

**January 22, 2001**

**P.S. Protest No. 00-23**

**LIBERTY DIVERSIFIED INDUSTRIES**

**Solicitation No. 475630-00-A-0180**

**DIGEST**

Protest of evaluation of offers for corrugated boxes is denied. Protester does not meet its burden in objecting to technical evaluation of successful offeror; as evaluated, it and successful offeror were substantially similar. While offers were incorrectly evaluated on the basis of f.o.b. origin prices inconsistent with the solicitation's terms, successful offeror remains low when f.o.b. destination prices are evaluated.

**DECISION**

Liberty Diversified Industries (Liberty) protests award of a contract for a lot of corrugated boxes to Skyline Container Corporation (Skyline) under solicitation 475630-00-A-0180.

Solicitation -0180 was issued July 17, 2000, by the Memphis, TN, Purchasing and Materials Service Center, seeking requirement contracts for six sizes of corrugated boxes used to transport mail, specifically parcels and bundles, in mail processing operations. Lot 3, at issue here, involved deliveries to postal facilities in the Mid-Atlantic area. Solicitation attachment 4 set out estimated quantities for the lots.<sup>1</sup>

The solicitation contemplated a three-stage process. "In the first stage, pre-qualified offerors will . . . agree[] to the terms of the solicitation by submitting the required documents." In the second stage, the pre-qualified offerors were to participate in "an online [reverse] auction called a Competitive Bidding Event [CBE]" which was to be conducted by FreeMarkets, Inc., on behalf of the Postal Service. In the third stage, offerors who bid were to provide additional pricing information.

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<sup>1</sup> The following figures related to lot 3:

Item	Est. Quant.	Percentage of Est. Quant.	Percentage Used in CBE
Box Type 1	257,896	35.9%	35%
Box Type 2	219,406	30.6%	30%
Box Type 3	0	0.0%	1%
Box Type 4	237,803	33.1%	32%
Box Type 5	2,880	0.4%	1%
Box Type 6	0	0.0%	1%

Section M.3 of the solicitation explained the basis for award:

- a. Award will be made to the responsible offeror whose proposal offers the best value to the Postal Service, (i.e., a combination of price, price-related factors, and/or other factors). The primary areas to be used in determining which proposal offers the best value to the Postal Service are listed below in descending order of importance:

Number	Evaluation Factor
1.	Written proposal from prequalification
2.	Price

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

The “written proposal from prequalification” was a response to the prequalification request, which set out five evaluation factors with the following weights:

1.	Production Capability	30
2.	Program Management and Service Capability	25
3.	Current and Past Performance	25
4.	Financial Responsibility	10
5.	Ability to Conduct Electronic Business via Web Based Purchasing	10

The solicitation sought pricing for boxes ordered in two different quantities; 1,000 box orders (“MX”) and truckload orders (“TL”). In the CBE, offerors were to specify an f.o.b. origin price per MX for each box size, and an f.o.b. destination price per MX for each box size to each of the identified destinations (e.g., for lot 3, Charlotte, NC; Louisville, KY; Richmond, VA; and “all others,” thirty-one other Mid-Atlantic postal facilities). From that information, FreeMarkets software automatically calculated a single “weighted average [f.o.b. destination] price” for the mixture of sizes delivered to the four destinations.<sup>2</sup> That price was to be displayed as the price submitted by each offeror in the CBE. The identities of the offerors were not displayed to the other offerors during the CBE.

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<sup>2</sup> The delivery destination percentages were

Charlotte	51%
Louisville	19%
Richmond	8%
All Other	22%

For truckload orders, offerors were to complete in stage three a pricing table which identified the number of boxes of each type comprising a truckload, and an f.o.b. destination price for that truckload to each of the four identified destinations.<sup>3</sup>

The contracting officer provides the assertion of FreeMarkets that "it was explained to the offerors that . . . truckload pricing tables were required of offerors after the bid [*i.e.*, after the CBE] and that they would be considered by the Postal Service in conjunction with 1000 box order pricing when making an award decision."

Clause A.1, Items and Prices, of the solicitation included the following:

This solicitation is for Direct Vendor Delivery to individual post offices throughout the United States. The prices for these items shall be FOB destination.

Clause G.3, Order of Precedence, established "the Schedule," which was Sections A through G of the solicitation, as first in precedence over (in descending order) solicitation provisions and instructions, special clauses and general clauses, and provisions in attachments or incorporated by reference.

Both Liberty and Skyline were prequalified; their respective evaluations are discussed *infra*. The CBE was held on August 3. At the close of the bidding, Liberty's weighted average destination price per MX, \$4,826.96, was slightly lower than Skyline's weighted average destination price, \$4,839.06.

In the third stage, Liberty and Skyline completed their pricing tables for both the MX and TL orders. Skyline's MX pricing table had a lower weighted average destination price than it had bid in the CBE. That lower price was not evaluated. Instead, prices based on the total estimated quantity were calculated using Liberty's and Skyline's prices for shipment to Charlotte (51% of the estimated volume). As so calculated, Liberty had a price advantage of slightly more than 2% over Skyline, rather than the slightly less than 0.2% advantage reflected in the weighted average destination prices from the CBE.

The truckload pricing sheets did not include space for weighted average destination prices. Calculating those prices using the solicitation's quantity and destination mix indicates that Liberty's TL weighted average destination price was \$4,629.13, while Skyline's price as \$4,227.21, an advantage for Skyline of about 8.6%. A spreadsheet in the protest file using prices for the total estimated quantity reflects a slightly greater Skyline advantage of about 8.9%.

The MX pricing tables included f.o.b. origin prices, but the TL pricing tables did not. Each offeror was requested to provide the TL origin prices. Liberty offered the same f.o.b. origin

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<sup>3</sup> Paragraph 2.3 of solicitation Attachment 2, Pricing Table Instructions/Explanations, had provided as follows:

Shipping Point and Weight. The Pricing Tables also require offerors to disclose the shipping point for the boxes going to a specific destination city as well as the weight (in pounds) of the box shipment. This shipping point and weight information will not affect the 1,000 box order price calculations for the online auction. The Postal [S]ervice is gather this information so that it can decide when it may make sense for it to provide its own transportation.

unit prices for its TL orders as for its MX orders; Skyline offered lower f.o.b. origin TL unit prices than it had offered for its MX orders.

Because they questioned Skyline's offered transportation prices as too high, the evaluators also evaluated the offers using the f.o.b. origin prices and freight costs estimated by the Postal Service. As so evaluated, Skyline's MX prices were about 8% lower than Liberty's prices, and its TL prices about 15.5% lower.

By letter dated August 25, Liberty was advised of the various awards, including the award of lot 3 to Skyline. With regard to that award, the letter stated:

The offer submitted by Skyline Corporation receive a higher score on their written proposal from the pre-qualification. When combined with their price[,] their offer was determined to represent the best value to the Postal Service.

Liberty obtained a debriefing concerning the award. At the debriefing, it was advised that the above statement was incorrect, and that, in fact, Liberty had received a score one point higher than Skyline's score. It also learned that the award had been based on f.o.b. origin prices and postal estimated transportation costs. Its protest to the contracting officer followed.

The issues raised in Liberty's protest to the contracting officer may be summarized briefly:

- Since the solicitation provided for f.o.b. destination pricing, offers should not have been evaluated on the basis of f.o.b. origin prices. The solicitation's order of precedence support this interpretation. Paragraph 2.3 of Appendix 2 is not to the contrary, since it does not disclose that "transportation information would be part of the price evaluation or used to impact the award."
- Since Liberty was evaluated more highly than Skyline, and the evaluation was a more important factor than price, Liberty should have received the award on that basis.

The contracting officer denied the protest, defending the use of f.o.b origin pricing for evaluation purposes, but noting that Liberty's f.o.b. destination pricing per MX "was only lowest . . . by 2%," while Skyline's f.o.b. destination price per TL "was 12.6% lower [*sic*]<sup>4</sup>. You were informed during training by FreeMarkets, Inc., that truckload prices would be evaluated. Therefore even if only destination pricing had been considered, Skyline would still have received the award as it is anticipated most [orders] will be placed for truckloads." With respect to the evaluation of offers, the contracting officer noted that Liberty's evaluated score was only one point higher than Skyline's score, and that Skyline's "price differential more than made up for the one point difference . . . and thus offered the best value to the Postal Service."

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<sup>4</sup> Although the protest file contains a sheet including the 12.6% figure, the TL figures on that sheet show the 8.9% difference in price discussed above.

Liberty's protest to this office restates its concerns about the evaluation of f.o.b. origin prices, but also questions how Skyline could have been evaluated as almost equivalent to Liberty, expresses its concern about the size of the f.o.b. origin price differentials, and notes a number of inaccuracies in the course of the purchase and the evaluation.

Replying to the protest, the contracting officer defends the award, making the following points:

- The solicitation's reference to f.o.b. destination prices "does not require award to be made on [that] basis." The solicitation requested f.o.b. origin prices, and "[t]here clearly were adequate grounds within the terms and conditions of the solicitation upon which to base an F.O.B. Origin award if that was the best value to the Postal Service." In an event, Skyline's TL f.o.b. destination price was lower than Liberty's, and the protest does not challenge our "right to base our decision on FOB Destination truckload pricing."
- The solicitation contained no inconsistencies in its terms and provisions which would have called the order of precedence clause into operation; similarly, the solicitation was not ambiguous in permitting either an origin or a destination award.
- In calculating the basis for award on an f.o.b. origin basis, estimated shipping costs were obtained from the Transportation Section at postal headquarters. Total costs for both origin and destination were calculated in the same way.
- "There were no mistakes made in the evaluation process." The problems Liberty identified had no impact on the evaluation process.
- "In conclusion, the purchasing team has a great deal of discretion in determining which offer provides the best value to the Postal Service as long as their decision is not arbitrary or capricious. . . . The [award] decision was not arbitrary in that every possible pricing scenario was considered."

Liberty offered the following comments on the contracting officer's statement:

- The basis on which the contract award was justified was different than the solicitation had specified.
- The solicitation's schedule specifically provided for an f.o.b. destination contract, thereby taking precedence over any other provisions that may have been to the contrary.
- In the evaluation, Skyline received a higher score for "production capabilities" than Liberty, even though Skyline is a broker, rather than a manufacturer. Further, a review of the individual evaluation scores shows that Liberty's score was miscalculated, and actually was nine points, rather than one point, higher than Skyline's score.
- The postal analysis of Skyline's proposal was based on incorrect and invalid pricing, lower than that submitted in the course of the CBE. Further, Skyline's TL pricing was based on truckload quantities which far greater than Liberty's; the price comparison should be based on the same quantities.
- The errors reflected in these comments are in addition to those previously identified.

Replying to the protester's comments, the contracting officer makes the following points:

- That Skyline is a broker does not diminish its capability, since brokers can have advantages over offerors proposing their own in-house resources.
- Liberty is correct that its score was 9 points, rather than 1 point, higher than Skyline's score, but the 2.25% difference in the scores is too insignificant "to justify any additional cost."
- The problem noted in the pricing tables was the result of the tables' makeup and the auction software; because any number of price combinations could result in the same weighted average price, the Postal Service could not "back in to the actual pricing" from the weighted average price.<sup>5</sup>
- Whether Skyline's truckload quantity figures were overstated or not was irrelevant to the pricing determination, since payment is made (on the basis of the truckload prices) only for the actual quantity delivered, and truckload prices were used to calculate unit prices for purposes of price comparison.

Liberty commented on the contracting officer's rebuttal comments, restating some of its earlier views and adding the following:

- The advantage which the contracting officer perceives in Skyline's ability to switch manufacturers is not an advantage, but an opportunity for it to substitute a lower cost supplier to the Postal Service's disadvantage. From Skyline's offered f.o.b. points, it is clear that its intended supplier is a firm which proposed separately on this solicitation and was rated substantially lower than Liberty; a fact which should be taken into account in the evaluation. Further, Liberty's actual advantage over Skyline in the evaluation was 9 points, not 1 point.
- Liberty disputes the contracting officer's contention that it is not possible "to back into the actual pricing" of the CBE, and objects to the consideration of Skyline prices that were lower than those offered in the CBE. As previously noted, in any event the Postal Service should not have relied on pricing information submitted after the CBE.

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<sup>5</sup> In making this point, the contracting officer refers to the "make me low" button, a feature of the CBE software, not mentioned in the solicitation, which allowed offerors to enter a weighted average price .25% lower than the existing low offer. Apparently, using the feature reduced the weighted average price without adjusting the component prices which went into the weighted average price. Liberty objects to the contracting officer's reference, noting that Skyline was not the last bidder, and asserting that the Postal Service must have had access to the costs behind the weighted average prices.

While the record is unclear on exactly what detailed price information was available to the Postal Service in the course of the CBE, analysis of the CBE weighted average prices discloses that in the last several rounds of the bidding, Liberty's prices and the prices of its competitors declined in units of .25%, suggesting that they employed the "make me low" technique.

Skyline has submitted comments which support the contracting officer's position, making the following points:

- Skyline did not find the solicitation ambiguous, understanding that the CBE was only one element in the award decision, and that other factors would be considered.
- Contrary to Liberty's position, Skyline believes that it compares favorably to Liberty, citing various factors as contributing to that result.

## DISCUSSION

To the extent that the contracting officer justifies the award on the basis that the determination of "best value" is within his discretion as long as it is not arbitrary or capricious, he overlooks one basic requirement: The contract award decision must be consistent with the terms of the solicitation.<sup>6</sup> Accordingly, we must review the award decision against the solicitation's provisions.

The protest involves the following two primary contentions: First, the evaluation of offers afforded Skyline too much credit in its evaluation, and, further, failed to give Liberty the benefit of its higher score. Second, the price evaluation improperly relied in part on prices submitted subsequent to the CBE and took into account f.o.b. origin, rather than f.o.b. destination prices.

In the first regard,

our review of the merits of technical evaluations is limited: We will not substitute our views for the considered judgment of technical personnel upon which such a determination is premised in the absence of fraud, prejudice, or arbitrary and capricious action. The protester bears the burden of proving its case affirmatively. This burden must take into account the 'presumption of correctness' which accompanies the statements of the contracting officer, and if such allegations do not overcome the presumption of correctness, we will not overturn the contracting officer's position.

*Pharmchem Laboratories*, P.S. Protest No. 99-19, December 17, 1999 (internal quotations and citations omitted). Our review is not *de novo*, and involves only a determination that the evaluation has a reasonable basis. *Computer Systems & Resources, Inc.*, P.S. Protest No. 86-4, March 27, 1986.

In this case, Liberty has not met its burden. It was not necessarily unreasonable for Skyline to receive a higher score for production capability than its supplier or a manufacturer, and its mere disagreement with that result does not establish that the evaluation was arbitrary. Similarly, it was not unreasonable for the contracting officer to conclude that Liberty's and

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<sup>6</sup> So, for example, when a solicitation requested quotes on alternate delivery bases (f.o.b. origin, palletized or non-palletized, or f.o.b. destination, palletized), but only the f.o.b. origin non-palletized prices, we said: "To do so was improper, because the quoters had a right to expect award to be made to the lowest priced quoter as evaluated among the three FOB types on which they had quoted. A change in the manner in which offers would be evaluated as occurred here is sufficiently significant to require amendment of the solicitation and a new round of quotes." *Leslie-Locke*, P.S. Protest N. 92-50, November 23, 1992.

Skyline's evaluations were essentially equal, even though Liberty's score was nine points (out of 400) higher than Skyline's.

With regard to the price evaluation, we cannot justify the bases for several of the calculations of price which occurred in this instance. The solicitation clearly provides that the MX prices are to be determined in the CBE, using a formula which considered deliveries to the four different destinations for which prices were sought. Accordingly, it was not appropriate (and there was a lack of need) for Liberty's and Skyline's MX prices to be evaluated on a different basis involving deliveries to only one destination.

That Skyline's TL prices were submitted after the CBE does not, as Liberty would have it, affect the outcome. The solicitation did not require an offeror's TL prices to relate to their MX prices, and offerors thus could improve their offers in the third stage of the purchase.

Skyline is correct in asserting that the TL prices should have been evaluated on the basis of their f.o.b. destination prices. That was the basis on which the solicitation sought offers, and solicitation attachment 2's discussion of delivery point information was not sufficient to require an different result.<sup>7</sup>

The solicitation did not state the basis on which the offerors' TL prices would be evaluated.<sup>8</sup> However, that in the absence of advice to the contrary, offerors could reasonably anticipate that TL prices would be evaluated on the same basis as the MX prices, that is, on the basis of a weighted average price which took into account the quantities of and destinations for the boxes which were set out in the solicitation. As discussed above, while the TL pricing tables which were submitted did not include a space for the weighted average price, such a price can be computed from the pricing tables and the solicitation, and as so calculated, Skyline's TL destination price is some 8.6% less than Liberty's price.

The contracting officer suggests that the TL prices should be given more weight than the MX prices in the consideration of offerors' overall prices because the majority of orders would be placed on that basis. While that may be the case, nothing in the solicitation suggested that result, which was inconsistent with the solicitation's emphasis on MX prices as the subject of the CBE. In the absence of any guidance with regard to the weight to be given the TL prices, it would be appropriate to evaluate those prices as comprising no more than 50% of the orders to be placed. See, e.g., *F.R. and Lee MacKercher*, P.S. Protest No. 85-45, September 17, 1985. Doing so yields a price advantage to Skyline of somewhat more than 4%. While that percentage is significantly less than the percentage

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<sup>7</sup> That attachment specifically stated that the shipping point and weight information would not be used in the evaluation of MX prices. It made no reference to using that information in the evaluation of TL prices, and the solicitation's TL pricing tables did not solicit that information for the TL quantities. The attachment's assertion that the information would be used to "decide when it may make sense for [the Postal Service] to provide its own transportation" is consistent with the protester's suggestion that the information might be used to adjust the f.o.b. point after award, but cannot readily be read as contemplating the evaluation of offerors on an f.o.b. origin basis for the purpose of award.

<sup>8</sup> Liberty does not dispute the contracting officer's representation that the offerors were advised in their training that the TL prices would be included as subjects of evaluation in the price determination.



which the contracting officer used to justify the award, it is sufficient to allow the award to stand.

The protest is denied.

William J. Jones  
Senior Counsel  
Contract Protests and Policies