Protest of	)	
	)	Date: April 19, 1990
JINDAL BUILDERS AND	)	
RESTORATION CORPORATION	)	
	)	
Solicitation No. 209986-90-A-0007	)	P.S. Protest No. 90-10

DECISION

Jindal Builders and Restoration Corporation (Jindal) timely protests its rejection as a nonresponsible offeror under Solicitation No. 209986-90-A-0007 for the construction of a new post office in North Bend, Ohio. The protester alleges that the contracting officer incorrectly determined that Jindal had a poor performance record and was, therefore, nonresponsible.

The Louisville Facilities Service Office (FSO) issued the solicitation on December 29, 1989, with an offer due date of January 31, 1990. Sixteen offers were received. Jindal submitted an offer of $216,000. A preaward survey was conducted by an FSO representative during which references from prior work performed by Jindal were contacted and their assessments of Jindal solicited. In total, three references given by Jindal were contacted.

The first reference contacted was Sam Patel, owner of the Cove Motel, and he gave an unsatisfactory assessment of Jindal's performance. Mr. Rick Deller who was the second reference contacted gave a mediocre account of Jindal's past performance; he expressed particular concern about the "quality" of the work performed by Jindal. The third reference given by Jindal was for work performed on the Relax Inn Motel. The FSO representative attempted to reach this third reference (Ronald Johnson), but he was unavailable, and his office directed the representative to contact Mr. Mike Patel, the owner of the Relax Inn, because he was the person who could give such a reference. When Mr. Patel was contacted, he told the contracting officer's representative that there were "major and minor problems" with Jindal's work performance, that Jindal is unskilled, and that he was unhappy with Jindal because problems with the construction had not been corrected.

As the result of the information collected from the references, the contracting officer determined that Jindal was nonresponsible because of the unsatisfactory performance reports he received about Jindal. On February 22, the contracting officer awarded the contract to D & D, Inc., in the amount of $216,700.[1/] On that date, the contracting

[1/] The protester questions the difference between its low bid of $216,000 and the awardee's bid of $216,700. Jindal argues that the difference between the two bids is "too close to be a coincidence." Jindal does not allege any wrongdoing on the part of contracting officials beyond the vague allegation

officer notified Jindal, by letter, that its offer had been rejected, citing Procurement Manual (PM) 3.3.1, which, among other things, requires that a contractor have a good performance record to be determined responsible. Jindal's timely protest was received by the FSO on February 27 via facsimile.

Jindal contests the contracting officer's finding of nonresponsibility. Specifically, Jindal argues that the information contained in the contracting officer's file is incorrect, or the information received by the office from previous customers was misinterpreted or mistaken.[1/] Jindal further contends that the customer (Mike Patel) reporting unsatisfactory performance was biased because Jindal is currently involved in litigation with him over the project and has filed a mechanics lien against the building in excess of $200,000. Jindal submits a letter signed by Ronald T. Johnson, which contains favorable comments about his relationship with Jindal.

The contracting officer, in his report, specifically states that he determined, based on information received from the references Jindal supplied, that Jindal's performance record was unsatisfactory and that Jindal failed to demonstrate that it was a responsible contractor. The contracting officer notes, as set out more fully above, that the three references given by Jindal were called; one reference reported unsatisfactory work, another reported mediocre work, and the third could not be reached, but suggested an alternative contact for information who gave an unsatisfactory performance reference of Jindal.

In its supplementary comments of March 27, Jindal simply reasserts that the contracting officer was in error in his determination that it was not a responsible offeror.[1/] Jindal also expresses concern about this office's denial of its request for an indefinite extension to file additional comments until five days after it receives information and documentation which it requested under the Freedom of Information Act (FOIA).[1/]

above. Protest decisions do not turn on vague and unsupported allegations of wrongdoing. York International Corporation, P.S. Protest No. 89-77, January 19, 1990. Additionally, this allegation is irrelevant to this protest because the contracting officer's rejection of Jindal's offer was based on a finding of prior poor performance, rather than any issue of contract price.

[2/]For example, Jindal states that Mr. Deller (one of the three references used by Jindal), did not remember giving a mediocre or derogatory account of Jindal's performance to the Postal Service. As evidence, Jindal submits an affidavit from Mr. Deller, attached to its supplementary comments, to that effect.

[3/]It also raises for the first time its allegation that Jindal was similarly treated under a solicitation for an indefinite quantity contract used by the FSO. That solicitation is not before us in this proceeding.

[4/]"It is not the practice of this office to suspend our decision based on a pending FOIA request." Garden State Copy Company, P.S. Protest No. 84-31, July 5, 1984; see also Cohlmia Airline, Inc., P.S. Protest 87-118, April 13, 1988. The protester was allowed an additional five working days past the deadline within which to file any supplementary comments.

Discussion

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 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; Cardinal Glove Company, Inc., P.S. Protest No. 89-84, November 14, 1989.

PM Section 3.3.1 a. sets forth general standards for determining whether a prospective contractor is responsible, 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, including, when necessary, the responsibility of its proposed subcontractors.

In order to be determined responsible, a contractor must have a good performance record (PM 3.3.1 b.3.), and "[i]n the absence of information clearly showing that a prospective contractor meets applicable standards of responsibility, the contracting officer must make a written determination of nonresponsibility." PM 3.3.1 e.1.

Our review of the file and the contracting officer's report concerning inquiries made of the protester's references indicates that the contracting officer's determination that the protester was nonresponsible is not arbitrary or capricious and was reasonably based on substantial information. The contracting officer contacted the references supplied by the protester and received responses from which he could reasonably conclude that Jindal's performance record was unsatisfactory. This determination was based on the findings from three separate reference checks. Given the requirement of PM 3.3.1 a. and 3.3.1 e.1 that the contracting officer find a prospective contractor nonresponsible absent information clearly and affirmatively demonstrating the contractor's responsibility, the contracting officer had substantial evidence upon which to find Jindal nonresponsible.

A nonresponsibility determination may be supported by what the contracting officer reasonably perceived to be the proposed contractor's prior inadequate performance, even if the contractor disputes the contracting officer's interpretation. Graphic

Technology, Inc., P.S. Protest No. 85-66, December 30, 1985 and cases cited therein. In this case, in reaching his conclusion, the contracting officer had no reason to question the truth of the information supplied by the references.

Although Jindal disputes the correctness of the contracting officer's determination on the grounds of misinterpreted and biased information, it has not submitted sufficient evidence to overcome this burden.

The protest is denied.

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

[checked against original JLS 6/2/93]