

July 9, 1999

P.S. Protest No. 99-22

MADONIA ELECTRIC, INC.

Solicitation No. 089913-99-A-0052

DIGEST

Protest of award of a contract for lighting replacement is denied. Low offeror's proposal offering an alternate to specified brand-name items was properly considered. While advice to offeror that the alternate was unacceptable and that its proposal must be revised to be satisfactory constituted discussions, those discussions did not require that discussions be held with other offerors.

DECISION

Madonia Electric, Inc., protests the award of a contract to Oneida Electric, Inc., for the replacement of high bay lighting at the Utica, NY, Processing and Distribution Center.

The Northeast Area Facility Maintenance Support Unit, Windsor, CT, issued solicitation 089913-99-A-0052 on December 4, 1998 seeking the replacement of approximately 200 lighting fixtures.

Section M. 2 of the solicitation provided that award would be made "to the responsible offeror whose proposal conforming to the solicitation offers the best value to the Postal Service, considering price, price-related factors, and other evaluation factors specified elsewhere in this solicitation." The solicitation did not elsewhere include other evaluation factors. Accordingly, award was to be made on the basis of price. *Ed Wilson, Inc.*, P.S. Protest Nos. 96-18, -19, February 4, 1997.

Four offers were received, of which that of Oneida was the lowest. However, Oneida had proposed on the basis of alternates to some of the Cooper Lumark lighting fixtures which had been specified by brand name. Solicitation provision K.15 allowed offerors to propose alternates to specified brand-name items. Oneida's proposed substitutions were reviewed by the Postal Service's architect, who concluded that the

alternates were not satisfactory because they provided less candlepower than the specified fixtures. Accordingly, the contracting officer advised Oneida that the proposed substitutions were not acceptable, and (in the words of a memorandum to file memorializing a telephone conversation) “that he could resubmit a product specified or rescind his proposal.” While that memorandum indicated the offeror’s intention to withdraw its proposal “because he wouldn’t be able to provide the specified product at his proposed price,” Oneida subsequently proposed to supply the specified products at an increased price.

Oneida’s revised proposal was found acceptable, and Oneida was advised of the Postal Service’s intent to award it the contract. That notice, however, required the submission of a Miller Act performance bond in the amount of 100 percent of the contract price, a requirement which the solicitation had imposed only in the event the contract price exceeded \$100,000. The contracting officer agreed to a further increase in Oneida’s price representing the additional cost of the performance bond, bringing the total contract price to \$54,055.58. As so revised, Oneida’s price remained lower than any of the other prices received.

The other offerors were advised of the award to Oneida by letters dated March 23. Madonia’s president wrote the contracting officer on March 30, asserting that he “wish[ed] to protest the award” and noting that “[i]n other state bidding situations, if the bidder does not use the equipment specified . . . or does not follow bidding procedures, immediate disqualification of that bid would result.” The letter also requested a copy of the protest regulations in chapter 3 of the Purchasing Manual (PM). The contracting officer provided those regulations by letter dated April 5.

By letter dated April 13, Madonia’s president wrote to the “General Counsel for USPS” at the address of the Windsor, CT, Field Office of the Law Department. That letter was belatedly referred to this office, where it was received on May 7. The April 13 letter raises two bases for its protest. First, Madonia asserts that it “was told by the engineer in charge that only the [brand-name] lights that were in the spec book were to be used,” and that Oneida’s proposal should have been disqualified for proposing an alternate fixture. Second, the protest contends that “if one contractor gets a second chance to rebid the project, then all contractors involved should be given a second chance.”

The contracting officer’s statement sets out the circumstances under which Oneida revised its offer and responds briefly to some of the protest’s contentions. With respect to the contention in the Madonia’s first letter that Oneida’s offer should not have been considered, the contracting officer notes that “[t]he Postal Service does not use sealed bidding procedures and perhaps is not as stringent [sic] as other state agencies” He further notes that the solicitation was issued pursuant to the guidelines

at Purchasing Manual (PM) 4.2.2.;¹ that the decision to allow Oneida to revise its offer “was based on PM 4.2.3.[c, “Late Proposals and Modifications” and] Provision A-4, Late Submissions and Modifications of Proposals”; and that “the consideration of Oneida’s [revised] proposal was deemed to be in the best interest of the Postal Service.”

The protester did not comment on the contracting officer’s statement.

DISCUSSION

One of the protester’s alternative theories may be disposed of summarily. Any advice that was given to the effect that the brand-name items had to be supplied was incorrect because it was inconsistent with the terms of the solicitation. As recited above, section K.15 of the solicitation provided that “[p]roposals offering equal products will be considered for award if these products . . . are determined by the Postal Service to contain all of the essential characteristic[s] of the brand-name products” Accordingly, the contracting officer properly undertook to evaluate Oneida’s offer of alternate lighting fixtures and there is no merit to the protester’s contention that Oneida’s offer should have been rejected simply for proposing the alternate.

The protester next contends that the contracting officer erred either in allowing Oneida to revise its proposal to provide the specified brand name item or in failing to allow other offerors a similar opportunity to revise their proposals.

The contracting officer’s assertion that Oneida’s revised offer could be considered as a late proposal is incorrect, because that offer was not a late proposal. Oneida’s revised proposal was “a normal revision of [a] proposal[] made by a supplier during discussions,” a category explicitly excluded from the definition of late proposals. PM 4.2.3.c 1. “Discussions include all communications held with suppliers during the purchasing process.” PM 4.2.5.c 1. One reason for discussions may be “to . . . allow for the clarification of matters contained in a proposal which raise questions regarding acceptability” PM 4.2.5.c. 2. The advice to Oneida that its proposed alternates were not satisfactory, and that it would have to revise its proposal in order to receive the award clearly were “discussions.”²

The discussions held with Oneida provided it with the opportunity to revise its proposal. The protester’s final contention is that it was improper to allow Oneida to do so

¹ PM Section 4.2.2. is entitled “Solicitations” and sets out guidance on the issuance and availability of solicitations, the amendment and cancellation of solicitations, and the disclosure and use of information in the solicitation process. What portion of 4.2.2. the contracting officer finds relevant to the issues raised by this protest is unclear.

² The contracting officer’s misunderstanding in this regard extended to the letter notifying the other offerors of the award, which recited that award had been made “without discussions.”

without allowing the other offerors a similar opportunity. A requirement for discussions with all offerors with a reasonable likelihood of receiving award when discussions are held with any offeror is an element common to many purchasing procedures, and has been an element in previous postal purchasing procedures (see, e.g., *Neil Gardis & Associates*, P.S. Protest No. 89-44, September 15, 1989 (noting, in part, that “[w]hen there are no particular matters to be the subject of discussion with a particular offeror, a request for that offeror’s best and final offer satisfies the requirement for discussions”)).

The Postal Service’s current purchasing regulations, however, explicitly exclude any requirement for discussions with multiple offerors when discussions are held with one offeror. “Discussions [after comparison of proposals] should be made with a sufficient number of suppliers for the purchase team to be confident that it can reasonably determine which supplier or suppliers offers the best value to the Postal Service. However, *the fact that discussions are held with one or more offerors does not require that discussions be held with other offerors if there is no business necessity for additional discussions*. Offerors whose offers are not the subject of discussions need not be afforded a specific opportunity to revise their offers.” PM 4.2.5.c 3.(b), emphasis supplied.

That discussions were held with Oneida did not require that discussions be held with Madonia, since there was no business necessity for them.³ The protest is denied.

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³ Discussions with Madonia would have afforded it no opportunity it did not already have to revise its offer. A voluntary modification would have been considered under the late modifications provision to which the contracting officer has referred. The consideration of late modifications is usually in the Postal Service’s interest if they offer “a significant cost, quality, or technical benefit” unless they come so late in the process of award that considering them would jeopardize or appear to jeopardize the integrity of the purchasing process. PM 4.2.3.c 2. Reserving a better offer for a late modification, however, is not advisable. Provision K.7, Award Without Discussion, informs offerors that “each initial offer should contain the offeror’s best terms” because award could be made without discussions.