

April 24, 1997

P.S. Protest No. 97- 04

DORIK NOBLE, INC.

Solicitation No. 415046-97-A-0043

DIGEST

Protest against award of contract for parking lot expansion is denied: protester failed to show that the contracting officer's determination of its nonresponsibility was arbitrary, capricious, or not reasonably based on substantial information or that that the contracting officer had discriminated against protester in making the award.

DECISION

Dorik Noble, Inc., (Dorik) protests the award of a contract for the expansion of a concrete parking lot and landscape modification at the Round Rock, TX, Main Post Office.

Solicitation No. 415046-97-A-0043 was issued on November 25, 1996, with a due date for proposals of December 20. Section M.1 of the solicitation describes the evaluation of proposals and award of contract, in pertinent part as follows:

Award will be made to the responsible offeror who submits the best combination of Technical Proposal, Business Proposal (cost/price), and other factors considered....

Cost/Price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest cost.

Subsequently, Dorik submitted a proposal offering to perform the work at a price of \$84,000. On January 17, the contracting officer awarded the contract to Chasco Contracting at a price of \$95,687. In a letter to Dorik dated January 22, the contracting officer said:

This is to notify you that the Chasco Contracting Company has been awarded the above (parking lot expansion) project for the amount of \$95,687, based on evaluation of past performance and best value to the Postal Service.

On February 3, Dorik filed a protest with the contracting officer disputing the award of contract to Chasco Construction, which is summarized as follows:

- Dorik submitted a lower bid of \$84,000.
- Dorik was not contacted by the contracting officer regarding its bid before the award was made.
- Dorik discounted its price to be sure to be sure it got the job, saying it was certain it could do the job at the price offered.
- Dorik is currently a Postal Service indefinite quantity contractor (IQC); completed two contracts successfully and has almost completed another.
- Dorik maintains a good relationship with all employees at the San Antonio post office, but believes that the contracting officer does not want Dorik as one of his contractors, saying “[i]t is my impression that [the contracting officer does] not want us [to be] one of his contractors. This impression is drawn from the way he addresses us both in person and in his letters to us, his delay in getting back to us and his decision to award this contract to Chasco [C]onstruction at about \$12,000 higher.”
- The contracting officer gave as reasons for making the award to Chasco that Chasco has its office at Round Rock; had good relations with the mayor and the post office; and knew where to get its material in Round Rock.
- The contracting officer’s determination was based on discrimination, which also explains why, since April 1996, Dorik has “only completed \$18,000 [on its] \$400,000 bonded two year contract.”

In his report, the contracting officer acknowledged that Dorik was the low offeror at \$84,000, and that Chasco Contracting was next at \$95,687.00. He stated, however, that in deciding whether or not to award the contract to Dorik he reviewed its performance on three recent projects:

- Seal coating at the Leon Valley, TX, station. It took Dorik 120 days to complete the 30 day contract.
- The Nursery, TX, project. Despite the clear contract specifications and drawings: sand rather than an aggregate, was used as a base prior to pouring

cement; the existing concrete base was not doweled; the area in which concrete was to be poured was not prepared properly "due to the irregular heights of the reinforcement framework"; and it took almost 60 days to complete, rather than the 45 days required by the contract.

— An architectural barriers project at the LaGrange, TX, post office. "The protester's performance on this contract has been terrible, as fully detailed in the numerous field reports of the project architect. This project also exceeded the time available for contract completion and is still not completed."

— The contracting officer states that "[b]ased on the above repeated, recent inadequate contract performance by Dorik Noble on projects of similar size, I determined that it was a nonresponsible offeror on the Round Rock project. Therefore, Dorik Noble was not eligible for award, and award was properly made to the next low offeror, Chasco Contracting."

In response to certain other statements and allegations made by Dorik in its protest, the contracting officer added the following remarks:

— Under Provision K.9, Award Without Discussion, an award could be, and was, made without contacting Dorik.

— He had no knowledge as to Dorik's claim that it had discounted its price in order to receive award of the contract.

— While acknowledging that Dorik holds a Postal Service indefinite quantity construction contract, the contracting officer said "it is absolutely false for it to claim that it has successfully performed three projects for the Postal Service. As the above narrative indicates, Dorik Noble has not adequately performed these projects."

— The contracting officer maintains a congenial, professional business relationship with Dorik and treated it no differently than any other contractor or offeror, and Dorik was the first offeror to be notified of the award of the contract.

— The award to Chasco was not made for any of the reasons stated in the protest; Chasco received the award because it was the next low offeror, and had excellent past performance, references, and supplier capability.

— The contracting officer had never discriminated against Dorik. Under its IQC, Dorik was guaranteed only \$10,000 in contract work over a two year period, and, in fact, had received 80% more work than the guaranteed amount.

In support of his determination of nonresponsibility the contracting officer submitted various documents, some of which were prepared in the course of the protest, documenting Dorik's performance of the three projects that he reviewed.

Dorik submitted a response to the contracting officer's report which is summarized as follows:

— It has been in business since 1985 and has completed a number of projects for other clients without complaints from any of them.

— It was unaware of any questionable quality of work at either the Leon Valley or Nursery projects, and further alleged that he was told by the project manager that it had done a good job on the Leon Valley project.

— The contracting officer based his determination of nonresponsibility on race. Dorik subsequently received an IQC contract and is now working on a project at the J.F. Doby post office and that during the construction meeting for that project, no mention was made of Dorik's nonresponsibility.

— The letters being used by the contracting officer to support nonresponsibility were written after the protest and contain false information aimed at supporting the contracting officer's position.

— The contracting officer told Dorik that Chasco is a Round Rock resident who knows the mayor, the postmaster and where to get materials in the area, and that Dorik's offer was below the contracting officer's estimate. In the contracting officer's experience that, if given the contract, the protester would come back for more money through change orders.

— The contracting officer's portrayal of poor performance on the Nursery project was exaggerated; work was begun on October 28, and completed on November 12, with the exception of certain striping which could not be done in cold weather. All work was finally completed on December 12.¹

— The Leon Valley project was Dorik's first post office project² and work was begun on October 23. During the paving it encountered a changed condition, bad weather "and other changes and additions with no extra time." Allegedly,

¹ A February 3 memorandum states that the Nursery Texas, project was not substantially completed until January 24.

²According to the contracting officer's records, the LaGrange project was awarded on September 11, and the Leon Valley project was awarded on September 30.

there was "substantial completion of the work" by December 10, but cold weather prevented it from completing all work until January 13. All "original contractual part of this job was completed within the time period."

— With respect to the LaGrange project, construction started on October 13, and continued at a steady pace until November 28 when the postmaster requested that construction be halted until after the holidays. Work resumed after the holidays and "all concrete work completed on this project received excellent marks from the Architect and Project Engineer."

— It was evident that the contracting officer did not want it as one of the post office contractors and that he threatened to terminate the LaGrange contract on several occasions.

— On three occasions it called about the results of the solicitation, but at no time was it told that Dorik was nonresponsible or ineligible.

— It has received poor treatment as an IQC contractor, and again alleged that the contracting officer has been discriminatory.

DISCUSSION

The contracting officer's determination of an offeror's nonresponsibility is subject to limited review by this 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 an 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.

T/F Trucking, P.S. Protest No. 92-65, October 22, 1992: see also *Fabricating Businesses*, P.S. Protest No. 92-77, December 16, 1992; *Lock Corporation of America*, P.S. Protest No. 89-14, March 10, 1989.

PM 3.3.1 a. sets forth the following general standards for determining whether a prospective contractor is responsible:

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 affirm-atively demonstrate its responsibility. . . .

PM 3.3.1 b.3 states that to be determined responsible, a contractor must have a good performance record. PM 3.3.1 e.3. requires that the contracting officer "possess or obtain information sufficient to be satisfied that a prospective contractor meets applicable standards of responsibility," and describes the sources from which that information may be obtained.

As noted above, the protester had in the recent past worked on several postal projects. The contracting officer has demonstrated that he had the necessary information, to assess the protester's performance record and make a determination of its responsibility. It included reports which were prepared while work on those projects was in progress, and subsequent statements from postal personnel confirming their earlier oral reports..

The various site reports covering these projects indicated that there were ongoing problems with the protester's performance. In contesting the contracting officer's determination, it is the protester's burden to show that the 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. The documentation of Dorik's performance record submitted by the contracting officer supports his determination of the issue of responsibility and apart from its bare denial of substandard performance on the projects reviewed by the contracting officer, we see no evidence that Dorik has met its burden to show otherwise.

Dorik also challenged the contracting officer's determination on the grounds that, prior to award of the contract to Chasco, the contracting officer never advised the protester that it had been determined to be nonresponsible. However, there is no requirement that an offeror be advised of a determination of nonresponsibility before awarding a contract.

[S]ince responsibility determinations are administrative in nature, they do not require the procedural due process, such as notice and an opportunity to comment, which is otherwise necessary in judicial proceedings. Accordingly, 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.

Lithographic Publications, Inc., Comp. Gen. Dec. B-217263, March 27, 1985, 85-1 CPD ¶ 357, citations omitted.

Dorik argued that the documents relied on by the contracting officer to support the determination of nonresponsibility were written after the protest and contained false information. While several memoranda included in the contracting officer's report were prepared after the protest was filed, they merely referred to oral information and accompanying documents

concerning Dorik's performance of its contracts that were given to the contracting officer earlier. We find no reason to question their accuracy or veracity.

Dorik has alleged that the contracting officer discriminated against it because of race, and stated that he *subsequently* awarded a contract to Dorik for work at the J.F. Doby post office, and at the preconstruction meeting for the project made no mention of Dorik's nonresponsibility.³ However, it has not produced any evidence which suggests such discrimination. "[P]rejudicial motives will not be attributed to individuals on the basis of inference or supposition." *Hunter L. Todd, dba Courier Express Mail & Package Delivery Service*, P.S. Protest NO. 85-78, October 18, 1985, quoting from *University of New Orleans*, Comp. Gen. Dec. B-184194, May26, 1978, 78-1 CPD ¶ 401.

Lastly, Dorik included in its protest, a complaint about the treatment it has received as an IQC contractor. Matters arising in the course of contract administration are outside the scope of our protest jurisdiction. *Lobar, Inc./Marroquin, Inc.; Bench-mark/Hercules Limited, supra*.

The protest is denied.

William J. Jones
Senior Counsel
Contract Protests and Policies

³With respect to the Doby project, according to the contracting officer's records the Doby contract was awarded to Dorik on November 14. The Round Rock contract was not awarded until January 22. Thus, Dorik received the Doby post office contract some time before the contracting officer made the determination of nonresponsibility, not subsequently, as Dorik stated.