

July 12, 1996

P.S. Protest No. 96-12

CIRCLE-A CONSTRUCTION COMPANY, INC.

Solicitation No. 332495-96-A-0058

DIGEST

Protest against award of contract for construction project is denied where contracting officer's determination that protester's proposal was technically unacceptable for failure to identify three prior projects of similar size was reasonable.

DECISION

Circle-A Construction Company, Inc., protests the determination that it had failed to indicate its experience on projects of similar size as required by a solicitation for the expansion of the Trenton, NJ, General Mail Facility.

Solicitation No. 332495-96-A-0058 was issued March 3, 1996, by the New York Facilities Service Office seeking offers for the Trenton project. Block 6, Notes to Offerors, of the first page of the solicitation included the following information and instructions:

Estimated Range: \$3,900,000.00 - \$4,600,000.00

* * *

Offerors must submit three (3) projects performed within the last three (3) years. These projects should be of similar size and involve phasing. . . .
THE SUBMISSION OF THIS INFORMATION IS MANDATORY. FAILURE TO INCLUDE THE DOCUMENTATION WITH YOUR PROPOSAL WILL

CAUSE YOUR PROPOSAL TO BE REJECTED, AND THEREFORE, WILL NOT BE CONSIDERED FOR AWARD.

[Emphasis in original.] We refer to this provision as "the experience requirement."

Section K of the solicitation included Provision A-9, Award without Discussions, providing that award could be made "on the basis of initial proposals received, without discussions."

Section M of the solicitation, Evaluation and Award Factors, contained two provisions, M.1 and M.2, which included the following:

M.1 CONTRACT AWARD (Provision A-8) (February 1992)

a. The Postal Service will award a contract resulting from this solicitation to the responsible offeror whose proposal conforming to the solicitation offers the best value to the Postal Service, considering price, price-related factors, and/or other evaluation factors specified elsewhere in this solicitation.

* * *

M.2 CONTRACT AWARD AND PROPOSAL EVALUATION
(Provision OA-16) (February 1992) (If Applicable)

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 declining order of importance:

[Blank in original.]

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. . . .

Circle-A submitted an offer to perform the requested work for \$3,917,000. Accompanying its offer was a list of three previous projects, which included the following information:

1. Interior Renovations, Career and Technical Institute
Naval Station, Lakehurst, NJ

Project Cost: \$1,019,777.95
Completion Date: 9/95

2. Dining Facility/NCO-EM Club Addition
Fort Monmouth, NJ
Eaton, NJ

Project Cost: \$1,483,339.00
Completion Date: 7/31/94

3. USPS Facility Upgrade Phase II
Asbury Park Main Post Office
Asbury Park, NJ

Project Cost: \$597,350.46
Completion Date: 9/95

Circle-A's offer was the third lowest of fourteen received. The lowest offeror was rejected because one of the three projects it identified in its submission had not been performed within the last three years, and another project, with a cost of \$707,947, was found not to be of a similar size to the Trenton job.¹ The second lowest offeror withdrew its offer after it realized that it had omitted over \$300,000 in costs.

The contracting officer declined to consider Circle-A's offer for award, having concluded that its third listed project, like the low offeror's \$707,947 project, was not of similar size to the Trenton project. Accordingly, TAK Construction, which had offered to perform for \$4,001,000 and whose response to the experience requirement was deemed satisfactory, was advised of the Postal Service's intent to give it the contract, supplied the necessary payment and performance bonds, and was awarded the contract on May 14. Circle-A and the other unsuccessful offerors were advised of the award by letters of that date.

Noting that TAK's price exceeded its price, Circle-A requested a debriefing, which was held by telephone on May 21. The contracting officer's notes of that debriefing, which were furnished to the protester, indicated that the Asbury Park post office project "was too small for us to consider," and that award was made without discussion "since we had a number of offerors in the competitive range[] who met all stated criteria." The notes also reflect the offeror's explanation that it "had other jobs to submit for reference, but thought a postal job would carry more weight" and that the offeror was advised that the "decision on [its] responsibility was for this solicitation only."

Circle-A's protest to this office was submitted by its counsel on May 24. The protest notes Circle-A's elimination from the competition because of its failure to identify three projects of similar size, and challenges the determination that it was nonresponsible.

¹ That offeror's protest to the contracting officer was denied by the contracting officer as obviously without merit. Procurement Manual (PM) 4.6.6 c.4.

Citing decisions of the Comptroller General involving sealed bidding, the protester notes that when information requested in the bid solicitation involves "the bidder's ability to perform," it is a matter of responsibility, not responsiveness; that information relevant to responsibility, unlike information involving responsiveness, may be submitted after bid opening; and that it "did not interpret the bid solicitation as precluding the post-bid submission of additional job references should the USPS have some concern about its qualifications." The protester asserts that a determination of nonresponsibility "necessitates a hearing and a rational basis," and that "the bidder is entitled to present evidence of its qualifications to perform the work."

Further, the protester contends that it was inconsistent with the solicitation, "applicable bidding policies, the [Postal Service's] interest in having its work done competently and for the lowest price, and basic notions of fairness" for the contracting officer to ignore the two projects of appropriate size which Circle-A identified to focus exclusively on the third project.

Finally, the protester recites its interpretation of the experience requirement as requiring the offeror to provide three job references, but not as mandating that the references otherwise meet the stated requirements. "On the contrary, the clear implication is that those projects are to be references to be checked by the USPS and, if need be, discussed with the low bidder. It is only when a bidder fails to include any references or includes incomplete references that the bid solicitation indicates that the bid is to be rejected."

The contracting officer's statement responding to the protest contends that Circle-A was properly found "non-responsive" because its submission with respect to the experience requirement did not conform to the solicitation's requirements, that the protester's reading of the experience requirement is contrary to the solicitation's terms, and that the notes concerning Circle-A's debriefing were in error in using the term "responsibility" instead of "responsiveness."

The protester replied to the contracting officer's statement, making the following points:

- The experience requirement was subjective and ambiguous, making it "an inappropriate criterion" for a responsiveness determination.
- It appears that the contracting officer considered projects of at least \$1 million to be "of similar size."² It was unfair to reject Circle-A's reference merely because it was \$400,000 less than this unannounced standard. The fact that Circle-A listed a postal project, rather than a non-postal one, provided the Postal Service direct evidence of its capability. If Circle-A received high marks from the USPS for its \$600,000 project, it would be qualified to perform a \$1 million project, and thus, under this criterion, eligible for the Trenton project.
- Alternatively, it was inappropriate to reject Circle-A because of its small listed project, just as it would have been inappropriate to reject an offeror because of a mistake in identifying a project or its scope. The protester cites additional

² The protester cites for this proposition the contracting officer's description of Circle-A's two satisfactory projects as having "costs over one million dollars."

Comptroller General decisions for the proposition, previously made, that evidence of a bidder's capability goes to its responsibility, not its responsiveness, and thus may be furnished subsequent to the submission of bids.

-- "The Contracting Officer's misperception of [the] issue as one of 'responsiveness' has apparently misled him to limit his 'responsibility' evaluations to the face of the bid proposal. This approach . . . encourages bidders to overstate the nature of and their participation in, listed projects." The submission is accompanied by the declaration of Circle-A's president to the effect that some of the projects listed in TAK's submission were not phased, that TAK was a subcontractor, not the prime contractor, on one project, and that the amount of one project was overstated.

DISCUSSION

In this instance, both the protester and the contracting officer misunderstand the procedural framework in which the protester's offer was considered for award and rejected.

The solicitation for the Trenton project was not an invitation for bids, and Circle-A's response to the solicitation was not a sealed bid. Instead, the solicitation was a request for proposals. Circle-A's response was a proposal. The procedures for its consideration were those set out at PM 4.2 under what the Postal Service refers to as "standard purchasing."

When, as here, the solicitation advised offerors that award could be made without discussion, "[a]ward may be made without discussion of proposals whenever the existence of adequate competition . . . makes it clear that acceptance of the most favorable initial proposal will result in a reasonable price." PM 4.2.5 f. Further, "[w]hen price or price-related factors are the most important or the only evaluation factors, award will normally be made without discussions if adequate competition exists" PM 4.2.5 c.2.

Contrary to the suggestion in the contracting officer's notes of Circle-A's debriefing, there is no "competitive range" established with respect to award without discussion. A competitive range is established only when discussions are to be held, in which case they are held with all offerors within the competitive range. PM 4.2.5 g.1.

PM 4.2.4 a. provides, *inter alia*, that "[p]roposal evaluation is an assessment of both the proposal and the offeror's ability, as demonstrated by the proposal, to perform the prospective contract successfully. Proposals must be evaluated in accordance with . . . the evaluation factors specified in the solicitation."

In this instance, the solicitation was less than clear in identifying the non-price evaluation factors which were intended to be used in offer evaluation since Section M contained two alternative evaluation provisions. Provision M.1 stated that evaluation criteria were specified elsewhere in the solicitation, while provision M.2 failed to state any evaluation criteria.

We conclude, however, that even though nothing in Block 6 described the experience requirement set out there as an evaluation criterion, its admonition put offerors on notice that there was a mandatory requirement for the submission of information on three projects accomplished within the past three years, that those projects "should be of similar size [to the solicited project] and involve phasing," and that proposals unaccompanied by the

request would "be rejected and . . . not . . . considered for award." As such, it was clearly a non-price evaluation factor.³

The rejection of an offer as unacceptable for failing to comply with a mandatory non-price evaluation factor does not involve either "responsiveness," a matter applicable only to sealed bids (*Government Contract Advisory Services, Inc.; B&B General Contracting, Inc.*, P.S. Protest Nos. 93-21; 93-25, December 16, 1993), or an offeror's responsibility, a matter for determination only after the selection of a prospective contractor (PM 3.3.1).⁴

A recent decision of this office, *CIR Industrial Automation, Inc.*, P.S. Protest No. 95-47, April 29, 1996, discussed the standard of our review of such a determination and other issues presented by Circle-A's protest:

When reviewing a determination that a proposal was technically unacceptable, 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." The purpose of our review is to ensure that the determination of technical unacceptability has a reasonable basis.

To be considered for award, offerors had to furnish sufficient information to allow their proposals to be evaluated under the criteria listed in Section M.2. CIR was rejected because its proposal failed to demonstrate its experience in fixed mechanization work and its completion of three projects of similar size and scope. Even given the contracting officer's liberal understanding that \$500,000 projects would be of similar size and scope to this \$2 million one, protester's cited projects[, none larger than \$291,000,] failed to measure up. . . . Since the solicitation set out the documentation requirements and

³ PM 2.1.7 c.1.(g) lists "past performance" as one of numerous evaluation factors "that may apply in various situations."

PM 2.1.7 c.3. provides that "[e]valuation factors may cover areas which are also considered in determining an offeror's responsibility, such as experience, when the needs of the procurement warrant their comparative evaluation. When there is such an overlap, the evaluation of proposals in accordance with chapter 4 must be kept separate from the determination of contractor responsibility in accordance with 3.3."

⁴ The protester's contention that if this were a matter of responsibility the offeror was required to be given an opportunity to be heard is incorrect:

A single nonresponsibility determination is administrative in nature, is largely dependent on the business judgment and discretion of the contracting officer, and provides minimal impingement on the contractor's interests since such determinations properly can and do vary from contract to contract. Accordingly, the procedural requirements of notice and an opportunity to be heard need not be provided to the affected contractor.

Frank Cain & Sons, Inc.--Request for Reconsideration, Comp. Gen. Dec. B-236893.2, June 1, 1990, 90-1 CPD 516.

sufficient warning of the consequences of not meeting them, the protester has no basis to complain about being rejected.

The contracting officer was not obligated to seek out information that should have been in the proposal. The burden to submit an adequately written and complete proposal was the protester's. Any reduction in the evaluation scoring that results from an incomplete proposal is attributable only to the offeror. A technically unacceptable proposal cannot be the "most favorable" even if it has the lowest price. Discussions are not required to point out "deficiencies resulting from the offeror's lack of diligence." PM 4.2.5 g.3.(a)(1).

[Footnote, citations and internal quotation marks omitted.]

The contracting officer clearly was entitled to conclude that Circle-A's \$600,000 project was not sufficiently similar to a \$4 million dollar job to establish its capability to perform the larger job.⁵ Circle-A apparently offered the smaller postal job instead of a larger non-postal job because it expected the Postal Service to look on prior postal experience more favorably than other experience. It did so at its risk and in contradiction to the solicitation's terms and must bear the consequences of that decision.⁶

It remains only to note that its complaint that the experience requirement is subjective or ambiguous involves a matter apparent on the face of the solicitation and thus is untimely raised after receipt of proposals (PM 4.6.4 b.), let alone subsequent to its initial protest (PM 4.6.4 c.), and that its challenge in its rebuttal comments to the evaluation of TAK's proposal is also untimely raised more than 15 working days after contract award (PM 4.6.4 d.).

The protest is denied.

William J. Jones
Senior Counsel
Contract Protests and Policies

⁵ Counsel's attempt to bootstrap Circle-A's experience in this respect is not persuasive.

⁶ Nothing in the solicitation precluded the submission of more than three projects, as TAK apparently did, and nothing precluded any offeror from including pertinent information in its offer in addition to the required material.