Protest of	) Date: February 12, 1991
	)
EXPRESS BY B & M	)
	)
Solicitation No. 010-005-91	) P.S. Protest Nos. 91-02

DECISION

Express by B & M (Express) timely protests the contracting officer's determination that it is a nonresponsible bidder under solicitation no. 010-005-91, issued by the Springfield Transportation Management Service Center (TMSC) for the highway transportation of mail from the Springfield, MA General Mail Facility to Northern Hub and Spoke Project Facility in Westborough, MA. The solicited service required two tandem-axle tractors and two tandem-axle trailers for estimated annual scheduled mileage of 174,367.72 miles and estimated scheduled annual hours of 5,927 hours. The solicitation was issued on October 5, 1990 with bid closing at 3:00 pm EST on November 6, 1990. Express' bid of $148,828 per year was lowest of the 23 bids received. The other bids ranged in amount from $184,739 to $378,869 per year.

As part of determining Express' responsibility, the contracting officer sent it a letter on November 7 requesting various items of information.[1/] The requests included the submission of a PS Form 5472, Pre-Award Questionnaire, current balance sheet (not older than 90 days), corporate papers (if applicable) and any other pertinent information to assist the contracting officer in making a determination of responsibility (documentation to support financial strength, business experience, etc.). The letter asked that the requested information be provided within 5 days and warned that failure to comply with the requests would result in rejection of Express' bid due to a finding of nonresponsibility. The requested financial information was not provided to the contracting officer.

In addition, a pre-award conference was held with Express.[1/] The memo to file of that meeting indicates that TMSC personnel were concerned with Express' ability to operate the route as indicated in its bid - the P.S. Form 7468-A, Bid or Renewal Worksheet,

[1/] The request was sent return receipt requested. The return receipt indicates the letter was received on November 8.

[2/] Neither the contracting officer's report nor the protest letter (both of which refer to the pre-award conference) indicates the date of the conference. We have been advised by TMSC personnel that the conference took place on or about November 9.

submitted with the bid indicates that the contractor would personally drive 4,757 of the route's estimated 5,927 annual hours.[1/] TMSC personnel informed Express that an individual driver operating a truck for that many hours a week (4,757 annual hours amount to a weekly average in excess of 91 hours) would violate Department of Transportation (DOT) regulations. The conference notes indicate Express insisted that the contract could be performed as bid. TMSC personnel also expressed their concern that the amount allocated for the payment of the 4,757 hours would not be sufficient to compensate an employee and that there was no evidence that Express was financially capable of operating the route at a deficit in order to offset the deficiency. Based on these concerns, TMSC personnel indicated that they would recommend that Express be found nonresponsible.

By letter of December 20, the contracting officer advised Express of his determination that it was a nonresponsible bidder. The letter indicated that the determination was based on Express' failure to demonstrate affirmatively that (1) it could operate the route in the manner in which it had bid and (2) it had the productive capacity or financial strength to perform the required service. By letter of December 28, Express protested the contracting officer's determination. The contracting officer forwarded the protest to this office for resolution.

In its protest, Express alleges that TMSC personnel had their minds made up before the pre-award conference was held.[1/] Express states that the determination that it could not operate the route as bid was based on the failure of TMSC personnel to consider the hours that the contractor would be working. Further, Express alleges that the TMSC personnel based their nonresponsibility recommendation on the assumption that the contractor could not operate its equipment for $.48 per mile even though the next three bidders in line for award would be operating their equipment at between $.31 and $.38 per mile. In light of these latter amounts and the fact the that the hours of service do not allow for equipment to be used on other service, Express alleges that the losses of these contractors would be greater than its own. For these reasons, Express requests that the contracting officer terminate the contract and resolicit.

In his report, the contracting officer states that TMSC personnel did not predetermine the issue of Express' responsibility. The contracting officer points out that TMSC personnel did consider the number of hours the contractor would be working and, in fact, determined that the stated amount exceeded DOT regulations, particularly since the contractor currently operates another route on which Mr. Leroux is driving 1,366 hours per year. As to Express' claim that its ability to operate the route for $.48 a mile was questioned, the contracting officer denies that the issue was brought up. Instead, TMSC personnel questioned Express's allowance of $.0287 on its PS Form 7468-A for operational costs. Additionally, the contracting officer questions the source of the $.31

[3/] The record does not establish the type of business entity that Express is - corporation, partnership or sole proprietorship. From the information supplied on the referenced P.S. Form 7468-A, we conclude that Express is the assumed name in which the individual, Marc Leroux, who signed the form is doing business.

[4/] In its protest, Express mistakenly assumes that one of the TMSC personnel who conducted the pre-award conference was the contracting officer.

to $.38 per mile rate for operational costs for other bidders since the information contained on bidders' worksheets (PS Forms 7468-A) is not public information and, therefore, is not released by the Postal Service.

In conclusion, the contracting officer points out that Express failed to submit documentation which would demonstrate it had the financial strength to perform the solicited service noting that a credit check contained only one entry which was not enough to make an affirmative determination. Finally, the contracting officer reaffirms that the failure of Express to establish its financial strength and productive capacity led to his determination of nonresponsibility.[1/]

Discussion

We turn first to the failure of Express to provide the contracting officer with financial information sufficient to make an affirmative determination of responsibility, a previous subject of protest decisions. See AHJ Transportation, Inc., P.. Protest No. 88-85, February 2, 1989; AHJ Transportation, Inc., P.S. Protest No. 89-01, February 3, 1989; AHJ Transportation, Inc., P.S. Protest No. 89-19, September 7, 1989. The substance of our analysis in such instances was first stated in the first of the AHJ decisions cited above and is equally relevant here:

> PM 3.3.1.a. states, in part:
>
> > 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....
>
> PM 3.3.1.a. In order to be determined responsible, a contractor must have, inter alia, financial resources adequate to perform the contract (PM 3.3.1.b.1), be able to comply with the required performance schedule (PM 3.3.1.b.2), and have "the necessary organization, experience, accounting and operational controls, [and] technical skills.....or the ability to obtain them" (PM 3.3.1.b.5).
>
> PM 3.3.1 e.3 identifies various sources of information from which the contracting officer may obtain information concerning a prospective contractor's responsibility. They include records and experience data of personnel in purchasing and contracting offices, information solicited from the suppliers, subcontractors, and customers of the prospective contractor, financial institutions, Government agencies and business and trade associations.
>
> The standard of our review of a contracting officer's finding of nonresponsibility is well established:
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> > A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the [requirements of the

[5/] Express has not submitted comments on the contracting officer's report.

> contract] with available information about the contractor's resources and record. We well recognize the necessity of S 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; Cimpi Express Lines, Inc., P.S. Protest No. 88-57, December 15, 1988. Here, the material available to the contracting officer clearly failed to provide sufficient information to allow him to make the affirmative determination of responsibility necessary to allow award to [the bidder]. That lack of information was the result of the bidder's failure to respond adequately to the contracting officer's requests for information. That failure was deliberate, apparently arising out of the bidder's mistaken belief that the information requested was unnecessary to the contracting officer's decision.

We have previously recognized that highway mail transportation contractors must have cash reserves to pay for fuel, maintenance, and other expenses before receipt of the first contract payment. David W. Baker, P.S. Protest No. 87-76, August 10, 1987. [The bidder's] lack of resources adequate to meet those expenses, in the absence of contrary evidence available to the contracting officer, makes a nonresponsibility determination appropriate. Although the contracting officer cannot place the entire burden of proving its responsibility on the bidder, see Government Products Corporation, P.S. Protest No. 84-58, December 10, 1984, a bidder's failure to provide information uniquely within its purview is properly charged against it. Marshall D. Epps, P.S. Protest No. 88-47, September 15, 1988; PM 3.3.1.e.3(c). (Footnote omitted).

AHJ Transportation, Inc., P.S Protest No. 88-85, February 2, 1989.

We recognize that the AHJ decisions turned upon the bidder's self-asserted lack of resources. We do not believe, however, the assertion of the lack of resources is any less telling than a refusal to provide information regarding such resources. As the cited analysis indicates, although the contracting officer cannot place the entire burden of establishing responsibility on the prospective contractor,[1/] a bidder's failure to provide information uniquely within its purview justifies a finding of nonresponsibility if the

[6/] As we noted in the first AHJ decision,

> ... a contracting officer may appropriately find a bidder responsible on the basis of information available from sources other than the contractor in the face of the bidder's failure or refusal to provide information itself. To conclude otherwise would allow bidders to avoid the "firm bid rule," improperly affording them "a second bite at the apple." See Dry Storage Corporation, P.S. Protest No. 88-37, August 8, 1988; Government Contract Services, Inc.; Daly Construction, Inc., P.S. Protest No. 85-95, January 21, 1986.

AHJ Transportation, Inc., P.S. Protest No. 88-85, February 2, 1989.

information available to the contracting officer from other sources is insufficient to affirmatively establish the bidder's responsibility.

Because we determine that the contracting officer was justified in finding Express nonresponsible based on its lack of financial capacity to perform the solicited service, we need not address the other stated bases for that determination - that Express did not have the productive capacity to perform the required service and that Express could not provide the service as bid.

The protest is denied.

[Signed]

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

[Compared to original 5/16/95]