

Protest of) Date: May 3, 1989
 AHJ TRANSPORTATION, INC.)
 Under Solicitation NO. 021-001-89) P.S. Protest No. 89-05

DECISION

AHJ Transportation, Inc. (AHJ) timely protests the contracting officer's decision to cancel Solicitation No. 021-001-89, issued by the Boston, MA, Transportation Management Service Center (TMSC), seeking bids for the highway transportation of mail between Brockton and Elmwood, MA. The route has an estimated scheduled annual mileage of 17,724 miles with 1,792 estimated scheduled annual hours. Bid opening was held on December 1, 1988, and five bids were received ranging between \$21,733.64 and \$35,157 as follows:

(1) Robert Harris	\$21,733.64
(2) Delivery Management Service	\$28,499.00
(3) Audley Hewitt	\$33,693.37
(4) AHJ Transportation	\$35,000.00
(5) Wilfred Dias	\$35,157.00

The lowest and second low bidders were determined nonresponsible on December 7 and December 19, respectively, whereupon the contracting officer contacted Audley Hewitt the third low bidder, even though his bid exceeded the estimated annual rate for the route generated by TMSC personnel.^{1/} The

^{1/} The estimated annual rate for the solicited service was based on:

1. The cost of the existing emergency contract-HCR 023BU--\$25,999 with 17,724.76 annual miles or a rate per mile of \$1.47;
2. The following routes in the TMSC service area requiring vehicles with load capacities within 500 cubic feet of the solicitation's 900 cubic feet of load capacity and estimated annual mileage within 5,000 miles of the solicitation's estimated annual mileage of 17,724 miles as a basis of comparison:

contracting officer believed that the higher rate would be offset by Mr. Hewitt's experience and performance record. During the pre-award conference, Mr. Hewitt indicated that he intended to relinquish the current route he operates if the solicited route were awarded to him.^{1/} The contracting officer informed Mr. Hewitt that he was contractually bound to perform his current contract until June 30, 1991, and that the Postal Service would not release him from that obligation in order to operate another Postal Service highway contract route. Mr. Hewitt agreed to find another driver to operate the solicited service. Subsequently, Mr. Hewitt indicated that he was unable to find another driver and would have to withdraw his bid. The contracting officer determined it was in the best interest of the Postal Service to release Mr. Hewitt from his bid.^{1/} After eliminating Mr. Hewitt's bid, the contracting officer rejected the remaining bids as excessive in price and cancelled the solicitation.

By letters of January 13 and 25, 1989, to the contracting officer, AHJ protested the decision to cancel the solicitation, contending that the solicitation did not state that bids would be rejected if above a maximum dollar amount and that to do so constituted auction bidding.^{1/} AHJ also alleges that the contracting officer's goal in not exceeding a specified dollar amount was to avoid awarding the contract to a person who would have to comply with the Department of Labor's wage and hour standards.^{1/} Finally, AHJ alleges that the cost of providing the solicited service

<u>HCR</u>	<u>Annual Miles</u>	<u>Cubic Capacity</u>	<u>Rate Per Mile</u>
02564	20,226.62	400	\$1.20
02767	12,368.23	400	\$1.72
02830	20,298.43	1,000	\$1.59

From the above, the TMSC calculated an average rate per mile of \$1.50 for service within the range of comparison; and

3. From that rate, the TMSC then generated an estimated annual rate for the solicited service of \$28,905.72.

^{2/} Mr. Hewitt is the contractor on HCR 02760, Fall River, MA to Little Compton, RI.

^{3/} Strictly speaking, there is no procedure by which bidders may be released from the obligations of their bids. Here, however, the contracting officer's action was tantamount to a finding that Mr. Hewitt was not a responsible bidder on the new route because of his previous contractual obligations. See Procurement Manual 3.3.1.b.2 which states that a prospective contractor must "...[b]e able to comply with the required delivery or performance schedule, taking into consideration all existing commitments...."

^{4/} AHJ initially protested the decision to cancel the solicitation by letter to the contracting officer on January 13. That protest was determined to be obviously without merit by the contracting officer on January 20. AHJ's January 25 protest of that determination was forwarded to this office. We treat the protest as consisting of the issues raised by both the January 13 and January 25 letters.

exceeds the amount of each of the three lowest bids.^{1/}

In his report to this office, the contracting officer states that after rejection of the three lowest bids, the remaining two bids were rejected as unreasonably high pursuant to Procurement Manual (PM) 4.1.5.e, which provides, in pertinent part, that:

All proposals received must be rejected if the contracting officer determines that-

1. Prices proposed are unreasonable and discussions have not resulted in a reasonable price or prices...^{1/}

The decision that the remaining bids were unreasonably high was based on an analysis of other contracts of the same size and scope as the solicited service.^{1/}

In rebuttal comments to the contracting officer's statement, AHJ questions only the contracting officer's consideration of Mr. Hewitt's bid which was above the Postal Service estimate, claiming that if Mr. Hewitt's bid was not excessive for the solicited service than neither was AHJ's.

Discussion

As our previous decisions indicate, the contracting officer has considerable discretion in determining when a bid price is excessive. American Contractors, Inc., P.S. Protest No. 87-123, February 4, 1988; Commercial Fleet Services, Inc., P.S. Protest No. 86-63, October 3, 1986. A decision to reject excessive bids will not be overturned unless the decision is arbitrary, capricious, or not supported by substantial evidence. American Contractors, Inc., supra; Grant Rental, Inc., P.S.

^{5/} We need not further consider this ground of protest since AHJ offers no evidence to support its allegation, and mere supposition is "insufficient to overcome the presumption of regularity attending a contracting officer's reported determinations." Marshall D. Epps, P.S. Protest No. 88-47, September 15, 1988, quoting Penny H. Clusker, P.S. Protest No. 80-37, August 27, 1980.

^{6/} This allegation does not warrant extensive discussion. Assuming AHJ is correct, the possibility of award to a bidder at a rate below the bidder's cost is not a legitimate basis for a protest. Cf. E-Z Copy, Inc., P.S. Protest No. 88-61, December 22, 1988.

^{7/} Although the referenced section does not address sealed bidding, the section may be applied to that method of procurement. The PM, as a whole, is written to accommodate the use of negotiated procurement. This approach is supplemented in the case of mail transportation procurement by provisions such as PM 12.4.5a.1 which allow the use of sealed bidding. PM Exhibit 12.1.1 makes PM 4.1 et seq. applicable to mail transportation procurement. As a result, a contracting officer may reject all bids received under a sealed bidding procedure when it is determined that bids are unreasonable.

^{8/} See footnote 1, supra.

Protest No. 79-29, August 1, 1979.

Previously, we have found a price which is 16.5% above the Postal Service estimate to be excessive. American Contractors, Inc., supra. The Comptroller General has upheld the cancellation of a solicitation where the low bid was 7.2% higher than the government estimate. Building Maintenance Specialists, Inc., Comp. Gen. Dec. B-186441, September 10, 1976, 76-2 CPD & 233.

Applying these precedents to the instant case, the contracting officer was justified in rejecting the remaining bids and canceling the solicitation. By our calculation, AHJ's bid exceeded the Postal Service estimate by 21%. Such an amount falls within previous precedent. Considering the methodology presented for establishing the estimated annual rate, the contracting officer's decision relying on that estimate was not arbitrary or capricious and was based on substantial evidence.

AHJ's contention that the contracting officer was stopped from rejecting its bid once he considered Mr. Hewitt's bid is mistaken. The contracting officer has discretion to determine, as a business decision, whether to cancel a solicitation if he considers the remaining bids excessive in price, and such a decision will not be overturned unless the contracting officer has clearly abused his authority. W.E. Graham, P.S. Protest No. 75-69, December 12, 1975. Further, the contracting officer has considerable discretion in determining whether a bid price is excessive. American Contractors, Inc., supra. We find no basis here to criticize the contracting officer's decision to consider a bid in excess of the Postal Service estimate. The contracting officer's business decision that Mr. Hewitt's experience and performance record offset his higher rate, and therefore it was in the Postal Service's best interest to consider his bid, was within the contracting officer's discretion. See Bish Contracting Company, P.S. Protest No. 79-08, April 6, 1979.

The protest is denied.

[DDAnna for:]
William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[checked against original JLS 5/3/93]