

August 28, 1996

P.S. Protest No. 96-15

FLUIDICS, INC.

Solicitation No. 412735-96-A-0221

DIGEST

Protest against nonresponsibility determination is denied where it was not an abuse of discretion for the contracting officer to base the determination on information indicating that recent performance on similar contract was poor.

DECISION

Fluidics, Inc., protests the contracting officer's determination that it was a nonresponsible offeror on a solicitation for air conditioning maintenance services.

Solicitation 412735-96-A-0221 was issued March 3, 1996, by the Purchasing and Materials Service Center, Philadelphia, PA, seeking offers for preventive maintenance of three air conditioning chillers and associated controls in a Philadelphia Bulk Mail Center.

Section 1.6 of the solicitation stated that a firm fixed price contract would be awarded "to the contractor who submits the best offer[, p]rice and other factors considered" and section 3.3 stated that award would go "to the responsible offeror whose proposal conforming to the solicitation offers the best value to the Postal Service, considering price, price-related factors, and/or other evaluation factors specified elsewhere in this solicitation." The solicitation contained no evaluation factors other than price.

A "Specification for chiller service" incorporated into the solicitation provided for the contractor to start up the chillers, provide monthly preventive maintenance during the cooling season, and shut the chillers down at the end of the season. According to the specification, the work "shall include but is not limited to . . . inspection, repairs and adjustments, preparation of reports, and instruction of postal maintenance employees." The initial term of the contract was from May 1, 1996, to October 30, 1996, with an option for the May -- October, 1997, term.

Two offers were received on March 26. Tozour Energy Systems offered a price for the initial term of \$6,768. Fluidics, which had held the prior season's air conditioning contract,

offered to perform for \$4,500. According to the contracting officer, Fluidics' prior contract¹ contained a renewal option which the Postal Service did not exercise due to "concerns with the contractor's past performance." The contracting officer refers specifically to a report Fluidics had submitted on January 12 which had indicated that all three chillers were in "good working order, when, in fact, chiller number three . . . was not operational." Fluidics was advised by letter dated

April 3 that it had been found nonresponsible, and that its offer on this solicitation would not be considered "because [it] had failed to exercise the necessary tenacity and perseverance in the performance of its [previous] contract." Award was made April 2 to Tozour Energy Systems. This protest followed.²

The protest acknowledges that by letter of February 1 a maintenance official at the Philadelphia Bulk Mail Center had rejected Fluidics' invoice because its final report was unsatisfactory for "le[ading one] to believe that all three chillers are in the same good working condition," when chiller 3 was not operable, and for failing to give measurements for the efficiency of the three chillers. The letter had asked for a "responsible final report in accordance with the contract." However, Fluidics asserts that it had been "fully aware of a repair needed on chiller #3, in fact, it was one of our Service Technicians that diagnosed internal vane assembly repairs were required" and that a February 20 response to the February 1 letter had "fully explained" the items about which the Postal Service had expressed concern. The response contended that a winter inspection of a chiller, "completed with the chiller completely shut down, ... has nothing to do with the running capability of the machine" and referred to a portion of the final report indicating that servicing of the lubrication system oil filter of chiller 3 would be completed "with partial teardown," which it stated was a "a clear indication that this machine has to come apart for additional repairs." The protester asserts that it is "fully aware of the expectations and requirements of the Postal Service" because it "has been servicing these chillers for approximately eight . . . years."

In his statement in response to the protest, the contracting officer elaborates on his reasons

¹ Fluidics' previous contract is not in the protest record.

² The contracting officer indicates that after receiving the timely April 9 protest, he decided to reconsider the nonresponsibility determination and resolve the protest himself. However, when he was unable to resolve the protest, he referred it to this office, which received it on June 27.

The contracting officer's actions were contrary to the requirements of Procurement Manual (PM) 4.6.6, which provides in part that:

b. A contracting officer's decision on a protest must be issued within ten working days after receipt of the protest. . . .

c. The contracting officer, if unable to conclude that a protest is obviously meritorious, may, *within the time allowed for a decision* . . . [r]efer the protest to the General Counsel for resolution . . . or . . . determine that it is obviously without merit. . . .

(Emphasis added.) Cf. *Farnham Security, Inc.*, P.S. Protest No. 96-13, August 2, 1996.

for finding Fluidics nonresponsible. He states that in October, Fluidics had been called to diagnose the malfunctioning chiller. After expending 56 labor hours and incurring \$4,422 in costs, it had been unable to determine why it was malfunctioning, and then requested an additional \$4,749 to tear down the chiller and \$5,936 to repair the vane assembly.

The contracting officer states that the maintenance supervisor on site had complained of the Fluidics mechanic's lack of competence to service or troubleshoot the equipment. The contracting officer views the 56 hours as "an inordinate amount of time" which reflects on Fluidics' "failure . . . to properly train and supervise their employees."

The contracting officer asserts that the "unreasonable" amount of time to trouble shoot the chiller was a "reasonable basis for determining the contractor non-responsible." Although the contracting officer concedes that there is no documentation indicating that the dissatisfaction was communicated to the contractor prior to the February correspondence, he asserts that that "does not mean poor performance is acceptable."

In response to the contracting officer's statement, Fluidics stresses its 27 years of experience and asserts that recently "a HVAC retrofit project for the 30th Street U.S. Post Office in Philadelphia valued at \$573,405 . . . was completed on time, on budget and no hard feelings." The protester also asserts that the service technicians about whom the Postal Service complains have been servicing the Bulk Mail Center for eight years "without disagreements or questions of competence." The protester complains that it should have been notified of any dissatisfaction on the part of the Postal Service when the 1995 contract was completed.

Finally, the protester submits a copy of the mechanic's report from the October, 1995, repairs, stating that it shows that "a percentage of the time was devoted to investigating system problems and making recommendations to fix [them]."

DISCUSSION

The contracting officer's determination of a bidder's nonresponsibility is subject to limited review by our office:

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.

Robertson & Penn, Inc., P.S. Protest No. 87-68, July 28, 1987; *Year-A-Round Corporation*, P.S. Protest No. 87-12, June 12, 1987; *Craft Products Company*, P.S. Protest No. 80-41, February 9, 1981.

PM 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. . . .

PM 3.3.1 b., General Standards, provides, in part, that to be considered responsible, "a contractor must . . . [h]ave a good performance record," and PM 3.3.1 d.2. states that "[p]ast failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility."

The determinations of technical personnel will not be overturned in the absence of fraud, prejudice, or arbitrary and capricious action. *Robertson & Penn, supra*. The contracting officer may rely on negative information given to him by technical personnel, even if there exists other, positive information about the contractor. *Id.* Finally, recent poor performance on another postal contract may provide a reasonable basis for a determination of nonresponsibility. *Pamela J. Sutton*, P.S. Protest No. 87-110, February 9, 1988.³

Here, the contracting officer could properly rely on the information from the maintenance personnel at the site, and the protester has failed to meet its burden of proving that the information was flawed or that it was an abuse of the contracting officer's "considerable discretion" (*Robertson & Penn, Inc., supra*) to consider the unsatisfactory experience under the previous contract as evidence of poor performance. While the protester is correct that the better practice would have been for concerns about that performance to have been communicated more timely, that omission is not sufficient to require the overturning of the contracting officer's decision in this case.

The protest is denied.

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Contract Protests and Policies

³ "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. That the contracting officer on Fluidics' 30th Street contract might have viewed the protester's performance as satisfactory is not a basis to overturn this contracting officer's decision. *Id.*