

September 9, 1998

P.S. Protest No. 98-15

MIDWEST TRANSIT, INC.

Solicitation No. 150-68-1998

DIGEST

Protest against determination of mail transportation contractor's non-responsibility is denied. Cited instances of contractor's irregularities on other routes provided a reasonable basis for the determination to deny protester the contract award.

DECISION

Midwest Transit, Inc., protests the determination of the contracting officer that it is a nonresponsible offeror with respect to a solicitation for the highway transportation of mail.

Distribution Networks, Allegheny Area Office, issued solicitation 159-68-1998 for the transportation of mail between the Philadelphia Bulk Mail Center and the Buffalo, NY, Processing and Distribution Center (P&DC). Service involved 259 annual trips, comprising approximately 529,000 annual miles and 16,430 annual schedule hours. Bids were due March 26, 1998.

Midwest Transit was the third low bidder on the route.¹ By letter dated May 8, it was advised that it had been found to be a nonresponsible bidder and was no longer being considered for the award because of its failure to perform

¹ The circumstances of the elimination of the two lower bidders from consideration for award do not appear in the record.

to acceptable levels on three existing contracts: Highway Contract Route (HCR) 442FT, Akron, OH, P&DC to Indianapolis, IN, Hub and Spoke Project (HASP); HCR 190ZU, Philadelphia, PA, P&DC to Indianapolis HASP; and HCR 150AE, Pittsburgh, PA, P&DC to Southeast Area HASP.

By letter furnished to the Allegheny Area on May 20, Midwest Transit protested the determination of its nonresponsibility.² The protest noted that it holds approximately 100 postal mail transportation contracts with an on-time performance record of 98.79%.³ The protest contends that the problems associated with the cited Akron contract were attributable to a driver since terminated, and that subsequent to the driver's replacement, an additional trip had been added to the contract. The problems on the Pittsburgh contract were similarly attributed to a departed driver, and on-time performance is now said to be 100%. (The protester states that this contract was the subject of a conference in April, at which time it complained that irregularities occurring as early as August, 1997, were being considered long after the fact.) With respect to the Philadelphia contract, the protester asserts an absence of service problems, with not "even an informal conference" on that route, involving 17 daily trips.

Responding to the protest, the contracting officer has detailed the chargeable irregularities (recorded on PS Forms 5500, Contract Route Irregularity Report) on the three routes. The contracting officer states that fifty-four chargeable irregularities were issued on the Akron route between September 27, 1997, and April 9, 1998; that fourteen chargeable irregularities were issued on the Pittsburgh route between August 8, 1997, and April 1, 1998; and that twenty chargeable irregularities were issued the Philadelphia route between September 20, 1997, and January 28, 1998; and that those irregularities "in the absence of convincing evidence of successful corrective action" provided the basis for his determination of Midwest Transit's nonresponsibility.

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

² The protest was said to be an "appeal to the next high[er] level of contracting authority," an action available with respect to certain actions taken in the course of administering a mail transportation contract, but not available with respect to a determination in the course of contract award. The contracting officer considered the letter to be a protest and forwarded it to this office for consideration as Purchasing Manual (PM) 3.6.6.c.1.(a) allows.

³ In response to a pre-award questionnaire, Midwest Transit had identified 128 postal contracts in effect as of February 18.

DISCUSSION

The legal standard by which this office reviews a contracting officer's determination that a bidder or 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.

Bill Cooper/Ray Cooper LLP, P.S. Protest No. 95-14, July 25, 1995, citing *Jeff Talano*, P.S. Protest No. 94-42, January 26, 1995, and *Todd's Letter Carriers, Inc.*, P.S. Protest Nos. 92-39; 92-40; 92-41, October 21, 1992.

"To be determined responsible, a contractor must . . . [h]ave a good performance record" Procurement Manual 3.3.1 b.⁴

In the instant case, the protester appears not to dispute that the cited irregularities occurred on the specified contracts, but to suggest that they are not relevant to the determination of its present responsibility either because they resulted from instances since corrected or which are otherwise unimportant given the extent of the contractor's other performance for the Postal Service.

Review of the irregularity reports which accompanied the contracting officer's statement established that the contractor was responsible for numerous delays arising under the three contracts, and that the incidents are closely related in time to the contract to be awarded.⁵

Further, the protester's suggestions why the cited instances should not be considered are either inconsistent with the record or unpersuasive. For example, several drivers, not one, were identified in the Akron and Pittsburgh irregularities, and if service im-

⁴ This contract was solicited under the procedures of the Procurement Manual, Pub. 41, the predecessor to the Purchasing Manual, as Purchasing Manual Transmittal Letter 1 allowed.

⁵ Not all the Forms 5500 cited by the contracting officer were included as attachments to the contracting officer's statement. The record includes 20 Forms 5500 on the Akron route; a summary of three Forms 5500 issued on the Philadelphia route during January, 1998, and 15 Forms 5500 on the Pittsburgh route.

proved on the latter route only after a driver quit, it does not reflect on the contractor's remedial actions. Similarly, that a trip was added to the Akron route may reflect less on the nature of the contractor's service than on other exigencies, and irregularities short of those which occasion a conference may still be considered in evaluating a contractor's past performance. While the record indicates that Midwest Transit operates a large number of postal contracts, that fact, by itself, does not preclude contracting personnel from taking specific instances of poor performance into account.

In short, we cannot conclude on this record that the contracting officer acted arbitrarily or without a reasonable basis in finding the contractor nonresponsible in this instance.

The protest is denied.

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Contract Protests and Policies