

Protest of ) Date: February 3, 1989  
AHJ TRANSPORTATION, INC. )  
Under Solicitation NO. 800-113-88 ) P.S. Protest No. 89-01

### DECISION

AHJ Transportation, Inc. (AHJ), protests the determination of the Manager, Denver Transportation Management Center (TMSC), that it is a nonresponsible prospective contractor under Solicitation No. 800-113-88, for highway transportation of mail between Denver and Englewood, CO. The solicitation required the contractor to furnish one single-axle tractor and one 40-foot trailer to perform service on a specified schedule estimated at 85,249 annual miles. AHJ's bid at an annual rate of \$120,000 was the lowest of seven bids received.

In connection with the responsibility determination, the contracting officer requested that AHJ complete a Pre-Award Questionnaire, PS Form 5472. AHJ's entries on the form indicated zero assets, zero liabilities, and no equipment yet owned or leased with which to perform the contract service. By letter dated December 16, the contracting officer advised the bidder of his determination that AHJ was not a responsible contractor. After noting that both Procurement Manual (PM) 3.3.1 and Postal Contracting Manual 19-122 require that prospective contractors must affirmatively demonstrate their responsibility, the letter noted that the information furnished by the bidder indicated that it is "currently working with very limited assets." The letter concluded that "the P.S. Form 5472 submitted to this office does not show sufficient financial resources to obtain necessary equipment to commence route operations and sustain them for even one accounting period."

AHJ's protest states that it has offered to supply a bond, or deposit cash in a bank "to your Assets-versa-Liability [sic] Ratio." The protest also states that two employees of the TMSC had informed AHJ's representative during a telephone conversation that its bid was too low to operate the route, but that they refused to state their projected cost to provide the service. In his report on the protest, the contracting officer points to AHJ's P.S. Form 5472 showing zero assets and zero liabilities as a basis for finding AHJ nonresponsible. The contracting officer also observes that the Postal Service discontinued the use of performance bonds for

highway transportation contracts several years ago, that in the telephone conversation referenced by the protester, its president stated that he could withdraw the cash on the afternoon of the day of deposit or the following day, that operation of the route could not be performed profitably at AHJ's bid price, and that, since operating costs vary from contractor to contractor, the TMSC does not ordinarily develop its own estimate of such costs.<sup>1/</sup>

We recently dealt with a similar protest involving AHJ's challenge to a determination of nonresponsibility based on the bidder's failure to provide evidence of financial responsibility. AHJ Transportation, Inc., P.S. Protest No. 88-85, February 2, 1989. The substance of our analysis there, equally relevant here, was as follows:

PM 3.3.1.a. states, in part:

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 have, inter alia, 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:

<sup>1/</sup>In this case, however, the contracting officer has provided us with figures for two elements of cost with respect to service on this route, figures which closely approach the amount of AHJ's bid. We give those figures no weight, however, because there is no indication they were considered in the responsibility determination. We note that while the reasonableness of a bidder's price may be considered in the course of determining its responsibility, or may give rise to appropriate inquiry concerning the possibility that the bidder has made a mistake, the fact that the Postal Service believes that a given offer may not be economic is not a basis to deny award on that bid to an otherwise responsible contractor James E. Toney, P.S. Protest No. 88-45, October 6, 1988.

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 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; 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, 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). (Footnote omitted).

The only circumstance present in the instant case not present in the previous one is the protester's offer, subsequent to the determination of nonresponsibility, to furnish a bond or cash deposit. Even without resolving the contracting officer's concern about the efficacy of such a bond or deposit, or the contracting officer's obligation to consider an offer first made subsequent to his determination of nonresponsibility, it is clear that the offer does not require a contrary result. As we have recently noted, "a performance bond cannot serve as a substitute for a determination of financial responsibility." Cimpi Express Lines, Inc., *supra*, citing Oertzen & Co. GmbH, Comp. Gen. Dec. B-228537, February 17, 1988, 88-1 CPD & 158.

The protest is denied.

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Office of Contracts and Property Law

**[checked against original JLS 5/3/93]**