

**July 27, 2000**

**P.S. Protest No. 00-08**

## **KLAASY WRAP**

**Solicitation No. 475630-00-A-0151**

### **DIGEST**

Protest of failure to receive contract for contract postal unit is sustained. Evaluation of apparently more favorable initial offer was flawed; consideration of protester's offer compared to offer of incumbent contractor to continue performance subsequent to first awardee's repudiation of its contract was arbitrary as based on objections to protester's offer and qualifications not identified in initial evaluation.

### **DECISION**

Ms. Helen Klaas, doing business as Klaasy Wrap, protests her failure to receive award of a contract to operate a contract postal unit (CPU) in Byram, MS, a station of the Jackson, MS, post office.

The contract for the CPU had been held by Schwartz Family Enterprises, Inc. (Schwartz). Schwartz' contract price had been \$41,000 per year. The contractor had sought an increase to \$65,597; the Postal Service had countered with an increase to \$51,000, which the contractor declined. Instead, Schwartz exercised its contractual right to terminate the contract on 60 days' notice. Pursuant to that notice, its performance was to end on April 9, 2000.

The Memphis Purchasing and Materials Service Center issued Solicitation 475630-00-A-0151 for the replacement service in Byram on March 15. It provided that offers would be evaluated on the basis of a business score comprised of suitability of location (25%), suitability of facility (35%), and ability to provide service (40%), which would constitute 45% of the final score, and a price score which would comprise 55% of the final score. Offers were due March 29.

Offers were received from Klaasy Wrap and from J-Tel Group, Inc. Ms. Klaas proposed to operate the CPU in connection with a new package wrapping business located in a shopping center which was under construction; J-Tel proposed to operate the CPU in an existing business offering cellular telephone and pager equipment and services. Each offer was found acceptable; as evaluated, J-Tel had a slightly higher

business score than Klaasy Wrap and a significantly higher price score. J-Tel's proposed annual rate was \$18,900; Klaasy Wrap's offer was somewhat higher than that of the Schwartz contract, although less than the amount which Schwartz had rejected.

The contracting office found J-Tel to be a capable supplier. The contracting officer's statement recites that the contract was awarded to J-Tel on April 3, and that J-Tel was advised of the award on that date. (The copy of the contract signed by the contracting officer, however, included "April 6, 2000" as the award date typed next to the contracting officer's signature. The contracting officer's statement does not resolve this discrepancy, but that date is inconsistent with the other documentation in the file as discussed below.)

Ms. Klaas was informed of the award to J-Tel in an April 4 telephone conversation. On April 5, J-Tel's president advised the Postal Service that "there was a problem with [it] being able to perform" said to involve increased costs imposed by its landlord and "additional costs associated with the operation of the CPU that [J-Tel had not been] aware of . . . ." The Postal Service initially advised J-Tel that it believed the contract to be binding, but that J-Tel might submit its issues in writing.

J-Tel subsequently asserted its need to revise its offer to \$48,000 per year. The Postal Service found that amount excessive in view of its estimate and the funds it had designated for the award, each slightly more than \$20,000 per year. After the Postal Service declined to accept the revised offer, J-Tel submitted a letter reciting its inability to perform. On April 8, the J-Tel contract was terminated by mutual agreement.

Urgently needing to continue CPU services in Byram, where postal customers rented 189 post office boxes, the P&SMC contacted Schwartz and inquired about the terms on which it was willing to continue to provide service. Schwartz offered to perform for \$60,000 per year. Agreement on that rate was reached, Schwartz withdrew its notice of termination, and its performance continued past April 9.

Klaasy Wrap's protest, dated April 11, objected to the conduct of the solicitation, making the following contentions:

- J-Tel should not have received the award because it did not control the site it proposed as the solicitation required, the site lacked internal space for the postal equipment and the sidewalk could not accommodate the necessary exterior postal boxes.
- J-Tel's offered price was not fair to itself, the Postal Service, or other offerors. The Postal Service should have known it was not in the best interest of the offeror or the Postal Service.

- Following J-Tel’s withdrawal of its offer, Ms. Klaas had expressed her willingness to have the contract facility operating on April 10; as the other remaining offeror, Klaasy Wrap should have received the contract, and efforts should not have been taken to reopen negotiations with Schwartz.

Responding to the protester’s specific points, the contracting officer’s statement contends that J-Tel’s offer was properly evaluated. It asserts that J-Tel’s proposal indicated that J-Tel “did control their space,” that the interior space was adequate, and that no exterior space was required by the solicitation. J-Tel’s offer was said to be within the Postal Service’s estimate based on the CPU’s 1999 revenue and that its technical offer met the solicitation’s requirements.

According to the contracting officer, all the following factors worked against an award to Klaasy Wrap: Once award was made to J-Tel, there was no mechanism by which Klaasy Wrap’s offer could be revived and considered without reopening the solicitation, an option which time did not allow. Construction at the Klaasy Wrap site would inconvenience postal customers, contingency plans would be needed if the construction was not complete by April 10, and it would be difficult for Klaasy Wrap’s employees to be trained to operate the CPU at the same time that they would be setting up its retail operation. Further, the Postal Service, which had agreed to waive the CPU bond requirement for J-Tel for a ten-day period because it was a going enterprise, was not prepared to waive the bond requirement for Klaasy Wrap, a new enterprise, and Klaasy Wrap could not commence service without the bond.<sup>1</sup>

Responding to follow-up inquires from this office, the contracting officer explained that the various risk factors associated with an award to Klaasy Wrap set out above would have given it a lower business score in comparison to Schwartz than it had received in comparison to J-Tel in the earlier competition. The contracting officer concluded that given the limited time before the continued service was needed, Klaasy Wrap “may not have had the capability to perform satisfactorily” and, in any event, “would not have been the most advantageous offer.”<sup>2</sup>

Replying to the contracting officer’s statement and her supplemental comments, Klaasy Wrap continues to take exception to the evaluation of the suitability of J-Tel’s

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<sup>1</sup> Handbook AS-707F, Contracting for Contract Postal Units, which set out the basis for this purchase, discusses the waiver of the bond requirement at 3.8.2.3. It provides that the bond may be waived in appropriate circumstances, but it also provides for contractors to deposit assets in lieu of a bond.

<sup>2</sup> The supplemental statement asserts that the Byram CPU “is only a temporary measure, as a new Postal Service station should be up and running within the year.” Nothing in the solicitation for the Byram service gave any indication of the limited term contemplated for the contract service. With respect to the further consideration of the protester’s offer directed below, the protester should have the opportunity to consider her desire to proceed in light of this limited term.

premises; notes that Schwartz's earlier negotiations for a contract increase appear to be premised on higher annual gross revenues than the contracting officer used in determining its estimate,<sup>3</sup> and disagrees with the contracting officer's re-evaluation of its offer. In that regard, Klaasy Wrap notes that offers were due on March 29 and evaluated on March 31, when Klaasy Wrap was found "technically acceptable and capable" for performance to start on April 10. Klaasy Wrap's facility was 100% complete as of March 31 and could have been made handicapped accessible in 24 to 48 hours; Klaasy Wrap was prepared to supply a bond and did not require a waiver of the requirement. Ms. Klaas notes her extensive experience in the retail trade and resents the suggestion that she could not operate her business and train her staff. She asserts that she is not a greater a risk that either the incumbent contractor or the other offeror.

Schwartz submitted comments as an interested party noting its benefits to CPU customers and supporting the contracting officer's conclusion that its offer was the most beneficial to the Postal Service.

## **DISCUSSION**

Viewed in retrospect, the chain of events outlined here does not reflect a particularly satisfactory solution to the need for the continuance of the Byram CPU. At the end of the process, the Postal Service finds itself paying slightly more for the services of its incumbent contractor than it was prepared to pay when that contractor sought a contract adjustment some three months before. In the meantime, it had expended significant postal resources and the time and effort of the prospective offerors to no apparently benefit over a result which a more considered negotiation strategy might have reached much earlier.

In the negotiated acquisition of contract units, the successful contractor is to be selected in accordance with the evaluation formula set out in the RFP. The assignment of a numerical score by the evaluator is an attempt to quantify essentially subjective judgments. Our review of such an evaluation is limited to whether the evaluation was arbitrary or in violation of any applicable procurement regulations. We do not substitute our judgment for that of the evaluator or redo the evaluation.

*Neil Deterding*, P.S. Protest No. 94-53, February 25, 1995, *citing Illeane M. Pierluissi*, P.S. Protest No. 87-02, March 19, 1987.

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<sup>3</sup> That conclusion is not completely evident from the document cited, which might reasonably be read as suggesting an annual price about 20% greater than the contracting officer's suggested figure. That figure remains significantly lower than Klaasy Wrap's offered price.

The evaluation of J-Tel's offer seems to have been superficial. While the evaluators noted the satisfactory nature of J-Tel's existing facility, neither they nor the contracting personnel apparently inquired about the nature of J-Tel's lease of that space.<sup>4</sup> Further, the contracting officer's analysis of J-Tel's offer made no reference to the reasonableness *vel non* of its proposed annual rate, even though it was significantly lower than both the incumbent's price and the price of the other offer received. While the Postal Service obviously desired a lower price, and was eager to accept J-Tel's offer because it was consistent with its objectives in that regard, it failed to evaluate whether J-Tel could be expected to perform satisfactorily at its offered price.<sup>5</sup>

The contracting officer's treatment of J-Tel's claim of inability to perform subsequent to award is difficult to understand. Although J-Tel was initially advised, correctly, that the contract, once accepted by the Postal Service, was binding, when J-Tel thereafter caused an anticipatory breach of its contract by advising that it would be unable to perform, the contracting officer did not hold J-Tel to its bargain. The failure to do so suggests that that some error in the award or some other problem may have been perceived as preventing its enforcement.

Having accepted J-Tel's breach, the Postal Service found itself with an urgent need for a replacement for Schwartz' soon-expiring services. The alternatives which it considered were unnecessarily limited, and the justifications for some of the conclusions reached with respect to the available alternatives were less than fully persuasive. As to the former, no consideration appears to have been given to short term alternatives such as negotiation with Schwartz for a contract extension of limited duration or the provision of the needed postal services temporarily by a means other than contract; either approach might have allowed a recompetition or alleviated the short-term concerns expressed about Klaasy Wrap's proposal.

As to the latter, consideration of Klaasy Wrap's recent proposal would not have required that the Byram requirement be resolicited; the compelling urgency of the need

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<sup>4</sup> While the contracting officer asserts that J-Tel represented that it "did control their space," nothing in the protest file, including J-Tel's proposal, provides any information about the nature of that control (including its term, etc.). Subsequent to the award, J-Tel advised that its landlord was requiring a higher payment and that J-Tel "would have to sign a 2-year lease," facts consistent with the protester's understanding, said to be confirmed by J-Tel's landlord, that it was leasing month-to-month.

On this record there is no basis to support the protester's objection to the evaluation of the suitability of J-Tel's offered facility.

<sup>5</sup> This is not to say that a CPU operator's price must equal or exceed its costs. *Cf.*, *Jaylor Graphics*, P.S. Protest No. 91-95, February 19, 1992 (noting that both protester (the prior contractor) and successful offeror had contracted to provide CPU services on terms below their costs for reasons of service to their customers or community service). Where, as here, however, the benefit to J-Tel's related business of the traffic generated by the CPU is not inherently obvious, some inquiry into the offeror's business expectations in the course of offer evaluation would not have been amiss.

would support its noncompetitive consideration. (See Purchasing Manual 3.5.5.d. 2.(a)(3).) All of the concerns expressed with respect to Klaasy Wrap's proposal *vis a vis* Schwartz' proposed contract extension could have been raised just as relevantly in the course of the initial evaluation. The construction at Klaasy Wrap's facility and the need for contingency plans to deal with it, the ability of Klaasy Wrap's personnel to receive CPU training while starting up the new facility, and Ms. Klaas' lack of previous management experience all should have presented the same concerns when her offer was initially evaluated eight or nine days before. That they were not strongly suggests their lack of real relevance in the subsequent consideration. Since Klaasy Wrap's offer should have been viewed as more advantageous than Schwartz' offer if evaluated in a manner consistent with the solicitation,<sup>6</sup> the evaluation of Schwartz' proposal as preferable to the protester's proposal was arbitrary.

"In an appropriate circumstance, we may direct the re-evaluation of offers on a basis consistent with the evaluation scheme set out in the solicitation." *Neil Deterding, supra*. That decision recognized, however, that the contracting officer could have rationally concluded that the circumstances involved in a particular CPU solicitation required an adjustment of the evaluation scheme, and provided the contracting officer the opportunity to make such revisions if they were required. If they were not required, the decision directed the re-evaluation of offers in a manner consistent with the evaluation scheme.

Similarly, we remand this matter to the contracting officer to determine whether the evaluation scheme for this solicitation requires adjustment. If it does, the protester and the incumbent should be advised of those adjustments, and their proposals should be evaluated pursuant to the scheme as revised. If adjustment is not required, the Schwartz contract should be terminated on notice pursuant to its terms and award made to Klaasy Wrap.<sup>7</sup>

The protest is sustained.

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<sup>6</sup> Klaasy Wrap's evaluated score was 91.9 points. If Schwartz had been given a perfect business score, its \$60,000 annual price, compared to Klaasy Wrap's price, would have contributed to an overall score for Schwartz of 88.8 points

<sup>7</sup> We assume the protester's continued interest in performing the service on the terms offered, but note that in a negotiated procurement, an offeror always has the opportunity to revise or withdraw its proposal prior to its acceptance.