

Protests of	)	Date: October 21, 1992
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TODD'S LETTER CARRIERS, INC.	)	
	)	
Solicitation Nos. 608-13-92	)	P.S. Protests Nos. 92-39
608-16-92	)	92-40
608-24-92	)	92-41

DECISION

Todd's Letter Carriers, Inc. ("Todd"), protests the contracting officer's determination that it was a nonresponsible bidder with respect to three solicitations issued by the Chicago, IL, Transportation Management Service Center (TMSC).<sup>1/</sup>

Facts

Todd is a newly-formed corporation, of which Todd L. Snyder is the President.<sup>1/</sup> Previously, Mr. Snyder had operated as a sole proprietor under the name of TLC Trucking ("TLC"). TLC has held some eleven Postal Service highway transportation contracts<sup>1/</sup> which it undertook to transfer to Todd by novation agreement, the subject of a January 20, 1992, request. By letter dated May 29, the Postal Service declined to approve the novation agreement.<sup>1/</sup>

<sup>1/</sup> Solicitation 608-13-92, involved in protest 92-39, called for service between Chicago, IL, and Milwaukee, WI. Solicitation 608-16-92, involved in protest 92-40, involved service between Milwaukee, WI, and Oshkosh, WI. Solicitation 608-24-92, involved in protest 92-41, involved service between Milwaukee, WI, and four local plant load sites. Bids on each solicitation were due April 21.

<sup>2/</sup> The January 20, 1992 request for approval of Todd's novation agreement, discussed below, describes Mr. Snyder as Todd's "sole shareholder, sole director, and President." Later documents in the file identify Carol C. Snyder as a second director, and indicate that Mr. Snyder is both President and Treasurer, while Ms. Snyder is Vice-President and Secretary.

<sup>3/</sup> These contracts included nine administered by the Chicago TMSC and one each administered by the Detroit and Denver TMSCs.

<sup>4/</sup> The protest file reflects that the novation agreement was not agreed to primarily because of concerns

After Todd was identified as the apparent low bidder on each of the three solicitations, efforts were undertaken to establish its responsibility.<sup>1/</sup> Todd was asked to supply various items of corporate and financial documentation, and a pre-award conference was held with Mr. Snyder on May 13.

After the pre-award conference, one of the transportation specialists in attendance wrote a memorandum for record which reflected that as of that time, the information submitted by Todd was incomplete, and that Todd had been given additional time to supply the information. On May 27, after Todd had furnished additional information, including a statement of assets and liabilities for the corporation (a similar statement for TLC had previously been supplied), the contracting officer wrote Todd requesting additional information concerning the interrelationship of the two entities and their financing. The letter requested various pieces of information, including "an updated statement of assets and liabilities for TLC after the transfer [of various TLC assets] to [Todd]....," TLC's projected cash flow statement for TLC reflecting the operation of its remaining contracts, and an explanation of the accountant's disclaimer which accompanied the asset and liability statement for Todd.<sup>1/</sup>

By letter dated June 5, Mr. Snyder replied for Todd to the contracting officer, noting that he had been advised at the pre-award conference that since Todd, and not TLC, had submitted a bid, "information pertaining to TLC was irrelevant and not needed, or wanted." He further noted that the contracting officer had acknowledged that the financial statements which had been furnished showed Todd's positive financial position, and asserted that he saw "no relevance for any further information regarding TLC." The letter did not, however, provide all of the additional information which had been requested concerning Todd.

The documentation submitted by Todd included a PS Form 5472, Pre-Award

expressed by the Detroit TMSO. TLC's service under its contract with that office had been unsatisfactory, and the Department of Labor (DOL) had had funds withheld from the contract for TLC's apparent violations of the Service Contract Act.

<sup>5/</sup> The information that follows relates specifically to solicitation 608-13-92; the records with regard to the other two solicitations are similar, except as noted below.

<sup>6/</sup> The statement noted that it was compiled on an income tax basis, rather than on the basis of generally accepted accounting principles, and that

Management has elected to omit the statements of revenues and expenses, retained earnings, and cash flows and substantially all of the disclosures ordinarily included in the financial statements. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the company's assets, liabilities, revenues and expenses. Accordingly, these financial statements are not for those who are not informed about such matters.

Questionnaire, which included the following description: "The Corp[oration] is new and is being run by Todd Snyder as President and sole share holder. The Corp[oration] is basically the former TLC Trucking in which Todd Snyder was sole proprietor"; two business references and a bank reference in the name of Mr. Snyder or TLC; and a different bank letter in the name of Todd noting the corporation's application for financing trucks in connection with the award.

By letter dated June 10, the contracting officer advised Todd that its bid had been rejected because the corporation had been found nonresponsible. The letter noted that Todd had included information about TLC's contracts in material it had submitted, that it had been indicated at the pre-award conference that TLC property would be transferred to Todd, and that Todd would lease equipment from TLC. The letter noted that the information concerning TLC that had been requested on May 27 was relevant to the determination because "[y]ou laid the ground work interconnecting TLC with [Todd]." Continuing, the letter stated that Todd would be overextended in performing the additional service on which it had bid because of TLC's obligations on its eleven routes.

The letter further stated, based on TLC's unsatisfactory performance on the contracts supervised by the Denver and Detroit TMSCs, that the contracting officer is unable to establish that "TLC has a good performance record." Similarly, the letter stated, based on TLC's Service Contract Act and Contract Work Hours and Safety Standards Act problems on the Detroit contract, and its inclusion (as "TLC Trucking (Todd Snyder DBA)") on the Department of Transportation (DOT) Unsatisfactory Ratings Report,<sup>1/</sup> that the contracting officer is "unable to affirmatively establish you have a sound record of integrity and business ethics." Turning to the matter of Todd's financial resources, and noting its failure to reply to the May 23 letter, the letter stated that the contracting officer is "unable to affirmatively establish [that] you have financial resources adequate to perform the contract."

Adopting the position expressed in Todd's reply to May 23 inquiry that information about TLC is irrelevant to the determination of Todd's responsibility, the letter then noted, alternatively, that under such a standard, Todd cannot show a good record of performance because it has not yet performed and two of its business references cannot be considered because they relate to TLC. The letter concluded by asserting that the contracting officer is "unable to affirmatively establish that the assets of TLC and [Todd] are not one and the same. This appearing true[, Todd] would not only share the assets of TLC but also the liabilities."

<sup>1/</sup> Provision 18 G. of the solicitation precludes any bidder included in the Report from receiving a contract.

## The Protests

Through counsel, Todd submitted timely protests on the determinations of nonresponsibility with regard to all three solicitations. The protests make the following contentions:

1. The actions of the Postal Service in denying the novation of TLC's contracts to Todd contributed to the determination of Todd's nonresponsibility. According to Todd, despite discussions with the Chicago TMSC and Postal Service counsel to the effect that the novation would be approved (including the "verbal approval" of the novation by a transportation specialist of the TMSC), the novation agreement was ultimately disapproved. "[H]ad the novation agreement been allowed, Mr. Snyder could have presented information ... that showed he had had experience as [Todd] in performing eleven contracts for the United States Postal Service. As a result of the failure of the United States Postal Service to approve the novation agreement, the experience factor for [Todd] was removed."
2. It was inappropriate to consider information relating to TLC in evaluating Todd's responsibility. The protest specifically objects to consideration of TLC's inclusion on the DOT Unsatisfactory Safety Ratings Report; the consideration of the Department of Labor investigation, as to which no findings have been made and the case is still in dispute; TLC's performance on the Denver TMSC contract, which has not been the subject of a conference, but only informal conversations, and on which corrective actions have begun; and TLC's unsatisfactory performance on the Detroit contract, which was the subject of a June, 1991, letter of warning, but on which no problems have been encountered in the past year. The protester also objects to the failure to consider TLC's fully satisfactory performance on the nine contracts administered by the Chicago TMSC.

3. Restating that TLC's experience is irrelevant, the protester asserts that what is relevant is the previous experience of Mr. Snyder, Todd's President, who has demonstrated past experience similar in scope to that solicited.

The contracting officer's statement and report responds to the points made by the protester. With regard to the first point of the protest, he notes that Todd was advised that novation agreements were generally approved, but only "if it is in the best interest of the Postal Service." The determination not to approve the novation agreement followed extensive inquiry; there was no "verbal approval" of the request, and the determination was appropriate.

With regard to the protester's second point, the contracting officer contends that consideration of TLC's record with respect to Todd's responsibility is appropriate. Describing the substantial similarity of the entities as to ownership and organization, the contracting officer characterizes the two as "'Siamese Twins' joined at the hip." The contracting officer restates the difficulties identified with TLC's appearance on the DOT report and the DOL investigation, and notes that the contracts on which TLC was cited as having performance difficulties are more similar to the service solicited than the Chicago-based contracts. Based on information supplied from a Milwaukee logistics engineer, the contracting officer describes TLC's performance on those contracts as "fair," due to equipment problems which were resolved after "repeated warnings." Finally, the contracting officer suggests that Todd is attempting to incorporate TLC's favorable previous experience and references while selectively excluding TLC's poor performance and other problems.

The protester responded to the contracting officer's statement and report, stating or restating the following points:

1. The denial of the novation agreement was a substantial contributing factor to Todd's failure to receive the bid. The contracting officer's statement understates the representations made by the Postal Service concerning the novation agreement, and the documentation furnished concerning the reasons for its denial establish that the denial was arbitrary and capricious.

2. Concerning TLC's performance on the Chicago TMSC contracts, it was inappropriate to rely on the "hearsay" evidence of the Milwaukee employee, and in any event the equipment problems charged were the result of improper postal loading. Concerning the Detroit TMSC contract, the protester restates the staleness of the warning letter, and contends that the lateness on which it was based was excusable. Further, it was inappropriate to rely on the information furnished by the Detroit TMSC about that performance, since it was supplied with respect to Todd's novation request, not with respect to the subsequent determination of Todd's responsibility. Concerning the Denver contract, TLC's performance has not been the subject of either a formal or informal conference, and no documentation has been offered to support the contracting

officer's assertion of unsatisfactory performance. Contract route irregularity reports are inappropriate support for such a conclusion, because they may reflect factors beyond the contractor's control.

3. Advice that a DOL investigation was underway was an inappropriate ground to support the determination, since TLC has not had the opportunity to confront and contest the Department's findings.

4. The contracting officer improperly relied on information relating to TLC in determining Todd's responsibility after Todd was advised at the pre-award conference that "TLC was not the bidder." TLC's financial position is not at issue; since Todd was shown to have a positive financial position, that should resolve the matter. "The only reason information regarding TLC was even needed was because the USPS rejected Mr. Snyder's attempts to have his highway contracts novated." Since TLC and Todd are different entities, TLC's unfavorable performance and DOT record are irrelevant.

5. The protester complains that contrary to PM 4.5.5, a contract was awarded to another bidder on solicitation 608-13-92 while the protest was pending, and Todd was not notified of the award. The protester also complains that the contracting officer may not have advised other interested parties of the protest and failed to provide the protester with a copy of the documents necessary to an understanding of the contracting officer's statement.

Further, with regard to the protests of routes 16 and 24, the protester makes the following additional points, contending that each protest must be resolved on its own merits:

1. The routes involved are of a smaller size than the route involved in solicitation 12, so that Mr. Snyder's satisfactory service on the Chicago TMSC contracts should be given more weight in determining Todd's responsibility with respect to them.

2. No pre-award conference was held with regard to either of those solicitations, so there is no information from such a conference to support a finding of nonresponsibility.

3. With regard to solicitation 16, the service (Milwaukee - Oshkosh) is the same service Mr. Snyder is already running, so "[i]t is clear that Mr. Snyder was 'responsible'...."

The contracting officer's reply to the protester's comments included the following points:

A contract was awarded on solicitation 608-13-92 on June 10, which was prior to Todd's protest. Although no pre-award conferences were held on solicitations 16 and 24, the determinations of nonresponsibility with respect to those solicitations correctly stated that they were based on information from a pre-award conference held with Todd

on May 13. TLC remains on the Department of Transportation Unsatisfactory Safety Rating Report, a factor which, alone, precludes award of the contract to the protester.

The protester has replied to the contracting officer's comments, repeating a number of the points previously raised. The protester comments at length on the unreasonableness of the decision not to approve the novation agreement; restates its objection to providing additional financial information about TLC with respect to Todd's ability to perform the contracts; asserts that the accountant's statement (set out at footnote 6, above) was "not disclaiming responsibility for the information, but was merely stating 'boilerplate' language used in accounting type letters"; objects that the protester was not advised of the contract award nor informed whether the successful bidder was notified of the protest, and that the contracting officer improperly failed to furnish it with all of the documentation which accompanied the contracting officer's statement; restates its point that preaward conferences were not held with respect to two of the three solicitations; and objects to the consideration of TLC's inclusion on the DOT report with respect to Todd's responsibility.

### Decision

Before awarding a contract to a bidder, the contracting officer must make an affirmative determination of that bidder's responsibility. "[A] prospective contractor must affirmatively demonstrate its responsibility. . . ." PM 3.3.1 a.

To be determined responsible, a contractor must:

1. Have financial resources adequate to perform the contract;

\* \* \*

3. Have a good performance record;

4. Have a sound record of integrity and business ethics;

\* \* \*

8. Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

PM 3.3.1 b.

The legal standard by which this office reviews a contracting officer's determination that an offeror is nonresponsible 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 Lock Corporation of America, P.S. Protest No. 89-14, March 10, 1989; Marshall D. Epps, P.S. Protest No. 88-47, September 15, 1988. We address the protester's various objections to the determination of nonresponsibility individually.

The Postal Service's failure to approve the novation of TLC's contracts to Todd was not an event relevant to the finding of nonresponsibility.<sup>1/</sup> The request for the novation was pending when Todd submitted its bids on these solicitations, and nothing in the bid or in the material subsequently submitted by Todd gave any indication that it expected its responsibility to be judged on the assumption that the contracts would have been transferred to it.<sup>1/</sup> (All of the information was supplied prior to the May 29 denial of approval except for Todd's June 5 reply to the May 27 request for additional information. The record does not indicate whether Todd had received the May 29 denial by that date, but the June 5 reply does not reflect it.)

It was wholly appropriate for the contracting officer to consider information concerning TLC's contract performance in evaluating Todd's responsibility. Where a new corporation proposes to provide contractual services, its responsibility may be determined by evaluating the responsibility of its principal officers and shareholders. Magnum Haulers Inc., P. S. Protest No. 85-90, March 7, 1986, (unsatisfactory performance of protester's sole stockholder's other wholly-owned corporation attributed to protester); Cimpi Express Lines, Inc., P. S. Protest 88-57, December 15, 1988 (same). Todd's principal was Mr. Snyder, and Mr. Snyder was also TLC. TLC's experience, including the problems identified with respect to its contracts were appropriate for consideration. Recent unsatisfactory prior performance, even without

<sup>8/</sup> To the extent that the protest seeks to challenge the failure to approve the request for novation, it complains of a matter outside our protest jurisdiction, which, pursuant to PM 4.5.2, extends only to the "written objection by any interested party concerning the terms of a solicitation, the award or proposed award of a contract, or any other action relating to the solicitation or award of a contract." Abso-Clean Portawash, P. S. Protest 92-06, March 30, 1992.

<sup>9/</sup> Nor was it reasonable for Todd to expect or anticipate that the novation agreement would be approved based on the oral representations of postal employees who lacked the authority to grant that approval. PM 6.5.4 b. provides that it is the contracting officer's responsibility to approve novation agreements. The individuals whom Todd identifies as indicating that approval would be given (an assertion which the individuals dispute) were not the contracting officer.

termination for default, may be the basis for a determination of nonresponsibility. Ron Garson d/b/a Ron's Trucking, P.S. Protest No. 91-33, July 15, 1991; Charlie L. Thompson, P.S. Protest 90-35, August 10, 1990. However, past poor performance which occasioned a letter of warning, followed by improved performance is not, by itself, adequate support for a finding of nonresponsibility. Package Express, Inc., P.S. Protest 87-57, July 27, 1987. Mr. Snyder's inclusion on the DOT list alone is sufficient to preclude award to Todd; any other result would allow unsafe operators to continue to obtain new postal contracts by the simple expedient of creating new corporate entities without correcting the underlying problems which occasioned the listing.

We touch briefly on some of the other issues raised by the protester. It was appropriate for the contracting officer to rely on information furnished by Detroit with regard to the novation and by Milwaukee employees with regard to the performance of the Chicago contracts. PM 3.3.1 e.3.(b) provides for data to be obtained from verifiable knowledge of personnel in purchasing offices, audit offices, and other contracting offices. Similarly, the contract route irregularity reports on the Denver contracts could be used despite the contractor's objections to them, and information provided by Mr. Snyder as to one solicitation could be used with regard to other solicitations.<sup>1/</sup>

Further, Todd's failure to respond to the questions concerning the interrelationship of its finances to TLC's supported the determination of nonresponsibility. Colorado Piping & Mechanical, Inc., P.S. Protest No. 90-23, June 20, 1990. The information was relevant to Mr. Snyder's ability to perform both the new service (as Todd) and his existing contracts (as TLC), and its absence allowed an adverse inference to be drawn.

The protest is denied.

For the General Counsel:

William J. Jones

<sup>10/</sup> The prospective contractor has no right to review or defend information used in a responsibility determination. CCP Manufacturing Corporation, P. S. Protest No 85-31, July 3, 1987.