

Protest of) Date: October 6, 1988
JAMES E. TONEY)
Solicitation No. 840-23-88) P.S. Protest No. 88-45

DECISION

Mr. James E. Toney timely protests the contracting officer's determination that he is a nonresponsible bidder under Solicitation No. 840-23-88, issued May 2, 1988, by the Salt Lake City Transportation Management Service Center (TMSC), for highway transportation of mail and box delivery service between Duchesne and Hanna, Utah, for a term from July 30, 1988, to June 30, 1991. \$16,000.

Based upon Mr. Toney's response to the pre-award questionnaire submitted to him, his unsolicited letter which included "additional information concerning [his] credit", and an authorized credit check, the contracting officer determined the following with respect to Mr. Toney's responsibility:

- (1) He had a small balance in his bank account;
- (2) He had a net worth of less than \$10,000;
- (3) He owed back taxes to the Internal Revenue Service and the State of Utah;
- (4) He planned to use a 1974 automobile on the route; and
- (5) He had bid a total of 4 cents per mile for operational costs (excluding fuel) on the worksheet which accompanied his bid.^{1/}

^{1/} The worksheet, which is not part of the bid, allocates the annual rate bid among various costs for the purpose of subsequent adjustments. The 4 cents per mile was arrived at by subtracting allocated fuel cost from the total fixed and operating costs on protester's bid worksheet. The fixed and operational costs include repairs, tires, general overhead costs, etc. While we understand that the contracting officer thinks that 4 cents per mile is insufficient to cover those costs, his report does not state what he believes to be an adequate allowance for such costs.

The major part of Mr. Toney's bid price was allocated to "salary" on the worksheet. It is undisputed that this "salary" reflects the labor of Mr. Toney, who will drive the route himself.

On June 22, a member of the contracting officer's staff, suspecting an error on Mr. Toney's PS Form 7468-A, Bid Worksheet, contacted him and expressed concern over the low operating costs shown on his bid worksheet. Mr. Toney stated that there had not been an error and confirmed this position by his letter dated June 24.

Based upon the information available to him, the contracting officer determined that Mr. Toney had inadequate resources to assure performance. By letter dated June 30, the contracting officer advised Mr. Toney that he had been found nonresponsible. By letter dated July 11, Mr. Toney protested to the contracting officer who referred the protest to this office.

Mr. Toney asserts that he has adequate financial resources to assume performance. He admits that his vehicles^{4/} are old, but states that he can keep them in good running condition with "very little money." He further states that his wife works for the Duchesne County Clerk's Office, but does not state her income.

In his statement to this office, the contracting officer indicated that his finding of nonresponsibility was primarily based on concern that Mr. Toney did not have enough cash available to operate the route for thirty days.^{1/} The contracting officer noted that a submitted bank statement^{1/} showed a negative cash flow prior to payment of any of the expenses associated with the contract. The contracting officer also expressed grave concern that service integrity could not be maintained if the protester were operating fourteen-year old vehicles on a route which requires stop and go service. The contracting officer found that Mr. Toney's allowance of 4 cents per mile for operational costs would not allow sufficient funds to maintain his vehicle, even if he did the work himself, unless he subsidized his maintenance expenses from his salary. Finally, the contracting officer indicated that Mr. Toney's other debts, when compared to his assets, particularly available cash, made him a high risk bidder in terms of his ability to maintain performance.

Two comments on the protest were received. In the first, the second low bidder, Mr. Bernard Hadden, submitted comments asserting that he is qualified to operate the route. Specifically, he states that he has two 1985 vehicles, one of which possesses four-wheel drive capability, and that he lives only seven blocks from the origin point of the route. In the second, Patricia T. Jess, the ninth lowest bidder, disagreed with the contracting officer's determination. Ms. Jess asserts that both the first and second low bids are too low to earn a reasonable profit.

^{2/} The protester's pre-award questionnaire indicates that he intends to use a 1974 Toyota passenger car as his primary vehicle with a 1974 Toyota truck also available for the route.

^{3/} Thirty days represents the time period between start-up and the first payment under the contract. The contracting officer states that the monthly cost associated with the contract is \$1,094, a figure which, we note, is one-twelfth of the annual rate Mr. Toney bid.

^{4/} The bank statement was submitted by the protester to document payment of outstanding debts.

The standard of review of a contracting officer's finding of nonresponsibility is well established:

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 will recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. 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. Craft Products Company, P.S. Protest No. 80-41, February 9, 1981; Pamela J. Sutton, P.S. Protest No. 87-110, February 9, 1988; David Guidry, Jr. and Johnny Jackson, d/b/a Guidry & Jackson Trucking, P.S. Protest 87-133, March 4, 1988.

The policy underlying responsibility determinations and the requirement that such a determination be made are clearly stated in the Postal Contracting Manual (PCM):

The award of a contract to a supplier based on lowest evaluated price alone can be a false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional procurement or administrative costs. While it is important that purchases be made at the lowest price, this does not require an award to a supplier solely because he submits the lowest bid or offer. A prospective contractor must demonstrate affirmatively his responsibility....

PCM 1-902. PCM 1-903.1(i) further specifies that to be determined responsible, a prospective contractor must "[h]ave adequate financial resources, or the ability to obtain such resources...."

Although this office's review of a contracting officer's finding of nonresponsibility is extremely circumscribed, on the record before us we find that the contracting officer exceeded his discretion. Our finding is narrowly constrained to the facts of this case.

The contracting officer based his decision, in part, on a finding that the protester has insufficient cash on hand to assure performance during the initial thirty days of the contract. That determination rests on an analysis which calculates the monthly operating costs of the contract to be \$1,032. The use of \$1,032 as the monthly operating cost of a \$13,129 annual contract is not reasonable. That amount represents the total cost to the Postal Service, not the contractor's actual out-of-pocket expenses. The use of this high statement of the operating costs makes the decision flawed. Though we cannot conduct an inquiry into what would constitute a reasonable estimate of the operating costs on a route of the size and type contemplated by Solicitation No. 840-23-88,^{5/} equally we cannot sustain a decision which finds inadequate cash

^{5/} Our bid protest forum does not conduct adversary proceedings nor resolve factual disputes to any

reserves when premised on a contractor's monthly operating cost equal to the total monthly cost of the contract to the Postal Service.

In the case of a highway contract held by an owner-operator, any distinction between the allocation of revenue to salary and profit on the worksheet is artificial. For a contractor who drives the route himself, salary is not an expense, it is a characterization of the amount in excess of expenses which the contractor hopes to receive.

The contracting officer further justifies his finding of nonresponsibility on the inadequacy of the protester's estimate of total fixed and operating costs. That analysis is flawed in that it assumes that a self-employed contractor cannot reallocate salary to operational costs. As we have pointed out, for a self-employed contractor, salary and profit are similar. There is no requirement that a contractor make a reasonable profit on a contract, see E-Z Copy, Inc., P.S. Protest 88-28, July 29, 1988, or any profit at all. See Lightron of Cornwall, Inc., P.S. Protest No. 84-06, February 27, 1984; Leewen Mechanical Corporation, P.S. Protest No. 83-70, January 19, 1984. Thus, the contracting officer's decision, premised on an assumption that the contractor cannot subsidize costs from his salary, is arbitrary; it imposes an unreasonable restriction on a contractor.

While we recognize that it is critical for highway contractors to have cash reserves to pay for fuel, maintenance, and other expenses before receipt of the first contract payment, David W. Baker, P.S. Protest No. 87-76, August 10, 1987, the contracting officer's decision in this case is arbitrary since it postulates an unreasonably high monthly operational cost as a basis for finding the protester's cash reserves to be inadequate. Further, the contracting officer's decision arbitrarily imposes a requirement that the successful contractor not subsidize operational costs from his salary and uses that requirement as a basis for his finding that the protester would not have adequate funds to maintain his vehicle.

The protest is sustained and the matter is remanded to the contracting officer for reconsideration of Mr. Toney's responsibility in a manner consistent with this opinion. Reconsideration may include such reevaluation of Mr. Toney's finances and other considerations as the contracting officer may wish to perform.

William J. Jones
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Office of Contracts and Property Law

[checked against original JLS 3/3/93]

significant extent or degree.

See Cohlmia Airline, Inc., P.S. Protest No. 87-118, April 13, 1988.