

Protest of ) Date: January 12, 1989  
AHJ Transportation, Inc. )  
Under Solicitation No. JAX-144-88 ) P.S. Protest No. 88-76

### DECISION

AHJ Transportation, Inc. (AHJ), timely protests the contracting officer's determination that it is an ineligible prospective contractor under Solicitation JAX-144-88 because its principal, Austin P. Hatcher, Jr., had been debarred by the Department of Labor (DOL).

The solicitation, issued by the Jacksonville, FL, Transportation Management Services Center, sought bids for the highway transportation of mail between West Palm Beach and Ft. Myers, FL. When bids were opened on October 11, 1988, AHJ's bid was the lowest of the 13 bids received.

After bid opening, as part of determining AHJ's responsibility, the contracting officer reviewed the "List of Parties Excluded From Procurement or Nonprocurement Programs" (Consolidated List) issued by the General Services Administration, and found that AHJ's principal, Austin P. Hatcher, Jr., appeared on the list as the result of his debarment by the DOL.<sup>1/</sup> By letter of October 12, the contracting officer advised AHJ that its bid was "nonresponsible" and would not receive further consideration since its principal's name appeared on the Consolidated List.<sup>1/</sup>

<sup>1/</sup> The notice indicated that the debarment was made by the Secretary of Labor for violation of the Service Contract Act, 41 U.S.C. ' 354, and would expire on November 1, 1988. According to the "Definition of Terms and Cause and Treatment Codes" portion of the Consolidated List, parties debarred for Service Contract Act violations were to be treated as follows:

Offers shall not be solicited from, nor contracts be awarded to, the listed contractor or any firm, corporation, partnership, or association in which the contractor has a substantial interest. Debarment is for a three-year period to terminate on the date shown.

This advice is consistent with the provision of the Act that "no contract of the United States shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until three years have elapsed from the date of publication of the list containing the name of such persons or firms...." 41 U.S.C. '354(a).

<sup>2/</sup> Responsibility is a characteristic of bidders, not of bids; we understand the contracting officer's intention to be to establish that AHJ was nonresponsible. See Procurement Manual (PM) 3.3.1.e1. Strictly speaking, however, the proper characterization of AHJ prior to October 1, was as "ineligible." PM 3.3.2,

By letter of October 20, AHJ protested this finding to the contracting officer. AHJ contended that because contract award under the Solicitation would not occur until after November 1, the date at which Mr. Hatcher's debarment would expire, AHJ would be eligible for consideration for award when award was to be made.<sup>1/</sup> By letter of October 28, the contracting officer denied AHJ's protest as obviously without merit, indicating that AHJ was precluded, as a matter of law, from receiving contract award until November 1.<sup>1/</sup> By letter of November 3, AHJ protested the contracting officer's decision, stating that it wished to protest "to the next higher level of authority." The contracting officer forwarded AHJ's November 3 protest to this office. No contract award was made prior to November 1.

## CONTENTIONS OF THE PARTIES

AHJ argues that the contracting officer erred in finding it nonresponsible since the applicable regulations speak of the bidder's status at contract award. In its protest to this office, AHJ notes that since no award has been made under Solicitation No. JAX-

"Debarment, Suspension, and Ineligibility," distinguishes between debarments and suspensions by the Postal Service and ineligibility such as is at issue here: PM 3.3.2.b6. provides the definition:

"Ineligible" means excluded from contracting and subcontracting under statutes, Executive orders, or regulations of Government agencies, such as the Davis-Bacon Act and its related statutes and implementing regulations, the Service Contract Act, [and other enumerated provisions].

PM 3.3.2.d.1. and 2. distinguish between the treatment of parties suspended by the Postal Service and those otherwise listed as ineligible:

1. Debarred or suspended contractors are excluded from receiving contracts, and contracting officers may not solicit proposals or quotations from, [or] award contracts to...such contractors, unless the responsible department head determines in writing that there is a compelling reason for such action in the interest of the Postal Service.
2. Contractors listed as having been declared ineligible on the basis of statutory or other regulatory procedures are excluded from receiving contracts...under the conditions and for the period set forth in the statute or regulation. Contracting officers may not solicit proposals or quotations from, [or] award contracts to...such contractors under those conditions and for that period.

<sup>3/</sup> It is not clear how AHJ could be certain on October 20 that award could not occur before November 1. AHJ also seems to suggest that the date of beginning contract performance and the ability of the contracting officer to postpone award are relevant to its protest. This is incorrect. The Act is quite clear on the effect of appearance on the Consolidated List and the relevant point in time is contract award. As to the ability to postpone award, it would not be appropriate to postpone contract award in order to allow the expiration of a particular bidder's ineligibility since this would violate the intent of the Act.

<sup>4/</sup> A contracting officer may, with the concurrence of counsel, summarily dismiss a protest as obviously without merit. See PM 4.5.6.c.2.

144-88, the term of its debarment has expired and it is now eligible for award. AHJ does not request that award be made to it.

In his initial report on the protest, the contracting officer reiterates that AHJ was determined nonresponsible because its principal's name appeared on the Consolidated List. That report does not address the effect of the expiration of the debarment during the pendency of this protest or state when contract award would have been in the absence of a protest. In a subsequent submission, the contracting officer states that he was prepared to make contract award to the next low bidder at the time of eliminating AHJ from consideration. However, that submission included a copy of an October 31 letter to the second low bidder requesting additional information for review prior to award, which suggests strongly to the contrary.

## DISCUSSION

This protest raises the issue of when a prospective awardee's status as an ineligible contractor should be measured. At the time of submitting its bid, AHJ's principal was on the Consolidated List, and AHJ thus was an ineligible contractor. Our regulations require that such a contractor be accorded the treatment specified by the applicable statute, Executive order, or regulation under which the contractor is excluded from contracting.<sup>1/</sup>

The language of the Act proscribes contract award to an ineligible contractor "until three years have elapsed from the date of publication of the list containing the name of such [contractor]..." 41 U.S.C. '354(a). The Act does not state that an ineligible contractor's bid should be rejected immediately (i.e. at bid opening), or prior to contract award, while that contractor is precluded from award.

Although the certitude of eliminating an ineligible contractor's bid from further consideration at bid opening, or before a responsibility determination has been made, may be preferable to factoring in such a determination before eliminating an ineligible prospective contractor from further consideration, the Act on its face requires that the effect of appearance on the Consolidated List be judged at the time of award and not before. See AHJ Transportation, Inc., P.S. Protest Nos. 88-18 and 88-19, May 12, 1988, citing Bauer Compressors, Inc., Comp. Gen. Dec. B-213973, April 23, 1984, 84-1 CPD & 458.<sup>1/</sup>

The Comptroller General takes the view that a contractor's eligibility for award should be measured at the time of award since eligibility relates to a contractor's responsibility, and responsibility is determined at the time of award. See Southern Dredging Co., Inc.,

<sup>5/</sup> See PM 3.3.2.d.2 and discussion at footnote 2<sup>supra</sup>.

<sup>6/</sup> We note that the Comptroller General has limited the holding in Bauer due to changes in federal regulations not relevant here. See Southern Dredging Co., Inc., Comp. Gen. Dec. B-225402, March 4, 1987, 87-1 CPD & 245.

supra.<sup>17</sup> This approach accurately reflects the relation contemplated between responsibility and eligibility expressed in the PM which advises that a contracting officer should consult the Consolidated List as a source of information relative to a prospective contractor's responsibility. See PM 3.3.1.e.<sup>17</sup> The requirement that a contracting officer evaluate a prospective awardee's eligibility at the time of contract award is consistent with our view that a "contracting officer should consider information as current as possible in making his responsibility determination,..." Year-A-Round Corporation, P.S. Protest No. 87-12, June 12, 1987. Evidence of a firm's responsibility may be furnished at any time prior to award. See TECOM, Inc., Comp. Gen. Dec. B-211899, June 27, 1983, 83-2 CPD & 28. A contracting officer may consider information brought to his attention after an initial finding of nonresponsibility, but before contract award. See Henry Spen & Company, Inc., Comp. Gen. Dec. B-183164, January 26, 1976, 76-1 CPD & 46. By gauging a prospective contractor's eligibility at contract award, the contracting officer assures that information relative to this aspect of responsibility is as current as possible in accordance with the above-quoted proscription.

On the record before us, the contracting officer was not prepared to make award prior to the expiration of AHJ's ineligibility. The contracting officer did not further consider AHJ's bid once he determined that Mr. Hatcher was on the Consolidated List. As a result, the contracting officer was not prepared to award the contract to AHJ but for its ineligible status, i.e. the contracting officer had not made determinations relative to the other aspects of AHJ's responsibility pursuant to PM 3.3.1. Nor had the contracting officer acquired sufficient information from the second low bidder to make award. Thus, we believe the effect of AHJ's ineligibility was measured prematurely. Consequently, AHJ was excluded from consideration when the time necessary for making a responsibility determination may have been sufficient for AHJ's ineligibility to expire, making it eligible for contract award. The Act requires a different result and therefore, we must sustain the protest. Since contract award has not been made, the contracting officer should now consider AHJ eligible for award and proceed to consider the other aspects of AHJ's responsibility pursuant to the relevant sections of the PM.

<sup>17</sup> Decisions of the Comptroller General are not binding on the Postal Service but the reasoning of such decisions will be adopted unless clearly inapplicable. Porter Contracting Co., Inc., P.S. Protest No. 87-82, October 23, 1987; Erickson Textile Co., P.S. Protest No. 81-35, September 25, 1981.

<sup>18</sup> The PM places the Consolidated List first in its list of sources of information which a contracting officer should consult in determining responsibility. See PM 3.3.1.e.3.(a). Although a contractor's ineligible status is relevant to its responsibility, it is not dispositive on that issue until the time of contract award. The order of the various sources of information listed at PM 3.3.1.e should not be construed to suggest otherwise; when a prospective contractor is being reviewed for responsibility, all possible sources of information should be investigated and reviewed.

The protest is sustained.

William J. Jones  
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**[checked against original JLS 3/8/93]**