

June 16, 2000

P.S. Protest No. 00-05

SHINE MASTER SERVICES, INC.

Solicitation No. 363199-00-A-0087

DIGEST

Protest of award of contract for vehicle washing services is dismissed in part and denied in part. Contention that various post office officials improperly refused to provide protester with information about postal purchasing procedures is not within the scope of the protest procedure and is untimely; contention that the solicitation terms were inconsistent with respect to the nature of the services to be performed is also untimely; contracting officials did not improperly withhold information; discussions to obtain lower price were appropriate; and conjecture that awardee might not intend to perform fully does not preclude award.

DECISION

Shine Master Services, Inc., protests its failure to receive award of a contract for vehicle washing services at two locations in Portsmouth, VA.

Shine Master's president, Mr. Minns, describes Shine Master as "a small disadvantaged minority owned auto detailing and pressure washing business." The protest recites Shine Master's repeated efforts "between 1998 and August, 1999," to obtain information about the Postal Service's vehicle washing needs and about the Postal Service's purchasing procedures from various postal facilities in the Hampton Roads, VA, area. As part of these efforts, in August, 1999, Mr. Minns left his card with Mr. Robert Linton of the Portsmouth post office. Having heard nothing from the Postal Service, in mid-January Shine Master submitted a Freedom of Information Act (FOIA) request to the office of Senator Robb of Virginia.¹ The request sought the identity of the pur-

¹ The protest suggests this happened around January 18. The contracting office's report includes a copy of Shine Master's January 11 letter to the Senator and the Senator's February 10 letter transmitting it to the Postal Service's Government Relations office, which includes that office's received stamp dated February 22. Shine Master received a February 8 letter from the senator noting the referral.

chasing office responsible for vehicle cleaning services in Virginia, “a copy of the public procurement policy of the U. S. Postal Service . . . applicable to procurement of vehicle cleaning services,” and copies of existing postal contracts for vehicle washing in Virginia.²

On January 14, the Purchasing and Materials Service Center, Greensboro, NC, issued solicitation 363199-00-A-0087 for Portsmouth’s vehicle washing services. The solicitation was sent to nine prospective offerors, including Shine Master. Shine Master had been one of three prospective sources identified on the request for the purchase submitted by Mr. Linton of the Portsmouth post office.³

Among the solicitation’s provisions were the following:

3.1 Instructions to Offerors – Commercial Items . . .

* * *

- f. Contract Award: The Postal Service intends to evaluate offers and award a contract without discussions with offerors. Therefore, the offeror’s initial offer should contain the offeror’s best terms from a price and technical standpoint. However, the Postal Service reserved the right to conduct discussions if later determined by the contracting officer as necessary. The Postal Service may reject any or all offers . . . ; accept other than the lowest offer, and waive informalities and minor irregularities in offers received.

* * *

3.4. Evaluation — Commercial Items . . .

- f. The Postal Service will award a contract resulting from its solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Postal Service, price and other factors considered. The following performance evaluation factors shall be used to evaluate offers:

² The P&MSC received the FOIA request from Government Relations by facsimile on March 3. The contracting officer’s statement includes the March 7 reply to the request, which identifies the P&MSC as the purchasing office and Procurement Manual (PM) 4.3.1, Commercial Purchasing, as the portion of the purchasing regulations applicable to these purchases, states that the PM is available for purchase through the Superintendent of Documents and available for inspection at the Postal Service, and advises that copies of the requested contracts would be made available upon receipt of the appropriate fee for research and document retrieval.

³ The timing recited in footnotes 1 and 2 indicates, contrary to the protest’s explicit assertion, that Shine Master’s inclusion in the Portsmouth competition was not related to the FOIA request.

1. Price and other price related factors.
2. Supplier Specific Factors:
 - (a) Past Performance

* * *
 - (b) Supplier Capacity
3. Proposal Specific Factors:
 - (a) The supplier[']s understanding of the requirement
 - (b) The supplier[']s management plan . . .
 - (c) The qualifications and experience of the supplier's keypersonnel
 - (d) The superiority of the supplier's technical approach
 - (e) The supplier's delivery terms

Proposal specific and supplier specific performance evaluation factors, when combined, are considered to be . . . as important as price and price related factors. Price . . . will not be the determining factor in choosing among all offers which meet the minimum acceptable performance evaluation factors.

Attachment 1 to the solicitation set out the numbers and types of vehicles to be washed at the two locations and the estimated number of washings over the two-year contract term. The headings on the attachment read as follows:

Washing for Vehicle Item No.	Capacity [<i>i.e.</i> , vehicle type]	QTY	Estimated Number of Washings	Washings Only Per Job Price Per Job
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A note on attachment 1 stated: "Vehicles are to be washed and cleaned completely, inside and out. Clean all windows and mirrors. (See Attachment 2 – Scope of Work.)" Attachment 2 elaborated on various environmental and other issues, and included this description of the service to be provided:

Vehicles are to be thoroughly cleaned, interior and exterior, including the removal of all road films. All windows/windshields must be thoroughly cleaned and wiped free of streaks. All interiors and exteriors are to be dry on completion of washing.

Five offerors submitted proposals. The contracting officer evaluated the proposals by multiplying the cost per washing times the estimated number of washings and the quantities of each vehicles.

All offerors' prices exceeding the funding which had been provided for the purchase. Accordingly, the contracting officer contacted each offeror to inquire if the offeror wished to revise its pricing.⁴ Three of the offerors reduced their prices; two, including Shine Master, declined to do so. The lowest price, as revised, was that of Tidewater Power Cleaners. According to the contracting officer's file memorandum concerning the award, Tidewater, the incumbent contractor, was highly regarded by the Portsmouth post office for the quality of its work. Tidewater received the award on February 24 at an estimated price of \$16,640. The contracting officer's statement recites that Mr. Minns inquired about the status of the award the next day. Advised of the award and of the estimated price, he contended that it was in error, and asserted that he would challenge the award.

Shine Master's protest, dated February 25, was received in this office on February 28. It complains that Shine Master was disadvantaged as a "first-time bidder" because it had not been furnished a copy of the Postal Service's purchasing regulations, that it was misled by the solicitation's advice to make its best offer in its initial offer, and that the contracting officer's conduct of discussions was improper. The protest also asserts that had Shine Master known it was within the "competitive range" when the contracting officer called, it would have revised its offered price, but that it did not do so because it had been denied access to the Postal Service's purchasing procedures.

The protest also complains about various inconsistencies in the solicitation's terms. These matters were apparent before offers were due, are thus now untimely raised under our protest regulation, PM 3.6.4.b, which requires them to be raised in a protest received before offers are due.⁵ The protester also asserts that in her telephone conversation subsequent to the award, the contracting officer advised that interior cleaning would not be required at each washing, since keys might not be available at each washing. Shine Master asserts, based on that discussion, that the award may be flawed because the awardee may have proposed on the basis of performing less work than the solicitation required.

⁴ According to the protester, in negotiations with it, the contracting officer asked if it had offered its best price, and in response to requests to clarify why she was inquiring, stated that she could not explain.

⁵ One objection is that the 52 estimated number of washings per vehicle in the attachment is inconsistent with the solicitation's requirement that vehicles be washed every two weeks, which Shine Master calculates to require 48 washings over a two-year term. Shine Master appears to understand that "every two weeks" is the equivalent of "twice a month," which is clearly incorrect, but the matter is of no consequence. Since offerors supplied only unit prices per wash, the relative price rankings of the offerors would not vary regardless of the figure by which those figures were extended. The other objection is a perceived distinction between "washing only" as stated on Attachment 1 and the solicitation's and specification's requirements elsewhere for washing and interior cleaning. The contracting officer asserts that "washing only" is used in contradistinction to contracts calling for "washing and polishing."

The contracting officer's response to the protest notes that she had "many . . . lengthy" telephone conversations with Mr. Minns to explain the procedures to respond to the solicitation. While she regrets any misunderstandings that may have remained, she believes that he was afforded the same opportunity to participate as other offerors. The contracting officer asserts that the discussions which she had with Shine Master and the other offerors were a reaction to the initial prices which exceeded the postal estimate, and were consistent with the terms of provision 3.1 f. She contends that seeking "better prices than that originally received" was "a reasonable action" which was "in the best interests of the Postal Service."

With respect to the issue of interior cleaning, the contracting officer asserts that the issue of key availability is worked out in the course of performance, and interior cleaning is comprehended within the scope of washing only as the solicitation is written.

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

DISCUSSION

The protester's principal contention is that it was harmed by the Postal Service's failure to respond to its requests for information about the Postal Service's purchasing policies which it made to individuals at Virginia post offices prior to and through August, 1999, and in its January, 2000, FOIA request. The inquiries to Virginia postal officials are outside this office's protest jurisdiction. First, the actions complained of do not involve "the terms of a solicitation, the award or proposed award of a contract, or any other action relating to the solicitation or award of a contract," PM 3.6.2.b (defining "protest"). Second, if it were a protest, it was untimely, as it was not "received not later than 10 days after the basis of protest is known or should have been known," that is, shortly after Shine Master requested the information but was denied it in (or before) August, 1999. To the extent that the protest objects to the lack of response to the FOIA request, it is without merit because the FOIA request was the subject of a timely response upon its receipt. The Postal Service is not responsible for any delay occasioned by the fact that the request was submitted through a U.S. Senator.

Shine Master's protest does not recite any undertaking to obtain information about the purchasing procedures from the contracting officer once it received the Portsmouth solicitation, or that any such inquiry was rebuffed. The contracting officer, on the other hand, states that she spent considerable time explaining the purchasing process to the protester. This record does not establish any basis to conclude that Shine Master

was improperly denied access to information about postal purchasing procedures in the course of the purchase.⁶

Shine Master's remaining contention is that the contracting officer conducted the telephonic discussions with it improperly, and that it was hampered in its reaction to those discussions by its lack of information about the Postal Service's purchasing procedures. Shine Master characterizes these discussions as indicating that it was in the "competitive range," but contends that because of its lack of familiarity with postal purchasing procedures, it did not understand the significance of that fact, and how to react to it.

The "competitive range" concept is no longer a feature of the Postal Service's purchasing procedures. Under the Postal Service's previous purchasing procedures as set out in the Purchasing Manual (Pub. 41), whenever discussions were held with any offeror, discussions also had to be held with all other offerors whose offers fell within the competitive range, that is, "all proposals that have a reasonable chance of being selected for award, either as submitted or as revised following discussions." Pub 41, 4.2.5.g. 1, 2(a). If the Postal Service had no issues which needed to be resolved with an offeror in the competitive range, the requirement for discussions could be met by requesting that offeror's "best and final offer," the common last step in the closing of negotiations. Pub. 41, 4.2.5.g. 4, *See also, e.g., Weber's White Trucks, Inc.*, P.S. Protest No. 91-63, December 16, 1991.

The PM,⁷ on the other hand, provides as follows with respect to discussions at PM 4.2.5.c.:

⁶ The Postal Service makes information about its purchasing programs available in many ways. As the FOIA response noted, the PM is available for purchase through the Superintendent of Documents, and available for inspection at the Postal Service. The PM and other purchasing information can also be found on-line on the Postal Service's website at www.usps.com/business.

Further, the Postal Service uses numerous resources to encourage the participation in its purchases of small and minority vendors like Shine Master. Over 150 supplier diversity coordinators and diversity development specialists participate in and disseminate information through trade and industry business opportunity fairs, seminars, conferences, workshops and the like. We are advised, for example, that the Greensboro P&MSC works with the Carolinas Minority Supplier Development Council, the MD-DC Minority Supplier Development Council, the Tidewater Regional Minority Purchasing Council and the Virginia Regional Minority Supplier Development Council, all affiliates of the National Minority Supplier Development Council. Purchasing opportunities are publicized through notices sent to trade/advocacy groups such as the Hispanic Chamber of Commerce, National Association of Women Business Owners, US Pan Asian American Chamber of Commerce, Women's Business Enterprise National Council, Organization of Chinese Americans, National Congress of American Indians, National Black Business Council. USPS procurement assistance (with contacts) is listed in the resource guide for the Small Business Administration (including field offices) and in major Government purchasing-related publications. Postal telephone and fax phone numbers, e-mail address and a link to the Postal Service's "Selling to the USPS" web page are also listed on the Small Business Administration's Office of Small & Disadvantaged Business Utilization Directory webpage.

c.

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2. Purpose. Discussions maybe held in order to (1) allow for the clarification of matters contained in a proposal which raise questions regarding acceptability or evaluation score; (2) address suspected mistakes or questionable assumptions; and (3) obtain the best value to the Postal Service and establish final contract terms and conditions. . . .

3. Use

(a) During the evaluation process, including during oral presentations, discussions maybe held with any supplier in order to clear up misunderstandings or uncertainties or to gain a better understanding of the supplier's responses and intent regarding the solicitation's provisions including its performance factors, and any aspect of a supplier's proposal including price, in order to obtain a more informed comparison of the relative value of individual proposals.

(b) After proposal comparisons have been made, further discussions may be held to address any outstanding matters. These discussions 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.

The contracting officer does not dispute the protester's contention that she inquired whether it had propped its best price, but declined to explain why she was inquiring. The contracting officer asserts that seeking lower prices was consistent with the Postal Service's interest and thus with the solicitation's provisions allowing discussions. That view is consistent with PM 4.2.5.c 2.(3), *supra*. But if the objective was to

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⁷ The PM was issued on January 31, 1997. Its implementation was phased in, and it became applicable to all purchasing transactions on January 27, 2000. PM Transmittal Letter 1, January 1, 1997; Postal Bulletin 22016, January 27, 2000, p. 60.

secure a lower price, so advising offerors in the course of discussions would have been both appropriate and consistent with the PM's negotiation scheme.⁸

Shine Master asserts alternative objections to these discussions. On the one hand, it contends that it was disadvantaged in the discussions because it had relied on the solicitation's representation that discussions were not contemplated, and accordingly could not lower its price when given the opportunity to do so. On the other hand, it appears to assert that it could have lowered its price, but failed to do so because it did not understand why it was being asked if had offered its best price, since it had been denied access to the Postal Service's purchasing procedure.

Under the first alternative, Shine Master suffered no harm from the discussions. Its undertaking to make its initial offer its best offer was a choice which reflected its expectations. Had discussions not been held, it would have been in a better position than offerors who retained some pricing flexibility in the event discussions occurred. The tradeoff, of course, was the inability to revise its price in the event of discussions. Since the solicitation clearly indicated both the Postal Service's disinclination to conduct discussions as well as the possibility that they might occur, the burden of this choice must be borne by the offeror.

The second alternative fails because, as discussed above, we have previously rejected its minor premise, that Shine Master improperly had been denied access to the Postal Service's contracting procedures.⁹

The protester's final contention is that the award was improper because the awardee may have intended to perform fewer services than the solicitation required. The protester's assumptions of the awardee's intentions are mere conjecture, an insufficient basis for a successful protest. *American Airlines, Inc.*, P.S. Protest No. 84-72, December 14, 1984. In any event, the awardee's intentions have no relevance to the contract terms, which may be enforced as written.

The protest is dismissed in part and denied in part.

⁸ Both Pub. 41 and the PM would preclude "leveling" or "technical transfusion," (Pub. 41, 4.2.5.g 3.(b)(1),(2); PM 4.2.5.c 2.), and Pub 41 also precluded "auction techniques," such as indicating a price which must be met, or disclosing other offerors' prices (4.2.5.g. 3.(b)(3)), a form of "leveling" specific to price, but neither would preclude soliciting a lower price *per se*, or advising offerors why the request was being made.

⁹ Further, of course, the extent of injury would be wholly speculative. As the solicitation indicated, award was not to be based solely on price, but instead on a combination of price and other factors which were to be weighted equally with price. The record sheds no light on how Shine Master would have fared in such an evaluation.

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