

May 6, 1998

P.S. Protest No. 97-37

C.A. EXPRESS, INC.

Solicitation No. 150-169-97

DIGEST

Protest against nonresponsibility determination because of highway mail transport contractor's poor past performance is denied; protester failed to meet its burden of proving that the contracting officer abused his discretion.

DECISION

C.A. Express, Inc. (CAE) protests the determination of the contracting officer at the Distribution Networks Allegheny Area Office that it is a non-responsible offeror on Solicitation No. 150-169-97, for highway transportation service between Harrisburg, PA and the Detroit, MI, & DC, a route known as Highway Contract Route HCR 171L0.

Solicitation 150-169-97 was issued on August 12, 1997, and offers were due on September 16. Upon opening the offers, CAE was found to be the low offeror.

A pre-award analysis and recommendation dated October 10 shows that a telephone conference was held on October 8¹ with Mr. Auckerman, president of CAE, at which time CAE's poor performance on two contracts, HCR 170A0, (between Harrisburg, PA, and Detroit, MI), and recently terminated HCR 171BT (between Harrisburg and Indianapolis, IN) were discussed. By letter dated October 14, the

¹ The contracting officer's report states that the conference took place on October 9.

contracting officer advised CAE that because of its poor performance on those contracts, it was no longer being considered for award on this solicitation. The contracting officer then advised the second low offeror, Midwest Transit, Inc., that it had been awarded the contract in a letter dated October 15, and on October 16, the contracting officer executed its contract.

CAE's protest was dated and received on October 20 by the contracting officer and forwarded to this office. The protest stated, "I wish to appeal to the next higher authority^[2] for a fair and non-partial decision" (regarding the contracting officer's letter finding CAE nonresponsible), that CAE would request that the Federal Department of Transportation "look into H CR 171BT and 170A0 to determine if sufficient time (was) allotted on these contracts," and that "[t]he circumstances under which we operated 171BT are totally different than on 171LO."

In his report, the contracting officer stated that CAE's emergency contract for H CR 171BT was terminated for poor performance on August 10, 1997, as a result of 61 contract route irregularity reports (PS Form 5500) that were issued between May 17 and August 10, 1997. Fifty-five reports were issued because of late arrivals, two for safety violations, two for mechanical failures, and two for unsatisfactory vehicles.

With respect to H CR 170A0, the contracting officer provided copies of 14 irregularity reports for a two week period, from July 15 to 29, 1997, 13 of which were issued as a result of late arrivals, and one for failure to secure the load. According to the contracting officer, CAE provided no reasons for five of the late arrivals, but attributed four late arrivals to construction and traffic, one to inability to "make proper connection," and three others, variously, to a lack of a cell phone to reach the driver, a broken fuel line, and a lack of a driver or trailer.

A conference was held on August 18, at which time CAE's unsatisfactory performance on H CR 170A0 was discussed. Subsequently, on September 15, a "Final Request for Service Improvement" was sent to CAE, noting six more irregularity reports and stating that service had not improved. On September 23, the Transportation contracting officer issued a final warning letter to CAE.

² Appeal to the next higher level contracting officer is a procedure available with respect to some determinations made by contracting officers in the course of the administration of highway transportation contracts; it is not available with respect to decisions in the course of the award of those contracts.

The contracting officer's report also states that CAE continues to have problems with drivers in its operation of a temporary contract, H CR 453L2, between the Dayton area and Indianapolis.³

Because of poor performance on H CR 171BT and 170A0, the contracting officer found CAE to be non-responsible. CAE responded that, with respect to H CR 171BT, most of the problems were related to road construction that also affected both the prior and subsequent contractors on this route. Though the contracting officer made no reference to driver problems in his statement, CAE stated that driver problems would be eliminated if a permanent contract were to be issued. CAE also alleged that it had not received any notice of safety violations, and claimed that the only mechanical failure it was notified about was an incident involving a flat tire. CAE further alleged that it did not receive any notice of an unsatisfactory vehicle except one involving a door latch, which it claimed was not a safety violation. CAE also alleged that it was told that if it did not object to the termination of the emergency contract, there would be no "detrimental effect" on the award of any future postal contracts.

With respect to the irregularity reports issued for H CR 170A0, CAE again blamed roadway construction and the rush hour arrival time for any late arrivals, and further states that on three occasions, its trucks were in the terminal waiting for an available dock. As to the issue of cell phones, CAE stated that all trucks are so equipped. It claimed that the broken fuel line that caused it to be late was caused by parts debris from another truck on the highway.

CAE alleges that with regard to H CR 453L2, the Postal Service adjusted the travel time to conform to the maximum speed limit and, subsequently, there have been no problems.

Lastly, CAE claims that "it is aware of no problems" in the last four years with either H CR 19025 or 15111.

A protest conference was held on December 10. It was memorialized in a December 12 letter from protester's counsel which is summarized as follows:

³ The contracting officer also stated that CAE had, in the past, experienced problems with the Department of Labor over two contracts, H CR 19025 and 15111, but in his preaward analysis and recommendation, he admitted that, as of October 9, 1997, these contracts were operating well.

With respect to H CR 171BT:

— CAE received only 29 of the route irregularity reports issued, of which most were received “outside the ten day time limit to respond to the allegations,” eight reports related to the same trip, and, three reports were issued prior to the start of its contract.

— The contract “ran flawlessly during its final 30 days.”

With respect to H CR 170A0:

— The contract does not allow sufficient time to make the runs without violating both the speed limit and Department of Transportation regulations 49 CFR §§ 392.6 and 395.3.⁴

With respect to H CR 453L2, there were no problems after a contract modification allowed additional time to complete the run, and that postal personnel had agreed that CAE’s running time was “acceptable.”

With respect to H CR 453L2, at Indianapolis, trucks were reported delayed because they were not logged in until they backed into the loading dock, and such delays caused by the unavailability of docks should not result in penalties.

CAE alleged that the Indianapolis and Dayton contracts required arrivals during rush hour, but did not allow sufficient time to get through these areas.

CAE complained that it is difficult to hire “competent and trustworthy drivers” in the absence of a permanent contract, and that postal workers were exacerbating the problem and interfering with CAE employees by telling them that CAE would not be awarded a permanent contract.

In response to the contracting officer’s statement about Department of Labor “problems” on contracts H CR 19025 and 15111, CAE averred that “nearly all” of

⁴ 49 CFR § 392.6 prohibits requiring a time schedule for a commercial vehicle that would necessitate operating it at speeds greater than the speed limits prescribed by the jurisdictions through which the vehicle must travel. § 395.3 states, in part, that a driver for a motor carrier shall not drive more than ten hours following eight consecutive hours off duty.

the problems were corrected after the contracts were amended to allow additional driving time. CAE also stated that certain claims that were made against CAE, resulted in findings of error and penalties against CAE in the amount of approximately \$2,500.

Finally, CAE averred that the contracting officer's decision "was not reasonably based upon substantial information."

DISCUSSION

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 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.

Jon B. Robinson, Protest No. 92-23, July 14, 1992 (citations omitted).

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. states that in order to be determined responsible a contractor must have a good performance record.

Recent unsatisfactory contract performance, evidenced by a default termination, can justify a determination of nonresponsibility. *Package Express, Inc.*, P.S. Protest Nos. 87-57, 87-58, 87-64, July 27, 1987; *Unter L. Todd*, P.S. Protest No. 85-78, October 18, 1985; *Bathey Manufacturing Company*, P.S. Protest No. 82-7, March 31, 1982. Although terminations for default in the distant past cannot be

considered by a contracting officer, it is allowable to consider a termination within the recent past. *Pamela J. Sutton*, P.S. Protest No. 87-110, February 9, 1988 (and protests cited therein). Though CAE alleged that it received only 29 irregularity reports against it during the course of H CR 171BT,⁵ the contracting officer submitted evidence that the Postal Service issued 61 such reports against CAE over a period of less than three months. Even if half of the eight reports that CAE alleges were duplicates, and the three reports which are alleged to have been issued before the contract start date, are removed, 54 reports of contract irregularities by CAE in less than three months remain.

The termination of H CR 171BT for poor performance, and the issuance of a final warning letter to CAE for poor performance on H CR 170A0, both occurred shortly before the contracting officer's determination at issue here and reasonably justify a nonresponsibility determination. We conclude that the determination of nonresponsibility in this case was not arbitrary and capricious, and was based on substantial evidence.

CAE also has alleged that Mr. Auckerman was told by the contracting officer that if he made no objection to the termination of the emergency contract, H CR 171BT, there would be "no detrimental effect on the award of any further postal contracts." The contention is irrelevant, since CAE's poor performance on H CR 170A0, alone, would support the determination of its nonresponsibility here. Further, however, CAE has offered no evidence in support of his allegation. 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 level of proof required to overcome the presumption of good faith has been described as "well-nigh irrefragable" and will not be sustained by inferences or speculation. See *Gregory Lumbar Co., Inc. v. U.S.*, 11 Cl. Ct. 489, 501 (1986) and case cited therein.

Lastly, CAE makes an allegation that postal employees had been interfering with CAE employees by telling them that CAE would not receive a permanent contract. Matters that arise in the course of contract administration are outside the scope of

⁵ This lesser number would be sufficient in itself to support a termination for default. See, e.g., *Kenneth G. Solomon*, PSBCA No. 1677, August 31, 1987, 87-3 BCA ¶ 20,128 (Twenty-four unexcused irregularities warrant termination action); *Steinmann Transportation, Inc.*, PSBCA No. 23302, 94-3 BCA ¶ 27,212 (twenty-three chargeable irregularities over seven month period support default termination).

our protest jurisdiction. *Lobar, Inc. Marroquin, Inc.; Benchmark Allmark Hercules Limited*, P.S. Protest Nos. 92-49 and 53, October 14, 1992.

The protest is denied.

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Senior Counsel
Contract Protests and Policies