

Protest of) Date: July 27, 1987
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 PACKAGE EXPRESS, INC.)
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 Solicitation commingled Nos. 850-034-87,) P.S. Protest Nos. 87-57,
 900-33-87, 900-43-87) 87-58, 87-64.

Decision

Package Express, Inc. (Package Express) timely protests the contracting officers' determinations of its nonresponsibility under three solicitations for highway transportation service. The solicitations are No. 850-034-87, issued by the Phoenix Transportation Management Service Center (TMSC) on April 24, 1987, for service between Phoenix and Flagstaff, AZ; No. 900-33-87, issued by the Los Angeles TMSC on May 1 for service between San Diego and La Mesa, CA; and No. 900-43-87, issued by the Los Angeles TMSC on May 15 for service on a box delivery route out of Nuevo Circle, CA.

The three determinations of non-responsibility identify various grounds for the determinations. For convenience of reference, they are set out here sequentially.

1. Each contracting officer cites the January, 1987, default termination by the Seattle TMSC of Highway Contract Route (HCR) No. 98025 (Seattle to Spokane) because of Package Express' unsatisfactory performance.

Solicitation 850-034-87

2. The signature on the bid purporting to be that of Package Express President Braxton B. Walker was apparently signed by another. The authority of that person to sign the bid on behalf of Package Express was not supplied with the bid or thereafter.

3. On a pre-award questionnaire Package Express wrote "NONE" in a box which asked it to identify any capacity in which the company, its owners, partners or officers, have engaged in the carrying of mails within the past five years. In fact, Package Express had been awarded several such contracts, including the one which was terminated for default.

4. On a Statement of Assets and Liabilities supplied with the pre-award questionnaire, Package Express included, without identification, personal assets and liabilities of Mr. Walker which were not assets or liabilities of the corporation.

5. In March, 1987, Package Express was determined to be nonresponsible under another solicitation issued by the Los Angeles TMSC.

Solicitation 900-33-87

6. In May, 1987, Package Express was permitted to withdraw without indemnity from HCR No. after 99511, Anchorage to Fairbanks, AK, in the face of a threat of termination for default after the Seattle TMSC discovered that the service was being performed by a subcontractor in violation of the contract.

7. The Seattle TMSC issued a letter of warning to Package Express in May, 1987, for unsatisfactory performance under HCR No. 98018, Seattle Airport Mail Facility to Spokane General Mail Facility. The contracting officer states that service improved following the warning.

8. Package Express' response to the pre-award questionnaire for this solicitation misstated its previous experience in the same manner as its response to Solicitation No. 900-33-87.

9. Package Express' statement of assets and liabilities Mr. Walker's personal assets and liabilities in the same manner as its response to solicitation 900-33-87. Package Express also submitted a balance sheet and operating statement as of March 31, 1987, showing the corporation to have a negative total equity.

Solicitation 900-43-87

10. The contracting officer restates the points set out in his determination of nonresponsibility under Solicitation No. 900-33-87.

11. Package Express has recently been determined to nonresponsible by the Los Angeles TMSC as to HCRs 900-33-87 (San Diego to Las Mesa) and 900-125-86 (San Diego to San Marcos), as

well as by other contracting officers at the Phoenix and Seattle TMSCs.

12. Mr. Walker, on behalf of Package Express, had advised that he planned to employ his wife to drive half of the hours of service on the route, and that he would drive the other half as owner-operator. The contracting officer calculates that payment to an employee such as Mrs. Walker for half the hours at the hourly wages required under the Service Contract Act would cost \$14,522.98 per annum, exceeding by \$385.16 Package Express' annual bid of \$14,137.82. This prospect of unprofitable operation of the contract, combined with Package Express' negative equity position, rendered it financially nonresponsible.

Package Express has responded to various of the points raised in these determinations with written comments and in a telephonic bid protest conference. Those responses are summarized below.

1. Package Express had difficulty obtaining liability insurance and good drivers for HCR 98025 in the short time allowed. The default was excusable, and an appeal to that effect is pending before the Postal Service Board of Contract Appeals.

2., 3., 8. The bids and the pre-award questionnaires were prepared and signed by Ms. Vicki Kapostow, a secretary for Roy Gray and Associates, who had prior written authorization from Package Express to sign the bids. The secretary made an honest mistake in not listing previous Postal Services transportation contracts on the pre-award questionnaires.

4. Both personal assets and liabilities and those of the corporation were listed on the statement of assets and liabilities.

5. The previous determination of non-responsibility involved the contracting officer's concern that "the hours recorded on a previous bid were not properly reported." Package Express protested that determination, but the protest was untimely.

6. The subcontracting of HCR 99511 was made known to and orally approved by two employees of the Seattle TMSC prior to commencement of service.

9. The balance sheet and operating statement accurately reflected the financial position of Package Express as of March 31, 1987.

12. The requirement to pay area wage determination wages for half of the hours of driver time required to operate the route would cause the contract to be operated at a loss.

Discussion

We have frequently stated the standard under which we review a contracting officer's determination of an offeror's responsibility.

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 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.

Tradewind Industries, Inc., P.S. Protest No. 85-1, February 14, 1985, quoting Craft Products Company, P.S. Protest No. 80-41, February 9, 1981; see also Mr. Cool's Refrigeration and Air Conditioning, P.S. Protest No. 84-53, October 10, 1984; Bush Plastics Division/James E. Mann Corporation, P.S. Protest No. 83-83, March 7, 1984.

Although some of the points cited by the contracting officers in their determinations are not grounds for a determination non-responsibility, the other points are sufficient to establish that the determinations were within the contracting officer's discretion. We discuss the various points again in the order set out above.

1. Package Express was terminated for default under HCR No. 98025 for unsatisfactory service. Recent unsatisfactory contract performance can justify a determination of non-responsibility. Postal Contracting Manual 1-903.1(iii);

Hunter L. Todd, P.S. Protest No. 85-78, October 18, 1985; Bathey Manufacturing company, P.S. Protest No. 82-7, March 31, 1982.^{1/}

2. The authority of a secretary of an outside agency to execute bids on behalf of Package Express is a matter going to the responsiveness of the bid, rather than the responsibility of the bidder.^{1/} The rule followed by the Comptroller General is that while submission of proof of an agent's authority to sign a bid before or at bid opening is encouraged, a bid may be considered if the proof is submitted the bid opening even if the solicitation instructions (here, provision I. D. 9 of P. S. Form 7469) required such information to accompany the bid. 49 Comp. Gen. 527 (1970); Durden & Fulton, Inc., Comp. Gen. Dec. B-192203, September 5, 1978, 78-2 CPD & 172. Accordingly, rather than reject the bid on this ground, the contracting officer should have asked the bidder to supply evidence of the agent's authority. (Such evidence should be in writing and should pre-date the bid. We note that here although the protester has alleged the existence of such evidence, as yet he has failed to produce it.)

3., 8. PCM 19-122.1 directs contracting officers to seek information from prospective contracts by pre-award questionnaire. It is not unreasonable for a contracting officer to consider the receipt of incorrect or incomplete information in response to such a questionnaire as impacting on the prospective contractor's responsibility. Such a conclusion need not necessarily impugn the bidder's integrity as an effort deliberately to mislead the contracting officer, it may also occasion questions about the bidder's ability to supervise its agents and employees and perform the contract work.

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4. The commingling of corporate assets and liabilities with the individual assets and liabilities of the corporation's owner was incorrect. Since any resulting postal contract would be only with the corporation, the Postal Service can look only to it, and not to the its principals. For the same reasons discussed above with respect to the responses to the questionnaire, the intentional overstating of corporate resources raises reasonable questions of a bidder's integrity, and their negligent misstatement raises questions of a bidder's competence.

5., 11. A contracting officer's determination concerning responsibility is one involving a "business judgment" as to which the contracting officer has "considerable discretion." See e.g., Dohrman Manufacturing Co., Inc., P.S. Protest No. 84-8, March 13, 1984. Each determination must stand on its own. That the same or another contracting officer has found the bidder non-responsible with respect to previous solicitations cannot support a current determination of non-responsibility, although the grounds for a prior determination may be considered among the grounds of a new determination. See S.A.F.E. Export Corporation --Request for Reconsideration, Comp. Gen. Dec. B-209491.2, October 4, 1983, 83-2 CPD & 413. In such use, however, care must be taken to assure that the evidence relied upon is sufficiently current to provide a basis for the evaluation of the bidder's present capacity to perform and that the other information reasonably available to the contracting officer is considered as well. Here, the mere recitation, without any discussion of the circumstances, of various prior findings of the bidder's nonresponsibility is not persuasive support for the current determinations.

6., 10. The record is insufficient to establish that the subcontracting of HCR No. 98025 was in violation of the contract. Subcontracting without the prior written approval of the contracting officer is permitted in some circumstances. See PCM 19-128.2. That the contract was terminated by mutual agreement without indemnity, rather than for default, suggests that the question was in doubt. The termination thus provides no support for the determination of nonresponsibility.

7., 10. The existence of a period of unsatisfactory performance under HCR No. 98018 culminating in a letter of warning from the contracting officer followed by improvement of service to an acceptable level, is not, without more, support for the contract

ing officer's determinations of non-responsibility. The fact of the contractor's greater-than-usual need to supervise particular contracts might, however, in appropriate circumstances not demonstrated here, relate to the contractor's ability to perform adequately on several contracts at one.

9., 10., 12. The perceived unprofitability of contract, coupled with the negative equity position of the corporation, constitutes an independent basis for contracting officer's determination under the solicitation. PCM 1-903.1(i) provides that in order to be determined responsible a prospective contractor must have adequate financial resources, or the ability to obtain such resources as required during performance on the contract.

The protest are denied.

William J. Jones
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[Compared to original 3/5/93 WJJ]