

**March 18, 1994**  
**P.S. Protest No 94-04**

## **RKM CONSTRUCTION COMPANY, INC.**

**Solicitation No. 052571-94-A-0011**

### **DIGEST**

Protest of exclusion of construction contractor from consideration for award is sustained where contracting officer concedes incorrectness of the exclusion; matter is remanded to contracting officer for determination of contractor's present responsibility.

### **DECISION**

RKM Construction Company, Inc., (RKM) of Broomfield, CO, protests its exclusion from consideration for award of an indefinite quantity contract for repairs and improvements to postal facilities in the Portland, OR, District.

Solicitation 052571-94-A-0011 was issued October 11, 1993, by the San Bruno, CA, Facilities Service Office, seeking offers for the Portland contract. The solicitation contemplated a two-year contract with an "initial value" of \$500,000, subject to an increase to \$1,000,000 during the contract term, but with a minimum quantity of work to be ordered of \$10,000. The solicitation included two descriptions of the basis on which award would be made. Paragraph M.1, Contract Award, provided in part as follows:

- a. The Postal Service reserves the right to make one award or multiple awards to the responsible offeror(s) whose proposal(s) conforming to the solicitation offers the best value to the Postal Service, considering price, price-related factors, and/or other factors specified elsewhere in this solicitation.

Paragraph 6 on the cover page of the solicitation provided in part as follows:

Award will be made based on the proposal that offers the best value to the U.

S. Postal Service.[<sup>1</sup>] Primary factors that will be considered are: 1) Minimum 5 years experience in construction. 2) Licensed in the State of Oregon. 3) Favorable client references. 4) Financial stability. 5) Ability to secure bonding up to \$1,000,000.

Prices were to be expressed in terms of a percentage multiplier to be applied to a listing of unit costs associated with specific construction tasks which could be the subject of orders placed during the term of the contract. When offers were received on November 26, RKM was found to have submitted the offer with the lowest multiplier.

The contracting officer's statement on the protest notes that inquiry was made concerning whether RKM was licensed by the State of Oregon. A December 17 Facilities Contract Specialist's memorandum to the file titled "Determination of Responsibility and Price Analysis" recites that "[a]ccording to the State of Oregon Contractor's Construction Board and confirmed by RKM Construction, the firm is not licensed by the State" and concludes as a result that the firm had "failed to meet the licensing requirement specified in the solicitation" and "is therefore found to be non-responsive."<sup>2</sup> The memorandum continues by recommending that award be made to offerors with the next two lowest multipliers, Pen-Nor Inc. and Arris Corp.

The contracting officer adopted the conclusions of the December 17 memorandum on December 20 and "intent to award letters" were issued to the firms.<sup>3</sup> Contracts were subsequently awarded to Pen-Nor and Arris on January 18 and 26, 1994, respectively. By letter dated January 27, RKM was advised that it had not met the solicitation's "qualification" that it be licensed in the state of Oregon, and as a result RKM "was determined to be ineligible for contract award."<sup>4</sup> RKM's protest was filed by facsimile with the contracting officer on February 3.

<sup>1</sup> Paragraph 6 elsewhere acknowledged the possibility of multiple awards.

<sup>2</sup> The contracting officer's statement also reflects that RKM was the contractor on existing postal contracts awarded in 1992 in the Portland and Seattle districts and was awarded a new contract for the Seattle district on December 4, 1993. The file contains correspondence dated December 10 from an architect/engineer in Seattle to the FSO advising that RKM had not paid its subcontractors on three completed projects, and that one subcontractor was filing a claim against RKM's bond. Such a claim was received on December 20. On January 19 and 20 the sureties on RKM's Portland and Seattle contracts requested that no funds be released to the contractor. The contracting officer also states that the sureties' attorney-in-fact advised "that no new work orders should be issued to RKM pending completion of the Surety's investigation," and asserts that as a result of that advice, "the Portland District issued four stop-work notices to RKM." RKM subsequently undertook to arrange for "a loan to make up the difference between receivables and payables" and to assign the funds payable by the Postal Service to a disbursing account at a Denver bank. The file reflects that as of February 11 the matter had not been finally resolved. A memorandum of that date from Field Counsel noted the need to obtain the sureties' approval of the arrangement before the Postal Service could agree to the assignment.

<sup>3</sup> An "intent to award" letter advises an offeror that award will be made to it upon receipt from the offeror of appropriate documentation, such as payment and performance bonds. Procurement Manual (PM) 11.5.1 p.1.

<sup>4</sup> In the meantime, on December 29, 1993, RKM had obtained an Oregon contractor's license, which it submitted to the Postal Service on December 30.

The protest contends that it was inappropriate to find RKM nonresponsible for failing to have an Oregon license if the contractor could have obtained the license before award, citing General Accounting Office decisions which identified specific licensing requirements as requirements of contract performance, rather than as definitive criteria of responsibility.

The contracting officer's statement on the protest concedes the inappropriateness of the determination that RKM's initial lack of an Oregon contractor's license disqualified it from eligibility for award. The contracting officer contends, however, that the error does not require that RKM receive a contract because of RKM's current financial difficulties, as reflected by the correspondence from its sureties which has led to the issuance of stop work orders on RKM's existing contracts and the Postal Service's inability to place orders against RKM's new Seattle contract. These difficulties, the contracting officer asserts, independently demonstrate RKM's current nonresponsibility.

The protester's reply to the contracting officer's statement takes exception to the contracting officer's position that RKM may be found nonresponsible, making three contentions: First, the contracting officer's determination was improper because he failed to refer the question of RKM's responsibility to the Small Business Administration for the issuance of a certificate of competency under 15 U.S.C. 637(b)(7)(A), a portion of the Small Business Act.<sup>5</sup> Second, the contracting officer failed to make an appropriate pre-award determination of RKM's financial nonresponsibility as required by PM 3.3.1 (e). Third, the matter of RKM's responsibility has been resolved as reflected in documents included in the contracting officer's report. The reply concludes by requesting that the existing contracts be terminated for convenience and award made to RKM.

## **DISCUSSION**

The contracting officer's concession that RKM was improperly removed from consideration for award was correct,<sup>6</sup> although not precisely for the reasons asserted by the protester. The solicitation's statement that the evaluation of offers would include consideration of Oregon licenses was neither a definitive criterion of responsibility (that is, a requirement which the offeror had to possess in order to receive the award) nor a performance requirement of the contract (that is, something that the successful offeror would have to

<sup>5</sup> The cited statute is not applicable to the United States Postal Service. To the extent that the Small Business Act is a "Federal law dealing with public or Federal contracts," it does not "apply to the exercise of the powers of the Postal Service" (39 U.S.C. 410(a)). The Small Business Act is not one of the contract-related statutes enumerated in 410(b) as exceptions to 410(a). Further, the Small Business Act itself omits the Postal Service from its coverage by excluding the Postal Service from the Act's definition of "Federal Agency." 15 U.S.C. 632(b).

<sup>6</sup> Although the contracting officer's statement adopts the protester's contention that RKM had been found to be nonresponsible, the contemporaneous documentation in the protest file did not so state. The December 17 memorandum concluded that RKM was "nonresponsive;" the January 28 letter asserted that RKM was "ineligible." Responsiveness is a term properly applicable to bids submitted under formal advertising, not to offerors in a negotiated procurement such as this. *Government Contract Advisory Services; B & B General Contracting, Inc.*, P.S. Protest Nos. 21, 25, December 16, 1993.

obtain in the course of performing the contract).<sup>7</sup> Instead, it was one of five "primary factors" which the solicitation indicated would be considered, in addition to price, in determining which of the offers provided the best value. Although it might have been appropriate to rate other offerors who possessed such licenses more highly than RKM when the offers were evaluated, the solicitation did not indicate that any of the listed factors was mandatory. Thus it was inappropriate to eliminate RKM from consideration because of its failure to have the Oregon license.<sup>8</sup>

We do not find it as clear as the contracting officer would have it that the circumstances arising out of the claim made by RKM's subcontractor necessitated the conclusion that the contractor lacked financial responsibility. That conclusion would not automatically follow from the initial advice that an unpaid subcontractor might assert a claim against the payment bond surety, or that such claim had been made, the events which were contemporaneous with the award decisions here. While the sureties' subsequent requests that payment not be made to the contractor may have provided somewhat more justification for the conclusion,<sup>9</sup> they were fairly quickly followed by correspondence suggesting that the matter was resolved or resolvable, a fact which might occasion a different result.

That question is academic, however, because under our precedent,<sup>10</sup> the matter must be

<sup>7</sup> Decisions of this office, like those of the General Accounting Office cited by the protester, have discussed the distinctions between the two requirements. See, e.g., *Restore Specialties*, P.S. Protest No. 88-13, June 21, 1988; *Transnorm System Inc.*, P.S. Protest No. 90-58, October 26, 1990.

<sup>8</sup> The December 17 memorandum recommending the awards in this case contained only minimal references to the evaluation factors listed in the solicitation, and those references appear to relate to the determination of the offerors' responsibility. (The determination of an offeror's responsibility is separate from the evaluation of its offer. *Hill's Capitol Security, Inc.*, P.S. Protest No. 90-25, July 20, 1990.) Thus, the memorandum describes the previous successful performance of postal construction contracts by both Arris and Pen-Nor (the former since 1990 and the latter since 1991), but fails to indicate whether either firm had five years of construction contracting experience. Similarly, while the memorandum notes that each firm is licensed, is not debarred, and each has "adequate surety credit available," there is no discussion of either firm's "financial stability" or its "favorable client references." The memorandum's analysis allows no reasonable conclusion other than that the award decisions were focussed entirely on price, rather than on a combination of price and other factors as the solicitation led offerors to believe. (*Compare C.J.M. Construction, Inc.*, P.S. Protest No. 91-74, December 10, 1991.)

<sup>9</sup> The Postal Service was not obliged to issue stop work orders on existing tasks in response to a surety's request that no new orders be placed. With respect to ongoing work, the Postal Service need not necessarily honor a surety's request to withhold payment. ("[T]he standard for assessing government payment made to contractors in the face of notice from the surety of payment defaults is significantly different depending on whether the government received notice from the surety before or after the completion date. During performance, the government has an interest in paying the contractor to insure timely completion of the project. Accordingly, the government is merely obligated to exercise discretion in weighing the surety's interest against its own. After completion, the government has no valid reason to decide the merits itself." *International Fidelity Insurance Company v. United States*, 25 Cl. Ct. 469, 477, March 9, 1992 (citations omitted).)

<sup>10</sup> A finding of responsibility is a mandatory requirement prior to the award of a contract. [PM 3.3.1] However, it is not the function of this office to make determinations of responsibility. Such determinations are properly discretionary judgements of the contracting officer and will not be disturbed by this office unless it is shown that a determination was arbitrary, capricious or not supported by substantial evidence. *Levi*

remanded to the contracting officer for a new determination of RKM's *present* responsibility, a determination which should take into account all of the relevant factors, including the adequacy of the contractor's financial resources. If RKM is found to be currently responsible, it should be awarded a contract in accordance with the terms and conditions of the solicitation. In that event, since the solicitation clearly allowed for the possibility of multiple awards, the contracting officer may, but does not have to, terminate one or both of the previously awarded contracts for convenience.

The protest is sustained to the extent indicated.

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Contract Protests and Policies

*Carver, On Reconsideration*, P.S. Protest No. 76-25, October 28, 1976. Accordingly, the matter is remanded to the contracting officer to determine whether [the protester] is responsible and otherwise eligible for award. In making his determination, the contracting officer may rely on all information available to him, including . . . such information [as] his inquiries in accordance with [PM 3.3.1 e.3] may disclose.

*L.P. Fleming, Jr. Hauling, Inc.*, P.S. Protest No. 83-64, December 19, 1983.