

August 26, 2002

P.S. Protest No. 02-10

SERVICE UNLIMITED, INC.

Solicitation No. 412735-02-A-0061

DIGEST

Protest of failure to receive award because of ambiguity in a solicitation for HVAC maintenance is dismissed as untimely; although solicitation was ambiguous, matter was untimely raised subsequent to contract award.

DECISION

Service Unlimited, Inc., protests its failure to receive award of a contract for HVAC preventive maintenance for stations and branches of the Wilmington, DE, post office.

Solicitation 412735-02-A-0061 for this service was issued January 28, 2002, by the Philadelphia Purchasing and Materials Management Center.¹ The solicitation sought offers for one "JB" (job) covering the time period 3/01/02 (or date of award, if later) to 2/28/05 (solicitation pages 1 and 2). Attachment 3 of the solicitation requested further pricing breakdowns, identifying five specific facilities as line items for which unit prices per month were requested, and those unit prices were to be extended by multiplying by 36. Line item 6 was "hourly manhour rate for HVAC mechanic," with provision for different rates for each of the three years of the contract; line items 7 and 8 were "discount from List price for parts [and] Equipment," expressed as percentages, and line item 9 was "cost per pound for Refrigerant" for which two lines were provided. At the bottom of the attachment was a place for the previously listed prices to be summed as the "GRAND TOTAL: Estimated."

A "Statement of Work HVAC Maintenance" described the work to be performed, including the following:

Work to be Performed

¹ While this protest was pending, responsibility for the contract awarded pursuant to Solicitation A-0061 was transferred to the Memphis, TN, Purchasing Service Center, which has not participated substantively in the protest.

Quotations shall be submitted covering these months. A quotation for each month is desired, preferably in equal amounts.

Paragraph 3.5 of the solicitation, Evaluation – Commercial Items, set out five evaluation factors (training and experience of key personnel, 25 points; documented visits to all sites, 15 points; references, 10 points; years in business, 10 points) and provided that “[p]erformance specific and supplier specific performance evaluation factors, when combined, . . . represent[] 50% of the e[valuation and price equals 50%.”

Four offers were received; three of the offers were closely grouped as to price, while the price of Service Unlimited, the incumbent contractor, was significantly (about 60%) higher. The contracting officer advised Service Unlimited that its offer was not competitive and suggested that it review its offer.

Service Unlimited did amend its offer by reducing the number of months of service offered. For each of line items 1 through 5, it reduced the quantity of months from 36 to 21; as so reduced, its offer was slightly lower than the other offers received. However, the contracting officer was concerned about the reduction in the number of months of service. In a memorandum to the file, he wrote:

The revision would result in no service for months of December, January, February, March, and April. This constitutes a change in the requirement, which I determined to be unacceptable.

Accordingly, I have rejected the revised offer as unacceptable and will consider the offer as submitted initially.

Award was made on April 3 to Modern Controls, Inc., at an estimated price of \$27,003.

Service Unlimited’s protest recites a conversation between its sales associate and the contracting officer on April 12, in which the contracting officer “informed [the sales associate] that [the contracting officer] desired to have HVAC preventative maintenance services performed on a 12 month basis and not limited to May thru December as outlined in specification 7-1.” Further, the protester recites the contracting officer’s assumption “that Modern Controls is providing 12 monthly preventative maintenance visits for each year of the contract.” The protester asserts that Modern’s proposal does not so provide, even though it provides for monthly invoicing, and notes that Service Unlimited’s existing contract provides for preventative maintenance only quarterly, even though it provides for monthly billing.

The protester seeks award of the contract to it as “the low responsible bidder for this project,” or the reissue of the solicitation “with a clear and definite scope of work so that

all prospective bidders are pricing the same services” or allowing the protester to reallocate its revised prices to reflect 12 monthly billings per year, rather than 7.²

Responding to the protest, the contracting officer’s statement contends that Service Unlimited’s revised offer, reflecting seven months of service each contract year, “takes exception to the service requirements, which include[] maintenance of heating, and contract term of 36 months service. . . . It was the intent of this office to insure that service would be available throughout the year to service heating and cooling equipment and do filter changes (air handlers operate summer and winter and have heating and cooling coils).” The contracting officer notes that “the protest does not address the maintenance of the Temperature Control System, which is performed once per year but may need service at any time during the heating or cooling season.”

The contracting officer asserts that the protest’s allegation that the statement of work is ambiguous is untimely raised, since questions about the statement of work should have been raised before offers were due. He also asserts that the protester’s references to the practices and pricing of the previous contract refer “to past practices, which no longer apply.” In the contracting officer’s view, the protester was confused about the requirements of this solicitation by reason of its past contracts, leading to “two offers which were nonconforming to the solicitation requirements” whereas the other offerors “clearly understood the statement of work.”³

Service Unlimited submitted comments on the contracting officer’s statement which reiterated the concerns and sought the alternative remedies set out in its initial protest. The comments explain that its initial offer, based on 12 months of service, followed a conversation with the contracting officer. After the contracting officer’s subsequent advice that its offer was excessive, it revised its offer to provide for monthly maintenance during the seven-month period for refrigeration service referenced in Specification 7-1. The protester contends, contrary to the contracting officer, that the solicitation covered only refrigeration services, providing “no mention whatsoever of anything in regard to the heating at any of these facilities and any maintenance required during any period of time other than the 7 months outlined in Specification 7-1.”

² The protest concludes with advice that subsequent to the contract award, a Wilmington facility had called both it and Modern Controls when service was required, and that Service Unlimited’s current agreements remain in effect until September 30. The contracting officer’s statement does not respond to this contention and nothing in the protest file sheds light on the matter. While it seems strange that the incumbent contractor would not have objected that the period of performance of the new solicitation overlapped that of its existing contract when the solicitation was first received, we need not inquire further, since the matter is not one for resolution in the protest process. *Cf. E-Z Copy, Inc.*, P.S. Protest No. 89-85, December 1, 1989.

³ This reference to two nonconforming offers is inconsistent with the contract file, which describes no lack of conformance in Service Unlimited’s initial offer, which was faulted only for its excessive price.

DISCUSSION

While there is no reason to doubt the contracting officer's stated intent that preventative maintenance be provided monthly throughout the year, it is less than clear that the solicitation which was issued unambiguously reflected that intent. The protester is incorrect in asserting that the solicitation did not mention heating or provide any reference to maintenance other than from May to November, since, as set out above, the "Statement of Work HVAC Maintenance," did recite that service was to be "provided monthly" "[w]hen Heating and Cooling Equipment is in operation." However, that document also incorporated Chapter 7 of Handbook MS-24, and specifically Specification 7-1, Refrigeration Service, with its inserted reference to May-November service. Further, the statement of work acknowledged that "no work on site" might be "performed for a particular month" and provided for that possibility.

An ambiguity exists if the specifications are "susceptible to two reasonable interpretations." *Grand Rapids Label Company, Inc.*, P.S. Protest No. 96-22, January 31, 1997, citing *Dataware Systems Lease, Inc.*, P.S. Protest No. 91-41, October 10, 1991. "Specifications must be sufficiently definite and free from ambiguity to permit competition on a common basis and an ambiguity exists if the specifications are susceptible to more than one reasonable interpretation." *Pitney Bowes Inc.*, P.S. Protest No. 89-22, July 7, 1989. As the contracting officer indicates, however, a protest that a solicitation is ambiguous must be presented prior to the time set for the receipt of offers (PM 3.6.4.b,⁴ *Grand Rapids Label, supra*).

It is worth noting, contrary to the contracting officer's suggestion, that nothing in the protest file affirmatively reflects Modern Controls' undertaking to perform preventative maintenance on a monthly basis throughout the contract, rather than during the seven month cooling system. That undertaking should be confirmed to the successor contracting officer's satisfaction. If Modern Control does not provide that confirmation, its contract should be terminated for convenience and the requirement resolicited.

The protest is dismissed as untimely.

William J. Jones
Senior Counsel
Contract Protests and Policies

⁴ "Protests based upon alleged improprieties in a solicitation that are apparent before the date set for the receipt of initial proposals must be received before the time set for the receipt of proposals."