

October 28, 1994

P.S. Protest No. 94-38

R.K. EXPRESS

Solicitation No. 608-6068-94

DIGEST

Protest against nonresponsibility determination is denied where contracting officer did not abuse his discretion by concluding that the protester lacked the ability to perform the solicited contract.

DECISION

Mr. Raymond Konopka, a sole proprietor operating under the trade name R.K. Express, timely protests the contracting officer's determination that he was a nonresponsible offeror for a contract for the highway transportation of mail.

Solicitation 608-6068-94 was issued June 3, 1994, by the Great Lakes Distribution Networks Office (DNO), seeking bids for highway transportation service between Highland Park, IL, and a postal facility at Chicago's O'Hare Airport. Bids were opened July 7. Mr. Konopka, a contractor on another route, submitted the lowest of the nine bids received.

On July 12, the contracting officer sent letters to several of the lowest bidders asking them to submit information showing that, among other factors, they had good performance records and adequate financial resources to perform. The letters asked for references and a statement describing experience, and included a pre-award questionnaire and an assets and liabilities statement for the bidders to complete.

The letter to Mr. Konopka also asked him to demonstrate affirmatively his present responsibility by documenting any circumstances that had changed since a previous mail contract, HCR 60081, had been terminated for default in August, 1993.¹ Replying, the

¹ The protest file contains a copy of a letter dated August 30, 1993, which informed MrKonopka that his contract, HCR 60081, was being terminated for default for failure to perform required service. The letter cited 15 notices of "contract irregularities" which had been issued between June 1, and August 10, 1993, and referred to a "formal conference" and a telephone conversation in which MrKonopka had been warned that his service was unacceptable and in which the contracting officer states that he had

protester submitted a narrative statement of "conditions that have changed since termination .. ." He also submitted a "statement of experience in transportation," references, and bank statements.² After reviewing those submissions, the contracting officer found Mr. Konopka nonresponsible due to an unsatisfactory performance history and inadequate financial resources.³ Award was made to PALS Cartage on August 3. This protest followed.

In his protest, Mr. Konopka states that R.K. Express has the "ability, the manpower, and the equipment to perform this contract. . . ." He complains that the contracting officer did not read his explanation of his termination from Emery or the other explanations which he gave of "what has changed" since his defaulted postal contract. (See footnotes 1 and 2.)

In reply, the contracting officer states that he "found nothing in [Mr. Konopka's] response to lead me to the belief that performance on a new contract would be satisfactory" and that he "doubted that [Mr. Konopka] had adequate financial resources to perform." The contracting officer lists the following reasons for the nonresponsibility determination:

- The termination for default on HCR 60081 followed "numerous service irregularities involving omitted service and operations with inadequate equipment as specified in the contract." The default termination occurred less than a year before this finding of nonresponsibility. (Footnote 1, *supra*.)
- Although the protester "goes to some length [to explain] the Emery termination . . .

anticipatorily breached the contract.

² The protester's narrative on "changed circumstances" explained that he lost a job at Emery Worldwide Airlines for "fraud and conflict of interest" after he suffered a back injury which restricted him to "light duty work" at Emery. Emery's investigators subsequently videotaped him performing a postal contract while he was on light duty status. He claimed that "under the laws of the contracting officer" he had no choice but to perform his postal contract himself because his hired driver could not perform a morning shift.

According to the protester, other "changed" circumstances included the fact that he works part-time for another cartage company and has use of its vehicles for his own contracts. He claimed that his performance on another postal contract, HCR 60084, has improved. "I no longer have Emery to contend with therefor[e] I am looking for full time employment with the Highland Park contract." He also cited his experience of "over 17 years" and refers to several other part-time positions.

³ On July 25, the contracting officer informed Mr. Konopka that he was found nonresponsible for solicitation 608-6068-94 due to his performance record on HCR 60081 and his failure to submit information in response to the contracting officer's letter of July 12 that "would enable me to make . . . an affirmative determination" of responsibility. The contracting officer wrote, "The information you submitted contains nothing to lead me to the belief that your situation with regard to satisfactory performance has changed." The letter emphasized a contractor "must demonstrate to the Contracting Officer that sufficient financial resources . . . are available to perform the contract." The letter referred to a "lack of adequate financial resources" but did not elaborate on what the contracting officer found inadequate.

I must state that this employment termination does not lead me to a positive affirmation of Mr. Konopka's responsibility."

-- The only financial documentation submitted by the protester was a checking account statement showing a balance of \$393.35. That statement contained five charges for "overdrafts, insufficient funds, overdrawn balance and returned check fees" and it "cast further doubt in my mind as to Mr. Konopka's financial health and his ability to undertake an additional postal contract."

The contracting officer states that while it is true that service has been satisfactory on Mr. Konopka's remaining highway contract, that fact was insufficient to offset the concerns expressed above. The contracting officer concludes:

[I]t was my business judgment that [the protester] lacked a stable record of satisfactory service performance, submitted nothing to controvert that inadequate record, and lacked sufficient financial resources that would insure success in an additional postal transportation contract. I therefore was unable to affirmatively find him responsible, and was required to find him nonresponsible.

The protester did not reply 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 a sound quality control program that complies with solicitation requirements or the ability to obtain one;
6. Have the necessary organization, experience, accounting and operational controls, technical skills, and production and property controls, or the ability to obtain them;
7. Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and
8. Be otherwise qualified and eligible to receive award under applicable laws and regulations."

Procurement Manual (PM) 3.3.1 b.⁴

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 will 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.

North American Manufacturing Corporation, P.S. Protest Nos. 29; 30, September 16, 1994; *OSM Corporation*, P.S. Protest Nos. 91-59; 91-61; 91-67, December 29, 1991; see also *A-1 Transmission*, P.S. Protest No. 93-14, October 29, 1993; *Wetler Corporation*, P.S. Protest No. 89-12, April 26, 1989.

As stated at PM 3.3.1 e.1, in the absence of information clearly showing that a prospective contractor meets standards of responsibility, the contracting officer must make a determination of nonresponsibility. See *Illinois Lock Company*, P.S. Protest No. 89-35, September 26, 1989; *Innovative Sales Brokers, Inc.*, P.S. Protest No. 89-41, August 31, 1989.

Here, the contracting officer based his determination of nonresponsibility on a record of poor performance on a similar contract that was recent enough (approximately 11 months earlier) to justify the determination. See *Pamela J. Sutton*, P.S. Protest No. 87-110, February 9, 1988 (upholding a nonresponsibility determination based on poor performance 13 months earlier). He also based his conclusions on the inadequate documentation of financial resources by the protester, as well as Mr. Konopka's record at Emery.⁵ While a

⁴ PM 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

⁵ PM 3.3.1 e.3. states:

Before making a determination of responsibility, the contracting officer must possess or obtain information sufficient to be satisfied that a prospective contractor currently meets applicable standards of responsibility.

The PM goes on to state that "[s]ources of information include" the list of debarred, suspended, and ineligible contractors; records and experience data, "including verifiable knowledge of personnel in purchasing offices"; the prospective contractor itself; and other customers of the prospective

contracting officer should consider information as current as possible in making his responsibility determination, *Automated Business Products, Inc.*, P.S. Protest No. 91-16, June 12, 1991, the contracting officer here fulfilled his affirmative duty to seek out responsibility information through his July 12 letter to Mr. Konopka.

It is the offeror which must bring changed circumstances to the contracting officer's attention to affirmatively show his responsibility. *Year-A-Round Corporation*, P.S. Protest No. 87-12, June 12, 1987. While the protester has stated that he has the ability, manpower and equipment to perform, he did not submit documentary evidence which supports that statement.⁶ Thus, he failed to meet his burden of showing that the contracting officer's determination was not supported by substantial evidence. *Lobar, Inc./Marroquin, Inc.*; *Benchmark/Hercules Limited*, P.S. Protest Nos. 92-49; 53, October 14, 1992.

contractor including other government agencies.

⁶ It was within the contracting officer's discretion to regard both MrKonopka's experience at Emery and his low bank account balance with its various overdraft charges in a negative light.

The protest is denied.

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