

Protest of) Date: February 2, 1989
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 AHJ TRANSPORTATION, INC.)
)
 Under Solicitation No. JAX-159-88) P.S. Protest No. 88-85

DECISION

AHJ Transportation, Inc. (AHJ), timely protests the contracting officer's determination that it is a nonresponsible bidder under solicitation JAX-159-88, issued by the Jacksonville, FL, Transportation Management Services Center, for the highway transportation of mail on an "as-needed" basis between a Jacksonville, FL, third-class mailer and the Boston, MA, Los Angeles, CA, and San Francisco, CA, General Mail Facilities. When bids were opened on November 17, 1988, AHJ's bid of \$1.02 per mile was the lowest of the 6 bids received; the next lowest bid was \$1.18 per mile.

Prior to determining AHJ's responsibility, the contracting officer sent it a letter dated December 7 advising that its bid was the lowest received and requesting various items of information. The requests included (1) AHJ's written statement indicating how the contract would be operated (including information whether operation would be as an owner/operator or by the use of hired drivers); (2) completion of a "Pre-Award Questionnaire" which included various items of information relative to the bidder's organization and a statement of its assets and liabilities; (3) copies of the corporation's Articles of Incorporation, minutes of the its last corporate meeting, and evidence of the authority of the individual signing the bid to execute a contract on behalf of the corporation; (4) a copy of the bidder's "most current bank statement and letter of credit from at least one financial institution with which you are associated;" and (5) various other documents relevant to the establishment of the bidder's costs for purposes of future contract cost adjustments.

AHJ returned the contracting officer's letter on December 12 indicating on the bottom of the last page that all requested information had been forwarded to the TMSC office in responses to two earlier solicitations, JAX 158:88 and JAX 3:89 on which

AHJ

had recently bid. Those responses, however (1) indicated that the bidder would not decide until it received the awards how those routes would be operated; (2) identified the bidder as having not yet acquired the vehicles to perform the route, which would either be leased or purchased, as not yet knowing what personnel would operate the service, and as having neither assets nor liabilities; (3) declined to provide articles of incorporation or corporate minutes until after award; (4) similarly declined to furnish a recent bank statement or letter of credit before award, contending instead that "since I [sic] am giving post office credit, I shall expect current financial statements and credit references"; and (5) similarly declined to furnish the additional cost-related information until award.

By letter dated December 13, the contracting officer advised AHJ that he had found it nonresponsible with respect to solicitation JAX:159:88 and the two earlier solicitations.¹⁴ By letter of December 16 to the contracting officer, AHJ protested that determination with respect to solicitation JAX:159:88. The protest stated no particular ground, but asserted that the determination of nonresponsibility failed to provide any information and requested that the contracting officer provide "a detail [sic] letter outlining all information as to how you arrived at your decision" so that the protester could respond to any item which the contracting officer "felt [he] needed." The protest was forwarded to this office for consideration; see Procurement Manual (PM) 4.5.6.

In his statement to this office the contracting officer indicates that he was unable to determine AHJ responsible based on the bidder's response to his letter of December 7. He notes in particular the bidder's apparent lack of assets sufficient to support the award of the contract. A copy of the contracting officer's statement was furnished to the protester who has not commented on it.

PM 3.3.1.a. states, in part:

¹⁴The text of that letter was as follows:

Contracts may be awarded to responsible prospective contractors. To qualify for award, a prospective contractor must affirmatively demonstrate its responsibility. You have failed to provide sufficient information for us to make an affirmative determination of responsibility and are therefor [sic] declared non-responsible relative to the award of the subject solicitations.

Contracts may be awarded only to responsible prospective contractors. The award of a contract based on price alone can be false economy if there is subsequent default, late delivery, or other unsatisfactory performance. To qualify for award, a prospective contractor must affirmatively demonstrate its responsibility....

PM 3.3.1.a. In order to be determined responsible, a contractor must, inter alia, have financial resources adequate to perform the contract (PM 3.3.1.b.1), be able to comply with the required performance schedule (PM 3.3.1.b.2), and have "the necessary organization, experience, accounting and organizational controls, [and] technical skills...or the ability to obtain them" (PM 3.3.1.b.5).

PM 3.3.1 e.3 identifies various sources of information from which the contracting officer may obtain information concerning a prospective contractor's responsibility. They include records and experience data of personnel in purchasing and contracting offices, information solicited from the suppliers, subcontractors, and customers of the prospective contractor, financial institutions, Government agencies and business and trade associations.

The standard of our 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 [requirements of the contract] 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 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; Cimpi Express Lines, Inc., P.S. Protest No. 88-57, December 15, 1988.

Here, the material available to the contracting officer clearly failed to provide sufficient information to allow him to make the affirmative determination of responsibility necessary to allow award to AHJ. That lack of information was the result of the bidder's failure to respond adequately to

the contracting officer's requests for information. That failure was deliberate,

apparently arising out of the bidder's mistaken belief that the information requested was unnecessary to the contracting officer's decision.

We have previously recognized that highway mail transportation contractors must 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. AHJ's self-asserted lack of resources adequate to meet those expenses, in the absence of contrary evidence available to the contracting officer, makes a nonresponsibility determination appropriate. Although the contracting officer cannot place the entire burden of proving its responsibility on the bidder,²⁴ see Government Products Corporation, P.S. Protest No. 84-58, December 10, 1984, a bidder's failure to provide information uniquely within its purview is properly charged against it. Marshall D. Epps, P.S. Protest No. 88-47, September 15, 1988; PM 3.3.1.e.3(c).

The protest is denied.

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

[checked against original JLS 3/8/93]

²⁴Thus, for example, a contracting officer may appropriately find a bidder responsible on the basis of information available from sources other than the contractor in the face of the bidder's failure or refusal to provide information itself. To conclude otherwise would allow bidders to avoid the "firm bid rule," improperly affording them "a second bite at the apple." See Dry Storage Corporation, P.S. Protest No. 88-37, August 8, 1988; Government Contract Services, Inc.; Daly Construction, Inc., P.S. Protest No. 85-95, January 21, 1986.