

October 11, 1996

P.S. Protest No. 96-18

CUSTOM PRODUCTION MANUFACTURING, INC.

Solicitation Nos. 052684-96-A-0128; A-0130

DIGEST

Protest against nonresponsibility determination is dismissed in part and denied in part where the determination was based on substantial evidence and was not arbitrary or unreasonable.

DECISION

Custom Production Manufacturing, Inc., (CPM) protests the determination that it was a nonresponsible offeror on two solicitations for the manufacture and supply of cabinets, cases and tables.

The solicitations were issued by the Purchasing and Materials Service Center, San Bruno, CA. Solicitation -0128, issued March 27, 1996, with an initial offer due date of April 27, sought offers to supply two-drawer key cabinets (Postal Service Item Number (PSIN) 1338B) and stamp storage cabinets (PSIN 222). Solicitation -0130 sought offers for the supply of PSIN 11, case and table. It was issued on April 22 and its initial offer due date was May 22.

The solicitations had different contracting officers who worked together on these procurements. Each used the preaward survey discussed below and each signed a common determination of CPM's nonresponsibility. The contracting officers submitted joint comments on this protest.

Both solicitations contained section K.5, Notice of Preaward Survey, which provided in part

that the Postal Service "may visit a prospective contractor's facilities to perform reviews or may ask for additional written information." Section K.5 went on to state that areas of interest included performance and quality control plans and production capability. Under production capability, section K.5 included plant facilities and equipment; subcontracting and labor resources; and performance record and ability to meet delivery schedules.

Solicitation -0128 stated at section M.4: "Award(s) will be made to the responsible offeror(s) whose proposal(s) complies with the solicitation requirements and is/are the lowest price(s)." At section M.2, it allowed for more than one award:

In addition to other factors, proposals will be evaluated on the basis of advantages and disadvantages to the Postal Service that might result from making more than one award (multiple awards). It is assumed, for the purpose of evaluating proposals, that \$500 is the administrative cost to the Postal Service for issuing and administering each contract awarded under this solicitation, and individual awards will be for the items or combinations of items that result in the lowest aggregate cost to the Postal Service, including the assumed administrative costs.

Solicitation -0130 stated at section M.3 that award would be made "to the responsible offeror whose proposal complies with the solicitation requirements and is the lowest price."

Three offers were received for each solicitation. The contracting officers state that no discussions other than requests for best and final offers (BAFOs) were held. CPM was the low offeror on solicitation -0130, and the second lowest on -0128. When the lowest offeror on -0128 was found nonresponsible, CPM was considered for award on both solicitations.

As part of the consideration of CPM's offers, the contracting officers sent it a letter on June 12 requesting that it indicate the following:

The names, addresses and telephone numbers of its subcontractors for the manufacture of all three items.

Which items or parts were to be manufactured at each subcontractor location.

Where lot inspections were to be performed for each item.

The letter also asked that CPM submit a production schedule for each item; a "flow chart indicating current and anticipated plant capacity taking into consideration the current work in house and the anticipated new business resulting from these two solicitations"; and a delivery schedule for each item corresponding to the solicitations' delivery due dates.

The letter further requested that CPM address the "level of quality at the subcontractor(s) facility(s)" and asked for CPM's "in-house plan" to insure quality requirements are met at the subcontractor facilities.

CPM responded by letter dated June 14, naming the two subcontractors that would be used

for PSIN 1338B and PSIN 222 and indicating which parts would be manufactured by each. CPM stated that Blackstone Enterprises, Inc., would be used for PSIN 222, for fabrication and painting of drawers and cabinets, and also would be one of two subcontractors for PSIN 11, manufacturing and painting the table top cases.¹ CPM also provided the requested flow chart.

By letter dated June 19, CPM was requested to furnish missing financial information and was advised that the schedule which it had submitted with its June 14 response gave shipping dates rather than the dates by which the items would be received at the postal facilities. (The solicitations called for delivery to be f.o.b. destination, and defined "due date" as "the day the shipment is received at destination, not the contractor's shipping date.") The letter asked CPM to indicate in writing whether it could deliver by the dates in the solicitation.

The contracting officer on solicitation -0130 and a quality control specialist from postal headquarters conducted a preaward survey at CPM's Hillside, NJ, plant on June 25 and at Blackstone's facility in Jamestown, NY, on June 26.

During the survey, additional documentation was requested from CPM, particularly about its quality control procedures and personnel and the working environment at the Blackstone site. CPM responded on June 28, asserting that quality assurance inspectors would be hired, and that "[m]echanical systems in CPM's designated space at [Jamestown], e.g., air, lights, water, sanitary facilities and electrical power are adequate and operational for this project."

Both surveyors wrote reports, in which they questioned CPM's ability to manufacture quality products and deliver them in a timely manner. Some of the factors which led the surveyors to believe that there was unacceptable risk to the Postal Service in making awards to CPM were that Blackstone's facility was far from being operational, that specific plans for that facility had been changed and continued to be changing, that this was the first joint effort between CPM and Blackstone, and that CPM has had a history of changing subcontractors.² Another major concern noted was that CPM has a record of unsatisfactory perfor-

¹ The record shows that Blackstone was to be both CPM's subcontractor and CPM's landlord at the Jamestown site, which it owns and leases to CPM. The parties to this protest have variously described the Jamestown site as CPM's and as Blackstone's, and have also described Blackstone as both a subcontractor and a joint venturer with CPM. Since CPM is the only offeror to the Postal Service on these solicitations, we will refer to Blackstone as CPM's subcontractor and to the New York site as "the Jamestown facility" or "Blackstone's facility."

² The contracting officer wrote that Blackstone and CPM do not have a "proven track record of successfully working together" and that the subcontractor's facility lacked "[a]dequate power to support the equipment requirements, acceptable work environment for employees working in the area, bathroom[s], proper lighting, adequate floor load for the equipment, water[,] and air for pneumatic operations." He wrote that "[d]espite these problems, we were told by CPM the area was ready to go other than for clean-up and set-up of the production equipment and assembly lines."

The contracting officer was concerned with what he termed the "repeated revisions" of CPM's manufacturing plans. As an example, he wrote that the estimated cost for providing adequate electrical power at Blackstone's facility changed from \$2,000 to \$15,000; and that CPM "will now use the area for only those production phases which do not require modified electrical power." He expressed doubt about

mance on its three most recent postal contracts.³ Finally, the surveying contracting officer was concerned with what he perceived as CPM's president's unwillingness to supply additional information and his generally adversarial attitude.⁴

(..continued)

CPM's ability "to become operationally ready at [the Jamestown site] in time to meet production schedules and shipment due dates."

Finally, the contracting officer wrote:

Although we can not say the contractor does not have a right to change his planned approach, we can say the risk associated with CPM's repeated changes is high and unacceptable to the Postal Service for the manufacture of this requirement.

The quality specialist's report included similar concerns. He cited frequent changes of plans for a new, unproven facility, and wrote:

They will face additional challenges with new employees learning new tasks while they struggle with the demands of the production and delivery schedules. They will require continuous Postal QAR surveillance in Jamestown and Hillside. This is an additional expense to Postal. I estimate the QAR requirement in Jamestown to be approximately 15 hours per week and Hillside to be 6 hours per week.

³ CPM is a longstanding postal contractor. The contracting officers have submitted information about its three most recent contracts: 052684-94-B-1176, 052684-95-Z-1279, and 052684-96-B-0070. The record indicates that 20 of 25 deliveries on contract -1176 for PSIN 222 were late (ranging from one day late to 34 days late); that two of two deliveries on contract -1176 for PSIN 222 were late (one was 79 days late, the other 44). On contract -1279, for PSIN 217 (cash drawers), the file indicates that the two scheduled deliveries were late, by 17 and 19 days, respectively. On contract -0070, also for PSIN 217, three out of seven deliveries were late (two by seven days, the other, due July 5, had not been delivered by July 17, when the nonresponsibility determination was made).

On contract -1176, the protest file indicates that eight of the late deliveries were in 1995; both late deliveries on contract -1279 were in 1995; and the three late deliveries on contract -0070 were in 1996.

⁴ The surveying contracting officer's report noted that CPM's president complained throughout the survey about the requests for additional information. "[His] attitude at this pre-award meeting was so adversarial that we believe a contract award to CPM would result in numerous arguments and requests for undeserved price increases. . . . This coupled with the potential coordination problem with the many subcontractors and lack of an established facility has a strong potential for creating quality problems and schedule delays. . . ."

CPM's June 28 response to the surveyor's final request for additional information included the following:

The information presented below is provided at your request, however, CPM strongly protests the added workload and cost to CPM for additional written information that, in our opinion, greatly exceeds the written information required by pre-award contract clauses.

* * *

CPM feels the quality inspection process for this preaward has been unreasonable, unfair, capriciously executed and totally unjustified in view of CPM's past performance and quality record with USPS. In fairness, request you consider authorizing a resubmission of CPM's BAFO price to cover these excessive administrative costs non anticipated in CPM's last BAFO resubmission [sic].

The contracting officers found CPM nonresponsible. Their July 17 letter stated:

Based on the review and analysis of the current information available at the time of the pre-award meeting, in which we discussed your proposed facility plan, your company's past performance history records for the three most recent contracts issued by our office, which indicate[] a pattern of late deliveries, and the behavior exhibited by you at the pre-award meeting in Jamestown, NY, CPM is determined to be a nonresponsible offeror for the referenced solicitations.

This protest⁵, dated July 18, was received on July 22, before awards were made on either solicitation.

The protest asserts that during the preaward survey, "CPM stated it was expanding its manufacturing base to improve its delivery performance by adding selective equipments [sic] and teaming with other quality sub-contractors. We feel strongly that this was proper to correct any existing deficiencies." CPM states that it should receive both awards because it was the "responsible low offeror on both solicitations."

The contracting officers' joint statement in response to the protest explains that the nonresponsibility determination was based on the preaward survey findings (footnote 2, *supra.*) and CPM's recent record of unsatisfactory performance (footnote 3, *supra.*).

Replying to the contracting officers' statement, CPM disagrees with the assessment of its past performance. CPM asserts that none of the deliveries for contracts -1176 and -1279 cited in the contracting officers' statement should be considered late because they all had been "verbally authorized" by the contracting officer. CPM admits "experiencing some minor past delivery problems with Postal contracts," but contends that many were caused by the Postal Service. Specifically, CPM claims that on contract -1279, the Postal Service first granted, then rescinded first article approval, then granted it again. "As a result of this extensive delay, CPM's entire production schedule was put in shambles and lengthened." CPM also asserts that late deliveries "occur when Postal Contracting Officers exercise 100% options early in the contract life." CPM states:

Normally, in the past, USPS ex[]ercised options near the end of the contract to allow contractors adequate manufacturing time. When options occur early the contractor is required to deliver double the basic quantity at the same time. This often results in late deliveries.

CPM states that it "recognized this problem" in 1994 and "initiated aggressive action to improve on-time delivery by developing a plan to expand its manufacturing capability."

⁵ During the course of this protest, a contract on solicitation -0130 was awarded on August 15 to Delta Industries, Inc., in accordance with the procedure at Procurement Manual (PM) 4.6.5 a.

The remaining offeror on solicitation -0128 withdrew its offer. Item 222 has been resolicited.

CPM claims that its "minor" delivery problems improved significantly after 1994.

CPM also takes issue with the preaward survey, stating that it had no notice of or opportunity to prepare documentation for the survey. CPM again complains of the "voluminous amount" of written information requested by the quality control specialist and the contracting officer after the survey, and states that the preaward surveyors misrepresent "facts so their viewpoint prevails."

CPM claims that the Jamestown site is ready for operation and that will "give us a conservative 90% improvement in our manufacturing capacity." CPM claims that these "planned performance improvements" were "discussed in detail in both preaward surveys and in the planning documentation submitted to [the contracting officer]." CPM emphasizes its past record as "a successful postal contractor for a period over eight years without one field reject" and its "100% on time delivery" record on a GSA contract.

The contracting officers submitted further comments claiming that no verbal authorizations were given for CPM's late deliveries:

Contractors are, on occasion, late in meeting the contract delivery due dates. If this occurs, the contract delivery schedule may be revised by modification to the contract. . . . Verbal authorization to be late is never authorized, however, the contractor is usually allowed to proceed with delivering items even if the scheduled due date has passed. Accepting late deliveries at their destination does not change the contractor's late performance status.

The comments contend that CPM's recent contract delivery problems were not minor, that CPM never mentioned that it was unable to meet its schedules at the times that options were exercised or schedules revised, and that all revisions to the delivery schedules "were by bilateral modification and those revised dates were the dates used in determining CPM's lateness."

The contracting officers also dispute CPM's claim that its performance improved after mid-1994. "It should be noted [that] late deliveries were evident as early as July 1994 and continue through July 1996. Whatever corrective action was taken by CPM in mid 1994 is not reflective in delivery performance since that date."

They assert that the Postal Service learned of CPM's plan to subcontract a substantial portion of the work during the preaward survey, "however, it was unclear as to specific production flow and manufacturing processes related to sub-contractor responsibilities." The contracting officer who conducted the preaward survey scheduled it at the Jamestown site "to determine if CPM had a sound manufacturing plan to receive an award for all items identified in both solicitations," since Blackstone was a new subcontractor and the Jamestown facility was not operational at the time of the survey.

The contracting officers point out that the documentation requests of which CPM complains were consistent with the requirements of solicitation section K.5 and are "common to all preaward surveys being conducted"--especially when a new facility that is not operating at the time of the survey will be used.

Finally, the contracting officers state that one reason why they believe that award to CPM might result in "undeserved price increases" is that CPM asked to resubmit its BAFO prices (which already were more than its original offers) in order to cover the administrative costs associated with providing the preaward survey documentation. (See footnote 4, *supra*.)

The protester asserts in supplemental comments that solicitation -0128 did not preclude awarding contracts to two different contractors, and asks that one item be awarded to CPM. CPM also claims that the preaward survey reports contain numerous "misrepresentation[s] of fact," including that CPM failed to answer questions remaining after the survey satisfactorily, and that CPM has had a problem with "maintaining specified dimensions."

A protest conference was held, during which CPM reiterated its position that it had been subjected to burdensome and unnecessary preaward documentation requirements, that it had, in fact, furnished all requested documentation, that its new plant is operational and that the quality control specialist, especially, was biased against CPM. CPM also maintained that its past performance was not as bad as the contracting officers represent and that it has made significant improvement in its performance since 1994.

CPM has made two lengthy post-conference submissions which it claims show that its quality control system has "vastly improved during the last two years," that the contracting officer's statistics about late deliveries were erroneous, that the Postal Service caused CPM's delivery delays, and that the quality control specialist conducting the preaward survey was biased. CPM alleges that the contracting officers acted in bad faith by not executing contract modifications when they knew CPM was going to make a late delivery. Also, CPM alleges that the Postal Service "breached its implied duty not to hinder or interfere with the contractor's performance" by causing delays in first article approval. Finally, CPM also asserts that it was "misled by the solicitation language" that did not advise CPM that it could not split its operations among two manufacturing plants.

DISCUSSION

The contracting officer's determination of an offeror'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.

A-1 Transmission, P.S. Protest No. 93-14, October 29, 1993; *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. Where a factual conflict occurs between the statements of the contracting officer and those of the protester, the "presumption of correctness" which attaches to the

contracting officer's statements requires that we accept such statements as true. See *Multigraphics*, P.S. Protest No. 87-24, June 12, 1987; *Lancom, Inc.*, P.S. Protest No. 85-48, October 9, 1985.

Further, it is the protester's burden to show that the contracting officer's determination was not supported by substantial evidence. *Lobar, Inc./Marroquin, Inc.; Benchmark/Hercules Limited*, P.S. Protest Nos. 92-49 and 53, October 14, 1992. CPM's arguments do not suffice to carry its burden of proof.

PM 3.3.1 b.3 states that to be determined responsible, a contractor must have a good performance record. See also PM 3.3.1 a. (timely delivery is an element of responsibility).

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. Further, "a record of recent unsatisfactory performance on a postal contract, even without a termination, can justify a finding of nonresponsibility." *Ron Garson d/b/a Ron's Trucking*, P.S. Protest No. 91-33, July 15, 1991; *Year-A-Round Corporation, supra*. (failure of contractor to perform in timely manner under prior contract may be reasonable basis for nonresponsibility determination); see also, *Firm Erich Bernion GmbH*, Comp. Gen. Dec. B-233106, December 28, 1988, 88-2 CPD & 632.

Here, the contracting officers reasonably based their determination upon a documented history of deficiencies during the offeror's performance of previously-awarded contracts, occurring as recently as this past year.⁶ The information supplied by the contracting officers is distinctly contrary to CPM's claims that its delays have been minor, and that its performance improved dramatically after 1994.⁷ While we apply a presumption in this factual dispute in the contracting officers' favor, *Multigraphics, supra*, even if we were to accept CPM's claim that its deliveries were on time 90% of the time, it would not be

⁶ Performance within the last twelve months preceding the nonresponsibility determination is "recent," *Pamela J. Sutton*, P.S. Protest No. 87-110, February 9, 1988, and the record shows quite a few instances of late deliveries in 1995 and 1996.

⁷ CPM has offered several explanations of its late deliveries. It claims that it received verbal permission to deliver late in most of the cases. The contracting officers flatly deny that. While there is evidence on the record that CPM requested permission to be late on various occasions, the contracting officers were under no obligation to modify the contracts when CPM informed them that its deliveries would be late, and there is no evidence on the record that permission to be late was granted. The contracting officer correctly points out that the fact that the Postal Service accepted the items once it finally received them need not mean that the performance was satisfactory--it merely evidences an overriding need for the items. Further, any failure to terminate CPM's contract after the late deliveries benefited the protester but did not obligate the Postal Service to contract with it again. *A-1 Transmission, supra*.

CPM's assertion that the exercise of options caused its tardiness is unpersuasive; it cannot be said that those options were unforeseen modifications to the contract. CPM's argument that its delays were excusable because the Postal Service caused them also is unavailing, for such an issue is a matter of contract administration to be resolved through the contract disputes process, not the protest procedures. *Id.*; *Firm Erich Bernion GmbH, supra*.

arbitrary or unreasonable for the contracting officers to disagree with CPM that 90% performance is sufficient.⁸

CPM also has voiced strong disagreement with the preaward surveyors' conclusions. However, it has not proven that its opinions should rule. The protest file in this case, when viewed as a whole, evidences at most strong differences of opinion involving business judgment, which are insufficient to prove that the contracting officers' determinations were not supported by substantial evidence or to warrant overturning their conclusions, for which they are accorded considerable discretion. *D.V. Industries*, P.S. Protest No. 87-81, August 19, 1987; *Robertson & Penn, Inc.*, *supra*.⁹

Some of CPM's allegations have been untimely raised. PM 4.6.4 b. requires that protests against allegedly defective solicitation terms must be received by the time proposals are due. PM 4.6.4 d. states that in "all other cases, protests must be received not later than ten working days after the information on which they are based is known or should have been known, whichever is earlier. . . ." CPM's allegations of bad faith and bias and its complaints about the solicitation were first made in submissions in the course of its protest received more than ten working days after CPM knew or should have known of the existence of the issues. While CPM submitted requests for information to the contracting officers after it filed its protest, neither the timeliness rules nor the issuance of protest decisions are suspended during the resolution of information requests, even if the information sought would be helpful to the prosecution of the protest. *Cohlma Airline, Inc.*, P.S. Protest No. 87-118, April 13, 1988.¹⁰

⁸ "A nonresponsibility determination may be based upon the contracting agency's reasonable perception of inadequate prior performance, even where . . . the contractor disputes the agency's interpretation of the facts. . . ." *Applied Power Technology Company and Contract Services Company, Inc.*, Comp. Gen. Dec. B-227888, 87-2 CPD & 376, October 20, 1987. In that case, the protester, a joint venture, claimed that in finding one joint venturer nonresponsible because of its unsatisfactory performance on prior contracts, the General Services Administration (GSA) did not take recent improvements in its performance into account. The Comptroller General concluded that "the prior performance information relied upon by GSA reasonably supported a finding that [the protester's] overall prior performance was unsatisfactory. . . ." In denying the protester's request for reconsideration, the Comptroller General stated: "There is no indication. . . as the protester suggests . . . that the protester's improved performance ratings in more recent years were ignored; rather, the contracting officer simply was not satisfied that recent improvements in performance, to the exclusion of earlier performance history, were the best indication of [the protester's] overall current performance capability." *Applied Power Technology Company and Contract Services Company, Inc.*, *Request for Reconsideration*, Comp. Gen. Dec. B-227888.2, 88-1 CPD & 247, March 10, 1988.

⁹ It is not arbitrary or capricious to have doubts about the capability of a facility not yet operational, the plans for which are in flux, nor is it unreasonable to want more than verbal assurances that the facility would be ready when needed. It also is not an abuse of discretion for the contracting officers to determine that an offeror who disputes every request for information and seeks to change his BAFO accordingly will be uncooperative with Postal Service contract personnel in the future and will cause them extra administrative expenses and headaches.

¹⁰ CPM is incorrect that the solicitation precluded it from splitting its operations. The issue, instead, was whether the contracting officers' concerns about the particular circumstances of CPM's split operations were unreasonable. Since they were not, we have no grounds on which to overturn their business judgment. CPM's contention that it should have received at least one of the awards on solicitation -0128 is similarly unavailing since as a nonresponsible offeror CPM is ineligible for any award.

The protest is dismissed in part and denied in part.

William J. Jones
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Contract Protests and Policies

(..continued)

The protester's evidence on its claims of bias and bad faith falls far short of meeting its stringent burden. As the Court of Federal Claims noted in a similar context:

In the absence of clear evidence to the contrary, . . . it must be presumed that the government acted in good faith [T]he plaintiff bears an extremely heavy burden of proving the contrary, and the government is prevented only from engaging in actions motivated by a specific intent to harm the plaintiff. The difficult burden of proof for a plaintiff attempting to show 'government bad faith' has been outlined as follows:

[i]t requires 'well-nigh irrefragable proof' to induce the court to abandon the presumption of good faith dealing. In the cases where the court has considered allegations of bad faith, the necessary 'irrefragable proof' has been equated with evidence of some *specific intent to injure the plaintiff*. Thus, in *Gadsden v. United States*, 78 F.Supp. 126, 127, 111 Ct.Cl. 487, 489-90 (1948), the court compared bad faith to actions which are 'motivated alone by malice.' . . . Similarly, the court in *Struck Constr. Co. v. United States*, 96 Ct.Cl. 186, 222 (1942) found bad faith when confronted by a course of Governmental conduct which was designedly oppressive.'

A-Transport Northwest Co., Inc. v. United States, 27 Fed.Cl. 206, 220 (November 25, 1992), quoting *Kalvar Corp. v. United States*, 211 Ct.Cl. 192, 198-99, 543 F.2d 1298, 1301-02 (1976), cert. denied, 434 U.S. 830 (1977) (some citations omitted; emphasis in original).

CPM has not demonstrated evidence of bias other than its opinions and vociferous disagreement with each point made and conclusion drawn by the quality control specialist in the preaward survey. That is insufficient evidence to overcome either the presumption of correctness or the presumption of good faith.

See, e.g., *B&S Transport, Inc.*, P.S. Protest No. 92-69, October 30, 1992; *Ameriflight, Inc.*, P.S. Protest No. 92-42, September 3, 1992.