

**January 28, 2000**

**P.S. Protest No. 99-27**

**OMAHA PAPER STOCK COMPANY**

**Solicitation No. 412735-99-A-0258**

**DIGEST**

Protest of award of contract for the recycling of paper and cardboard is denied; protester was not entitled to rely on its understanding of the contracting officer's oral explanation of the price evaluation scheme contrary to the solicitation's terms.

**DECISION**

Omaha Paper Stock Company (Omaha) protests the circumstances of the evaluation of its offer in response to solicitation 412735-99-A-0258 for recycling at the Cincinnati, OH, post office.

Solicitation 412735-99-A-0258 was issued by the Philadelphia Purchasing and Materials Service Center on May 19, 1999, seeking offers for the recycling of cardboard and undeliverable Standard A mail (also referred to as "mixed paper"). The solicitation included seven line items for which offerors were to provide price information. Items 1 and 2 were amounts to be paid the Postal Service for the mixed paper and cardboard. Offerors were to identify the amount to be paid the Postal Service for 11 ranges of the market price for mixed paper expressed in \$10 increments from -\$59 to \$49, and nine ranges of the market price for cardboard from -\$9 to \$79. Items 3 through 7 were items for which the Postal Service was to be charged, as follows:

Item 3	Container Rental	Per container per month
Item 4	Hauling fee per container	Per container; fees were sought for five years of the contract
Item 5	Sorting Material	Per ton
Item 6	Baling material	Per ton

Item 7      Disposal of material exceeding      Per ton  
                 stated contamination level

For evaluation purposes, the solicitation included estimates that the Postal Service would deliver 30 tons of mixed paper and 50 tons of cardboard monthly. Although the solicitation included a provision allowing either party to terminate the contract on 60 days' notice, it stated that the contract was to have a term "of approximately five (5) years." Other parts of the solicitation reflected a five-year term.

Offers were due on June 10, when three offers were received. A fourth offer, received late, was also considered. The offers were evaluated on the basis of price and business factors by the contracting officer and the Cincinnati environmental coordinator. Rumpke Waste Collection & Disposal Systems (Rumpke) and the protester were each evaluated as paying nothing for mixed paper, and the same amount per ton for cardboard. Their prices for items 3, 4, and 7 were about the same in the aggregate. The significant difference between the offers was that Rumpke proposed no prices for items 5 and 6 (noting that for those items were reflected in its offers for items 1 and 2), while Omaha provided specific prices per ton for those items.<sup>1</sup>

Award was made to Rumpke on August 17, and the unsuccessful offerors were notified of the award by letters of that date. On August 24, an Omaha representative had a long telephone conversation with the contracting officer, who memorialized the conversation in a file memorandum:

Much of the discussion revolved around the sorting and baling charges. . . . [Omaha] claimed that the sorting and baling charges only applied to contaminated loads that had to be sorted. In the proposal, the contractor indicated that all materials are baled. There is no mention of sorting. [Omaha] claimed that the cost of baling was recovered in the sale of the material. It was my intent to pay for all costs associated with . . . marketing the item and letting the market index set the value of the material. . . .

[Omaha] also[] referred to earlier discussions of this issue during the solicitation phase. . . . I do recall having a lengthy discussion of the proposal and . . . how and why I was trying to price out the . . . cost of performing the work. Somehow, in my opinion, [Omaha] confused the contaminated load issue with sorting and baling from a normal operational consideration. . . .

I added the cost of these services in determining what I believed was the true cost of disposing of the material for the purpose of recycling.

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<sup>1</sup> In computing the value of the offers, the contracting officer applied the per-ton price for sorting materials to 1800 tons, the estimated quantity of mixed paper to be generated over the contract term. He applied the per-ton price for baling materials to 4800 tons, the sum of the quantities of mixed paper and cardboard estimated to be generated of the contract term.

The contracting officer received Omaha's protest, dated August 30, on August 31. The substance of the protest is as follows:

The solicitation cannot be evaluated equally due to the omission of instructions relating to items (5) and (6) . . . . Our company was given incorrect instructions by phone from your office. Our conversation on August 24, 1999, confirmed your recollection of my phone call to you. We feel that this solicitation should be cancelled and a new solicitation sent out.

The contracting officer's statement in response to the protest asserts that the offeror should not have relied upon its understanding of the conversation that it had with the contracting officer, since such conversations are not binding upon the Postal Service, and that it could have submitted its questions about the evaluation of items 5 and 6 in writing. Further, Omaha's protest is now untimely; it is a protest against the solicitation terms, and as such should have been submitted before offers were due.

With respect to the merits of the protest, the contracting officer asserts that because the market value of the recycled material fluctuates dramatically and a contractor must continue to cover its costs to perform for the Postal Service over the five-year contract term, "[i]t is the intent of the Postal Service to compensate the contractor for the cost of providing the recycling service while allowing the value of the material to float with the market price . . . ."

Contractors prepare recyclable materials for sale in different ways depending on the purchasers' requirements. Some contractors deliver materials loose; others bale them. Some sort all the material; others sort contaminated loads to make them saleable. Omaha's baling cost was evaluated because its proposal stated that all material was to be baled. Its sorting cost was applied only to the volume of mixed paper because cardboard is "usually very clean . . . [and] rarely sorted."

In the post-award telephone conversation, Omaha indicated its intent to sort only contaminated mixed paper, and to absorb the baling charge unless the sale value of the material "went negative." However, nothing in Omaha's proposal indicated its intentions in that respect. "It is up to the contractor to specify how and when those charges are to be applied." The contracting officer contends that the award decision was appropriate.

Omaha did not submit comments on the contracting officer's statement. Rumpke submitted comments which echoed the contracting officer's suggestions of the protest's untimeliness and that Omaha should have inquired of the solicitation's terms. Further, Rumpke contends that a new competition would be inappropriate, since its offer had been exposed, and notes that it has made expenditures and arrangements in light of the contract award. It contends that it was properly given the award.

## **DISCUSSION**

The contracting officer and Rumpke both suggest the untimeliness of the protest, which is asserted to comprise a protest against the solicitation's terms. While any in-

consistency between the solicitation and what the offeror had been told should have been “apparent before the date set for the receipt of initial proposals” so that a protest of such a defect would have to be received prior to the time set for the receipt of offers in order to be considered (Purchasing Manual (PM) 3.6.4.b.), we understand Omaha’s protest to raise a different issue involving the contracting officer’s failure to evaluate the proposals in a proper manner. That issue is timely since it was known only after the evaluation was performed and the result, adverse to the protester was known.

To the extent that the protester seeks to have its offer evaluated on the basis of its understanding of the oral explanation which the contracting officer imparted in the telephone conversation prior to the time set for the receipt of offers, it cannot prevail, since that understanding was inconsistent with the solicitation’s terms. “Where . . . an alleged oral modification to the solicitation is inconsistent with the written solicitation, absent a written amendment or confirmation of the oral advice, we will find unreasonable a protester’s reliance on the alleged oral representation.” *Imaging Systems Technology*, Comptroller General Dec. B-278479, December 10, 1997, 1997 U.S. Comp. Gen. LEXIS 418.

The protest is denied.

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Contract Protests and Policies