

Supply Management



September 4, 2014

Mr. Tarun Ghosh, PhD, Director
The Continuum Engineering
3435 Wilshire Blvd, Suite 2270
Los Angeles, CA 90010

RE: Supplier Disagreement Resolution Case No. SDR14SR-07
USPS Solicitation No. 3D-14-A-0096, Tire Chains

Dear Mr. Ghosh:

The Continuum Engineering ("TCE") lodged a Disagreement with the Supplier Disagreement Resolution Official ("SDRO") on August 10, 2014 (the "Disagreement") with respect to the United States Postal Service ("USPS") award pursuant to USPS Solicitation No. 3D-14-A-0096, Tire Chains. TCE lodged an initial disagreement regarding this award with the contracting officer ("CO") on July 25, 2014. The CO denied the initial disagreement on August 5, 2014.

THE DISAGREEMENT

TCE's Disagreement is based on the following assertions:

- TCE contends that the contract should have been a Section 8(a) competitive set-aside contract but was awarded to an awardee who is not a Section 8(a) participant.
- USPS's position that it does not have to give a contract to a Section 8(a) supplier is allegedly incorrect because TCE claims that USPS regularly gives contracts advertised as Section 8(a) set-asides to Section 8(a) participants.
- USPS allegedly prevented other likely bidders from bidding by advertising the solicitation as a Section 8(a) set aside, potentially causing non-Section 8(a) participants to overlook the solicitation.
- TCE alleges the proposal was defective in that it let suppliers cheat by providing samples that would not be representative of what the supplier would actually provide if awarded the contract.
- USPS allegedly practices favoritism in the award of contracts.
- The Contracting Officer allegedly did not respond to the protest on time.

Materials Reviewed

In my review, I have considered the following relevant material, among other things:

- the Solicitation and amendments,
- the initial disagreement;
- the CO's initial disagreement resolution letter;
- TCE's and the awardee's proposals;
- the Award Recommendation; and
- the Disagreement lodged with the SDRO.

In addition, pursuant to 39 C.F.R. § 601.108(e), I have had communications, both by telephone and email, with the CO and the Purchasing and Supply Management Specialist ("Purchasing & SM Specialist").

DISCUSSION

Section 8(a) Assertions

TCE claims that the USPS designated the Solicitation as a Section 8(a) set-aside on the Federal Business Opportunities ("FedBizOpps") website; therefore, the USPS should have awarded the contract to a supplier who is a Section 8(a) participant. TCE disagrees with the USPS's position that it does not have to give a contract to a Section 8(a) supplier and asserts that the USPS regularly gives contracts advertised as Section 8(a) set-asides to Section 8(a) participants. (Disagreement at 1).

Section 8(a) of the Small Business Act authorizes federal agencies to contract for goods and services within a limited competitive environment among defined groups of suppliers to ensure their participation in procurement. USPS is not subject to the Small Business Act and does not participate in the Section 8(a) program; therefore, USPS is not required to restrict participation in a solicitation to Section 8(a) suppliers or to award a contract to a Section 8(a) participant. The Solicitation on FedBizOpps was mistakenly identified as a Competitive Section 8(a) set-aside. However, the contract was not awarded under the Section 8(a) set-aside program because USPS contract awards are based on which supplier can offer the best value to the Postal Service. The Solicitation was clear that the Postal Service award from this Solicitation would be based upon best value as stated in section 1.6, Best Value Determination, of the Amended Solicitation, and not based on any consideration of suppliers' Section 8(a) status:

An award will be made to the supplier whose pricing and technical proposals provide the best value to the Postal Service. Best value will be determined through consensus of the evaluation team by comparing differences in the value of the proposal specific evaluation factors with differences in cost to the Postal Service. Price is more important than technical score, however, the closer pricing becomes the more important technical scores become. However, the Postal Service will not make an award at a significantly higher price to achieve slightly superior performance.

The US Postal Service shall reserve the right not to make any selection if no offeror's combined price and technical scores provide the best value to the US Postal Service. (Solicitation at 4).

Moreover, the USPS is not subject to the Federal Acquisition Regulation ("FAR") as TCE stated in its Disagreement. TCE believes that by mistakenly advertising an unrestricted solicitation under a Section 8(a) set-aside the competition was not full and open, as required by the FAR. (Disagreement at 2). Unlike the FAR requirements for full and open competition, USPS policy and procedures do not require full and open competition. Nevertheless, the fact that the Solicitation was mistakenly advertised as a Section 8(a) set-aside did not affect competition as the USPS received three offers in response to this Solicitation.

Samples

TCE's Disagreement also claims that it was unfair for USPS to require samples as bidders were likely to provide tire chains as samples that they had no intention of providing after winning the contract. TCE requested additional time, long after the close of the Solicitation, to provide actual prototypes as samples because TCE stated "practically all chains are made in China." (Disagreement at 2). In its summary of its protest, TCE also alleges that the proposal would allow bidders to "cheat" by providing samples that are not representative of what the bidder would actually provide if it won the contract. (Disagreement at 3).

Offerors were required to provide representative samples based on the descriptions of the tire chains in the Solicitation. TCE was not responsive to the Solicitation because it did not provide samples along with its submission of hard copy proposals by the May 5, 2014 deadline. Attachment 6 to the Solicitation, titled Proposal Submission Instructions, stated in section 3: "Samples [-] along with the hard copy proposals, Suppliers must submit at their own expense at least two pair, representative sample, of each type of Tire Chains to the address in block #9 (*PS Form 8203*)." (emphasis in original) The awardee and another supplier who submitted an offer were both able to comply with the requirement of submitting samples along with their proposal submissions by the May 5, 2014 deadline. On May 15, 2014, the Purchasing & SM Specialist emailed TCE asking it to confirm what was mailed to her in terms of documentation and samples. TCE responded that they had delivered their technical proposal by mail and email; however, TCE's manufacturer in China informed them that it would take two months to provide the samples due to the fact that the tire chains would have to be made per USPS specifications. In a May 28, 2014, letter, the Purchasing & SM Specialist informed TCE that its proposal was not accepted because, while TCE submitted its proposal in a timely manner, it did not submit samples. Furthermore, the Postal Service noted that TCE's "request to submit samples in 2 months would greatly hinder and delay the evaluation process." On June 4, 2014, TCE forwarded an email to USPS stating that its manufacturing partner based in China could provide the samples in 15 days. In a June 10, 2014, response letter, the Purchasing & SM Specialist stated the Evaluation Committee determined "it is not in the best interest of the Postal Service to consider proposals or samples received late." After reviewing the record, I have determined that the Postal Service appropriately decided not to accept late samples for the tire chains Solicitation.

TCE also alleges bidders were able to cheat due to an alleged defect in the proposal. Pursuant to the regulations, in 39 C.F.R. § 601.107(b), TCE is untimely in asserting a claim regarding an alleged defect in the proposal:

For disagreements that concern alleged improprieties in a solicitation, the contracting officer must receive the disagreement before the time set for the receipt of proposals, unless the disagreement concerns an alleged impropriety that does not exist in the initial solicitation but which is subsequently incorporated into the solicitation, in which event the contracting officer must receive the disagreement no later than the next closing time for the receipt of proposals following the incorporation.

The record does not indicate that the contracting officer received a disagreement from TCE regarding an alleged defect in the Solicitation prior to the time set for the receipt of proposals. This assertion is therefore untimely, and I will not consider it.

No Evidence of Favoritism

In its Disagreement, TCE asserts that because the awardee has another contract with USPS, the awardee has extensive contacts with high-level personnel at USPS and access to privileged information. (Disagreement at 2). TCE also alleges that the awardee was given an unfair business advantage by USPS that constituted favoritism. (Id.) Despite the broad allegations TCE included in its Disagreement regarding the issue of alleged favoritism, TCE has not presented anything that leads me to conclude that there was favoritism in the award of this contract. Moreover, after reviewing the record and holding conversations with USPS officials, I did not find anything that would suggest any type of favoritism toward the awardee was present in this procurement. Additionally, the CO made a best value determination and award from the proposals submitted by the two offerors that met the Solicitation's requirements.

Timeliness of CO's Response

TCE states that I should disregard the resolution of the Contracting Officer because the Contracting Officer did not communicate, in writing, his resolution to the supplier at the conclusion of the 10-day resolution period. (Disagreement at 2). According to the CO, TCE lodged its Disagreement on July 25, 2014; however, the CO did not issue a resolution letter until August 5, 2014. (CO Decision Letter). The applicable regulations state that "at the conclusion of the 10-day resolution period, the contracting officer must communicate, in writing, to the supplier his or her resolution of the disagreement." (39 C.F.R. § 601.107(b)). The regulations also state that "Disagreements under § 601.107 not resolved with the contracting officer must be lodged with the SDR Official within 20 days after they were lodged with the contracting officer unless ADR had been used to attempt to resolve them." (39 C.F.R. § 601.108(d)(1)). Therefore, because the CO did not communicate his resolution in writing to the supplier at the end of the 10-day period, TCE had 20 days within which to lodge a disagreement with the SDR Official. TCE lodged its Disagreement with the SDR Official within the applicable timeframe outlined in the regulations; therefore, it is timely, with the exception of the "defect" claim referenced above. The regulations provide the SDR Official with the ability to obtain materials, information, or advice that may help me to resolve the disagreement. (39 C.F.R. § 601.108(e)). While I have reviewed the CO's resolution letter, my decision regarding this Disagreement is based on having reviewed the entire record, thus the timeliness of the CO's response has no bearing on my decision.

RESOLUTION

After considering the information provided to me by the Postal Service and TCE, and after having conducted a thorough review of the materials listed above, I have denied TCE's Disagreement in its entirety and thus will not disturb the contract award.

In accordance with 39 C.F.R. § 601.108(g), this is my final decision.

Sincerely,



Trent Ensley
USPS Supplier Disagreement Resolution Official