, Inc. (RAF) protests the award of a contract for Small Facility Optical Character Readers (SFOCRs). Solicitation 102590-98-A-0140 was issued by Automation Purchasing at Postal Service Headquarters on June 24, 1998, seeking five prototype SFOCR units, with an unpriced option for a Gray Scale Image Binarization Module.¹

According to section M of the solicitation, award was to be made on the basis of best value, taking into account technical factors² and price "of approximately equal impor-

¹ According to the Statement of Work, the contract work involves repackaging of a prototype coprocessor for installation in existing Carrier Sequence Bar Code Sorters, and the enhancement and modification of the coprocessor.

² There were three technical factors of equal weight: System Configuration, Technical Expertise, and Prior Performance.

tance.” Two firms were solicited, RAF and Pacific Northwest Software, Inc. (PNS). Each submitted a proposal, and written and oral discussions were conducted with each offeror. Best and final offers were received and evaluated. As evaluated, each offer was “eminently satisfactory,” but PNS had a slightly higher technical score. PNS’s price, \$122,725, was substantially lower than RAF’s price, \$745,564.

Award was made to PNS on September 3. RAF’s protest was dated and received September 14. The protest raises the following issues:

The award to PNS was improper because its price reflects only “the amount of the hardware cost associated with the contract, and does not include software or service costs,” and is therefore unbalanced.

Washington state corporate records do not list a corporation named Pacific Northwest Software, Inc. Award cannot be made to the corporation, to the corporation’s principal, or to that principal’s other corporation.

Neither PNS nor its principal “have ever performed a contract, . . . they have no track record” and they cannot be found responsible.

PNS’s principal was terminated from RAF. He has made misrepresentations about it, and, as a substantial shareholder in RAF, has created a conflict of interest. He “has shown a pattern of violating [RAF’s] confidential information rights and intellectual property rights.” (Elsewhere, the protest asserts that the “winning offer is believed to contain [RAF’s] proprietary and confidential information.”)

Under previous contracts, RAF has provided software to the Postal Service with “limited rights” which the Postal Service can furnish to its contractors. RAF has a “reasonable fear” that PNS will damage RAF’s business through misuse of the software so provided.

RAF believes that PNS’s proposal may have misstated its principal’s work, background, and software development experience, inflating his experience and accomplishment.

The contracting officer’s statement includes the following points:³

— Given the disparity in the offerors’ prices, RAF is not “in line for award in the event the protest is successful.”

³ A contention that the protest was untimely was withdrawn.

— PNS’s price proposal (which the protester has not seen) included both hardware and software costs. The Postal Service considered that price fair, reasonable, and realistic. The offer is not unbalanced, since there is only one priced line item.

— PNS was incorporated in Washington State on September 3, 1998, as shown by its certificate of incorporation. While the corporation did not exist when offers were submitted, award to PNS is appropriate because the Postal Service knew with whom it was dealing, and that entity did not change during the solicitation process, except for its incorporation (citing *Bromma, Inc.*, 68 Comp. Gen. 433 (1987)).

— PNS’s principal’s interactions with RAF (other than anti-competitive practices, not here alleged) do not present a conflict of interest of concern to the Postal Service, and are for resolution between the parties, if necessary (citing *Sanimasters, Inc.*, P.S. Protest No. 93-09, August 2, 1993).

— RAF’s claims concerning postal release of its software fail because it has not “alleged that the USPS will breach its contract[s] or other legal obligation[s].” Protester has provided no evidence in support of its allegations concerning PNS’s use of its intellectual property, but the Postal Service intends to release only software to which it has unlimited rights. In any event, any issue about the release of software in the course of performance is untimely raised, since the solicitation disclosed the Postal Service’s disclosure intentions.

— RAF’s concerns about PNS’s proposal representations are unsupported suppositions. The Postal Service relied not only on the proposals, but on its knowledge of PNS’s principal’s prior work under postal contract (as it may do in considering the experience of a new entity), including representations about the principal previously made by RAF.

— The determination to award to RAF is entitled to a presumption of correctness, and RAF’s protest has not rebutted the presumption or shown the determination to be unreasonable.

The protester submitted comments on the contracting officer’s statement, including the following:

— The contracting officer has wrongly analogized the situation concerning PNS’s corporate existence to one involving ambiguity of an offeror’s identity; rather, the issue involves the falsehood of the assertion of the existence of PNS in its proposal. In cases involving formal advertisements, the Comptroller General has held that bids by nonexistent corporations should be disregarded, since they “could be avoided or backed up by the real principals as their interests might dictate” (citing *Delaware East Wind, Inc.*, Comp. Gen. Dec. B-22134,

March 12, 1986, 86-1 CPD ¶ 246). While cases involving advertised procurements are not controlling as to negotiated procurements, they provide useful guidance in resolving similar issues (citing *Pedestrian Bus Stop Shelters, Inc.*, 63 Comp. Gen. 433, (1984)). In this case, PNS's principal submitted an offer in the name of a nonexistent corporation. Upholding the award "would allow an entity . . . not an original participant . . . to . . . receive an improper transfer of rights in the proposal." Doing so would "undermine the competitive bidding process" and should not be permitted.

— Basing a determination of PNS's responsibility on knowledge of its principal overlooks the most significant fact concerning the principal; that he misrepresented PNS's status in its offer, violating the statute against making false statements. One who has done so cannot be found responsible.

— The assessment that the risk of PNS's performance is low is incorrect; its offer agrees to supply third party hardware to the Postal Service at its cost, so it cannot profit on either the hardware or software and thus has no incentive to perform.

— RAF's proposal is realistic, and, in the event of PNS's disqualification, the Postal Service "must . . . seek to negotiate a contract with [RAF]."

— The software licenses included with the contracting officer's report include one involving RAF's software not developed with postal funds. It provides that the Postal Service may provide that software to contractors if they "agree to maintain the confidentiality of the Source Code and use [it] as specified [in the license]. Because PNS's principal "has a history of disclosing [RAF's] software," the Postal Service cannot assure that he will adhere to a confidentiality agreement, so contract award exposes it to breach of the license agreement.

The contracting officer submitted a rebuttal to the protester's submission which included the following:

— The cases previously cited concerning PNS's corporate existence were apposite. There is no firm bid rule in negotiated procurements, and offers may be withdrawn before award. Since the offer was evaluated from the standpoint of PNS as a corporation, its incorporation did not affect that evaluation, and the Postal Service has "obtained . . . the awardee that it bargained for and expected."

— Any representation that PNS was a corporation was not fraud or misrepresentation. In its offer, PNS acknowledged that it was newly formed and without corporate history. The corporate representation was a mistake or error which was corrected before award. Revoking the award on the basis of that mistake

would “unjustly benefit a supplier that offered a clearly less advantageous proposal.”

— The assessment of PNS’s risk was appropriate, based on the expertise of its principal. Contrary to the protester’s assertion, “there was profit in [PNS’s] proposal, including profit for hardware. . . .” The short-term nature of the contract also supported that determination, even given the contractor’s status as a new company with limited resources. The Postal Services’ experience since contract award has validated that assessment.

— The responsibility determination was appropriate because PNS was found able to perform “the technical aspects of the job.” Concerns about its financial responsibility were ameliorated by a plan for partial and milestone payments.

— The Postal Service does not believe that PNS would violate the non-disclosure provisions of the software licenses, but in any event source code is not to be disclosed to PNS.

— Under applicable standards, the PNS contract should not be terminated even if the protest is sustained because much of the contract performance has occurred. RAF was not prejudiced by the award, since its proposal was both lower-rated technically and much higher priced. Reopening the competition now would create an improper auction.

DISCUSSION

Basic to the protest process is the principle that the protester has the burden of establishing its case affirmatively, and that in doing so it must overcome the "presumption of correctness" which accompanies the statements of the contracting officer.

International Business Machines Corporation, P.S. Protest No. 98-22, January 5, 1998. Here, the protester’s statements about PNS’s principal’s previous relationship with RAF, his violations of RAF’s rights, and the possibility that the proposal may have overstated his qualifications are mere allegations, unsupported by evidence of any kind. "Unsupported allegations . . . cannot amount to evidence necessary to sustain a protest." *Frederick Manufacturing Co., Inc.*, P.S. Protest No. 88-03, March 25, 1988.

The protester’s fear that the award will result in a breach of its software license agreements with the Postal Service provides no basis for relief, since those agreements do not require RAF’s approval when the Postal Service provides its software to contractors pursuant to the agreements’ terms. If the information furnished is subsequently disclosed, the license agreements provide RAF’s remedy.

With the exception discussed below, the challenge to the contracting officer's determination of responsibility⁴ is not for review. The well-established rule regarding determinations of responsibility (or, as here, capability), is that "[a]n affirmative determination of responsibility is a matter within the broad discretion of the contracting officer and 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." See, e.g., *Grand Rapids Label Company, Inc.* P.S. Protest No. 96-22, January 31, 1997. Accordingly, the contention that PNS is not a capable offeror because of its corporate inexperience or because of its pricing is not for our review.

The protester's contentions concerning the corporate identity of the offeror warrant somewhat more extended discussion. PNS's proposal was submitted in the name of Pacific Northwest Software, Inc., and signed by its principal as President. In Section L of the solicitation, provision A-20, Type of Business Organization, was completed to reflect that the offeror "[o]perates as: a corporation incorporated under the laws of the state of Washington . . . [and as] a limited liability company."⁵ Elsewhere, the proposal reflected that "[PNS] has not done any business It was founded by [its principal] in order to provide contract software development such as required by this project."

The "firm bid rule" applicable to formally advertised (sealed bid) procurements requires that contracts only be awarded to an entity which has been bound by its bid to perform the work. However, as we have noted, "negotiated procurements [such as the one at issue here] involve a different issue; whether there has been an attempted transfer or assignment of a proposal other than as allowed by law" since the "firm bid rule" does not apply, and an offeror can withdraw its offer at any time *Sheffield Press P&L, Inc.*, P.S. Protest No. 94-11, May 13, 1994.

⁴ Although both the protester and the contracting officer have framed the issue in terms of "responsibility," under the Postal Service's current purchasing regulation, the correct term is "capability." Supplier capability is a supplier-specific evaluation factor which is "evaluated in order to determine a supplier's ability to perform upon award." Purchasing Manual (PM) 2.1.7.c.3.(a) While the key elements of supplier capability, set out at PM 2.1.7.c.3.(b), are similar to the key elements of responsibility as defined in the Postal Service's previous purchasing regulations (see, e.g., Procurement Manual (Pub. 41) 3.3.1.b.), the two terms differ in that capability is considered and established in the supplier-selection process (PM 2.1.5), while responsibility was considered and determined separately from the evaluation of offers prior to contract award (Pub. 41 3.3.1).

⁵ The identification of PNS as both a corporation and a limited liability company is, of course, internally inconsistent, since the terms describe different legal entities. Given that the offeror included in its name the term, "Inc." (an abbreviation for "incorporated") which Washington state law reserves for corporations, (RCW § 23B.04.010 (1)(a)) and that its principal indicated his title as President, a position appropriate to corporate status and not to status as an L.L.C., the inconsistency is immaterial. Cf. *Zinger Construction Co., Inc.*, P.S. Protest No. 85-67, November 7, 1985.

In this case, award was made to the same entity which submitted its offer, so there is no question of attempted transfer or assignment. Nor, despite protester's urgings, is there a question of misrepresentation in PNS's submission of its offer in its corporate name prior to its incorporation. That submission reflected PNS's principal's intention of proceeding as a corporation, and the accomplishment of the incorporation coincident to the contract award accomplished that intention.

The protest is denied.

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