

**February 4, 1997**

**P.S. Protest Nos. 96-18, 96-19**

## **ED WILSON, INC.**

**Solicitation No. 482980-96-A-0356,  
Solicitation No. 482980-96-A-0384**

### **Digest**

Protest against removal from prequalified list for lobby renovation contracts is denied; protester's less than satisfactory performance on first phase of work justifies its exclusion from subsequent phases.

### **DECISION**

Ed Wilson, Inc., (Wilson) protests its failure to receive award of a construction contract under solicitation 482980-96-A-0356, and its failure to be solicited for a similar contract under solicitation 482980-96-A-0384.

Solicitations -0356 and -0384, issued by the Facilities Service Office, Dallas, TX, involved the second and third phases of post office lobby renovations in and around Austin, TX. The first phase of the work had been the subject of solicitation 482980-96-A-0341.

All three phases involved the evaluation of offers from firms which had responded to an April 2, 1996, Commerce Business Daily notice soliciting prequalification statements from firms interested in performing lobby construction services in Arkansas, Louisiana, Oklahoma, and Texas. Relevant terms of the notice are set out below.<sup>1</sup>

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<sup>1</sup> The notice stated that "[e]ach postal facility involved will remain in full operation throughout contract term," and that:

Wilson was among five firms which were prequalified pursuant to the notice and were solicited to propose on phase one in response to solicitation -0341. Wilson submitted the lowest price and was awarded the phase one contract on May 20; it was issued a notice to proceed on May 24. The contract duration was to be 45 days, making the scheduled contract completion date July 6.

Solicitation -0356 for phase two was issued to Wilson and other prequalified contractors on July 11, and offers were requested to be submitted by July 24. The solicitation stated at Section M that award would be made on the basis of “best value to the Postal Service, considering price, price-related factors, and/or other evaluation factors specified elsewhere in the solicitation,” but no such factors were specified elsewhere.<sup>2</sup>

Wilson submitted an offer with a contract price of \$1,505,000. Wilson was notified by letter dated August 27, which it received on August 29, that the phase two award had been made to Parkway Construction & Associates in the amount of \$1,633,426.<sup>3</sup>

Wilson filed its two protests with this office on September 13. The first, number 95-18, complains that the award was inconsistent with the solicitation evaluation scheme, since Wilson had offered a lower price. Alternatively, believing that the contracting officer had removed Wilson from the prequalified list for delays arising out of the phase one contract, Wilson complains that it was not notified of such action and asserts that any delays were caused by the Postal Service and were outside Wilson’s control.<sup>4</sup> The

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Primary prequalification factors are: (1) have minimum of five (5) year[']s experience in multi-project retail construction programs; (2) Satisfactorily completed or be currently participating in at least three (3) programs of similar size and scope; (3) Be legally licensed to perform work and offer a competent traveling staff as required to complete the work; (4) be familiar with local building, zoning, and permit requirements and restrictions in the geographic area; (5) Complete the projects using own supervision forces. Assignment of the work from the general contractor to other prime contractor will not be allowed; (6) Provide references of completed projects . . . ; (7) Provide resumes of key personnel who will be assigned to project; and (8) . . . maintain and furnish evidence of . . . insurance . . . and bonding capacity . . . . Other factors to be considered will include project management capabilities, company organization, and MBE participation. Applications will be evaluated by a USPS committee . . . . Firms selected as most qualified will be placed on the pre-qualified list. The list will remain active for up to two (2) years. . . .

<sup>2</sup> Previous decisions of this office have noted that when a solicitation with such a notice contains no evaluation criteria, award is to be made solely on the basis of price. *Electro-Test, Inc.*, P.S. Protest No. 94-26, August 5, 1994.

<sup>3</sup> The letter, addressed to “all offerors,” further advised only that two offers had been received, and that award was made “on the basis of initial proposals received, without discussions.” It thus provided Wilson with no explanation of the basis on which its lower-priced offer had been declined.

<sup>4</sup> Wilson cites the Postal Service’s untimely furnishing of materials and fixtures, the unavailability of a specified floor tile available only from a single source (subsequently replaced by contract modification), and the Postal Service’s failure to obtain the permission of a building owner for punchlist floor work to be performed.

protest seeks the suspension of performance, award of the contract to Wilson, and other relief, including bid and proposal costs and attorney fees.<sup>5</sup>

The second protest, number 96-19, complained that Wilson had been denied a copy of the solicitation for the third phase of the Austin retail renovation work, number -0384, for which offers were due at 3:30 p.m., September 13. The protest contended that the failure to furnish Wilson a copy of the solicitation violated the requirement of Procurement Manual (PM) 1.7.2 a. that purchases be made on the basis of adequate competition, and constituted an illegal *de facto* debarment of Wilson.

Replying to the protests, the contracting officer submitted letters indicating that Wilson “had been removed from the list of prequalified contractors” prior to the award of phase two, because “it failed to meet specific contractual requirements” on phase one.<sup>6</sup>

The contracting officer contends that Wilson was advised of the reasons for its removal from the list in a series of telephone conversations and meetings, and denies that contract performance delays were among those reasons. With respect to solicitation - 0384, the contracting officer asserts that the solicitation of the four offerors remaining on the prequalified list meets the PM’s requirement for adequate competition.

The contracting officer was asked to supplement his statement by responding to several specific questions. His response included the following:

— Wilson was removed from the prequalified list on August 9 “based on ongoing problems with his work in Phase I.” Documentation relating to those problems was presented to the contracting officer on August 13.

— Wilson was advised of its removal by the August 27 letter to offerors advising of the award to Parkway, and Wilson’s representatives were advised on August 28 of its failures to update or abide by its schedule; to provide sufficient assets, specifically supervision, to perform quality work; and, despite repeated requests, to clean its work sites sufficiently for daily business.

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<sup>5</sup> Whether to suspend performance when a post-award protest is pending lies within the purview of the contracting officer; this office does not award proposal costs and attorney fees. *Weis Builders, Inc.*, P.S. Protest No. 96-21, December 6, 1996.

<sup>6</sup> Specifically, Wilson was faulted for failing to keep its sites “retail clean” following each night’s construction, its late furnishing of and failure to update its construction schedule, inadequate supervision “which resulted in poor quality work and site being left unfit for retail activities the following day,” failure to protect sensitive postal equipment from construction dust, failure to respond to requests for corrective action prior to final finish, “resulting in extensive rework of walls at multiple locations,” and failing to respond in a timely manner to proposals for construction changes.

The letters were accompanied by various documents generated in the course of the contract, including the minutes of several construction progress meetings, transmitted with an August 13 cover memorandum from the manager, retail operations, setting out that organization’s concerns about Wilson’s work.

— The second phase award was delayed to August 22 by insufficient funding.

Wilson submitted comments on the contracting officer's statement and its supplement. Its comments on protest 96-18 included the following points:

— It is unclear whether the decision to remove Wilson from the list was made by the Austin "Facilities team" or by the contracting officer, and when that decision was actually made. If the decision was made by anyone other than the contracting officer, it was invalid.

— The phase two contract was improperly delayed, not for lack of funding as the contracting officer suggests, but so that a list of Wilson's deficiencies could be manufactured.

— The August 27 letter did not advise Wilson that it had been removed from the prequalified list, and the August 28 telephone conversation which did so advise came a week after the phase two award occurred.

— In removing Wilson from the prequalified list, the Postal Service failed to take into account all eight of the primary qualification factors set out in the CBD notice, and treated Wilson unequally from Parkway, which it did not reevaluate at all.

— The solicitation was not limited to prequalified offerors.

— There is no authority to remove an offeror from a prequalified list after it has submitted an offer on a solicitation limited to prequalified offerors; rather, in such a case, an offeror must be found nonresponsible if it is not to receive an award to which it is otherwise entitled. Wilson has not been found nonresponsible.

— The Postal Service was obliged to provide Wilson with written notice of its removal from prequalified status and an opportunity to be heard concerning that removal. Procurement Handbook 3.1.6.c.-173 c. so provides, and is applicable by analogy here.

— The Postal Service may not remove Wilson from the prequalified list because its regulations are defective in failing to provide for such a remedy.

— The contractor evaluation forms are suspect, since they profess to have been prepared prior to a time at which Wilson was told that none existed. Further, they are based on requirements and standards of performance not set out in the contract, reflect misunderstandings of the contract's requirements with respect to supervision, and overlook the impact on contract performance of the delays which the Postal Service admits it is accountable.

Wilson's comments on protest 96-19 included the following additional points:

— PM 11.5.1 h. requires that construction contracts be the subject of presolicitation notices where practicable; since none was issued here, the solicitation must be withdrawn and readvertised.<sup>7</sup>

— As in the case of the other protest, the Postal Service treated Wilson and the other prequalified firms unequally because it failed to reconsider their eligibility for prequalification before soliciting them.

The contracting officer was given an opportunity to respond to various portions of the protester's submission. His comments included the following:

— In the context in which it was issued, the phase two solicitation clearly was limited to prequalified offerors, and Wilson was aware of that fact.

— Wilson was not treated differently than any of the other prequalified offerors when its performance on the phase one contract was considered with respect to the subsequent phases; none of the other contractors had received a phase one award, so they had no similar performance to be evaluated.

— The phase two award was not held up to allow time for Wilson to be removed from the prequalified list; the delay resulted solely from problems in obtaining funding under an appropriate finance number, a process which required Headquarters approval.

— The process of evaluating Wilson's performance began on August 9; on August 13 documentation was presented to the contracting officer, who reviewed it, visited some of the phase one sites, and determined "that Wilson was not capable of performing adequately on the Phase II projects." He then removed Wilson from the prequalification list.

— The protester cites no authority for the proposition that offerors may not be removed from a prequalified list in the course of a solicitation, and the contracting officer is aware of none. Contracting officers have general authority to protect the interests of the Postal Service and to act in a business-like fashion.

— The contracting officer would have found Wilson nonresponsible for the phase two contract based on its phase one performance had such a finding been required.

— There is no requirement for prompt notification when offerors are removed from a prequalified list; the Procurement Handbook does not apply to construc-

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<sup>7</sup> This issue was untimely raised more than ten working days after Wilson was aware that the solicitation had been issued. The timeliness of issues raised in the course of a protest is measured from the date they are received, and not some earlier date. *Cordova Air Service, Inc.*, P.S. Protest No. 92-86, January 22, 1993.

tion work, and the nonbinding guidance of the Design and Construction Handbook, which does apply, contains no requirement. In any event, the verbal notice given on August 28 was timely and sufficient.

— The decisions cited for the proposition that the determination to remove an offeror from a prequalified list must be based on the precise criteria of the prequalification announcement are inapplicable; there is no applicable authority to that effect, and the contracting officer may effect such a removal on any “appropriate, reasonable basis.” In any event, Wilson’s phase one performance sufficiently related to its evaluation with respect to the requirement for satisfactory completion of programs of similar size and scope, its completion of projects with its own supervision forces, and its project management capabilities.

— That the Postal Service’s prequalification regulations are deficient is not a ground for protest. PM 4.6.2 a. provides that protests must involve “the terms of a solicitation, the award or proposed award of a contract, or any other action relating to the solicitation or award of the contract.”

— The advice that no contract performance evaluation forms had been prepared was erroneous; the forms were prepared, as stated, on August 13.

— Wilson’s performance failures were not occasioned solely by the Postal Service’s delays, but related to its performance in accordance with the contract specifications, its supervision of contractors, its provision of contract schedules and revisions to schedules, its coordination with station managers, and its responses to requests for proposals for contract modifications.

— The protester has the burden of proving that the contracting officer abused his discretion, and a presumption of correctness attaches to the contracting officer’s statements. The facts demonstrate that Wilson’s removal from the prequalified list was reasonable, supported by substantial evidence, and within the contracting officer’s discretion.

A conference was held with the protester, and the protester made a post-conference submission. Much of the conference and submission reiterated points previously made. However, the submission made the following additional points:

— Because solicitation -0356 contained no references to the fact that it was limited to prequalified offerors, it was improper to condition award on an offeror being prequalified, and thus to deny the award to Wilson because it had been removed from the prequalified list.<sup>8</sup>

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<sup>8</sup> Wilson notes that although the CBD notice encompassed retail renovation in various states in addition to Texas, including Arkansas, in mid-August it received a contract for such work in Arkansas under a solicitation which it understands not to have been handled under the prequalification process of the CBD notice.

- Solicitations and contracts are to be interpreted objectively, rather than subjectively, and unexpressed intentions are not controlling.
- There is no contemporaneous documentation that Wilson was removed from the prequalified list.
- The Procurement Handbook and the other statutes and regulations cited by Wilson are relevant as a foundation upon which the system of prequalification exists in federal procurement.
- While Parkway was not performing the Austin phase one contract, it was performing similar lobby renovation contracts elsewhere, and it was inequitable for the contracting officer not to consider its performance on those jobs when re-evaluating Wilson.
- Wilson was not, and could not reasonably have been found, nonresponsible with respect to the phase two work. Wilson has a long history of successful contract work, and was awarded contracts by the Postal Service for work in Blytheville, AK, for work similar to that here (see fn. 8, *supra*) and in Oklahoma City, OK, which was awarded on a noncompetitive basis by the contracting officer involved with the Austin work. The objections cited to Wilson's work on the Austin project were neither adequately documented by contemporaneous evidence nor communicated to Wilson in the course of contract performance, and in any event were not serious enough to occasion a finding of nonresponsibility, citing *Mesa Constructors*, P.S. Protest 83-39, September 20, 1983.

## DISCUSSION

This office plays a limited role in reviewing the technical evaluation of prequalification or similar information submitted by a potential offeror. Such a review affords considerable discretion to the contracting officer and the evaluators. The technical determinations of a contracting officer will not be overturned unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence. The protester bears the burden of overcoming the "presumption of correctness" which accompanies the statements of contracting officers.

*W. M. Schlosser Co., Inc.*, P.S. Protest No. 93-30, March 9, 1994 (citations omitted).

The protester's suggestion that the adequacy of its immediately preceding performance on work similar to that contemplated under these solicitations was not a relevant subject for the contracting officer's inquiry is unpersuasive. "[P]ast performance is always a legitimate factor to be considered in the evaluation of a prospective contractor's technical proposal; to expect the evaluators to determine whether an offeror's proposal evidences ability to comply with the technical requirements while ignoring readily available informa-

tion on whether the offeror has complied in the past would not be reasonable." *American Bank Note Company*, P.S. Protest No. 94-02, May 11, 1994.

Wilson's suggestions that removal from prequalification may not be accomplished in the course of proposal evaluation and that the rules for such action are those associated with the determination of an offeror's responsibility are similarly unpersuasive. These contentions are offered without persuasive authority, and they are inconsistent with the general discretion afforded contracting officers in the course of negotiated procurements.<sup>9</sup>

*Mesa Constructors, supra*, cited by the protester as an example of an instance in which this office declined to adopt a contracting officer's determination of a contractor's non-responsibility, represents perhaps the high-watermark of this office's non-responsibility jurisprudence. As a subsequent decision of this office noted:

The *Mesa* protest involved an offeror who was found nonresponsible because the contracting officer "concluded that Mesa had failed to meet the standard of a satisfactory record of performance as required by Postal Contracting Manual (PCM) 1-903.1 (iii)." . . . In support of his conclusion, the contracting officer in *Mesa* cited five Mesa projects, some completed, some current, which he claimed indicated deficient performance by the protester. Most of these cited projects were the subject of then-current litigation, and Mesa presented evidence countering the contracting officer's allegations for all five projects. Additionally, as to Mesa's then-current project progress, which the contracting officer had deemed deficient, this office noted that "[t]he disagreements between [postal personnel] and Mesa were not of a nature significant enough to disqualify Mesa for award of the present solicitation." Accordingly, we found "that the contracting officer's determination is not supported by substantial evidence to support his finding that Mesa lacks tenacity and perseverance."

In contrast to *Mesa*, the comments received . . . in the instant case represent a much more general discussion of [the protester's] past performance. The contracting officer has noted his determination that delays at the Brooklyn and Queens GMFs were the responsibility of [the protester], resulting in poor ratings for [the protester] in the areas of references and project management; while [the protester] has presented arguments that suggest otherwise, we are hesitant to overturn these portions of the contracting officer's evaluation on such a disputed factual basis. First, there is a "presumption of correctness" which attaches to statements of contracting officers. See *QMC, Inc.*, P.S. Protest No. 91-52, December 27, 1991; . . . . Second, our bid protest forum is poorly suited to resolving factual disputes

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<sup>9</sup> See, e.g., *Jenkins, Gales & Martinez, Inc.*, P.S. Protest No. 88-65, January 26, 1989, distinguishing between the pre-solicitation qualification process and the determination of an offeror's nonresponsibility.



as exist in this matter, as we cannot conduct adversary proceedings to any significant extent. *International Business Machines Corporation*, P.S. Protest No. 90-66, February 22, 1991. . . .

*Kleinknecht Mechanization Group*, P.S. Protest No. 92-24, October 2, 1992.

The current case involves a situation far closer to *Kleinknecht* than to *Mesa*. While the instances which gave rise to the contracting officer's dissatisfaction with Wilson's performance are disputed, the protester's contentions that its performance was consistent with the contract's requirements have not been established or documented to the extent that similar contentions were in *Mesa*.

Accordingly, we conclude that the protester has not met its burden of establishing that the contracting officer's action in removing it from the prequalified list for the remaining Austin projects was arbitrary or capricious. The concerns expressed about Wilson's scheduling, supervision, and performance of the initial Austin contract justified its removal from consideration for the subsequent portions of the Austin work.

The circumstances which gave rise to these protests reflect an extremely unsatisfactory failure of communication by the Postal Service with Wilson, its contractor, in the course of its initial contract, including the failures to advise Wilson in a timely manner either of the problems perceived in its performance or that it was being removed from the prequalified list, as well as misstatements and inconsistencies in the information provided to this office and to Wilson in the course of the protest.<sup>10</sup>

Further, the record is far from clear about the contracting officer's intentions regarding Wilson's participation in other lobby renovation projects within the four-state and two-year span of the April 2 request for prequalification statements. While we have found the concerns resulting from Wilson's less than satisfactory performance on the initial Austin contract sufficient to justify its nonconsideration for the remaining Austin work, those concerns are of less significance with respect to projects to be performed elsewhere, particularly since Wilson was being found capable of performing such work elsewhere at the same time it was being omitted from consideration for the remaining Austin projects.

Accordingly, the contracting officer is directed to retain Wilson on the April 2 prequalified list for projects other than Austin, TX, unless he determines that Wilson should be removed from the list for a subsequent solicitation or solicitation under that list. Wilson

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<sup>10</sup> These included the contracting officer's assertion that the August 27 letter put Wilson on notice that it had been removed from the prequalified list; the advice to Wilson that no contractor evaluation forms had been prepared when, in fact, they had; and the contracting officer's initial advice that the decision to remove Wilson from the list was made on August 9 and his later advice that although members of the project team had so concluded on August 9, the contracting officer had not adopted that conclusion until August 13.

shall be advised of any such determination, and the reasons for it, in sufficient time to allow it to contest the determination before offers are due.

The protest is denied.

William J. Jones  
Senior Counsel  
Contract Protests and Policies.