



December 22, 2011

Mr. Thomas P. Kane
Hinshaw & Culbertson, LLP
Attorneys at Law
333 South Seventh Street
Suite 2000
Minneapolis, MN 55402-2431

RE: Supplier Disagreement Resolution Case No. SDR-11SR-08
Solicitation No. 7GBTNS-10-0003

Dear Mr. Kane:

This responds to your supplier disagreement (hereinafter, "Disagreement") on behalf of SICK, Inc. (SICK) regarding US Postal Service solicitation 3A-11-A-00177 for "the continuation of existing software maintenance services in support of the Flats Sequencing System (FSS)." You lodged an initial disagreement with the contracting officer (CO) on July 15, 2011; the CO responded to the initial disagreement on July 22, 2011, and your Disagreement was received by this office on July 28, 2011.

The Disagreement

The Disagreement is based on SICK's contention it has a binding contract with the Postal Service. As stated in the disagreement, "SICK is requesting, by this letter, that the SDR Official direct USPS to honor its Contract (sic) with SICK." The question to be addressed is whether a contract was ever awarded to SICK, and this subject will be the focus of the discussion that follows.

The Solicitation

Solicitation No. 7GBTNS-10-A-0003 was issued on April 29, 2011. It called for software maintenance support for the Postal Service' Flat Sequencing System (FSS). Paragraph a. of Provision 4-2, Evaluation, stated, in part:

The Postal Service will award a contract resulting from this solicitation to the offeror whose offer conforming to the solicitation is deemed to offer the Postal Service the best value, price and other factors as specified considered. The following technical factors will be used in the evaluation of offers, and are listed in descending order of importance:

1. Supplier Capability
 - i. Knowledge of FSS System, FSS Software, and FSS Development tools
 - ii. Knowledge of USPS plant mail processing operations
 - iii. Technical skill and software development experience
 - iv. Ability to generate quality SDLC documentation.

Paragraph d, Notice of Award, of Provision 4-2 stated:

The Postal Service may accept an offer (or part of an offer), whether or not there are discussions after its receipt, before an offer's specified expiration time, unless a written notice of withdrawal is received before award. A written notice of award, or acceptance of an offer, mailed or otherwise furnished to the successful offeror within the time specified in the offer, will result in a binding contract without further action by either party.

Material Reviewed

In deciding this disagreement I have reviewed the following:

The statement of work and solicitation;
SICK's initial and later proposals and the awardee's proposal;
The CO's award recommendation;
Several emails to the CO from individuals who had been proposed by SICK declining to work on the contract if it was awarded to SICK;
A series of emails between the CO and SICK;
Sick's initial disagreement and the CO's response; and
SICK's disagreement lodged with the SDRO.

Conferences and fact-finding were also held with the CO and with SICK.

Chronology

This disagreement essentially devolves upon the question of whether SICK was awarded a contract for the above-referenced solicitation. In order to determine the answer, a review of communications (mostly emails) between the parties is required. The following chronology and review is not intended to be a complete record of communications between the Postal Service and SICK, but rather to highlight the relevant communications that go to the question of SICK's disagreement, i.e., whether a contract between the Postal Service and SICK ever existed.

The record shows the following:

That on June 10th (all dates refer to 2011), the CO wrote to SICK stating, in part: "This email is to confirm that the parties have an understanding as to the cost of the contract, key individuals by name and overall scope of the program. The total three year value of the contract is \$5,800,320. It is also the understanding of the Postal Service that final approval of the contract is required by SICK in Konstanz Germany . . . once the contract is reviewed and signed, I will countersign and issue contract award notices."

That on June 13th, the Postal Service purchasing specialist working for the CO sent an unsigned/undated Postal Service Form 8203, Order/Solicitation/Offer/Award to SICK. The email stated: "Please see the attached PS Form 8203. This should reflect all the requested changes (names, address, and dollar values). If it looks okay, please use this copy for signatures." SICK replied, in relevant part, to this email on the same day as follows: "This looks good."

That later on June 13th the CO emailed SICK stating: "Do you have concurrence from your management yet. The program office here is getting a little anxious, and I would like to report to them that all parties are in agreement as of COB today." SICK responded to this email stating "Unfortunately, I won't be able to give you concurrence today. However, I have a review tomorrow

morning with a Board member . . . and he has the authority to approve. I'll let you both know tomorrow morning."

That on June 14th, SICK emailed the CO stating: "For your consideration, below is draft wording based on our conversation. Please call me at your earliest convenience to discuss your opinion." The draft wording discussed joint termination of the contract, and was new language adding new terms and conditions to the terms and conditions previously agreed to by the parties.

That, beginning on June 14th, the CO received emails from several of the key personnel included in SICK's proposal stating that they would not work on a contract awarded to SICK.

That on June 15th, the CO emailed SICK stating: "As a follow-up to our phone conversation I want to confirm the (sic) SICK is prepared to execute the contract as presented to you without modification." The CO's email also asked SICK for clarification on how it would handle key personnel. SICK responded: "Yes, I'm prepared to execute the contract immediately without modification." The response went on to discuss the key personnel issue.

That later on June 15th, SICK emailed the CO stating: "We are standing by to sign the 8203. Are we in a position to move forward? I want to make sure that I'm not waiting for you and you waiting on me." The CO responded: "You are waiting for me to provide you with direction to sign the 8203. I hope to give an update later today."

That still later on June 15th, SICK wrote the CO stating: "I'm getting ready to travel back to ___ and will be unavailable for a while so I wanted to send this to you now. SICK is pleased to accept this contract as offered. The signed 8203 is attached. Also, I have two originals which I will mail to you shortly. I hopeful (sic) that you will be able to execute this quickly and return in soft copy." The CO responded to this email by stating: "Just to reiterate our conversation of this morning, a contract can only be established if the document is countersigned by the Postal Service."

That on June 16th, SICK emailed the CO stating, in part: "It is our opinion that SICK has a contract with USPS. A contract was issued to SICK and we executed it. SICK intends to perform to this contract with all our efforts. We have already begun to actively work on this project." The CO responded that day by stating, in part: "Your interpretation is incorrect. Any costs incurred on this effort are done so at SICK's liability."

That later on June 16th, the CO wrote to SICK stating, in part: "I cannot move forward with award to SICK unless you can confirm the availability of the key personnel per the contract attachment we discussed." SICK then apparently provided the CO not with the confirmation, but rather with some correspondence from SICK's President. The CO responded to this email by writing to SICK: "I have forwarded the letter to my management for review and comment. My recommendation as the contracting officer is not to take the actions that SICK has requested."

There is further email correspondence between the parties but it is not particularly relevant to the contract formation question.

Discussion

The record shows that no contract was formed between the Postal Service and SICK. The first indication of this is the June 14th email where SICK wrote back to the CO suggesting some additional language concerning joint termination be added to the contract. SICK's suggested change shows that negotiations between the parties were continuing and that the parties were still in the contract formation/negotiation stage of the purchase. The June 15th email from the CO to SICK similarly

affirms that the terms and conditions of a contract had not been mutually agreed upon and that no contract existed at this point, as does the email exchange between the CO and SICK later that day. One of the June 16th emails reiterates the CO's position that "a contract can only be established if the document is countersigned by the Postal Service." And later that day the CO wrote to SICK asking for confirmation as to the availability of the key personnel included in SICK's proposal.

Rather than the record showing that SICK had been awarded a contract, it appears that the CO made an offer to SICK, that SICK could not accept the offer before it got approval from higher authority, and that SICK then made a counteroffer containing the new joint termination language (see above). At this point, the CO was informed by several of the key personnel included in SICK's proposal that they would not work for SICK. This development called into question the validity of SICK's proposal. On June 17th, a telecon was held between the CO and USPS management and SICK during which the Postal Service representatives reiterated that no contract had been formed between USPS and SICK, and gave SICK a few days to see if SICK could secure the commitment of the key personnel it had proposed.

As indicated in the CO's response to the initial disagreement, SICK then met with the CO on June 21st, informing the CO that SICK could not secure written commitments from some of the key personnel. The CO then suggested that SICK provide a revised proposal, and SICK agreed. The revised proposal, containing new and different key personnel, was received by the Postal Service on June 23rd. The fact that SICK provided a revised proposal reinforces the point that no contract yet existed between the Postal Service and SICK. This revised proposal was evaluated by the evaluation team, and was scored lower than the original proposal due to different key personnel.

The CO then entered into discussions/negotiations with the offeror whose technical proposal was ranked as high as SICK's during the original evaluation, and higher than SICK's revised proposal. These discussions were successful, and the contract was awarded to this offeror. Prior to award, the CO notified SICK that its new proposal had been scored lower than its original.

To put it simply, SICK, by not being able to ensure that the key personnel included in its original proposal would in fact work for SICK, could not fulfill the promises it made in its proposal. The CO became aware of this and asked SICK to submit a new proposal. When SICK's new proposal did not score as high as its original, the CO negotiated a contract with the offeror that the CO determined offered the best value to the Postal Service. If the CO had accepted SICK's proposal knowing that the proposal was flawed by the fact that SICK could not ensure the participation of the proposal's key personnel, the CO would not be acting in the best interests of the Postal Service or ensuring that the Postal Service obtained the best value.

Decision

After considering all information provided by the CO and SICK, including during fact-finding conferences with both parties, and after having conducted a thorough review of the record, I have determined that the CO awarded the contract to the offeror who offered the best value to the Postal Service and that a contract was never finalized between the Postal Service and SICK. As the latter point is the basic contention of SICK's disagreement, the disagreement is denied.

Sincerely,



Trent Ensley
USPS Supplier Disagreement Resolution Official