

May 18, 2000

P.S. Protest No. 00-02

SOUTHERN INDUSTRIAL SALES, INC.

Solicitation No. 273786-99-A-0021

DIGEST

Protest of award of construction contract for installation of dock seals is denied. Protester could not rely on oral representation that brand-name seals had to be furnished when solicitation provided that equal items could be substituted; contracting officer's determination that substitute was an equal was not arbitrary or improper.

DECISION

Southern Industrial Sales, Inc., (Southern) protests award of a contract to Serco, Inc. for dock seals at the Jackson, MS, Processing and Distribution Center.

Administrative Services, Mississippi District, Jackson, MS, issued solicitation 273786-99-A-0021 for the replacement work; it described the 27 dock seals to be furnished, in part, as follows:

2.1 Manufacturer

- A. . . . [P]roducts of Kelley Tufseal Corporation are specified herein. Other manufacturers having equal products shall be consider them [sic] as equals.
- B. Foam Dock Seals: Shall be DC Series
- C. Dock Seals shall consist of three full-recovery foam pads bonded to formed steel on sides and head.
- D. Base Fabric Cover to be "TS-55" or equivalent.

Paragraph G.20, Materials and Workmanship, provided in part as follows:

a. . . . Unless otherwise specifically provided, reference to any equipment, material, or patented process by brand name, make, or catalog number establishes a standard of quality only. The supplier may substitute any equipment, material, or process that the contracting officer finds to be equal to that named. To obtain approval to use a different equipment, material, or process, the supplier must furnish the contracting officer the manufacturer's name, the model number, and other identifying data and information regarding the nature and performance of the proposed substitute.

The solicitation also contained Paragraph K-15, Brand Name or Equal, providing that offerors proposing alternatives to brand-name items specified were to submit information regarding the substituted item with their proposals.

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." No "other factors" were listed elsewhere in the solicitation, with the result that award was to be made on the basis of lowest price. *Madonia Electric, Inc.*, P.S. Protest No. 99-22 July 9, 1999.

Three offers were received August 31, 1999, of which that of Serco, Inc., was the lowest priced at \$24,800. Serco's offer, submitted on the Postal Service forms included in the solicitation, but without the references which the solicitation asked for, did not identify the dock seals that it proposed to provide.¹ A second offeror, whose price was slightly higher than Serco's, proposed an alternate but was found deficient for other reasons. Southern, whose price was significantly higher than the other two offers, proposed the specified Kelley Tufseal dock seals.²

Serco's offer was accepted by the Postal Service on November 15 and it was advised to proceed with the work by letter of that date. By letter dated December 16, the contracting officer advised the other offerors of the award.³ By letter dated December 22,

¹ That information apparently was contained in project submittals which the project manager reviewed just prior to contract award.

² Southern's offer was a letter quotation accompanied by a page of references; it did not return pages 1 and 2, Offer and Award, Fixed Price Construction, and pages 47 and 48 of the solicitation, on which various signatures and items of information about the offeror's business status, its taxpayer identification number, and the like were to be provided.

³ The contracting officer's statement includes a recital of various delays before and after November 15 due to difficulty reaching Serco's representatives. It appears that Serco's acknowledgement of receipt of the award was received "in early December," and that there was further delay in preparing the notices of award as "the file was passed between two [contract technicians]." Purchasing Manual (PM) 4.2.7. a. provides, in part, that notices of award are to be provided to the unsuccessful offerors "within three days after award." Here that date was not met.

Southern protested to the Jackson office, stating its “belief that the company awarded the project did not quote per specifications.”

Following receipt of the protest letter, an inquiry established that Serco’s offered dock seals differed from the brand-name item in two significant respects: The seal fabric was Hypalon 40, not TS-55, and the seals had a lumber, rather than steel, backing. An e-mail message from the postal project manager notes that the Hypalon fabric appeared to be “more pliable or malleable than TS-55” and was more expensive than the specified fabric. Further, he concludes that the lumber backing, which he “overlooked (missed)” in reviewing the shop drawings, appeared to be a satisfactory substitute since the seals were “under a covered overhang” and the lumber was covered by the fabric.

The contracting officer’s January 10 letter responded to Southern’s protest. He noted Southern’s failure to complete various pages of the solicitation,⁴ stated, with respect to the substance of its protest, that the contracting officer had “reviewed submittals proved by the successful offeror and determined that the product offered adequately satisfies the term of the solicitation,” and denied the protest.

By letter of January 12, Southern protested to this office. The protest contends that Southern “quoted per plans and specifications,” that it had been advised “that only bids [sic] that were per the written specification would be considered.” The protest contends that the Jackson office acknowledged that “it did approve material that was inferior to the written specification” but that the material had already been “approved and manufactured.”

The contracting officer’s report includes a further statement from the postal project manager and statements from the current contracting officer and his predecessor. The project manager’s statement restates the substance of his earlier e-mail, including his belief that the fabric and lumber are acceptable substitutes. It also notes that following the denial of the initial protest to the contracting officer, on January 11, Serco was directed to proceed with the installation of the door seals. The contracting officer’s statement notes that the project manager had been aware that the awardee’s offered dock seals used an alternate fabric, but was unaware that they had wooden, rather than steel, backing. Noting, however, the project manager’s satisfaction with

⁴ Similar comments are contained in the contracting officer’s statement, and the protester has taken exception to them. The matter does not require extended comment. The contracting officer’s contention that because it did not submit the required forms, “[a]ward could not have been made to . . . Southern Industrial,” is incorrect. The admonition in paragraph 5 of page 1 of the solicitation that “failure to follow the instructions above [to make entries on and return pages 1, 2, 47, and 48 of the solicitation] could result in the rejection of your proposal” did not *require* the rejection of a proposal for that reason. Had Southern’s offer otherwise been under active consideration, the omitted information could have been requested by the Postal Service and supplied by the offeror. Southern’s objection to the fact that Serco was allowed to supply its references belatedly is similarly without merit.

the substitutions, and the fact that the seals had already been manufactured, he had authorized their installation.

The protester's response to the contracting officer's statement takes exception to the project manager's conclusion that the substituted fabric is a satisfactory "equal," offering "government conducted test reports" to demonstrate T5-55's superiority, and contends that wood is not a satisfactory substitute for steel. The protester asserts that the Tufseal dock seals will last three times longer than Serco's substitute.

DISCUSSION

As noted above, this construction contract contained two different provisions with respect to the specification of brand-name items.

PM 2.3, Specifications and Statements of Works, provides at 2.3.1.c. that whenever commercial products will meet postal needs, product descriptions must be used instead of specifications. A product description includes the identification of one or more known acceptable brand-name products, PM 2.3.1.c 2(b), and, if fewer than three brand-name products are identified, PM 2.3.1.c 4 provides that if the product description lists fewer than three brand-name items, the solicitation shall include "a description of the item's essential characteristics, such as material, size, or capacity. . . ."; 4(a), and provision 2-8, Brand Name or Equal, 4(c). That provision was included in this solicitation at K.15.

However, PM 2.3.1.c 4 begins by excepting construction specifications from its requirements, including the requirements of 4(a) to list essential characteristics and of 4(c) to include the Brand Name or Equal clause. The exception exists because PM 2.3.4, Construction Specifications, provides that, consistent with PM Clause B-63, Material and Workmanship, (which appeared here at G.20), construction contractors may, after award, "seek approval to substitute equal products or processes for those specified by brand-name" unless the solicitation identifies products or processes that may not be substituted after award. We understand this latter clause to be the one which governs the substitution of materials in this construction contract.

Contrary to the protester's assertion that it was improper for an offeror to propose an alternative to the listed brand-name dock seal, the successful offeror could propose an equal substitute pursuant to the Materials and Workmanship clause. The protester's assertion that it received oral advice from the project manager that no substitutions could be made is unavailing. Not only would such advice have been inherently inconsistent with the plain terms of the solicitation, but the solicitation included, at provision K.5, Explanation to Prospective Offerors, the advice that "[o]ral explanations or instructions will not be binding." "[T]his language . . . clearly precludes any offeror from relying upon oral advice given prior to the proposal due date" *Owens Roofing Inc.*, P.S. Protest No 91-75, December 3, 1991.

To the extent that the protester contends that approved substituted dock seals were less satisfactory than the brand-name seals which it had proposed to supply, it involves the area of the technical acceptability of the proposed alternative, a matter where our review is limited:

This office will not substitute its judgment for that of the contracting officer or disturb his evaluation of an offer's technical acceptability unless it is shown to be arbitrary or in violation of procurement regulations.

TLT Construction Corp, Inc., P.S. Protest No. 89-75, January 18, 1990. Where, as here, the solicitation provided for award on the basis of price and the solicitation provided for the consideration of equal alternatives, we cannot conclude that the determination made was arbitrary, and we decline to disturb the award. Contracting personnel should, however, undertake to assure that future solicitations do not overstate the Postal Service's requirements. See, e.g., *Office Systems of Florida, Inc.*, P.S. Protest No. 91-70, December 6, 1991.

The protest is denied.

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Contract Protests and Policies