

March 10, 2000

P.S. Protest No. 99-30

ADVANCED LIGHTING, INC.

Solicitation No. 232098-99-A-0084

DIGEST

Protest of failure to receive contract for facility relamping project is denied. While solicitation's evaluation scheme and elements of the evaluation were flawed, rejection of unreasonably low offer because of the risk of performance failure it presented was appropriate, and grounds asserted by protester to justify its price did not require overturning that determination.

DECISION

Advanced Lighting protests its failure to receive a contract for relamping a postal facility.

On August 4, 1999, the Columbia, MD, Facilities Services Office issued solicitation 232098-99-A-0084 to retrofit and replace the lighting at the Cincinnati, OH, Bulk Mail Center (BMC). A "note to offerors" on the second page of the solicitation provided that a pre-proposal conference, at which the attendance of offerors was mandatory, would be held on Friday, August 13. The Commerce Business Daily (CBD) announcement of the solicitation, which had appeared on the CBDNet website on August 2, included no reference to the mandatory pre-proposal conference.

Provision M-1 of the solicitation provided in part as follows:

- a. Award will be made to the responsible offeror who submits the best combination of Technical Proposal, Business Proposal, (cost / price), Business / Management proposal (if applicable), and other factors considered. The primary areas to be used in determining which proposal is most advantageous to the Postal Service are listed below in descending order of importance:

[No areas were listed in the space provided.]

b. Cost / Price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest cost

Block 8 on the Offer and Award sheet included the following:

- Evaluation Criteria:
1. Price
 2. Experience with projects of similar scope and dollar amount.
 3. Financial Responsibility.

A sheet headed "Instructions to Prospective Offerors" included the following:

In order to evaluate a firm's responsibility, the offeror MUST include with his/her offer all of the following:

1. Financial Statement (within the last 12 months).
2. List of 5 largest complete jobs within the last two (2) years (also, any U.S. Postal Service or other Government Agency jobs). . . .
3. Provide a list of current projects
4. Actual work to be performed by your firm, excluding subcontractor[s].

Advanced Lighting, Inc., had attended the August 13 pre-proposal conference. A CBD announcement posted on CBDNet August 14 amended the previous CBD notice to reflect the requirement for attendance at the pre-proposal conference and scheduled a second pre-proposal conference, which the attendees at the August 13 conference need not attend, for Monday, August 23.

Seven offers were received on September 2. Advanced Lighting's offer was the lowest priced, at \$1.086 million. Buckeye Electric Company of Cincinnati, which had attended the August 23 pre-proposal conference, submitted the fourth low offer at \$1.555 million.

By letter dated September 9, Buckeye was advised of the Postal Service's intent to award it the contract upon receipt of Buckeye's executed payment and performance bonds and certificate of insurance. By letter dated September 22, Buckeye was provided its copy of the executed contract. A notice of the contract award to Buckeye was posted on CBDNet on September 22. Advanced Lighting's September 30 protest recites that it learned of the award in a September 24 telephone call.¹

¹ Notice of award letters were not provided to the other offerors until November 18. Purchasing Manual (PM) 4.2.7.a., states that notice of award is to be provided "within three days after award." The file does not explain the reason for the delay.

The protest objects to the award to Buckeye on the specific basis that Buckeye had not attended the August 13 pre-proposal conference, and that the protester and others had been told that no other pre-proposal conference would be held.² The protest contends that under the solicitation's terms, award should have been made to Advanced Lighting, and that it was improper to make award to another offeror on the basis (as Advanced was advised) that that offeror had a higher level of experience and financial responsibility. Further, the protester notes that at no point was it advised of any deficiencies in its offer, including any concerns arising out of what may have been perceived as "an unusually low price."

The protest contends that the award to Buckeye was arbitrary, and the weighting of the evaluation factors lacked a rational basis. Further, the protester perceives favoritism to Buckeye in the conduct of the second pre-proposal conference, and a negative bias against small-business firms, and against non-local firms, in the comments of the project manager.

The contracting office's responses to the protest included the following:

— A November 10 letter addressed to the protester declined to change the decision not to award the contract to Advanced Lighting. The letter noted that because Advanced Lighting's price was "60% low" (this apparently was a reference to the price's relationship to the low end of the published estimated price range which the solicitation stated was between \$1.8 and \$2.6 million), it had been asked to provide a schedule breaking out their costs for various line items. Those costs were evaluated, with the contracting officer concluding "that it was not reasonable to assume success of the project as solicited at [those costs]." In the contracting officer's view, items of the quality needed to perform the contract cannot be purchased at the costs quoted. "The extremely low cost offer submitted by Advance[d] did not reasonably reflect expectations of successful execution and completion of this project." The letter further notes the significance of demonstrated experience with work on projects of similar size and scope in establishing the offeror's ability to perform during ongoing postal operations.

— An "Evaluation of Contractor Proposals" signed by the contracting officer discussed the evaluation of the proposals. Each offer was scored on the three identified evaluation factors. Price could comprise up to 50 points, experience up to 35 points, and financial responsibility up to 15 points. Advanced Lighting received the maximum points for price, 21 points for experience, and 5 points for financial responsibility, for a total of 76 points. Buckeye received 44 points

² A subsequent submission makes it clear that this advice had been given Advanced Lighting before the pre-proposal conference in the context of its request that the conference be held at a time more convenient for it.

for price, 21 points for experience, and 14 points for financial responsibility, a total of 79 points, the highest number of points received. Two other offerors' point scores fell between Buckeye's score and Advanced Lighting's score.

The offerors' price scores were determined by assigning the maximum points to the lowest offer, 30 points to the highest offer, and points between 50 and 30 to the remaining offers based on where they fell between the lowest and highest offers.

Experience was evaluated by assigning points for various factors as follows

Previous BMC Experience		12
BMC Lighting Projects	12	
Other BMC Projects	6	
Other Lighting Upgrades		8
Dollar Size of Similar Projects within 5 Years		5
\$2 million and above	5	
\$1.5 to \$2 million	4	
\$1 to \$1.5 million	3	
\$.5 to \$1 million	2	
under \$.5 million	1	
Previous Postal Experience		5
Previous Government Experience		3
Previous Industrial Experience		<u>2</u>
	Total Points	35

Advanced Lighting received no points for BMC experience, 8 points for other lighting upgrades, 3 points for project size, and 5, 3, and 2 points for previous postal, government, and industrial experience. Buckeye received 6 points for previous BMC experience, 5 points for project size, and 5, 3, and 2 points for the last three previous experience factors.

Financial responsibility was measured by considering the offerors' total assets as reflected on their consolidated balance sheets. 15 points were awarded to firms with \$5 million or more in total assets, with points below that declining by one in increments of \$.5 million, so that, for example, assets in a range from \$2.5 to 3 million received 10 points, and assets of \$.5 to \$1 million received 6 points. Advanced Lighting, which indicated total assets of less than \$.5 million, received a score of 5 points; Buckeye received a score of 14.

The “Evaluation” concluded with the following:

The final analysis which was presented to the Contracting Officer took into account the specified materials and the cost thereof. The materials alone approached \$950,000.00. This would not allow Advance[d] Lighting, Inc., to provide the specified material and cost of labor using the estimated number of hours at prevailing rates, bond cost at 1.5 to 3 percent and minimum overhead and profit. This project is to be performed in a busy Bulk Mail Center while full operations are ongoing. We were required to award this project to the “best value proposal” that we had confidence in their ability to perform both financially and technically to complete the project in accordance with the quality of the scope of work and to perform within the specified time. Advance[d] would not be able, with their offer, to provide the proper manpower resources or quality of performance with their offer. Our evaluation is not an action process where we must award to the lowest bidder. Experience has taught us that award to a low offeror who is 35 percent lower than the competitive range^{3]} leads to excessive change orders, late delivery and very often job failure when the project lingers in an unfinished state until money matters are worked through default and finish by the bonding company.

Replying to the specifics of the evaluation of offers, the protester makes the following points:

- The contention that the omission of the pre-proposal conference from the CBD notice required the second conference is an unsuccessful bootstrap argument; “it appears that the USPS was not satisfied with the seven prospective offerors that attended the (initial) mandatory pre-proposal conference.”
- The delay in the provision of the official notice of award (*supra*, footnote 1) further calls into question the integrity of the process.⁴
- The Postal Service may award contracts only to responsible bidders.⁵ While determination of Advanced Lighting’s financial responsibility was appropriate,

³ Elsewhere, the term competitive range had been used to describe the second- through fifth-lowest offers, which ranged between \$1.4 and \$1.8 million.

⁴ The protester does not associate any particular harm with the cited delay, and acknowledges that notice of the award was timely posted on CBDNet.

⁵ The protester cites 3.3.1 a. of the Postal Service Procurement Manual, Publication 41, for this proposition. Publication 41 was superceded by the PM on January 30, 1997, and this purchase was conducted pursuant to the PM’s procedures. The initial protest and other portions of the protester’s

(Footnote continued on next page.)

rating that element solely in terms of the offeror's assets was "arbitrary and discriminatory against small businesses." In effect, Advanced Lighting was found financially nonresponsible, which was in error since it had demonstrated that it had bonding capacity for the project.⁶

— The evaluation process was further flawed in that it failed to afford Advanced Lighting credit, under the experience factor, for its work at the Albuquerque BMC.⁷ It was "incongruous" for the Postal Service to favor Buckeye, which had no lighting upgrade experience, over Advanced Lighting, which did.

— The contention that Advanced Lighting could not provide necessary manpower or quality resources for the project overlooks its successful completion of the Albuquerque project, of projects for the Navy of \$1.2 million and \$670,000, and other federal government projects.

— The assertion that Advanced Lighting's material costs were too low overlooks its "discount buying power." The Postal Service's concerns in this regard should have been the subject of discussions where the offeror could have substantiated its material prices.

The project manager submitted a response to the protester's comments on behalf of the contracting officer. The response discussed at length the decision to hold the second pre-proposal conference, which was attributed not to dissatisfaction with any of the attendees at the first conference, but to the unfairness perceived in the fact that prospective offerors responding to the initial notice learned of the conference requirement only after they had purchased the solicitation package.

The response also discussed the 8 point credit afforded Advanced Lighting for its work at the Albuquerque P&DC, as to which it was noted that the evaluators purposefully distinguished between BMCs and other types of postal facilities because dissimilarities of mail processing operations, types of mail handling equipment, and floor equipment densities seriously affect the contractor's experience. In the project manager's view, P&DCs and BMCs are "extremely different," and the working environment for a contractor in a BMC is much more difficult.

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submissions recite terms of the PM as relevant to this purchase. As discussed at footnote 8, the later regulation substitutes "capability" for the previous regulation's "responsibility."

⁶ Contrary to this contention, the capability to obtain project bonds has not been viewed as an adequate substitute for financial responsibility. *Oertzen & Co. GmbH*, Comp. Gen. Dec. B-228537, February 17, 1988, 88-1 CPD & 158, cited in *Cimpi Express Lines, Inc.*, P.S. Protest No. 88-57, December 15, 1988.

⁷ In so asserting, the protester misidentifies the Albuquerque facility, which is not a BMC but a Processing and Distribution Center (P&DC) and was so described in Advanced Lighting's offer.

DISCUSSION

The protester's objection to the fact that a second pre-proposal conference was held is untimely raised, since it was a matter of which the protester knew or should have known before offers were due, and thus required to be the subject of objection before offers were submitted. PM 3.6.4.b. In any event, the effect of holding the second conference was to enhance competition; we see no need to object to action which has that effect. *Cf. Ivey Mechanical Company*, Comp. Gen. Dec. B-272764, 96-2 CPD ¶ 83, August 23, 1996 (“[W]e have repeatedly approved of the issuance of amendments extending closing dates after the expiration of the original closing date when the result is enhanced competition.”)

The protester's concerns about the manner in which the offers were evaluated require more substantial analysis. The solicitation's presentation of the evaluation scheme was awkward and inconsistent. PM 2.1.7 sets out a discussion of solicitation evaluation factors. Among its provisions are the following:

There are two sets of performance evaluation factors: Proposal-specific factors which are specific to the particular purchase, and supplier-specific factors “central to the supplier being evaluated”⁸ (2.1.7.a.1) although “[t]here may be overlaps between [the two sets of factors, as when] proposal-specific factors cover areas which are also considered in evaluating a supplier's capacity.” 2.1.7.a.3. “Risk of successful performance should almost always be considered as a performance evaluation factor” either as a separate factor or as an element of other factors. 2.1.7.b.

“Solicitations must indicate the relative significance of the identified performance evaluation factors and the relationship of those factors to the solicitation's cost/price factors. All evaluation factors must be clearly stated in enough detail to give suppliers a reasonable opportunity to understand the aspects of value important to the Postal Service. . . . When factors other than price are used, their relative significance should correspond to their value to the Postal Service.” 2.1.7.d.

Performance evaluation factors are to be treated separately from cost or price factors, the relationship of the cost/price factors to the performance

⁸ There are two supplier-specific factors, past performance and supplier capability. 2.1.7.c. “While the key elements of supplier capability . . . are similar to the key elements of responsibility as defined in the Postal Service's previous purchasing regulations. . . , the two terms differ in that capability is considered and established in the supplier-selection process, while responsibility was considered and determined separately from the evaluation of offers prior to contract award.” *RAF Technologies, Inc.*, P.S. Protest No. 98-24, January 11, 1999 (citations omitted). Past performance and supplier capability “must be evaluated during the purchasing process” (2.1.7.c.1.) unless award is to be made solely on the basis of price (as, for example, where offerors have been prequalified, but in that case, those factors “should be reexamined before award” (2.1.7.d)).

evaluation factors is to be stated in general terms, and solicitations “should not establish a strict mechanical relationship between the cost/price factors and any other factors.” 2.1.7.f.

This solicitation failed to distinguish between the performance evaluation factors (and the two classes of those factors) and the price factors, failed to identify risk as a performance evaluation factor, failed to include the mandatory performance evaluation factor of supplier capability,⁹ failed to treat price and performance evaluation factors separately, described inconsistently the relationship of the performance evaluation factors and their relationship to the price factors, and applied a mechanical formulation to the performance/price tradeoff.¹⁰ Further, the description of the past experience factor was insufficiently detailed to alert offerors that prior BMC experience on projects unrelated to lighting upgrades was a significant evaluation criterion.¹¹

Further, the offers were evaluated arbitrarily and illogically with respect to two of the listed evaluation factors. With respect to the evaluation of price, no explanation is offered why 30 points was assigned to the highest priced offer. Had the prices been ranked in a ratio relationship to the lowest offer, the highest ranked offer would have received only 20 points, ($\$1.086/\2.665×50) and each of the intervening offers' scores would have been reduced. (As so calculated, Buckeye's price score would have been 35, not 44.)

With respect to the evaluation of financial capability, it is not clear why offerors' total assets were the only factor considered;¹² why information which could be as much as 12 months old, rather than current data, was determined relevant to the consideration of current capability; and why offerors were afforded additional credit for assets in excess of those demonstrative of their capability to perform this particular job.

While these flaws in the selection and application of the solicitation's evaluation criteria are serious, only two of the flaws relate to the protester's objections to the evalua-

⁹ Financial capability (considered here as “financial responsibility”) is only one of seven enumerated components of supplier capability. 2.1.7.c 3.(b).

¹⁰ No criteria were stated in provision M-1, which asserted that performance factors would be considered in descending order of importance. Instead, the criteria were listed on the Offer and Award sheet without any reference to their relative importance. The contracting officer, however, applied M.1's descending order to the listed factors. Price was mechanically considered as the most important factor by assigning the price factor a specific point factor.

¹¹ The evaluation criterion was “projects of similar scope,” presumably a reference to relamping projects, and the “Instructions to Prospective Offerors,” while soliciting information on “largest completed jobs” and postal and government jobs, did not indicate the significance of BMC experience.

¹² Other relevant criteria might include, e.g. available working capital; the ratio of the offeror's assets to liabilities, and its ratio of total debt to net worth. (*Dohrman Manufacturing Co., Inc.*, P.S. Protest No. 84-8, March 13, 1984.)

tion. The protester objects to the manner in which its financial responsibility was evaluated. While we agree with the protester that the manner in which the offers were scored appears to lack a rational basis, we do not agree with its contention that it was found financially nonresponsible. In any event, the protester's financial capability was not the ground on which it was denied the award.¹³

It is clear from both the November 10 letter to the protester and from the subsequently submitted memorandum discussing the evaluation of proposals that Advanced Lighting's proposal was found to be unsatisfactory because its offered price was viewed as unrealistically low, and that the low price jeopardized the protester's successful completion of the work,¹⁴ and that Advanced Lighting would not have received the award even if its evaluated score had exceeded Buckeye's. That conclusion was an assessment of the risk associated with Advanced Lighting's proposal, which, as noted above, was an issue required to be evaluated, even though the solicitation was defective for failing to identify it as an evaluation criterion.

We do not understand the protester to dispute seriously the premise that the realism of its offer cannot appropriately be considered. Instead, the protest contends that its offer was realistic, and that if there were concerns about its realism, the Postal Service was obliged to inquire about them.¹⁵ Further, it has contended in the course of the protest that the Postal Service should have considered its success on other government projects, as well as its "discount buying power" as evidence of the reasonableness of its price. These generalized contentions are not persuasive. We note, for example, that while the contracting office challenged the reasonableness of the protester's material costs, the final paragraph of the evaluation noted that even accepting those costs, the proposal lacked sufficient funds for the estimated labor hours necessary to complete the work. An offeror's "buying power" is not a factor with respect to the cost of labor hours. Advanced Lighting's contentions with respect to its material

¹³ "Where errors in the evaluations, when corrected, would not change the award decision, there is no prejudice to the protester." *Standard Register; Moore Business Forms, Inc.*, P.S. Protest No. 92-68, November 22, 1992. Because that is the case, the protester's further contention that it was not afforded sufficient credit for its experience as a result of its Albuquerque contract also need not be addressed.

¹⁴ "[B]ecause of the risk of poor performance when a contractor is forced to provide products or services at little or not profit is a legitimate concern the evaluating proposals, an agency at its discretion . . . may provide for a price realism analysis in the solicitation of fixed price proposals. The nature and extent of an agency's price realism analysis is a matter within the sound exercise of the agency's discretion." *GEC-Marconi Electronic Systems Corporation*, Comp. Gen. Dec. B-276186; May 21, 1997, 97-2 CBD ¶ 23 (citation omitted). The risk associated with low price may also be considered in the absence of an explicit price realism evaluation factor when "the RFP either expressly or implicitly encompasses offeror understanding in its evaluation factors" (*SEEMA, Inc.*, Comp Gen. Dec. B-277988, December 16, 1997, 1997 U.S. Comp. Gen. LEXIS 490).

¹⁵ The protest's complaint that the Postal Service's failed to discuss these concerns overlooks the fact that it was asked to provide a breakout of its line item costs. This communication constituted discussions. PM 4.2.5.c 1.

costs and its generalized disagreement with the evaluation are thus insufficient to call the evaluation into question. *SEEMA, Inc., supra.*

The protest is denied.

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