

May 20, 1998

P.S. Protest No. 98-04

CACTUS DELIVERY, INC.

Solicitation No. 980-190-97

DIGEST

Protest against termination of mail transportation contractor's non-responsibility is denied. Corporation's failure to provide evidence of its financial assets support termination; assets of corporation's shareholders may not be substituted.

DECISION

Cactus Delivery, Inc., protests the termination of the contracting officer that it is a nonresponsible offeror with respect to a solicitation for the highway transportation of mail.

The Western Distribution Networks office, Seattle Branch, issued solicitation 980-190-97 for the transportation and delivery of mail to 181 boxes on a 48 mile route out of the Eagle, ID, post office. Bids were due October 23, 1997.

Cactus Delivery was the low bidder on the route. Its bid was signed by "Douglas Cremer, V. P."¹ Information submitted with the bid indicated that Cactus Delivery was an Idaho corporation. Douglas Cremer, the spouse of a postal employee, had submitted the lowest bid in response to an earlier solicitation for service on this

¹ The contracting officer takes this to stand for Vice President, although no documentation provided by Cactus Delivery establishes Douglas Cremer as holding such an office.

route, but that bid had been rejected due to the ineligibility of a postal spouse to contract with the Postal Service.²

A standard credit check produced no information about the corporation. By an October 30 letter the contracting officer asked Cactus Delivery to provide information including evidence of its incorporation, a current balance sheet, and a profit and loss statement. A further letter of November 4 identified various problems found in Cactus Delivery's bid worksheet.³

In various submissions from David Walsh, Cactus provided a corporate taxpayer identification number; a copy of the minutes of a September 8, 1997, stockholders and directors meeting attended by Greg Cremer and Douglas Cremer, which stated that "stock will be issued" to "Greg Cremer 49%, David Walsh [sic] 41%, and Douglas Cremer 10%" and which established Greg Cremer as Chairman and President and David Walsh as Secretary; and a PS Form 5472, Pre-Award Questionnaire, dated November 10, 1997, which describes the past postal contracting activities of Messrs. Cremer and Mr. Walsh in response to questions about past experience of the corporation or its officers, states "none" with respect to the postal employment of any majority stockholder's or corporate officer's spouse, minor child, etc., and lists assets in excess of \$1 million, subject to liabilities of slightly more than \$200,000. Some of the listed assets, notably a farm and a home, appear to be assets of the stockholders, and not of the corporation.

² General policy in that regard is cited in Procurement Manual 1.7.3; Section II.A.1.a. and b. of PS Form 7469, incorporated into the solicitation here, set out the prohibition:

1. Persons ineligible to become Contractors:
 - a. Employees of the U.S. Postal Service or members of their immediate families. "Immediate family" means spouse, minor child or children, and other individuals related to the employee by blood who are residents of the employee's household.
 - b. Business organizations substantially owned or controlled by Postal Service employees or their immediate families.

³ That letter noted the bidder's need to pay its hired drivers wages and benefits consistent with the Department of Labor Service Contract Act wage determination contained in the solicitation. Those wages (\$10.21 per hour) and benefits (\$3.06 per hour), over the 1,339 annual estimated hours set out in the contract require payments of \$17,768, almost all of the corporation's \$18,921 bid. Since there is no basis for exemption from the Act's requirements for wages paid to shareholders, directors, or officers who are performing as service employees (*Spick & Span Maintenance Company, Inc.*, P.S. Protest No. 87-122, February 9, 1988), the corporation's financial resources are of particular significance in view of the amount of its bid. The protest file does not include Cactus Delivery's original worksheet or any modifications to it it may have submitted.

Subsequently, by letter dated December 15, Cactus Delivery was advised that its previous submission had been incomplete, and further information was requested, including "a current balance sheet, and a profit/loss statement for the corporation for the most recent calendar or fiscal year, certified by an independent accountant," and "[o]wnership documentation . . . for the assets listed . . . on the form PS 5472, and all equipment which will be used in the performance of the contract."

David Walsh replied by furnishing a copy of the firm's articles of incorporation, showing its directors as David Walsh and Greg Cremer, and a letter dated January 6, 1998, which included the following:

[A]s per our conversation concerning financial responsibility for us to be able to operate for 2 or 3 months without funding, I would like to point out that I have already done that since I was not paid for 3 months because of the paperwork problem when I started the emergency bid.⁴ I should think that this should provide that we can operate the company in a financially responsible way.

* * *

Your request for a current balance sheet for Cactus Delivery is not possible to include as Cactus Delivery is a new company just formed and has no profit and loss statement or current balance sheet . . . [T]he company is like any new company and depends on the assets and financial responsibility of the shareholders[.] I have already included the assets of the stockholders and feel that they are more than adequate to operate a[n] 18,000 dollar a year contract as we have proven that we have in actuality been running the contract for several months now [.]

* * *

[T]he assets [of the company] are currently held by the stockholders and the vehicle has not been purchased for the contract as of yet[. When the contract is awarded we will be able to provide you with the ownership documentation.

⁴ In November, 1997, an emergency contract for the route had been awarded to David Walsh as an individual. Mr. Walsh also bid on this solicitation as an individual; that bid was the third lowest bid received.

The letter went on to request "a fact sheet showing the financial standards that a company must meet," and inquired whether contracts had been awarded to newly formed companies in the past.

Following the receipt of this information, the contracting officer concluded that he could not make an affirmative determination of Cactus Delivery's responsibility. The company was informed of this decision by a letter dated February 9 which noted, in the absence of a current balance sheet or profit and loss statement, that "the information you provided does not indicate that the corporation has adequate financial resources to successfully operate the route."

Cactus Delivery received the February 9 letter on February 23. Its protest to the contracting officer, dated February 25, noted its previous request for information about the financial standards a company must meet and recited its understanding that "the financial standings of the stockholders would be sufficient." Seeking reconsideration of the determination of nonresponsibility, Cactus Delivery requested "some guideline as to what you are looking for."

The contracting officer's statement recounted the circumstances relating to his efforts to elicit information about Cactus Delivery's assets as recited above and commented on the corporation's January 6 letter, noting the corporation's failure to identify any corporate assets, and explaining that the corporation's request that its stockholder's assets be considered had been declined because "[t]here was no documentation establishing that shareholder assets had been transferred to or were held by Cactus as a corporate entity, and the shareholders were not separately listed as offerors." The statement also noted that the letter inaccurately asserted that Cactus Delivery was currently operating the emergency contract, since David Walsh was operating the contract as an individual.

Two of the other bidders on the route submitted comments on the protest. Each contended that the vehicle used by Mr. Walsh in the performance of the emergency contract failed to meet the contract requirement for a four wheel drive. One bidder also noted that service on the route was often provided by Douglas Cremer, and questioned his eligibility as a driver by reason of his spouse's employment and whether he was being paid at the rate established by the contract for hired drivers. That bidder also noted the solicitation requirement that a corporate bidder "must be engaged in business other than as a mail transportation contractor in a county traversed by the route or an adjoining county as of the date and time set for bid closing" and questioned whether Cactus Delivery met that requirement. The contracting officer's statement also asserted that Cactus Delivery had failed to demonstrate its performance in this regard.

Although it did not otherwise respond to the contacting officer's statement, in response to this office's inquiry, Cactus Delivery produced a letter from the Wall Street Journal indicating the company's performance of services prior to the date bids were opened, but the letter failed to establish where the services were performed. A further inquiry to the corporation was not answered. Notwithstanding that omission, we reach the merits of the protest, as discussed below.

DISCUSSION

The legal standard by which this office reviews a contracting officer's determination that an offeror is nonresponsible is well settled:

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 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.

One element of responsibility is the requirement that the prospective contractor have "financial resources adequate to perform the contract." FM 3.3.1 b.1.

In determining a corporation's financial resources, the contracting officer may not look to assets other than those of the corporation:

The commingling of corporate assets and liabilities with the individual assets and liabilities of the corporation's owner [in the bidder's "Statement of Assets and Liabilities"] was incorrect. Since any resulting postal contract would be only with the corporation, the Postal Service can look only to it, and not to the its principals. The intentional overstating of corporate resources raises reasonable questions of a bidder's integrity, and their negligent misstatement raises questions of a bidder's competence.

Package Express, Inc., P.S. Protest Nos. 87-57, 87-58, 87-64; July 27, 1987. See also *G. T. Transportation Inc.*, P.S. Protest No. 96-07, June 18, 1996 (a bidder's "financial imprecision may reasonably add support to the conclusion that it does lack the skills necessary to perform the service.")

The contracting officer's determination of Cactus Delivery's nonresponsibility was neither arbitrary nor capricious. The corporation's failure to identify any corporate assets, separate and distinct from the assets of its shareholders, was a sufficient basis for the determination that it lacked the financial capacity to perform.⁵

The protest is denied.

William J. Jones
Senior Counsel
Contract Protests and Policies.

⁵ Ordinarily, when a corporation is formed, it acquires assets from its initial investors, who receive shares of stock in return. Often, these transactions are reflected in corporate documents. In this case, however, the documentation furnished by Cactus Delivery is completely silent with respect to *any* assets held by or pledged to the corporation, or of any consideration given by the stockholders for their shares. The corporation's lack of assets is confirmed by Mr. Walsh's letter of January 6, which also recites the lack of any contractual agreements or understandings by which the corporation might call on its stockholders for additional funding or financial assistance.