

July 6, 1994

P.S. Protest No. 94-25

MAJESTIC AIRLINES

Solicitation No. D5K-07-94E

DIGEST

Protest against determination that bidder is nonresponsible with respect to mail transportation contract is denied when that determination is not abuse of contracting officer's discretion.

DECISION

Majestic Airlines protests the award of an emergency contract for the air transportation of mail between Salt Lake City, UT, and Boise, ID.

Solicitation D5K-07-94E was issued telephonically on April 27, 1994, by the Seattle Branch, Western Area Distribution Networks office, to replace service previously performed by OKAir under a contract for service beginning March 5, 1994. The OKAir contract was terminated for default effective April 30. Award was to be made "to the responsible offeror whose proposal is technically acceptable and offers the lowest price." Majestic Airlines, which had provided service between Salt Lake City and Boise under a Christmas contract which preceded the award to OKAir, submitted the lowest offer in response to the telephonic solicitation.

The Seattle Branch's investigation into Majestic's responsibility disclosed a variety of problems with its previous performance and its current financial condition, including the following:

A previous contract for service between Twin Falls, ID, and Salt Lake City, had been terminated for default on June 4, 1993.

The administrative official familiar with Majestic's performance on the Christmas

contract advised that its service had been unsatisfactory. It often substituted a smaller aircraft for the aircraft required by the contract and "seldom notified [the post office] when they were unable to perform due to weather or mechanical [circumstances]. . . ."

A February, 1994, letter from a postal inspector set out a number of irregularities in connection with Majestic's performance on the Christmas contract, including the substitution on 90 occasions of a smaller Piper Navajo . aircraft for the required Beech 99 aircraft; the omission of information on copies of PS Form 2768, Aircraft Weight and Balance Data, in connection with the aircraft substitution; and problems with the lift capacity of the Beech 99 aircraft in warm weather.

A credit report showed a number of judgments against Majestic and that some accounts had been placed in collection.

On the basis of this information, the contracting officer concluded that Majestic was not responsible and proceeded to analyze the next lowest offer, that of Big Horn Airways. Finding Big Horn responsible, the contracting officer awarded the contract to it.¹ By letters dated May 11, the other offerors were advised of the award. The letter to Majestic included the following:

You were the low offeror on Solicitation D5K-07-94, Boise to Salt Lake City, however the Contracting Officer was unable to determine your responsibility, due to your financial situation, the use of aircraft that were less than contracted for . . . and the poor recommendation of postal officials concerning your performance on previous postal contracts.

Majestic's protest, addressed to the contracting officer, was dated May 4, prior to the written notification of its nonresponsibility. The substance of the protest is as follows:

We wish to protest this on the basis that we offered an aircraft . . . with a larger payload, larger cubic feet available, and . . . at a cost below that the aircraft which was awarded the contract [T]he speed of our [aircraft] is comparable to and actually a few miles per hour faster than [Big Horn's aircraft]. . . . [W]e have performed this contract with [the offered aircraft] sixty days prior to the award to OKAir and performed flawlessly during that period of time

The contracting officer's statement sets out the basis of his determination of Majestic's nonresponsibility. The protester has not replied to the contracting officer's statement.

DISCUSSION

¹ It appears that service began April 30, but that the processing of contract documents continued after that date. Big Horn's proposal in the contract file is dated May 9, and the contracting officer's acceptance of that proposal is undated.

To the extent that the protester has challenged the determination of its nonresponsibility, it has not met its burden of proof.

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 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.

Craft Products Company, P.S. Protest No. 80-41, February 9, 1981; see also *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.

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. . . .

Among the elements which must be demonstrated to establish responsibility are having "financial resources adequate to perform the contract" (PM 3.3.1 b.1.), and being "able to comply with the required . . . performance schedule, taking into consideration all existing commitments." (PM 3.3.1 b.2.)

Recent unsatisfactory prior performance, even without termination for default, may be the basis for a determination of nonresponsibility. *Todd's Letter Carriers, Inc.*, P.S. Protest Nos. 92-39, 92-40, 92-41, October 21, 1992.

In this instance, the contracting officer has cited numerous circumstances involving Majestic's past performance and its current financial situation which adequately support the determination of nonresponsibility.²

The protest is denied.

² The protest's challenge to the suitability of Big Horn's offered aircraft is an issue we need not reach. As a nonresponsible offeror, Majestic lacks standing to challenge the contracting officer's determination of the suitability of Big Horn's offer. *Jindal Builders and Restoration Corporation*, P.S. Protest No. 90-18, June 19, 1990.

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