

Protest of) Date: November 20, 1992
TODD'S LETTER CARRIERS, INC.)
Solicitation No. 608-50-92) P.S. Protests Nos. 92-74

DECISION

Todd's Letter Carriers, Inc. ("Todd"), protests the contracting officer's determination that it was a nonresponsible bidder with respect to a solicitation issued July 1 by the Chicago, IL, Transportation Management Service Center (TMSC) for service between Waterloo, WI, and Milwaukee, WI.

Facts

Todd is a newly-formed corporation, of which Todd L. Snyder is the President.^{1/} 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^{2/} which it undertook to transfer to Todd in early 1992.^{1/} By letter dated May 29, the Postal Service declined to approve the novation agreement transferring the contracts from TLC to Todd.

Bids were opened August 5, and Todd was identified as the apparent low bidder on the solicitation. Earlier in the year, Todd had been the low bidder on three other solicitations issued by the Chicago TMSC, and had been requested to provide various items of information concerning its planned operations and its connections with TLC. In June, Todd had been found nonresponsible with respect to each of those solicitations.

By letter dated August 18, the contracting officer advised Todd that its bid had been rejected because the corporation had been found nonresponsible. The letter noted that

^{1/} The letter referenced in footnote 3, below, describes Mr.Snyder as Todd's "sole shareholder, sole director, and President." Later documents 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.

^{2/} These contracts included nine administered by the Chicago TMSC, including one involving service between Waterloo and Milwaukee, the predecessor to the service here sought, and one each administered by the Detroit and DenverTMSCs.

^{3/} The letter requesting approval of the novation agreement was dated January 20, 1992.

materials previously furnished with respect to the earlier solicitations established Todd to be the corporate successor to TLC, and that TLC had been placed on the Department of Transportation Unsatisfactory Safety Rating Report. Item 19 G. of the solicitation prohibits award to contractors who appear on the report. The letter further states that Todd had cited the past experience of TLC in operating its eleven routes, but noted that TLC had performed less than satisfactorily on the contract supervised by the Denver TMSC, in that 53 irregularity reports (Forms 5500) had been issued between September 21, 1991, and May 1, 1992. Further, with respect to the contract supervised by the Detroit TMSC, it was asserted that service was also unsatisfactory in that an informal conference was held in February, 1992, and a formal conference was held in April, 1992, to obtain satisfactory service, and that a letter of warning had been issued in June, 1991, on the route.^{4/}

The Protest

Through counsel, Todd submitted a timely protest on the determination of nonresponsibility. The protest makes 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. Further, some of the material considered was incorrect. The protest specifically objects to consideration of TLC's inclusion on the DOT Unsatisfactory Safety Ratings Report; 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 Postal Service's 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 already is satisfactorily performing service on the Waterloo - Milwaukee route.

^{4/} The letter's description of the problems with the Detroit contract was inconsistent with information previously furnished this office with respect to the earlier determinations of Todd's nonresponsibility. When asked to explain the inconsistencies, the contracting officer advised that the February and April conferences did not occur with respect to the Detroit contract, but with respect to another contract for service between the Kansas City Bulk Mail Center and the Chicago Truck Terminal.

The contracting officer's statement and report responds to the points made by the protester. As to the novation agreement, the contracting officer contends that its denial was not material to his finding of nonresponsibility. 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 associated with TLC's appearance on the DOT report.

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 award. 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. It was incorrect to describe TLC's performance on the Detroit and Denver contracts as unsatisfactory. Concerning the Detroit TMSC contract, the protester restates the staleness of the June, 1991, warning letter, and contends that the lateness on which it was based was excusable. 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.

In any event, the protester wonders why these problems with respect to these two contracts are viewed as more significant than TLC's satisfactory performance on its nine contracts administered by the Chicago TMSC.^{1/}

3. The contracting officer improperly relied on information relating to TLC in determining Todd's responsibility. Todd had been advised at the pre-award conference held in connection with one of its earlier bids that information regarding TLC was not relevant to Todd's responsibility because "TLC was not the bidder." According to the protester, "[t]he 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 is irrelevant.

4. The protester complains that contrary to PM 4.5.5, a contract was awarded to another bidder on solicitation 608-50-92 while the protest was pending, and Todd was not notified of the award. The protester also complains that the contracting officer did not advise the protester that interested parties had been notified of the protest.^{1/}

^{5/} The protester also repeats objections made in the earlier protests to the contracting officer's characterizations of TLC's performance on the Chicago contracts. These comments do not appear relevant to the subject protest, in which the contracting officer has not made similar comments.

^{6/} The file does not support the contention that award has been made while this protest is pending.

Further, the protester responds to various points made in the contracting officer's statement:

1. No pre-award conference was held with regard to this solicitation, and it was inappropriate to rely on the pre-award conference held in May with respect to another solicitation.
2. The service (Waterloo - Milwaukee) is the same service Mr. Snyder is already running, so "it is clear that Mr. Snyder was 'responsible'"
3. The contract with TLC for Waterloo - Milwaukee was not renewed because TLC was on the DOT unsatisfactory list. Subsequent to the decision not to renew, the Postal Service issued a policy which advised that contractors on the list would be allowed "a one year period on renewal to obtain an acceptable DOT rating." The protester contends that this policy should have applied to the bid in this case.

The contracting officer was asked to comment on this last point. In response, he notes that when TLC's contract was due for renewal, it was subject to the requirement in a standard specification that the contractor not be included on the DOT list. Because TLC was on that list (where it still remains), it was advised that the contract would not be renewed. Subsequently, a new policy with respect to renewal of contracts with listed contractors was promulgated by a Transportation Bulletin dated July 31, 1992. Under the new policy, effective August 1, listed contractors could be the subject of a "short-term renewal" of one year's duration. If the contractor did not obtain a satisfactory rating from DOT during the one-year period, the contract would not be further renewed.

The protester has commented on the contracting officer's further comments and on the documentation which accompanied them, making the following points:

1. Contrary to the contracting officer's assertions, no conferences were held with TLC with respect to the Kansas City route. The only conference which was held was the 1991 conference with respect to the Detroit route; service subsequent to that conference has been satisfactory, so that under Package Express, Inc., P.S. Protest No. 87-57, July 27, 1992, the prior poor performance does not support a finding of nonresponsibility.
2. The protester contends that the adverse DOT listing is the only ground supporting the finding of nonresponsibility, but that ground should not be available. The protester notes that another portion of the July 31 Transportation Bulletin directed the amendment of the provision of the standard solicitation format, which makes reference

Rather, the file indicates that award was made to J & J Mail Service, Inc., the second low bidder, on August 18, which was prior to the receipt of the protest, which was dated September 2.

The assertion that the protester must be advised of the notification of other interested parties is incorrect. PM 4.5.7 g. requires that such a statement must be furnished to the General Counsel, but does not require that the information be furnished to the protester. In any event, we can discern no adverse impact on the protester from such an omission.

to the DOT list, to provide that to be eligible for award, bidders must not be on the DOT unsatisfactory list at the time bids are received,¹⁷ and that bidders who have not been listed by DOT must obtain a satisfactory listing within the first year of contract performance or be terminated for default.¹⁷ The protester notes that Todd (as opposed to TLC) has no DOT rating, and contends that it should have a year to obtain one.

3. Alternatively, if TLC's negative rating is to be attributed to Todd, then TLC's renewal right under the new policy should also be attributed to Todd, so that Todd should have the opportunity to perform the contract for at least a one-year renewal term.

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;

* * *

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.

¹⁷ In that respect, the Bulletin did not establish a new rule with respect to this solicitation. Section 19 G. of the solicitation here so provided. Compare Midwest Transit, Inc., P.S. Protest No. 92-34, August 4, 1992, which involved a provision requiring that a successful bidder not be on the list "from the date of bid closing to the date of award."

¹⁸ The solicitation here contained no such requirement with respect to unlisted contractors.

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. We have cited this standard and addressed several of the protester's contentions in a previous decision having to do with the three previous determinations of Todd's nonresponsibility, Todd's Letter Carriers, Inc., P.S. Protests Nos. 92-39, 92-40, 92-41, October 21, 1992.

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.^{1/} The request for the novation had been denied several months prior to Todd's bid. Unlike the situation present in the previous protest, where the bids had been submitted while the request for novation was still pending (but as the decision noted, "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"), here Todd had the opportunity to take the fact of that denial into account in preparing and submitting its bid.

Our previous decision concluded that it was appropriate to exclude Todd from eligibility based on TLC's inclusion on the DOT list:

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, 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.

* * *

Mr. Snyder's inclusion on the DOT list alone is sufficient to preclude award to Todd; any other result would allow unsafe operators to obtain new postal contracts by the simple expedient of creating new corporate entities without correcting the underlying problems which occasioned the listing.

Todd's Letter Carriers, Inc., *supra*.

The protester challenges this conclusion based on the changes in renewal procedure which became effective August 1, and which it asserts warrant a different result. We

^{9/} To the extent that the protest seeks to challenge the failure to approve the requested novation, it raises 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.

disagree.

Initially, we note that to the extent that the protest seeks to apply the August 1 policy to the contracting officer's failure to renew TLC's previous contract, it involves a matter of contract administration not within our protest jurisdiction. Ruben Luis Rivera Garcia, P.S. Protest No. 91-25, May 20, 1991. However, to the extent that Todd is asserting that TLC had a right to have its contract renewed under that policy, and that Todd somehow is entitled to the benefit of that right, its contentions are clearly incorrect. The consideration of the renewal of TLC's contract occurred well prior to August 1, 1992, under a previous policy which precluded renewal due to TLC's inclusion on the DOT list; the policy established by the July 31 Transportation Bulletin was prospective, not retroactive.

Alternatively, Todd contends that it is entitled to award as a contractor unlisted at the time of bid opening which should have a year to establish its satisfactory rating with DOT. Since the solicitation here did not incorporate the revision of the DOT listing provision promulgated by the Transportation Bulletin, the revision will not apply to the resulting contract.^{10/} However, the effect of the application of the policy which Todd advances would be to perpetuate the operation of contracts by reorganized contractors who otherwise would be ineligible for consideration for award.^{11/} It was well within the contracting officer's discretion to preclude that result.^{12/}

The protest is denied.

For the General Counsel:

William J. Jones

^{10/} The result will be that if J & J Mail Service, Inc., was unrated at the time of award, it will have no obligation to obtain a satisfactory rating within one year.

^{11/} That the August 1 policy provides a limited exception to allow short-term renewal of contracts with contractors on the list does not preclude the contracting officer from excluding Todd here. Todd was not a renewal contractor entitled to that preference, nor, as discussed, above, was TLC entitled to consideration on those terms.

^{12/} Because we uphold the contracting officer's determination of nonresponsibility on this ground, we need not reach the question whether the performance problems identified with respect to TLC's contracts provide separate support for the determination.