

July 22, 1996

P.S. Protest No. 96-09

CLEVE'S SPORTING GOODS AND APPAREL

Award No. 089480-96-P-0078

DIGEST

Protest contending that contracting officer improperly applied excessive standard of responsibility to offeror is denied; offeror's conditioning of offer on award by date which had passed when determination was made was sufficient to support the determination.

DECISION

Cleve's Sporting Goods and Apparel, a minority-owned partnership, protests the contracting officer's determination not to contract with it for a quantity of sweatshirts.

The protest and the protest file reflect the following chain of events. On April 16, the Windsor, CT, Purchasing and Materials Service Center received a requisition for 9,600 sweatshirts for the Albany District. The sweatshirts, to be printed with a silkscreened promotional logo, were to be delivered by May 17.

On April 18, the Service Center issued an informal letter solicitation for the sweatshirts. Offerors were to propose separate prices for quantities of four different sizes of sweatshirts from Large to XXX Large. The solicitation provided that delivery was required by May 17, but it allowed offerors to indicate their earliest delivery date "if you cannot deliver by May 17" Offers were to be evaluated on price and delivery time. The solicitation requested offerors to provide references regarding "three large sweatshirt contracts that you have completed."

Thirteen responses to the solicitation were received by noon on April 22, of which eleven offered delivery on May 17. Cleve's offer was the lowest priced;¹ it conditioned its May 17

¹ Cleve's total price was \$73,382; the next lowest price, that of Professional Marketing Services (PMS),

delivery as follows:

Delivery date of May 17, 1996[,] can be met if award is made by Tuesday, April 23, 1996.

The contracting officer states that the timely offerors were contacted to establish the FOB points for their shipments for the computation of shipping costs, which were added to the offered prices.² The offerors apparently were also asked to identify the manufacturers whose sweatshirts were to be supplied.³

On April 23, the contract specialist contacted the references of several offerors, including Cleve's and PMS. Information which Cleve's references supplied caused the contract specialist to have concerns about Cleve's ability to perform a contract of this size. Those concerns included the terms of its payment arrangements with its sweatshirt supplier⁴ and its ability to provide sweatshirts of the brand it identified.

About 8:30 a.m. on April 24⁵ the contract specialist attempted, unsuccessfully, to reach Cleve's by telephone. He then reached Cleve's supplier, Tultex. The notes of his conversation indicated that Cleve's had an open account with Tultex, that its usual terms were "Net 30," and that a 45 day payment term was "doubtful, but possible." Tultex also advised that it did not stock or supply XX Large or XXX Large sweatshirts. It appears that following the contract specialist's conversation with Tultex, no further consideration was given to Cleve's offer. A document included in the protest file titled "Determination of Nonresponsibility" which bears the date April 24 sets out four reasons for the determination which we summarize as follows:

-- Concern over Cleve's financial ability to process an order of this size, centering around the disparity between its representations of the payment terms it could arrange with Tultex and Tultex's statements in that regard.⁶

was \$77,159.

² Shipment was to be accomplished on Government Bills of Lading. Shipping costs are a price-related factor, the consideration of which in connection with contract award is to be stated in the solicitation. Procurement Manual (PM) 4.3.1 e.3; 4.3.3 b.2. Since the written solicitation made no reference to shipping costs as a price-related factor, they should not have been considered here, but that erroneous consideration had no effect on the ranking of prices.

³ The solicitation had not sought that information, but an abstract of the offers includes that information for several of the offerors. No information concerning the supplier was reflected on Cleve's offer or was shown with respect to Cleve's on the abstract, but the protest and the protest file reflect that Cleve's had stated its intention to supply Tultex sweatshirts.

⁴ "Payment [by the Postal Service is] made as close as possible to, but not later than, the 30th day after receipt of an invoice or acceptance, whichever occurs later . . ." PM 6.4.3 b. Since the contractor needed to obtain the sweatshirts enough in advance of the delivery date to have them silkscreened as required, it would receive payment about 45 days after it took delivery of the sweatshirts.

⁵ The date "May 24" in the contracting officer's statement is an obvious error.

⁶ Like the protest, which states that Cleve's had told the contract specialist "on two occasions" that Cleve's "could arrange 45-day terms with Tultex," and that Cleve's had received 45-day terms on a

- Adverse comments from a listed reference concerning Cleve's contracting practices.
- Tultex's representations that it did not supply the needed XX Large and XXX Large sweatshirts.
- Cleve's qualification of its offer requiring award by April 23, a date which had passed when offers were evaluated.

A purchase order was issued to PMS on April 26.⁷ Cleve's was debriefed concerning the award on May 3. Its May 7 protest to this office was received on May 10.

The protester contends that it was improperly denied the award. It asserts, based on its conversations with its references and with Tultex, that nothing in those sources' discussions with the Postal Service justified the determination that Cleve's was not responsible, and that the Postal Service did not conduct similarly rigorous investigations with respect to other offerors. The protest complains that Cleve's was not contacted concerning its financial capabilities and that its supplier was contacted instead.

The protester recites the "feeling that this team had no intention of awarding this contract to [Cleve's] because of our Minority status" and notes a previous similar unsatisfactory experience involving a Connecticut postal union's requirement for jackets.⁸

The contracting officer's statement notes the urgency of the delivery requirement, and asserts that Cleve's responsibility was appropriately investigated in accordance with the PM's requirements for determining contractor and subcontractor responsibility, which the statement recites at length. The contracting officer contends that Cleve's was "treated like any other vendor." The statement cites as the reason for Cleve's nonresponsibility that since "the condition of award by April 23, 1996 [contained in Cleve's offer] could not be met, we were unable to conclude that Cleve's could meet the May 17 . . . delivery date."

The protester has submitted comments on the contracting officer's statement which restate several of the points contained in its initial protest. With respect to the contention that there was concern about Cleve's ability to meet the May 17 delivery date, the protester states that the contract specialist expressed no such concern when, "near the end of the work day" on April 24, he left "a message that 'he had all the information that he needed and that the Procurement Office would be looking to award on Thursday or Friday, April 26, 1996.'"

Tultex transaction in 1994, the determination states that Cleve's represented that it had arrangements with Tultex for 45-day payment, but goes on to state that when that representation was conveyed to Tultex's Sales Manager, he checked Cleve's file and advised that none of its invoices reflected 45-day payment terms.

⁷ The contract specialist's conversations with PMS's references had been uniformly favorable; the protest record reflects no inquiries beyond those references.

⁸ Postal unions are organizations representing postal employees which the Postal Service is required by law to recognize and bargain with. 39 U.S.C. 1201 *et. seq.* The contracting practices of those organizations are unrelated to those of the Postal Service.

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 3.3.1 b. sets forth general standards for determining whether a prospective contractor is responsible. A responsible contractor, *inter alia*, must have "financial resources adequate to perform the contract" (PM 3.3.1 b.1.), must be "able to comply with the required or proposed delivery . . . schedule" (3.3.1 b.2.), and must have "a sound record of integrity and business ethics" (3.3.1 b.4.).

As the contracting officer notes, this purchase was accomplished under the simplified purchasing procedures set out at PM 4.3. PM 4.3.3 e. provides that 3.3.1's general standards of responsibility apply to such purchases, but that "the extent of review may be limited to readily available information." Further, "[i]n the absence of information clearly showing that a prospective contractor meets applicable standards of responsibility, the contracting officer must make a written determination of nonresponsibility." PM 3.3.1 e.1. Suppliers and references are both appropriate sources for information relative to an offeror's responsibility. PM 3.3.1 e.3.(d).

We need not second-guess the adequacy of the contract specialist's effort to resolve the questions of Cleve's financial capabilities or of its ability to provide the oversized sweatshirts. The delivery condition contained in its offer provided a reasonable basis for the contracting officer to question its ability to deliver by the required delivery date once award by April 23 was no longer possible. Nothing in the protest, the protest file, or the protester's supplemental statement gives any indication that Cleve's undertook to modify its offer at any time prior to the award to PMS to remove the condition. Accordingly, the contracting officer properly excluded Cleve's from consideration once the stated date had passed.⁹

Finally, we note that to the extent that Cleve's contends that it was excluded on the basis of its minority status, its contention rests on mere speculation unsupported by evidence.

⁹ Consideration of Cleve's offer after April 23 would have constituted a relaxation of the stated delivery requirement, to the detriment of the other offerors which had met the initial requirement. *Cf. Presearch, Inc.*, Comp. Gen. Dec. B-257889, November 21, 1994, 94-2 CPD 197.

Speculation is insufficient to support the protester's claim. *BWN Contracting Co. Inc.*, P.S. Protest Nos. 89-38, 89-50 and 89-57, August 31, 1989 ("No factual substantiation of this allegation [of a discriminatory motive] was supplied by the protester, and we may not make such a finding based on speculation"); *Hunter L. Todd, d/b/a Courier Express Mail & Package Delivery Service*, P.S. Protest No. 85-78, October 18, 1985.

L & J Transportation Inc., P.S. Protest No. 91-42, August 29, 1991.

The protest is denied.

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