

Protest of) Date: April 20, 1989
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 OLYMPIC PRECISION WORKS, INC.)
) P.S. Protest No. 89-17
 Solicitation No. 059990-89-0003)

DECISION

Olympic Precision Works, Inc. (OPW), of Union, WA, timely protests the contracting officer's determination that it is a nonresponsible offeror under Solicitation No. 059990-89-0003, issued December 1, 1988, by the Western Service Center, San Bruno, for 37 tray racks with associated gravity roller conveyors.

Offers were due on December 30 and OPW was the low offeror with an offer of \$308,025.00. A pre-award survey was conducted at OPW on January 13, 1989. The pre-award survey report states that OPW appeared to have the technical capability to perform the proposed contract and maintained an adequate quality control system. The report notes that OPW is a new family-owned corporation, with no prior performance record, which occupies the same physical location and address as Union Precision & Engineering (UP&E), shares UP&E's employees, and lists the same equipment. Gordon Gerbing is the president of OPW, and his son, Jeffrey Gerbing is the president of UP&E; Gordon Gerbing is also listed as an employee of UP&E. An earlier Gerbing family business was Valley Precision (VP). In a recent contract with the United States Air Force, UP&E was terminated for default due to the inability to produce an acceptable product. Because UP&E made no deliveries under the Air Force contract and was storing the inventory on its premises, the pre-award survey noted a lack of storage space. UP&E has appealed the Air Force's termination decision ordering UP&E to repay approximately \$193,000 in progress payments. This matter is still in litigation.

In regard to financial capability, the report states that one financial institution made an affirmative commitment to lend OPW \$25,000, secured by two parcels of property owned by Gordon Gerbing. OPW's financial statement also showed it as having \$21,655 in accounts receivable. A document entitled "Summary of Current and Past Contracts", submitted by OPW, listed three prior Postal Service contracts, one identified as having been performed under the name of UP&E and the other two unidentified as to the name of the company. The summary listed other government contracts which had been performed by either UP&E or VP.

On February 9, based on the results of the pre-award survey, the contracting officer found OPW to be a nonresponsible offeror for three reasons: 1) inadequate storage space; 2) the possibility of an adverse impact on OPW's technical capability if UP&E should win their appeal with the Air Force and reactivate the contract, using the same equipment and labor resources that would be required to perform the Postal Service contract; and 3) uncertainties about OPW's financial situation.

In its protest, OPW states that adequate storage space could be provided easily by storing the Air Force parts more compactly, or by renting another building. In addition, it notes that UP&E is currently making arrangements to sell some of the inventory. It vigorously defends its technical capabilities and asserts that, if the Air Force dispute should be decided in UP&E's favor, the Postal Service contract could easily be completed before reactivation of the Air Force contract, since no hearing will be held on the matter until May. OPW emphatically denies any association with UP&E, stating that each company has its own ID numbers, and their own Washington State tax numbers. It also states that Gordon Gerbing owns all the OPW equipment and property listed. OPW thinks that its financial commitment for \$25,000 is adequate and, in any event, other financial institutions have indicated their willingness to provide financial assistance. Finally, it states that UP&E is currently working with the USAF to repay the progress payments, if it should be necessary.

In his report, the contracting officer further explains the reasons for the nonresponsibility determination. He states that, at the time of the pre-award survey, there was no evidence of any additional space that could be used for storage. The contracting officer asserts that he had raised no concerns about the technical abilities of the Gerbing family, noting that the Gerbings have a previous record of satisfactory performance. His sole concern with respect to OPW's technical capability was the possible adverse impact should UP&E win its appeal and begin to use OPW's resources to perform the Air Force contract.

The contracting officer makes several observations about OPW's financial capability. He states that, as a brand new corporation, a single firm commitment of \$25,000 worth of financing would be inadequate, as it would not meet the initial material needs of the contract, which the contracting officer contends amount to between \$100,000.00 and \$125,000.00, with a good credit rating. He also notes that the apparent close nexus between OPW and UP&E creates serious questions as to OPW's ability to perform. He disagrees with OPW's contention that it has no connection with UP&E, citing the shared location, mailing address, equipment and employees. He concludes that the accounts receivables included in OPW's financial statement must relate to UP&E's business, since OPW is a new corporation. Similarly, he notes that OPW's listing of prior contracts with the Postal Service must refer to contracts between the Postal Service and either VP or UP&E, since OPW was nonexistent before January 17. In light of the perceived close relationship between UP&E and OPW, the contracting officer expresses concern that if UP&E were to lose their appeal with the Air Force, there is no guarantee, given the shared assets of both companies, that OPW would not be liable for the repayment of the \$193,000 in progress payments, or that the Air Force would not attach a lien to some or all of the commonly held equipment or property.

Decision

The Procurement Manual (PM) states that "[c]ontracts may be awarded only to responsible prospective contractors....To qualify for award, a prospective contractor must affirmatively demonstrate its responsibility...." PM 3.3.1.a. Among the standards that must be met, two are pertinent here: "a prospective contractor must ... [h]ave financial resources adequate to perform the contract" and "[h]ave the necessary production, construction, and technical equipment and facilities, or the ability to obtain them..." PM 3.3.1.b.1 & 6. "In the absence of information clearly showing that a prospective contractor meets applicable standards of responsibility, the contracting officer must make a written determination of nonresponsibility." PM 3.3.1.e.1.

The standard governing our review of a contracting officer's determination of nonresponsibility is well settled.

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 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; see also Fairfield Stamping Corporation, P.S. Protest No. 88-04, June 3, 1988; Pamela J. Sutton, P.S. Protest No. 87-110, February 9, 1988.

On this record, OPW has not established the unreasonableness of the contracting officer's decision. See Lock Corporation of America, P.S. Protest No. 89-14, March 10, 1989. OPW offers suggestions that it alleges will solve the problem of inadequate storage space but the issues of OPW's financial and technical capabilities remain. Despite OPW's avowals to the contrary, the contracting officer's conclusions with respect to OPW's close association with UP&E were reasonable. The pending litigation between UP&E and the Air Force presents reasonable concerns about, on the one hand, OPW's financial capability, if UP&E should lose, and, on the other, its technical capability, if UP&E should win. In addition, OPW's financial condition is further obscured by accounts receivable and past performance records which do not separate it from UP&E.^{1/} On the record before us, the protester has not met its burden of showing the unreasonableness of the contracting officer's determination.

^{1/}Mr. Gordon Gerbing's assertion that any concerns about OPW's property and equipment assets are resolved by the revelation that the property and equipment are owned by him personally further complicates the issue. If that is the case, absent leases or other binding agreements between Mr. Gerbing and OPW, it's not clear how the property and equipment can be listed as assets of OPW.

This protest is denied.

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

[checked against original JLS 5/11/93]