

Protest of) Date: July 1, 1987
)
MARINE & INDUSTRIAL)
INSULATORS, INC.)
)
Solicitation No. 19-9986-87-A-0028) P.S. Protest No. 87-31

DECISION

Marine & Industrial Insulators, Inc., (MII) timely protests the contracting officer's determination that it is a nonresponsible bidder in response to Solicitation No. 19-9986-87-A-0028.

Background

Solicitation No. 19-9986-87-A-0028, issued February 27, 1987, invited bids for a term construction contract for asbestos abatement at postal facilities in Colorado and Wyoming. The minimum value of work under the contract was to be \$5,000, and the maximum \$250,000. Bid opening occurred at 3:30 p.m. on March 20, 1987. Five bids were received, and MII's bid of a multiplier of .78 was low.^{1/}

The contracting officer conducted a pre-award survey, in which MII's references were contacted and a credit report was obtained. MII's performance references commented favorably upon the company's workmanship and the timeliness of its performance. The Postal Service reference, however, indicated a number of problems related to the company's management and administration. Of the three projects represented by the references, MII's work for the Postal Service in Michigan and Illinois involved the largest amount of money (\$2 million) and was still in progress at the time of the pre-award survey. The Postal Service official contacted in the survey reported that MII had a "paper work problem," failed to answer letters, signed work orders after work was completed and billed, had filed for bankruptcy under Chapter 11, and was being investigated by the Internal Revenue Service in connection with its payment of employees' withholding taxes.

The pre-award survey indicated that MII's banking reference had indicated a low, four-figure balance, and refused to provide a credit rating. The summary of the Dun &

^{1/}In solicitations for term construction contracts, potential bidders are supplied a schedule of tasks and unit prices for each task. Each bidder offers to perform the tasks as ordered during the term of the contract at the prices on the schedule, as adjusted by the multiplier. Hence, MII offered to perform at 78 percent of schedule prices.

Bradstreet report requested on March 31, 1987, indicated "low" financial strength and a "slow" credit rating.

By letter dated April 9, the contracting officer advised MII that, based upon the results of the pre-award survey, he had determined that MII was a nonresponsible bidder. Referring to the pre-award survey, and specifically to MII's bank and the Dun & Bradstreet report, the contracting officer found indications that MII "lack[s] the financial capacity requisite to an award." The contracting officer also concluded that "[s]uch indication is furthered by the fact that your firm has filed a voluntary petition in bankruptcy in Charleston, South Carolina." Finally, the contracting officer noted that MII's president had been a principal officer of a corporation that filed for bankruptcy in 1982.

The Protest

MIl's protest was received by this office on April 16, 1987. MII objected primarily to the contracting officer's consideration of its bankruptcy status, citing statutory authority, 11 U.S.C. ' 525(b), prohibiting private employers from discriminating against debtors or bankrupts with respect to employment. MII asserted that, in reviewing the contracting officer's decision, we should consider its successful completion of other postal contracts, its banking reference, its successful operation under Chapter 11, and the possibility that it would be issued a certificate of competency, or other evidence of responsibility, in other circumstances. Finally, MII argues that it can obtain performance and payment bonds that fully protect the Postal Service, but has not been asked to do so.

Contracting Officer's Position

In his report, the contracting officer provides a summary of the pre-award survey upon which he based his determination of nonresponsibility. The contracting officer states that he does not consider a Chapter 11 proceeding to be an "absolute disqualification," but rather a factor to be considered in making his determination. He disputes MII's assertion that the Postal Service is a private employer, noting that the Postal Service is an independent establishment of the executive branch. He also asserts that the relationship between the Postal Service and its contractors is not in the nature of an employment relationship.

The contracting officer states that he did not base his determination solely on MII's bankruptcy status. With regard to the firm's president's association with a bankrupt corporation, the contracting officer finds evidence of a lack of financial management. He notes that performance of the contract far from the company's headquarters in South Carolina could exacerbate difficulties in meeting withholding obligations and that the company's low bank balance further indicates a lack of financial capacity. The contracting officer considers the possibility that MII could obtain a certificate of competency to be a matter of speculation, and the Postal Service would not be bound to honor it in any event.

The contracting officer submitted further comments, dated June 2, 1987, in rebuttal to

the protester's response to his report. The contracting officer argues that under the applicable provisions of the Postal Contracting Manual (PCM), he must make a determination of nonresponsibility when the information that he obtains does not indicate clearly that the subject bidder is responsible. He states that while such factors as a low cash balance may not require a determination of nonresponsibility, they may be considered in reaching such a determination. He asserts that his determination was based upon all the information available to him, and not solely upon MII's bankruptcy status.

Protester's Position

In its response to the contracting officer's report, MII asserts that determinations of responsibility have been upheld by the Comptroller General in spite of balance-sheet deficits, payroll difficulties, or the like. It argues that responsibility determinations must consider all aspects of a bidder's financial condition, that negative determinations must be supported by facts, and that affirmative determinations are appropriate even where a bankruptcy petition has been filed by the bidder. MII offers numerous citations to Comptroller General decisions in support of these propositions. MII concludes that, considering all aspects of its financial condition, there is a lack of substantial evidence supporting the contracting officer's determination that it was a nonresponsible bidder.

MIl contends that a review of the comments received by the contracting officer demonstrates that his determination was not based on "substantial evidence of nonresponsibility." MII notes that the Postal Service official in Chicago who was contacted in the pre-award survey had rated MII's workmanship "very good," but referred to a "paper work problem." MII argues that it had remedied any paper work problem it may have had through its employment of a management consultant in December of 1986. The company also supplemented its response with a letter from its Postal Service reference, commending the firm for its cooperation and expeditious accomplishment of contract work during a period of reorganization.

The protester also offers evidence that it has paid all withholding taxes due since the filing of its Chapter 11 petition in October, 1986. It explains that it cannot begin to pay taxes due prior to the filing of its petition until the Bankruptcy Court approves a plan covering such payments.

MIl notes that it was given a favorable rating by two of its customers, as well as by a surety that had bonded it in the past.^{1/} It disputes the pre-award survey's account of the report given by its bank reference. MII asserts that the bank's representative had not refused to rate MII's credit, but had provided all information requested by the Postal Service, indicating that MII had met all its bank obligations. It also maintains that its balance was well over \$100,000 on the day that the Postal Service made its inquiry.

MIl also contends that the contracting officer should not have requested a full report from Dun & Bradstreet. Viewing the contracting officer's skepticism as lacking a basis in the information received from its references, MII concludes that the contracting

^{2/}The bid submitted by MII in the instant solicitation was guaranteed by check, rather than by bid bond.

officer's "decision to order the full report could only be an unjustified reaction against the bankrupt status of MII." MII explains that the bankruptcy of its president's earlier firm was not the result of a lack of financial management.

In evident response to the contracting officer's argument that the Postal Service should not be considered a private employer under the Bankruptcy Code, MII shifts the proffered support for its non-discrimination argument to another portion of 11 U.S.C. ' 525, which, in certain types of transactions, prohibits governmental units from discriminating against debtors solely on the basis of their bankruptcy status. 11 U.S.C. ' 525(a). MII cites cases holding the provision applicable to government contracting activities, and notes that a company's protection under the bankruptcy laws may substantially enhance its ability to perform contracts. MII concludes that upon examination of the contracting officer's evidence, only MII's bankrupt status could have formed the basis of the contracting officer's determination.

A conference in this matter was held with the protester's representatives on June 9, 1987. Generally, MII contended that the contracting officer based his determination on stale, inaccurate, and insubstantial information. Its only direct factual dispute with the contracting officer concerned the response given by the protester's banking reference to the Postal Service's inquiry. On this matter, MII augmented the argument presented in its written comments, asserting that the bank's representative had not been asked about MII's balance, but rather had indicated simply that MII was current in its obligations to the bank. However, MII did not dispute the bank-balance information reported in the pre-award survey; it asserted that broad fluctuations in bank balances are to be considered normal.

MIl argued that other factors cited by the contracting officer, shaky credit, withholding taxes, and "slow-pay" history are matters predating MII's filing of a bankruptcy petition, and are not relevant to the contracting officer's responsibility determination. It asserted that the Dun & Bradstreet report did not reflect recent events that would indicate an improvement in the protester's financial condition. As it did in its comments, MII maintained that the bankruptcy of another company with which its president was associated was the result of non-payment by a large customer, not of poor management.

MIl views the non-bankruptcy bases for the contracting officer's determination as post hoc rationalizations. Given the lack of opportunity for MII to become responsible through a certificate of competency from the Small Business Administration, it urged close scrutiny of the contracting officer's determination. It maintained that the contracting officer should have sought clarification of discrepancies uncovered in the pre-award survey, and that it stood ready to provide further evidence of its responsibility. It noted that the contracting officer does not point to any failure of MII to complete performance of any contract; it also noted that the firm's work is not sophisticated and has not been the subject of complaints by customers.

Discussion

The standard governing our review of a contracting officer's determination of

nonresponsibility is well settled.

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement with available information about the contractor's resources and record. We well recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

Dohrman Manufacturing Co., Inc., P.S. Protest No. 84-8, March 13, 1984, quoting Craft Products Company, P.S. Protest No. 80-41, February 9, 1981.

The facts in Dohrman were quite similar to the facts presented here. Specifically, the contracting officer based his determination on a weak balance sheet, non-payment of obligations, and the filing of a petition under Chapter 11 of the Bankruptcy Code. In addition, the contracting officer's determination was found not to be an abuse of discretion, despite a different exercise of discretion by another contracting officer, who had found the protester responsible in a procurement conducted in another postal region.

As in Dohrman, we conclude here that the contracting officer dealt with the information before him in a way that was not arbitrary and capricious. The information gathered in the pre-award survey painted an internally consistent picture of a technically capable firm in weak financial condition. The contracting officer has stated correctly that he is obligated to reach a determination of nonresponsibility when his investigation does not clearly indicate that a bidder is responsible. PCM 1-902. The problems noted by another postal official, the firm's low bank balance, and weak credit status revealed in the Dun & Bradstreet report could reasonably lead the contracting officer to question MII's financial capability, and thus to determine that it is a nonresponsible bidder with respect to the instant solicitation. Dohrman Manufacturing Co., Inc., *supra*.

The contracting officer also obtained sufficient information on which to base his determination. He contacted several of the protester's customers (including the Postal Service), its bank and its surety. He also obtained a report from Dun & Bradstreet. The contracting officer's approach brought together an amount of information that was reasonable under the circumstances.^{1/}

Having found that the contracting officer conducted a pre-award survey of reasonable type and scope, and that his business judgment followed reasonably from his

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III cites the lack of sophisticated work requirements as a basis for questioning the reasonableness of contracting officer's doubts about its financial condition. However, the relative simplicity of the work and the modest size of the contract are also relevant to the reasonableness of the contractor's efforts to marshal evidence in support of his responsibility determination.

information, we turn to MII's objections to the basis for the determination. This challenge is essentially twofold. First, MII asserts that the contracting officer should have placed little or no importance on certain information produced in the survey, and should have sought additional information on MII's financial capability. The second element is MII's discrimination argument; here, the protester asserts that certain factual findings should not be permitted to lend support to the contracting officer's determination.

MIl objects on two grounds to the information gathered by the contracting officer. First, it objects to the contracting officer's decision to obtain a evaluation full report from Dun & Bradstreet. We find nothing objectionable in the contracting officer's decision to seek such a report. Obtaining information from an independent financial-information business is quite reasonable; to the extent that the contracting officer's initial concerns prompted him to ask for information in greater quantity or detail, he followed an information-gathering strategy which cannot be faulted and which, in another area, MII would press upon him, as discussed below.

MIl's second objection to the information assembled by the contracting officer is that much of it is stale and predates the filing of its bankruptcy petition. If this assertion were correct, it could raise a question about the reasonableness of the contracting officer's investigation. However, nothing in the record before us indicates that the contracting officer overlooked or avoided recent, "post-petition" information. MII's postal reference was contacted while work was still in progress, and its most favorable references came from customers whose contracts were performed during the "pre-petition" period. The Dun & Bradstreet report obtained by the contracting officer covers a longer period of time, but hardly omits recent information. The report's payment ratings show payments reported in January, February and March of 1987, and show a declining payment score for the period.

MIl argues that the contracting officer should have made additional inquiries of the firm, and that only the company's bankrupt status could realistically have formed the basis for his determination. However, these arguments do not persuade us that the contracting officer's determination should be set aside. The facts -- other than MII's bankruptcy status -- uncovered in the pre-award survey were gathered from the company's references, and from information supplied in a Dun & Bradstreet report. In reporting his determination of nonresponsibility, the contracting officer referred initially, and principally, to information from the bank and from Dun & Bradstreet. He states that the firm's filing of a voluntary bankruptcy petition furthers the indication of lack of financial capacity.

As to MII's assertion that the contracting officer should have requested further information on, or assurances of, its financial capability, we have declined to impose an information-gathering duty on contracting officers. Hi-Line Machine, Inc. and Gardner Industries, Inc., P.S. Protest No. 85-6, March 7, 1985. Although MII asserts that the contracting officer should have made inquiries necessary to resolve discrepancies, it points to no discrepancies beyond a mixture of favorable and unfavorable responses by its references, and its dispute over the information provided by its bank. The comments provided by references reveal no conflicting statements of fact, but merely a variety of viewpoints. The numerous endorsements of the quality of MII's workmanship are not

contradicted by other information or by the contracting officer; they are not inconsistent with unfavorable information concerning the firm's financial condition. Although MII disputes the pre-award survey's account of the bank representative's response, it does not dispute the accuracy of bank-balance information reported. Since it is the bank-balance information upon which the contracting officer relied, the dispute does not go to the basis for the contracting officer's determination.

A contracting officer is not required to discuss his findings on responsibility with a bidder before making his determination. Currency Technology Corporation, P.S. Protest No. 85-22, July 8, 1985. Thus, while MII might have been able to provide additional evidence related to its financial condition^{4/} (and has produced such evidence in support of its protest), the contracting officer was not obligated to discuss his findings with MII, or to afford it an opportunity to present "rebuttal evidence."

A challenge to a nonresponsibility determination based upon 11

^{4/} MII's assertion that the Postal Service could have been protected by payment and performance bonds is not relevant to the contracting officer's determination. The bonds would not have been required until after award, whereas the contracting officer is required to make an affirmative finding of financial responsibility prior to award. Such bonds do not provide the Postal Service with complete protection from a contractor without financial capability in any event. In fact, PCM 18505 provides: "In evaluating the financial resources and ability to perform of a prospective contractor, the contracting officer, in addition to other pertinent factors (see Section 1, Part 9), shall not consider the mere ability to furnish a bid guarantee and performance and payment bond as evidence of adequate financial resources and ability to perform."

U.S.C. ' 525 has not been confronted in our prior decisions.^{1/} Section 525 prohibits discrimination "solely" on the basis of the debtor's status, and MII challenges the contracting officer's determination on the basis that it is based solely upon MII's bankrupt status. The cases cited in MII's comments, In re Marine Electric Railway Products, 17 Bankr. 845 (Bankr. E.D.N.Y. 1982), and In re Son-Shine Grading, Inc., 27 Bankr. 693 (Bankr. E.D.S.C. 1983), involved disqualifications based solely upon firms' having filed bankruptcy petitions.^{1/}

Where other bases for governmental action have been found, the provision's prohibition has been held not to apply. For example, in In re Rose, 23 Bankr. 662 (Bankr. D. Conn. 1982), the court upheld rejection of an application under a state mortgage program. Although the original rejection letter impermissibly demanded that the applicant reaffirm student loans discharged in an earlier bankruptcy proceeding, the court found that the rejecting officials "reasonably supported their decisions without reference to the student loan affirmation request" imposed by another official.^{1/}

The Comptroller General has also had occasion to apply ' 525. In Sam Gonzales, Inc. - Reconsideration, Comp. Gen. Dec. B-225542.2, March 18, 1987, 87-1 CPD & 306, the Comptroller General reviewed an agency's withdrawal of a section 8(a) project out of concern for the financial capacity of a contractor who had filed a petition under Chapter 11. The Comptroller General upheld the agency's action, concluding that it did not "act as it did solely because Gonzales sought Chapter 11 protection." In discussing ' 525, the Comptroller General noted that "11 U.S.C. '525 is intended to protect debtors from discriminatory treatment; it does not grant them rights greater than they would enjoy outside of bankruptcy." Id. (citations omitted).

To the extent that MII objects to "pre-petition" financial information as support for a contracting officer's determination, we do not find support for the proposition in ' 525. The Sixth Circuit, in concluding that ' 525 did not bar the maintenance of financial-responsibility requirements on the basis of unsatisfied judgments that were dischargeable in a pending bankruptcy proceeding, recognized that the provision's prohibition

does not extend so far as to prohibit examination of

^{5/}We note that the protester bases its conclusion that the Postal Service is a "governmental unit" within the meaning of ' 525 upon a statutory definition and legislative history referring to a definition of the term in the "broadest sense." However, MII has not addressed the effect of 39 U.S.C. 410(a), which generally makes federal laws dealing with "public or Federal contracts, property, works, officers, employees, budgets, or funds, . . ." inapplicable to the exercise of the powers of the Postal Service. We need not decide this question, however, because even if the actions of the Postal Service are governed by ' 525, the contracting officer's nonresponsibility determination did not violate the section.

^{6/}In Marine Electric, the contracting authority stipulated that the dependency of a bankruptcy petition was the sole basis for disqualification. In Son-Shine, a contractor was precluded from bidding on a state contract as the result of its bankrupt status.

^{7/}The debtor had argued that "solely" in '525 should be interpreted as "primarily" or "predominantly." However, the court could not find, under either a narrow or broad interpretation of "solely", that the prior bankruptcy was the sole reason for denial of the loan.

the factors surrounding bankruptcy, the imposition of financial responsibility rules if they are not imposed only on former bankrupts, or the examination of prospective financial condition or managerial ability .

. . .

Duffy v. Dollison, 734 F.2d 265, 273, (6th Cir. 1984), (court's emphasis), (quoting from legislative history).

We have held that, while the pendency of a bankruptcy petition does not require a determination of nonresponsibility, it is one of a number of factors that a contracting officer may consider. Government Products Corporation, P.S. Protest No. 84-58, December 10, 1984; Dohrman Manufacturing Co., Inc., *supra*. In the instant protest, the contracting officer has shown a basis for his determination that involved not only the pendency of MII's voluntary bankruptcy petition, but also a number of other factors reasonably related to MII's current financial condition. Under the standard recognized in these cases, we find no basis for setting aside the contracting officer's determination.

The analysis of 11 U.S.C. ' 525 presented above does not require the opposite conclusion. At most, ' 525 would require that we test the support of the contracting officer's determination without reference to the two bankruptcy petitions that came to light in the pre-award survey. In reporting his conclusion, the contracting officer referred initially and principally to facts about MII's finances other than the filing of two bankruptcy petitions. We conclude such other financial information, uncovered and considered by the contracting officer, meets the requirement that his determination be based upon substantial information.

The protest is denied.

**Signed "Norman DMenegat
for"**

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[Checked against original 3/3/93 WJJ]