

June 14, 1996

P.S. Protest No. 96-06

P.J. COMPANY

Solicitation No. 198525-96-0001

DIGEST

Protest against nonresponsibility determination is denied where contracting officer reasonably based it on lack of required quality control system and previous poor performance on postal contracts.

DECISION

P.J. Company protests the contracting officer's determination that it was a nonresponsible offeror on a solicitation for caster wheels.

Solicitation 198525-96-0001 was issued on October 25, 1995, by the Topeka Purchasing Center, Topeka, KS, seeking offers to supply 153,600 caster wheels, with an option for 76,800 more. Solicitation section M.1 made the firm fixed unit price the only evaluation factor, stating that award would be made to "the responsible offeror(s) who submits an acceptable offer in compliance with solicitation terms and conditions and the lowest offer price."

Solicitation section E.5, Quality Assurance, stated that the contractor's inspection system "must be in accordance with Specification MIL-I-45208, Inspection System Requirements, of the issue in effect on the solicitation date." The solicitation gave an address from which a copy of that specification could be obtained.

The solicitation incorporated Provision A-9, Award Without Discussions,¹ and contained at

¹ Award Without Discussions (Provision A-9) (October 1987), provides:

section K.4 Provision A-19, Notice of Intent to Award Without Discussions, which states:

The Postal Service intends to make award on the basis of initial proposals received, without discussions, as permitted by the "Award Without Discussions" provision of this solicitation.

Eleven offers were received by December 22. After the lowest-priced offeror was found nonresponsible, the contracting officer requested a preaward survey of P.J., which had offered the second-lowest price, \$8.05 per unit. The survey revealed that P.J.'s quality control program did not comply with specification MIL-I-45208. Based on that and his negative view of P.J.'s performance record in connection with several recent delivery orders, the contracting officer found P.J. nonresponsible on March 5, 1996. On March 5, award was made to a higher-priced offeror.

On March 8, P.J. asked the contracting officer to reconsider the determination, stating that it was willing to change its quality control system and that it had corrected the quality problems found in its previous deliveries. On March 13, the contracting officer informed P.J. that his decision would stand; this protest followed.

The protest asserts that the contracting officer's determination was arbitrary and capricious and lacked a "rationale [sic] basis" because it did not consider explanations for that poor performance or other instances in which delivery had been expedited pursuant to Postal Service requests. Citing *Mesa Constructors*, P.S. Protest No. 83-39, September 20, 1983, the protester alleges that it had taken the necessary actions to correct its problems and the contracting officer erred in not considering "a further elaboration of the circumstances" of the delays. The protester also cites other decisions of this office for the proposition that "present" capability should be the deciding factor in a responsibility determination, and that the determination should be based on "substantial evidence."

The protester also asserts that it was improper not to hold discussions with P.J. in order to inform it of the deficiencies in its proposal and to give it an opportunity both to "offer the corrections to it[s] performance record" and to show that it had a compliant quality control program. Citing various decisions of the General Accounting Office, the protester contends that the Postal Service had an obligation to conduct meaningful discussions with it.

The protester suggests that the responsibility determination "should be tempered by the fact that no . . . termination [for] default has occurred" on P.J.'s previous contracts and the fact that P.J. is "a small minority owned business. . . ." P.J. requests that the protest be sustained and the contract awarded to it.

In response to the protest, the contracting officer states that since price "was the only evaluation criteria, I saw no need for discussions." He emphasizes that the solicitation "warned offerors that the Postal Service intended to award without discussions." The contracting officer asserts that P.J. "delivered late on six of its last nine delivery orders" and

The Postal Service may award a contract on the basis of initial proposals received, without discussions. Therefore, each initial proposal should contain the offeror's best terms from a cost or price and technical standpoint.

had "quality problems" including defective packaging on four of them.² The contracting officer states that P.J.'s explanations would not change these facts. He cites *Thuro Metal Products, Inc.*, P.S. Protest No. 95-42, December 12, 1995, for the proposition that a past record of poor performance is sufficient grounds for finding a firm nonresponsible even if it has not previously had its contracts terminated for default.

The contracting officer states that he did not believe that P.J. could correct the problems in its quality control program in time to perform this contract:

The preaward survey ordered by my staff determined that PJ lacked . . . a [MIL-I-45208 compliant] quality control program. . . . [I]n its March 8 letter responding to my nonresponsibility finding, PJ acknowledged its failure. . . . In light of the urgent need for caster wheels, I did not believe that PJ could correct its deficient quality control system in time to perform this contract.

The contracting officer states that he "promised to assist PJ in correcting its quality control program for the future, but . . . continued to find its program deficient for this contract."

The contracting officer also defends his decision not to hold discussions, asserting that "there is no requirement that an offeror be given an opportunity to respond" to the nonresponsibility determination, citing *Thuro Metal Products, supra*.

In reply to the contracting officer's statement, the protester's counsel reiterates P.J.'s argument that P.J.'s quick and prompt correction of its 1994 performance problems and several instances in which P.J. expedited deliveries at the Postal Service's request should have been considered. The protester cites various decisions of this office for the proposition that a nonresponsibility determination will be overturned if it was not based on substantial evidence.

P.J. also asserts that it has never had a quality problem with products which are relevant to this solicitation. P.J. reiterates that the Postal Service was obligated to conduct discussions in which it notified P.J. of any weaknesses or deficiencies in its proposal, and that since the Postal Service never requested a MIL-I-45208 quality assurance plan in the course of the preaward survey, it cannot rely on that ground to find P.J. nonresponsible.³

P.J.'s president asserts that the contracting officer "should have discussed with us any issues on past performance records and quality control systems before he decided PJ

² In the course of determining P.J.'s nonresponsibility, the contracting officer had identified to it various deficiencies in its performance of previous contracts, and the protester had asserted various inaccuracies in the contracting officer's accounts. The contracting officer's statement acknowledges some of those inaccuracies, but continues to assert an overall lack of satisfactory delivery and quality performance on those contracts.

³ The protester is either contending that it did not know during the survey that such a quality control program was required, or asserting that it was not required to produce the plan during the survey. Both contentions lack merit. The solicitation informed the protester of the MIL-I-45208 requirement, and it has acknowledged its lack of such a plan.

Company was a 'nonresponsible' supplier" and incurred more than \$133,643 in extra costs. Finally, the statement complains of a "dual bidding standard in USPS" evidenced by the fact that P.J. proposed for another Postal Service contract after the performance problems at issue in this protest occurred but before this solicitation was issued, and was not deemed to be nonresponsible for that contract.

In rebuttal, the contracting officer makes the following points:

-- The argument that since its performance record prior to 1994 was "superior to its recent record, we should forgive its recent failures" is flawed because "it is precisely the recent past performance that is the most important in determining responsibility," citing *Pamela J. Sutton*, P.S. Protest No. 87-110, February 9, 1988.

-- "[I]t is expected that PJ will correct quality errors, otherwise it would be in breach of contract. The fact that PJ had quality errors that needed correction can be considered in a subsequent responsibility determination. . . . It does not matter that this contract does not require the axles that PJ manufactured improperly previously."

The protester's president submitted a statement in surrebuttal. He claims that the contracting officer "ignored the more recent past PJ Company good performance records; Order No. 198525-96-M-0024 for the 15,000 piece deliveries, Order No. 198525-96255 for 5,000 piece delivery, and Order No. 102590-95-B-0203 for 24,000 piece delivery. These were delivered in 1995 and 1996, not prior to 1994."

P.J.'s president also asserts that the preaward survey was too brief for the quality assurance specialist to have examined its quality control program manual. He asserts that the same person found that P.J.'s quality control program met the requirements of MIL-I-45208 for its previous contract [198525-94-B-H011]. He concludes that if he had been informed during the survey that P.J.'s quality program lacked certain requirements, "we would have come up with a letter of commitment to a quality program meeting MIL-I-45208. We do not see any problem to meet all requirements of MIL-I-45208 as some of the procedures are already in compliance and we can modify our sampling procedures to meet the standards of MIL-I-45208."

DISCUSSION

To be determined responsible, a prospective contractor must:

1. Have financial resources adequate to perform the contract;
2. Be able to comply with the required or proposed delivery or performance schedule . . . ;
3. Have a good performance record;
4. Have a sound record of integrity and business ethics;
5. Have a sound quality control program that complies with solicitation

requirements or the ability to obtain one;

* * *

PM 3.3.1 b.⁴

The standard for 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 requirement[s of the contract] 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.

OSM Corporation, P.S. Protest Nos. 91-59; 91-61; 91-67, December 29, 1991; see also *A-1 Transmission*, P.S. Protest No. 93-14, October 29, 1993; *Wetler Corporation*, P.S. Protest No. 89-12, April 26, 1989.

As stated at PM 3.3.1 e.1, in the absence of information clearly showing that a prospective contractor meets standards of responsibility, the contracting officer must make a determination of nonresponsibility. See *Illinois Lock Company*, P.S. Protest No. 89-35, September 26, 1989; *Innovative Sales Brokers, Inc.*, P.S. Protest No. 89-41, August 31, 1989.

Here, the contracting officer based his determinations of nonresponsibility on two factors: the preaward survey showing an insufficient quality control system and poor performance on recent postal contracts.

"When the decision of the contracting officer is based on the judgment of technical personnel, the protester must show that such judgment was fraudulent, prejudiced, or arbitrary and capricious." *Wetler Corporation, supra; Year-A-Round Corporation*, P.S. Protest No. 87-12, June 12, 1987. "The contractor bears the heavy burden of proving that either the pre-award survey was inaccurate or the resulting responsibility determination was unreasonable." *Fairfield Stamping Corporation*, P.S. Protest No. 88-04, June 3, 1988.

The protester has not met its burden of proof. It did not submit evidence that its quality control system is or would be adequate under MIL-I-45208. *Year-A-Round Corporation*,

⁴ 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.

supra. Stating an intention to do so is not sufficient. *Id.* "[A] prospective contractor must affirmatively demonstrate its responsibility . . ." PM 3.3.1 a. P.J.'s arguments are even less persuasive in light of the fact that it continued to submit the same, defective, plan during this protest process. The protester offers no evidence that the technical personnel who judged its quality control system acted in a fraudulent, prejudiced, or arbitrary and capricious manner.

While a contracting officer should consider information as current as possible in making his responsibility determination, *Automated Business Products, Inc.*, P.S. Protest No. 91-16, June 12, 1991, the contracting officer fulfilled his affirmative duty to seek out responsibility information by requesting the preaward survey of P.J. Company, and even considering the information submitted during the protest. The evidence before him, both before and during the protest, supported the contracting officer's doubts about the adequacy of the quality control system. *Fairfield Stamping Corporation*, P.S. Protest No. 88-04, June 3, 1988.⁵

The failure of an offeror to perform in a timely manner under prior contracts may provide a reasonable basis for a nonresponsibility determination. *Year-A-Round, supra*; see also, *Lithographic Publications, Inc.*, Comp. Gen. Dec. B-217263, March 27, 1985, 85-1 CPD 357.

The contracting officer based his conclusion about P.J.'s performance upon a documented history of late deliveries and quality problems. That evidence was substantial (*A-1 Transmission, supra*) and reasonably recent. See *Pamela J. Sutton, supra.*, and cases cited therein. Overall, the record evidences sufficient doubt about P.J. Company's responsibility to permit the contracting officer to find it non-responsible for the solicitation at issue here. *Innovative Sales Brokers; Illinois Lock Company, supra.*

⁵ Compare *Automated Business Products, supra*, where, unlike here, the protester brought changed circumstances to the contracting officer's attention with evidence detailed and thorough enough to resolve doubts about the protester's responsibility.

In its submissions, P.J. has disputed various aspects of the contracting officer's version of performance under the prior contracts. Although the protester has voiced strong disagreement with the contracting officer's assessment of its past performance, it has not documented its contentions. It is the protester's burden to show that the contracting officer's determination was not supported by substantial evidence.⁶ *Lobar, Inc./Marroquin, Inc.; Benchmark/Hercules Limited*, P.S. Protest Nos. 92-49 and 53, October 14, 1992.

Further, since the decision contained Provisions A-9 and A-19, *supra*, the protester was on notice that discussions were not contemplated. Finally, the contracting officer is correct that contrary to the protester's contention, there is no requirement than an offeror be given the opportunity to respond to a negative responsibility determination.

[A] contracting officer may base a determination of nonresponsibility upon the evidence of record without affording bidders an opportunity to explain or otherwise defend against the evidence, and there is no requirement that bidders be advised of the determination in advance of contract award.

A-1 Transmission, supra., quoting Lithographic Publications, Inc., Comp. Gen. Dec. B-217263, March 27, 1985, 85-1 CPD 357, citations omitted.⁷

The protest is denied.

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⁶ "A nonresponsibility determination may be based upon the contracting agency's reasonable perception of inadequate prior performance, even where the agency did not terminate the prior contract for default and the contractor disputes the agency's interpretation of the facts. . . ." *A-1 Transmission, supra.*, quoting *Applied Power Technology Company and Contract Services Company, Inc.*, Comp. Gen. Dec. B-227888, 87-2 CPD 376, October 20, 1987. It is not necessarily inconsistent for one contracting officer to evaluate the ability of a prospective contractor differently than another. *MCI Constructors, Inc.*, Comp. Gen. Dec. B-240655, November 27, 1990, 90-2 CPD 431. The fact that another contracting officer has found P.J.'s past performance record to be satisfactory is not grounds to overturn this contracting officer's decision. *Id.*

And, of course, the protester's status as a minority-owned small business affords no basis for the contracting officer to overlook its deficiencies. *Gil Trucking*, P.S. Protest No. 84-87, February 11, 1985.

⁷ The term "discussions" applies to communication in the course of negotiations, prior to the determination of whether a prospective awardee is responsible. In this case, since the solicitation required a quality control plan meeting the specification MIL-I-45208, the contracting officer could have rejected P.J. as technically unacceptable rather than nonresponsible, similarly without discussions.