

Protest of) Date: April 30,1992
OSM CORPORATION)
Solicitation No. 104230-91-A-0054) P.S. Protest No. 91-62

DECISION

OSM Corporation (OSM) timely protests the contracting officer's determination that it was nonresponsible under Solicitation No. 104230-91-A-0054, issued on February 27, 1991, by the Headquarters Office of Procurement for dual container collection mail-boxes. Offers were due on March 29, 1991. OSM was one of the offerors responding to the solicitation.

A preaward survey was conducted at OSM's facility on July 17. By letter dated August 30, the contracting officer notified OSM that it was determined nonresponsible for this solicitation because of the negative information obtained during the survey. The letter also notified OSM that Jebco, Inc., had been awarded the contract.

By letter dated September 6, 1991, OSM protested to this office stating, "We disagree in his determination in all aspects."

In her statement, dated March 16, 1992,^{1/} the contracting officer identified the bases for her determination that OSM was nonresponsible:

- (1) Financial data provided by OSM revealed that the company is operating in a "negative working capital" and a "negative net worth position".
- (2) Financial data provided by OSM revealed that their only known source of financing was a \$3.9 million claim against the USPS.
- (3) Independent audit reviews of OSM stated that OSM's omission of cash flow data and valuation of inventory resulted in inability of outside audit to determine the company's financial condition.
- (4) A production and technical capability review by USPS quality personnel revealed that:

^{1/}We note that OSM had filed a petition under the provisions of Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of New York seeking injunctive relief against the Postal Service. Subsequently, a hearing regarding OSM's solvency was held at the Bankruptcy Court. During this hearing, OSM indicated that it would withdraw the above protest (P.S. Protest No. 9-62). However, OSM has not submitted a letter of withdrawal to date. The contracting officer was instructed, as a result, to submit her statement to this office so that a decision could be rendered.

(i) OSM could not provide documentation to demonstrate current certification to meet the solicitation's welding and testing requirements.

(ii) OSM could not provide evidence of a secured lease to operate in the facility proposed for production of the collection boxes.

(iii) OSM could not provide evidence of vendor commitments for purchased materials, including the critical item, steel.

(iv) OSM could not provide a viable plan for production and delivery.

(5) Past performance by OSM under Postal Service Contract No. 104230-89-B-1088 has been unsatisfactory due to numerous quality deficiencies.

OSM did not file a response to the contracting officer's statement.

DISCUSSION

To be determined responsible, a prospective contractor must:

(1) Have financial resources adequate to perform the contract:

(2) Be able to comply with the required or proposed delivery or performance schedule . . .;

(3) Have a good performance record;

(4) Have a sound record of integrity and business ethics;

(5) Have the necessary organization, experience, accounting and operational controls, technical skills, production and property controls, and quality controls, or the ability to obtain them;

(6) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and

(7) Be otherwise qualified and eligible to receive award under applicable laws and regulations.

Procurement Manual ("PM") 3.3.1 b.

The standard for 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 requirement[s 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; accord Cimpi Express Lines, Inc., P.S. Protest No. 88-57, December 15, 1988.

Procurement Manual 3.3.1 a. sets forth the reasons for responsibility determinations, as follows:

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

It is well settled that in a factual dispute we accept as true the statements made by the contracting officer absent controversion by the protester or sufficient evidence to overcome the presumption of correctness which attaches to the contracting officer's statements or action. Barber-Colman Company, P.S. Protest No. 90-34, December 5, 1990, citing Air Transport Association of America, P.S. Protest No. 90-02, March 23, 1990; Alta Construction Company, P.S. Protest No. 85-2, February 26, 1985; Harper's Ferry Properties, Inc., P.S. Protest No. 76-67, November 8, 1976. OSM has not offered any evidence to rebut the contracting officer's statements. Thus, we accept as true the factual statements of the contracting officer regarding OSM's past performance and current capabilities.

The contracting officer's determination of nonresponsibility in this case was not arbitrary and capricious and was based on substantial evidence. The contracting officer reasonably analyzed the information she received from the pre-award survey conducted at OSM's facility. Her determination of nonresponsibility was based primarily on the fact that OSM could not meet at least five of the seven elements required by PM 3.3.1 b. to be determined responsible, and that OSM did not provide any evidence which controverted or challenged her conclusion. The record contains ample evidence supporting the contracting officer's determination that OSM was nonresponsible.

The protest is denied.

[Signed]

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

[Compared to original 5/15/95 WJJ]