

Protest of ) Date: September 7, 1989  
 )  
AHJ Transportation, Inc. )  
Under Solicitation No. 200-35-89 ) P.S. Protest No. 89-19

### DECISION

AHJ Transportation, Inc. (AHJ), timely protests the contracting officer's determination that it is a nonresponsible bidder under Solicitation No. 200-35-89 issued by the Washington, DC Transportation Management Service Center (TMSC). The solicitation sought bids for service on two segments, A and B. Segment A required, as needed, one-way service between an Elm City, NC third-class mailer to the Richmond, VA General Mail Facility with an intermediate stop at the Norfolk, VA post office. Segment B required, as needed, one-way service from the same Elm City third-class mailer to the Birmingham, AL metro area. Bid opening was December 30, 1988, and AHJ was low on both segments.

On January 24, 1989, the contracting officer requested that AHJ complete PS Form 5472, Pre-Award Questionnaire, and provide other information necessary for a determination of responsibility. On February 8, the contracting officer received AHJ's response to the request for information which indicated that the forms were filled out to the "best of [AHJ's president's] knowledge" and that the requested financial statements, current balance sheet, profit and loss statement, and cash flow statement were not "available at this time." The information provided on PS Form 5472 indicated that AHJ had no assets and no liabilities. The response included an offer by Austin Hatcher, Jr., AHJ's president, "to deposit on account the assets or monies needed to operate this contract, or I can purchase a bond to the amount required by the U.S. Postal Service." (Emphasis in original.) Further, Mr. Hatcher indicated that his "credit is good enough that we can operate this route[,] lease or purchase the equipment and not have to pay one penny until the U.S. Postal Service pays us." In support of its position, AHJ had letters sent to the TMSC from two vendors: one quoted prices for the lease of equipment inclusive of insurance, fuel and maintenance and the other offered to provide drivers anywhere in the United States. Both offers expressed a willingness to use a 28-day billing cycle.

On February 17, the contracting officer determined AHJ nonresponsible since AHJ had not provided, nor could TMSC personnel obtain, sufficient information and/or documentation to make a determination of responsibility. By letter of February 23, AHJ protested the contracting officer's determination arguing that the contracting officer had not asked for any additional information from AHJ to establish its responsibility. The protest was forwarded to this office for resolution, where it was received March 9.<sup>1/</sup>

<sup>1/</sup> The long delay in deciding this protest was caused by the failure of the contracting officer to provide

The contracting officer's report states that based on the available information he was unable to make an affirmative determination of responsibility. In the absence of necessary requested financial information from AHJ, and having no basis to consider the assets of its president, the contracting officer determined AHJ nonresponsible.

### Discussion

This protest does not differ substantially from previous ones in which AHJ has declined to provide the contracting officer with sufficient information for an affirmative determination of financial responsibility. See AHJ Transportation, Inc., P.S. Protest No. 88-85, February 2, 1989; AHJ Transportation, Inc., P.S. Protest No. 89-01, February 3, 1989. The analysis first stated in AHJ Transportation, Inc., P.S. Protest No. 88-85, February 2, 1989, and quoted at length in AHJ Transportation, Inc., P.S. Protest No. 89-01, February 3, 1989, is equally applicable here:

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 be able to comply with the required performance schedule and have the necessary organization, experience, accounting and organizational controls, [and] technical skills...or the ability to obtain them. PM 3.3.1.b.1,2,5.

Procurement Manual 3.3.1 e.3 identifies various sources 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:

this office with a contracting officer's report until August 24, apparently because of difficulty in coordinating the report with assigned counsel. Such delays are inimical to the objectives of the Postal Service's protest process.

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 an 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 circumstances which distinguish this protest from the previous AHJ protests are the inclusion of a proffer from Mr. Austin Hatcher, Jr. to underwrite the credit of AHJ and the offers by vendors to provide services and equipment on a 28-day billing cycle.<sup>1/</sup>

Mr. Hatcher's proffer to provide additional credit or have his financial worth considered in the determination of AHJ's responsibility was properly ignored by the contracting officer. AHJ bid in its name; only its assets may be considered in establishing its responsibility. Considering Mr. Hatcher's assets would, in effect, allow AHJ to amend its offer. As we have noted in a related situation:

<sup>2/</sup> AHJ's offer to provide a performance bond was previously discussed in AHJ Transportation, Inc., P.S. Protest No. 89-01, February 3, 1989, and the reasoning there is applicable here,

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.

Id.

To do so would be unfair to other bidders because it would allow the bidder the option, in effect, of withdrawing [its] bid by allowing [itself] to be declared nonresponsible or substituting [its president's] assets if it wished to perform the contract. (citation omitted). Such an option would afford the bidder "a second bite at the apple" to the detriment of the other bidders and the competitive process. (citation omitted).

David Guidry, Jr. and Johnny Jackson, d/b/a Guidry and Jackson Trucking, P.S. Protest No. 87-133, March 4, 1988. See also, Package Express, Inc., P.S. Protest No. 87-57, July 27, 1987 (commingling of president's assets with corporate assets for determination of responsibility improper).

As to the offers of the vendors to provide services on a 28-day billing cycle, we take this to be the bidder's attempt to show that it need have no assets in order to acquire the equipment and personnel necessary to provide service. The contracting officer indicates that he did not consider these offers as assets of the corporation for purposes of determining AHJ's financial responsibility. The contracting officer's action in this regard was reasonable.

As we read them, neither "offer" is sufficiently firm to constitute a binding commitment to provide the equipment and labor that AHJ would require for the contract. One is styled as a quotation for the leasing of trucks and vans, including maintenance, insurance, and "fuel availability." The supplier advises that it "is willing to work with [AHJ] on a 28 day billing cycle." The other is a letter from a supplier of transportation personnel asserting its ability to provide driving personnel nationwide and similarly asserting its willingness to work on a 28 day billing cycle. Neither letter expresses any understanding of AHJ's financial condition or establishes a firm offer subject only to AHJ's acceptance. It seems unrealistic that these vendors would be willing to enter into contracts with a corporation with no assets on terms wholly contingent on funds to be generated by the corporation's contract.

Further, AHJ's proffer of vendors purportedly agreeable to billing on a 28 day cycle (the cycle on which the Postal Service pays its contractors for services rendered) does not fully resolve the matter. The contracting officer advises that under per trip rate highway contracts payment is made by mailing a check by the end of the first week following the 28 day period during which the service was performed. The time between performance of service and receipt of payment by the contractor can exceed five weeks for trips performed during the first few days of the 28 day period. Any successful proffer of billing terms tied to the Postal Service's 28 day payment cycle must explain how the necessary delay in payment will be accommodated. See Ella Beachy, P.S. Protest No. 87-05, April 17, 1987.

The protest is denied.

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**[checked against original JLS 5/20/93]**