

**November 4, 1997**

**P.S. Protest No. 97-28**

**MAC/MYC, INC.**

**Solicitation No. 232092-97-A-0024**

**DIGEST**

Protest against failure to receive construction contract is denied; contracting officer's determination that offeror whose experience involved smaller projects and performance as subcontractor, rather than as general contractor, and whose offer was substantially less than the postal estimate and the other offers received was not responsible was not arbitrary or capricious.

**Decision**

MAC/MYC, Inc., protests its failure to receive award of a contract for the expansion of the Fort Washington, MD, branch post office.

The DC Metro Facilities Service Office issued solicitation 232092-97-A-0024 for the Fort Washington project on June 24, 1977. The solicitation package described the project as follows:

Expand existing 12,116 square foot building to approximately 25,000 square foot including relocation of employee and vehicle parking and extension of customer parking spaces. Project will require partial clearing of adjoining site.

The solicitation included, at K.8, Provision A-8, Contract Award (February 1992), which provided, in part, as follows:

The Postal Service will award a contract resulting from this solicitation to the responsible offeror whose proposal conforming to the solicitation will be most advantageous to the Postal Service, cost or price and other factors specified elsewhere in this solicitation considered.

No factors other than price were specified elsewhere in the solicitation, so award was to be made solely on the bases of price and responsibility. *Valerie Knox*, P.S. Protest No. 94-34, September 30, 1994.

A sheet titled "Instructions to Prospective Offerors" which accompanied the solicitation included the following:

In order to evaluate a firm's responsibility, the Offeror **MUST** include with his/her offer all of the following:

1. Financial Statement (within last 12 months).
2. List of 5 largest completed jobs within the last two (2) years (also any US Postal Service or other Government Agency jobs). Provide client/owner's name, address, telephone number and contract amount and contract number, if available.
3. Provide a listing of current projects, including client/owner's name, address, telephone number and contract amount and contract number, if available.
4. Actual work to be performed by your firm, excluding subcontractor[s] (provide in percentage and dollar amount).

(Emphasis in original.)

Offers were received on July 31. MAC/MYC proposed to do the work for \$900,000. The next lowest offer was that of MCM Enterprises, Inc., for \$1.6 million; thirteen other offers, ranging from \$2.2 million to \$2.9 million dollars, were also received. A document accompanying the contracting officer's statement which was prepared after the receipt of offers asserts that the "bid range established by the government estimate was between \$1.5 million to \$2.2 million . . . ."

MAC/MYC's offer was accompanied by an unaudited financial statement showing total assets in the mid-low six figures, and shareholder's equity in the high five figures,<sup>1</sup> and a letter which listed four previous projects, all at Dulles Airport. Three projects were in the \$305,00 to \$220,000 range, while the fourth was about \$40,000. MAC/MYC was a subcontractor to a general contractor on all but one of the projects, the rehabilitation of

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<sup>1</sup> The contracting officer's statement asserts that the financial statement was misdated as "12/31/97." This is apparently an error; the statement was dated June 30, 1997, although it covered the year ending December 31, 1996.

a water pump station, the largest projected listed, but a note to the financial statement describes that project as having been “put on hold” in January, 1997, and “officially canceled” by the owner in June, 1997, with a mid-five figure termination payment to MAC/MYC. MAC/MYC’s letter also stated that MAC/MYC had no current projects, and that it would perform 50% of the work itself.

An August 4 evaluation of MAC/MYC’s offer by the project manager stated in part as follows:

My bases for rejecting the lowest bid [sic<sup>2</sup>] by MAC/MYC, Inc., are the following:

- 1) An addendum was issued to provide a \$80,000 allowance for a storm water retention system. [T]his was not done,<sup>[3]</sup> additionally their site work cost breakdown is substantially lower than actual costs. A review of their unit prices has me sufficiently concerned that they are inadequate for the requirements of the construction documents and specifications.
- 2) They have no prior Postal construction experience. This is not required, however[,] the unit pricing for doors and windows, equipment, wood & plastic and thermal and moisture protection are unusually low and considering experience they seem unaware of our requirements.
- 3) I do not feel it is necessary or worth the effort to qualify each of the unit prices with them simply because I am concerned they just do not understand the complexity of the project.

On the other hand, MCM’s bid[,] while being lower than the other bidders, is a result of familiarity with numerous postal projects. I have talked to them . . . and am confident their numbers are adequate.

MAC/MYC’s protest recites that its representatives discussed the scope of the project with postal representatives on August 6, and again at a meeting on August 8 which included MAC/MYC’s subcontractors. At that time, the Postal Service requested that it provide “additional background to show sizes of jobs and types of jobs especially in the value of [\$]1 million to [\$]2 million jobs as a general contractor.” MAC/MYC replied on

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<sup>2</sup> Materials submitted by both the protester and the contracting officer use terms such as “bid” which are appropriate to purchasing by sealed bid, but inappropriate to this transaction, which was a negotiated procurement.

<sup>3</sup> This is apparently a contention that MAC/MYC’s cost breakdown for the project did not reflect the \$80,000 amount.

August 11 by furnishing “a complete resume/background package of [MAC/MYC’s vice-president] and his management personnel with letters of recommendations and credit references and licenses.”

By letter dated August 10, the contracting officer advised MCM of the Postal Service’s intent to award it the contract upon receipt of the necessary payment and performance bonds. MAC/MYC’s vice president learned that it would not receive the contract on August 11. Unsatisfied by the Postal Service’s subsequent explanation of the basis of its decision, it submitted its timely protest to the contracting officer by letter dated August 12. After the contracting officer had failed to resolve the protest within ten days after its receipt as provided by Purchasing Manual (PM) 3.6.6.c.1, the protest was transferred to this office for consideration pursuant to PM 3.6.7.<sup>4</sup>

The protest asserts that the failure to award it the contract “was inconsistent with the evaluation criteria set forth in the IFB.” The protester asserts that it has “proved beyond a shadow of doubt its capability of performing this size contract” contending that MAC/MYC’s acquisition of a Virginia Class A general contracting license and qualification to do business statewide in Maryland establishes its responsibility. It further contends that the fact that the firm “has not physically completed a project in the 1 million to 2.5 million dollar range as a general contractor does not mean that it or its personnel [are] not qualified to perform successfully on that level.”

The protest asserts that it is entitled to the award because it submitted “the lowest responsive bid.” It seeks award of the contract “after completion of the negotiation process” or, “[i]f the Postal Service finds it must evaluate factors [other than price],” the rejection of all bids and the amendment of the solicitation. (The protest also refers to “the set of flawed plans and specifications . . . received from USPS to bid the project,” but identifies no specific flaws. Lacking that specificity, and given the evident untimeliness of such an objection first raised after contract award, the contention warrants no consideration.)

The contracting officer’s statement asserts that because MAC/MYC failed to provide the information requested in the instructions to offerors, he was unable “to evaluate MAC/MYC’s responsibility.” The specific omissions which are cited are the identification of fewer than five projects, and the provision of owner’s references for only one of its cited projects (since the other references cited were general contractors, not owners). Further, he asserts that the Postal Service was unable to reach any of the contacts which MAC/MYC had listed, and that MAC/MYC’s offer “failed to demonstrate

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<sup>4</sup> Although the PM governs the conduct of this protest, the procurement was conducted under the terms of the prior regulation, the Procurement Manual, Publication 41, cited here as Pub. 41.

understanding of the project requirements” because it “was significantly below the Postal Service estimate and the other offers.”

The protester did not comment on the contracting officer’s statement.

## **DISCUSSION**

As noted above, award of the Fort Washington contract was to be made on the basis of price and responsibility.

Even where price will be the sole factor considered with respect to the award decision, an affirmative determination that the proposed awardee is “responsible” must precede the award.

Contracts must 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 . . . .

Pub. 41 3.3.1.a.

While the nature and extent of a contractor’s prior experience with projects of similar size and scope to that being solicited is often a matter considered in the course of technical evaluation (*CIR Industrial Automation*, P.S. Protest No. 95-47, April 29, 1996), and may be so considered when stated as an experience requirement in the instructions to offerors when the solicitation is otherwise silent about non-price evaluation factors (*Circle-A Construction, Inc.*, P.S. Protest 96-12, July 12, 1996), past experience may also be considered in the course of determining an offeror’s responsibility (*Cimpi Express Lines, Inc.*, P.S. Protest No. 88-57, December 15, 1988; *John F. Tyra*, P.S. Protest No. 91-79, November 21, 1991) since “necessary . . . experience” is an element of responsibility. Pub. 41 3.3.1.b.

As we have often noted, the contracting officer's determination of an offeror's nonresponsibility is subject to only 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 well 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.

*Dorik Noble, Inc.*, P.S. Protest No. 97-04, April 24, 1997, and cases cited therein.

The record before the contracting officer indicated that MAC/MYC had accomplished only three contracts in the past two years, that it had accomplished them not as a general contractor, but as a subcontractor,<sup>5</sup> and that all of the projects were substantially smaller than the Fort Washington project. Given the opportunity to supplement the material furnished with additional evidence of its prior performance of projects of similar value to that project, MAC/MYC responded by providing licenses and resumes largely irrelevant to the request.<sup>6</sup>

We cannot conclude that the contracting officer exceeded his discretion or acted arbitrarily in concluding on the basis of this record that MAC/MYC had failed to demonstrate its capacity to perform the Fort Washington project.

Further, the significant variance between MAC/MYC's price and the Postal Service estimate and the other offers received, coupled with MAC/MYC's lack of prior postal construction experience, provided a further reasonable basis for concern about its understanding of the project and its responsibility.

[T]he risks to the government inherent in accepting an unusually low-priced offer should be considered by responsible procurement officials in the evaluation and selection process. In this context, consideration of price realism can serve as an aid in determining whether the offeror understands the scope of the work required, uncovering mistake or alerting the government to the possibility of a "buy-in" so that precautions may be taken against its possible adverse effects.

*Everhart Appraisal Service, Inc.*, Comp. Gen. Dec. B-213369, May 1, 1984, 84-1 CPD ¶ 485 (citations omitted).

The protest is denied.

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<sup>5</sup> The one project on which MAC/MYC had been the general contractor had been canceled, as noted above.

An offeror may be considered nonresponsible as a general contractor even though it has demonstrated satisfactory performance as a subcontractor. *Ray Angelini, Inc.*, P.S. Protest No. 89-58, October 24, 1989.

<sup>6</sup> Although a list of "Major Contracts Completed by [MAC/MYC's vice-president] as Colbert Refrigeration, Inc. since 1992 [sic]" submitted as part of the vice-president's resume includes nineteen projects arranged in ascending value from \$110,000 to \$1,500,000, it includes no information about the dates of performance and provides no contact points or references.

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