

**September 2, 1997**

**P.S. Protest No. 97-18**

**VINCENT OGONNAYA OFOR**

**Solicitation No. 632-261-97**

**DIGEST**

Protest against a determination of nonresponsibility is denied; protester failed to show that the contracting officer's determination of his nonresponsibility was arbitrary, capricious, or not reasonably based on substantial information or that the contracting officer and other personnel had conspired to cause him to default on an earlier contract, resulting in the determination of nonresponsibility.

**DECISION**

Mr. Vincent Ogonnaya Ofor protests the contracting officer's determination that he is a nonresponsible offeror for a contract for highway transportation of mail.

Solicitation No. 632-261-97 was issued on May 6, 1997, by the Midwest DNO, seeking sealed bids for highway transportation services between the Minneapolis P & DC, and Franklin, MN, for a term beginning July 1, 1997, and ending June 30, 2000. Bids were opened on June 6, and Mr. Ofor submitted the lowest of the nine bids received.

On June 10, the contracting officer sent Mr. Ofor a letter stating that his bid had been rejected as nonresponsible because his earlier transportation contract, HCR 58061, had been terminated for poor performance.

On June 16, this office received from Mr. Ofor a letter dated June 16, in which he protested the contracting officer's determination of his nonresponsibility. Mr. Ofor alleged that his former contract was terminated for irregularities that were caused mainly by

"USPS approval of non-workable equipment." Accompanying the protest were three letters of reference.<sup>1</sup>

On July 7 the contracting officer replied to Mr. Ofor's protest. He stated that Mr. Ofor was previously awarded a contract for HCR 58061 from Wahpeton to Cogswell, ND, from July 12, 1995, until June 26, 1996, when his contract was terminated for continued poor performance.<sup>2</sup> In answer to Mr. Ofor's allegation that his termination was caused mainly by USPS approval of non-workable equipment, the contracting officer said:

The poor performance which formed the basis for the default termination were numerous incidents such as, loss of USPS equipment (due to non-secured door on truck), misdelivery of mail, failure to observe contract schedule, failure to follow Administrative Official's instructions, and several safety complaints.

The contracting officer concluded that Mr. Ofor's recent termination justified a nonresponsibility determination.

In response to a request from this office for additional information concerning Mr. Ofor's terminated contract, the contracting officer provided copies various documents relating to the contract, including the termination notice and order, and 75 contract route irregularity reports (PS Form 5500) and several warning letters issued to Mr. Ofor between July 1, 1995, and June 21, 1996.

Replying to that submission, Mr. Ofor contends that several of the irregularity reports were "conspiracy write ups" that led to the termination of his contract, that on some occasions one incident triggered multiple irregularity reports,<sup>3</sup> and some reports resulted simply from bad weather conditions. He also alleged that at the hearing before the Board of Contract Appeals a postal employee admitted having approved the use of improper equipment that caused some performance problems.

## **DISCUSSION**

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<sup>1</sup> Two letters dated September 2, 1986, and May 16, 1995, are letters of recommendation from previous employers; the third letter, dated May 18, 1995, is a personal letter of recommendation.

<sup>2</sup> The contracting officer indicated that Mr. Ofor had filed a timely appeal of the termination decision with the Postal Service Board of Contract Appeals, where a decision is pending in docket 3965.

<sup>3</sup> Mr. Ofor indicated that from July through December of 1995, he received about 40 irregularity reports in 18 days, and from January through June of 1996, he was cited 30 times in 16 days.

The standard of our review of a contracting officer's finding of nonresponsibility is well established:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the [requirements of the contract] with available information about the contractor's resources and record. We well 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; *Cimpi Express Lines, Inc.*, P.S. Protest No. 88-57, December 15, 1988.

Procurement Manual (PM) 3.3.1.a. sets forth the reasons for responsibility determinations 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.3 provides that to be determined responsible a prospective contractor must "[h]ave a good performance record." It is well established that recent unsatisfactory performance, evidenced by a default termination, justifies a determination of nonresponsibility.

*E.H.O. Trucking*, P.S. Protest No. 91-28, June 24, 1991.

The contracting officer's determination of nonresponsibility in this case was based on substantial evidence and was not arbitrary and capricious. Mr. Ofor's default on his postal contract within a year of the contracting officer's determination at issue here reasonably justifies a nonresponsibility determination.<sup>4</sup> The fact that facts relied on by the contracting officer are being contested in another forum, such as, here, the Board of Contract Appeals, does not prohibit the use of those facts in a determination of nonre-

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<sup>4</sup> It is clear from the number and nature of the irregularities recited with respect to Mr. Ofor's prior performance that they were not all the result of the Postal Service's acquiescence in the provision of unsatisfactory equipment or attributable to weather.

sponsibility. *C & H Enterprises*, P.S. Protest No. 84-70, December 6, 1984; *Mark A. Carroll & Son, Inc.*, P.S. Protest No. 79-42, October 3, 1979.

Mr. Ofor's allegation concerning a conspiracy against him by representatives of the Postal Service is not supported by the record. "Prejudicial motives will not be attributed . . . on the basis of inference or supposition." *I.C., Inc.*, P.S. Protest No. 86-06, April 25, 1986. Mr. Ofor has offered no evidence the earlier irregularity reports and warning letters that lead to the default termination were the result of bias. Inferences or suppositions are insufficient to overcome the presumption that government personnel act in good faith in compliance with their duties. See *Marshall D. Epps*, P.S. Protest No. 88-47, September 15, 1988.

The protest is denied.

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Contract Protests and Policies