

February 7, 1995

P.S. Protest No. 94-55

DESIREE DAIS

Highway Mail Transportation Solicitation 200-8-95

DIGEST

Protest against determination of nonresponsibility is denied where bidder's lack of financial resources, coupled with her understatement of required costs relating to the payment of a hired driver, supports determination.

DECISION

Ms. Desiree Dais protests the contracting officer's determination that she is a nonresponsible bidder on Highway Mail Transportation Solicitation 200-8-95.

The solicitation, for service between the Charleston, SC, Processing and Distribution Center, Isle of Palms, SC, and various intermediate points, for a term beginning December 31, 1994, and ending June 30, 1998, was issued September 24, 1994, by the Distributions Networks office, Mid-Atlantic Area. The solicitation indicated that performing the scheduled service would require an estimated 2,413 schedule hours annually. The solicitation included a Department of Labor Service Contract Act wage determination which required that the contractor's employee receive a minimum hourly wage of \$12.92, plus various fringe items, including health and welfare benefits, vacation and holiday pay, and pension.

Paragraph 4, Contract, of PS Form 7405, Transportation Services Bid or Proposal & Contract for Regular Service, includes the following:

The bidder/offeror submitting the offer or proposal agrees with the U.S. Postal Service that if this offer or proposal is accepted, the bidder/offeror will give personal or representative supervision to the performance of the service. The bidder/offeror certifies that this proposal [sic] is made in his own interest

and not by him as the representative of another person or company and with full knowledge of the required conditions of service.

Paragraph 9 of PS Form 7469, Highway or Domestic Water Transportation Contract Information and Instructions, July 1992, provides as follows:

9. All bidders/offerors are cautioned not to allow their names to be used unless they intend to carry the mail or supervise the service in person. Every bidder/offeror submitting bids or proposals is required to make a signed statement "that the bid or proposal is made in good faith with the intention to enter into contract [sic] to perform service in case the bid or proposal shall be accepted." Bids or proposals signed by an agent must be accompanied by evidence of his authority.

The bid of Ms. Dais was the lowest bid received, at an annual rate of \$48,570.23.¹ Ms. Dais' bid was accompanied by a bid worksheet which showed that she calculated her total labor costs as \$38,007.²

Ms. Dais was one of several bidders asked to provide additional information about her financial capabilities by completing a pre-award questionnaire. Ms. Dais' completed questionnaire³ disclosed that she was currently employed as a registered nurse and that her husband, John Dais, was intended to have access to the mails (that is, to provide the services required by the contract). The assets and liabilities portion of the questionnaire indicated that Ms. Dais had approximately twice the amount of liabilities as assets.

The contracting officer advises that subsequent to the receipt of the pre-award questionnaire, a contract specialist in the Distributions Network office twice reached Ms. Dais by telephone. The contract specialist was aware that Mr. Dais had previously been the driver on the Charleston -- Isle of Palms route when that route had been operated by another contractor under a contract which had been terminated for default for reasons unrelated to Mr. Dais' performance. A memorandum for the file sets out the contract specialist's account of the relevant portions of the conversations:

I noticed John Dais listed as the husband and recognized the name as a driver [on the previous service]. I asked Ms. Dais whether she had bid for her husband. She stated "Yes, he knows all about contracts." At that point, I told Ms. Dais I would call her back later.

¹ A total of twenty-eight bids were received. The second-lowest bid was at an annual rate of \$53,001.

² Mrs. Dais' worksheet included 2,413 hours of "straight time" at \$12.50 per hour for an annual total of \$30,162; annual payroll tax costs of \$3,943, annual health and welfare costs of \$2,350, and annual vacation and holiday costs of \$1,550. No provision for pension costs was included on the worksheet.

³ Ms. Dais did not complete a questionnaire in connection with this solicitation, and there is some dispute in the protest file whether she timely received a request to do so. She had, however, completed a questionnaire with respect to a contemporaneous solicitation, number 200-12-94, which was, with her consent, considered with respect to this solicitation.

* * *

I called Ms. Dais a second time. . . . I again asked Ms. Dais if she had bid for her husband. Again her reply was "Yes, he knows all about contracts." I informed Ms. Dais that it was illegal to bid for another person and it so stated on PS Form 7405, item 4. I then informed her that she would be contacted later.

By letter dated December 7, the contracting officer advised Ms. Dais of his determination of her nonresponsibility. The letter made two principal points. It adopted the contract specialist's contention that Ms. Dais's bid was inconsistent with the requirements of item 4 of Form 7405 because she had indicated that she had submitted the bid for her husband, and it asserted that the bid understates the amount necessary to perform the contract. The contracting officer concluded that Ms. Dais lacks financial resources adequate to perform the contract.

Ms. Dais protested the contracting officer's determination in a December 13 letter addressed to the Distributions Network office, but with the salutation "To General Counsel." The contracting officer, who received the protest on December 15, considered it as one addressed to the contracting officer under Procurement Manual (PM) 4.5.6,⁴ and undertook to find it obviously without merit. PM 12.4.8 b. requires that such a determination with respect to a transportation-related protest be the subject of higher-level review. The office at Postal Service headquarters which performed that review referred the protest to this office.⁵

The protester acknowledges replying affirmatively to the contract specialist's question whether she was bidding for her husband, but contends that the conversations upset her and that she felt "unnecessarily harassed and badgered" by them. She further explains:

My husband . . . does have knowledge of contracts. I feel he is part of the contract with or without his name on it. My knowledge of contracts are [sic] suitable and I will be the sole owner of the contract.

The protester also questions the contracting officer's calculation of the contract's wage requirements, contending that the wage rate required per hour is \$14.53, not \$18.53 as he contends.

The contracting officer's statement on the protest restates the circumstances of the contract

⁴ This section allows contracting officers to undertake to resolve protests addressed to them as meritorious or obviously without merit. If the contracting officer is unable to make such a determination, or cannot make it within ten working days, the matter is to be referred to the General Counsel for decision.

⁵ In supplemental comments on the protest, the contracting officer appears to suggest that the referral may have resulted from the protester's confusing use of the Distribution Network office's address while invoking the General Counsel's name in the salutation, and defends his consideration of the protest as addressed to the contracting officer. The contracting officer's assumption is incorrect; the referral was based, instead, on the reviewing office's inability to determine the protest obviously without merit.

specialist's conversations with Ms. Dais and the basis for the calculation of the wage costs associated with the contract.⁶ The contracting officer's statement represented that no contract had yet been awarded on the solicitation. A supplemental statement advised that that assertion was incorrect, and that while award to the seventh low bidder, Stanton-Stanton-Stanton, did occur on December 13,⁷ prior to the December 15 receipt of the protest, the contractor had not begun service pending the resolution of the protest. Instead, service is being provided under an emergency contract.

The protester did not comment further on the contracting officer's submissions.

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 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.

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 "financial resources adequate to perform the contract" (PM 3.3.1 b.1.) and "the necessary organization, experience, . . . technical skills, . . . or the ability to obtain them" (PM 3.3.1 b.6.).

Here, the contracting officer based his determination of the bidder's nonresponsibility on

⁶ According to the contracting officer's calculations, straight time wages at the \$12.92 hourly rate come to \$31,175, payroll taxes total \$6,331, and fringe benefits, including health and welfare, vacation and holiday pay, and pension costs, are \$5,087.41. In addition to calculating straight time, workers' compensation taxes and pension costs at higher rates than those used by the protester, the contracting officer includes more hours of vacation and holiday pay than she did.

⁷ The file does not disclose the circumstances surrounding the elimination of the intervening five bidders (one bidder submitted two bids) from consideration for award.

two separate bases; her violation of the contract's prohibition against a bidder bidding on behalf of another, and her lack of financial responsibility. While we find the first basis lacking, we uphold the determination on the second basis.

As noted above, the solicitation is internally inconsistent with respect to the nature of the prohibition. While one portion of the solicitation, Form 7405, appears to preclude such agency altogether (by requiring the bidder to certify that the "proposal is made in his own interest and not as a representative"), another portion, Form 7469, while repeating the requirement stated on Form 7405, specifically allows bids or proposals by disclosed agents when accompanied by evidence of their authority. *Package Express, Inc.*, P.S. Protest Nos. 87-57;58;64, July 27, 1987.

Ms. Dais' bid reflects her submission of the bid in her own name as a sole proprietor; her protest notes that although her husband would have been performing the contract, she would be "the sole owner of the contract." Her response to the contract specialist's question whether she bid for her husband does not clearly demonstrate any inconsistency with those assertions.

The solicitation does not require the bidder to give personal supervision to the performance of the contract; "representational supervision," which we understand to mean "supervision by the bidder's representative," is all that is required. Ms. Dais's statements about the participation of her husband with respect to the contract may have been no more than an indication that she intended him to provide that representational supervision. Whether supervision by the same individual who is hired to perform the service on the contract is satisfactory is a determination for the contracting officer to make; on this record, however, the contracting officer has failed to make it.

The matter of the adequacy of Ms. Dais' bid, however, is another matter.

The perceived unprofitability of [a] contract, coupled with the negative equity position of the [bidder], constitutes an independent basis for [the] contracting officer's determination under the solicitation.

Package Express, supra.

Here, the contracting officer has raised substantial questions about the adequacy of Ms. Dais' allocation of contract proceeds to the compensation of her employee, Mr. Dais, which the protester has failed to rebut. Contrary to her representations, the contracting officer's calculations of the hourly costs of wages and benefits required by the Service Contract Act wage determination incorporated in the solicitation appear correct. As so calculated, they significantly exceed those which the protester has computed. Given the bidder's financial condition as evidenced by her statement of assets and liabilities, this raises significant questions about the bidder's ability to perform the service for the amount bid, providing an adequate basis for the determination of her nonresponsibility.

The protest is denied.

William J. Jones
Senior Counsel

Contract Protests and Policies