

Protest of)
E.H.O. Trucking) Date: June 24, 1991
Solicitation No. 380-039-91) P.S. Protest No. 91-28

DECISION

E.H.O. Trucking (E.H.O.) has protested a determination by the Memphis Transportation Management Center (TMSC) that E.H.O. is a nonresponsible prospective contractor under Solicitation No. 380-39-91, for highway transportation service between Knoxville, TN and Surgoinsville, TN. E.H.O. was the low bidder.

The contracting officer's determination of nonresponsibility was based upon the default terminations of two contracts held by E.H.O., both on November 15, 1990, for failure to perform service.^{1/}

The protest filed by Mr. Eddie H. O'Brien on behalf of E.H.O. alleges facts which amount to an argument that the defaults were excusable, or were caused by actions or failures to act on the part of Postal Service employees. Specifically, Mr. O'Brien alleges that he was involved in a motor vehicle accident on November 12, 1990, which caused him to be hospitalized from November 12 to November 20, and that his truck was damaged in the accident. He alleges that he was not paid for service after November 21, and has not been paid for "extra miles" or insurance. Mr. O'Brien also alleges interference with his contract performance by several postal employees, harassment and threats against his life by the contracting officer, and racial discrimination by a member of the TMSC staff. Mr. O'Brien claims a total of \$196,000 for breach of contract by the Postal Service under the two contracts terminated for default.

Discussion

E.H.O.'s claims for breach of contract are subject to procedures set out in the Contract Disputes Act of 1978 and the provisions of the Claims and Disputes clause of the

^{1/} The terminated contracts were Highway Contract Route (HCR) No. 38460, Columbia, TN, to Duck River, TN, and HCR No. 38461, Dyersburg, TN, to Gates, TN.

contracts implementing the Act. Complaints resolvable under these procedures are not amenable to resolution under the bid protest procedures.^{1/} Ric Marinkovich, P.S. Protest No. 87-63, August 6, 1987.

The standard of 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 [requirements of the contract] 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; Cimpi Express Lines, Inc., P.S. Protest No. 88-57, December 15, 1988.

Procurement Manual (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....

PM 3.3.1 b.3 provides that to be determined responsible a prospective contractor must "[h]ave a good performance record." It is well established that recent unsatisfactory performance, evidenced by a default termination, justifies a determination of nonresponsibility. Mike and Candace Russell, P.S. Protest No. 91-13, May 6, 1991; Package Express, Inc., P.S. Protest Nos. 87-57, 87-58, 87-64, July 27, 1987; Hunter L. Todd, supra; Bathey Manufacturing Company, P.S. Protest No. 82-7, March 31, 1982. The fact that a contractor challenges or might challenge a termination does not preclude consideration of the termination in determining responsibility. DWS, Inc., P.S. Protest No. 87-100, November 6, 1987.

Our bid protest regulations limit our jurisdiction to "protests against Postal Service contracting procedures and awards." PM 4.5.1. To the extent that Mr. O'Brien's claims assert racial bias, personal threats or harassment by the TMSC staff, they are outside the scope of our bid protest function. Fred Austin Trucking, Inc., P.S. Protest No. 86-

^{2/} We note that E.H.O.'s breach of contract claims are pending before the Postal Service Board of Contract Appeals in Docket No. 3052. Although certain facts relied on by the contracting officer are or may be contested in litigation, that does not prohibit his use of such facts in reaching this determination. Hunter L. Todd d/b/a Courier Express and Package Delivery Service, P.S. Protest No. 85-78, October 18, 1985 n.1.

66, December 10, 1986. We note, however, that the allegations are unsupported by any factual evidence. Mere supposition is considered insufficient to overcome the presumption of regularly attending a contracting officer's performance of his official duties. Penny H. Clusker, P.S. Protest No. 80-37, August 27, 1980. Mr. O'Brien's claims of harassment and interference with contract performance in connection with the terminated contracts are also matters which are not within the scope of our bid protest jurisdiction. Fred Austin Trucking, Inc., *supra*.

The protest is denied.

[Signed]

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

[Compared to original 5/17/95 WJJ]