

**February 3, 1999**

**P.S. Protest Nos. 98-27; 98-30; 98-32**

**CONNER TRUCKING,  
M. C. TISBE TRUCKING,  
PRIORITY EXPRESS, INC.**

**Solicitation 948-54-98**

**DIGEST**

Protests of three offerors on solicitation for highway mail transportation service are sustained. Determinations that offerors were not capable based on their failure to supply specific information were erroneous because solicitation did not require that the omitted information be provided. Matter is remanded for a new determination of capability.

**DECISION**

Donald T. Conner, doing business as Conner Trucking; Lorna Tisbe, doing business as M. C. Tisbe Trucking; and Priority Express, Inc., each protest their failure to receive award under a solicitation for the highway transportation of mail.

Distribution Networks, Pacific Area, issued solicitation 948-54-98 seeking offers for mail transportation service between the Bakersfield, CA, Processing and Distribution Center and various postal stations and branches in the Bakersfield area. The solicitation contemplated service comprising 225,583 annual schedule miles and 18,299 annual schedule hours using at least seven 1300 cubic foot vans.

Section M.1 of the solicitation discussed the basis for award, in part, as follows:

**M.1 GENERAL**

Offerors are encouraged to submit their best offers both whether within or outside the service requirements specified in Section B, Statement of Work,

and Specifications (the “service requirements”). Offers will be evaluated in the following way:

- a. First consideration will be given to proposals which meet all of the service requirements specified. If one or more proposals offer service that meets the service requirements, award will be made to the low, responsible offeror. However, if no fully compliant offer is received, or the only offer or offers are excessive in price, no award will be made, and the procedure outlined in M.I.b. will be followed.
- b. If no award can be made under M.I.a., the contracting officer will reevaluate the proposals received to determine the extent to which they deviate from the service requirements. Proposals will be more favorably considered to the extent that they demonstrate a high degree of compliance with the service requirements at a reasonable price. The evaluation process specified in M.2, Evaluation of Technical Management Information, will be used to evaluate technical information. A proposal that offers an unrealistic level of service or a level of service at an unrealistic price will be downgraded. Award will be made to the responsible offeror who proposes the best value — i.e., the best combination of price and service for the service requirements. Award will not necessarily be made to the offeror who provides the best service or to the offeror who offers the lowest price. In addition, the Postal Service reserves the right to reject any and all offers that are determined to be excessive in price.

M.2. set out the three evaluation factors, in descending order of importance, as past performance, schedule, and type of equipment and capacity.

Section J of the solicitation discussed various aspects of the contents of offers. J.2. d., Basis of Award, stated: “The Postal Service will award a contract resulting from this solicitation to the responsible offeror who submits the combination of evaluation factors stated [in Section M], most advantageous to the Postal Service . . . . To be eligible for award, the successful offeror also must be determined ‘responsible’ pursuant to the USPS Purchasing Manual.”

J.4., Information that Must be Provided, directed offerors to complete Form 7405, Transportation Services Proposal and Contract; a cost worksheet (Form 7468-A); and Form 7319-C, Representations and Certifications; and, as to the technical/management proposals, to provide “the following technical information . . . : (1) The required route and schedule, and any proposed deviations, (2) The vehicle types(s) to be used, (3) The capacity for mail of the proposed vehicles/trailers.” It also provided: “Prior to

contact award, the contracting officer may require any offeror to submit financial data or other information sufficient to establish the responsibility of the offeror.”

The solicitation package included a copy of PS Form 5472, Pre-Award Questionnaire and Assets and Liability Statement, which included space for the offeror (described on the form as the “bidder”) to provide various items of information including its organization; its other business ventures (and, if it had been in business less than three years, the ventures of its owners, partners, or officers); the equipment it proposed to use and how it would be acquired; the employees to be have access to the mail and whether they had previously been screened for such access; and descriptions of the offeror’s assets and liabilities.

The contracting officer advises that thirty-one proposals were received in response to the solicitation, and that after the eight lowest offerors were found to be nonresponsible, award was made to Ramon Lorico at an annual rate of \$496,488. Mr. Conner, Ms. Tisbe, and Priority Express, who each offered a lower price than Mr. Lorico<sup>1</sup> submitted protests following their receipt of the notice of award.<sup>2</sup>

Mr. Conner’s protest notes that he has more than 20 year’s experience handling mail, but never as a sole contractor, that he submitted two proposals,<sup>3</sup> each lower than the awarded price, that although he completed the forms correctly, but that he was never contacted before the award.

Ms. Tisbe’s protest notes that she was discriminated against because although she is “a qualified contractor with sufficient means to perform the contract and a proven record, her bid was never considered,” and that the contracting officer advised her that he didn’t consider her low offer because she had also submitted a higher offer.<sup>4</sup>

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<sup>1</sup> Since those prices were not disclosed in the course of award, they are not recited here.

<sup>2</sup> Purchasing Manual (PM) 4.2.7.a. identifies five items which are to be included in a notice of contract award. The notice of award here provided the first three (the number of proposals received, the name and address of the awardee, and the amount of the award), but it omitted the last two (a statement that award was made without discussions (as was the case) and “a brief rationale relating the award to the selection criteria”). PM 4.2.7.b. specifically requires that the notice of award disclose “the actual basis of the award.”

<sup>3</sup> One proposal was in Mr. Conner’s name; the other was in the name of Conner Trucking, which does not appear to be a separate entity from Mr. Conner. According to the contracting officer, he orally advised Mr. Conner of his view that his submission of “multiple bids [*sic*], without explanation of the different contingencies that they represented, suggested that he was not fully aware of the nature and the extent of the expenses he could expect to encounter in servicing a route of [this] size and complexity.”

<sup>4</sup> Ms. Tisbe had submitted two offers, both in the name of M. C. Tisbe Trucking; only the lower was less than Mr. Lorico’s offer. The contracting officer had disavowed any such theory in the course of the protest.

Priority Express's protest notes that it is a woman-owned company that holds "one small contract," that it was discriminated against by the contracting officer "because he assumed [it] could not handle this magnitude of a contract."<sup>5</sup>

The contracting officer's statement on Mr. Conner's protest notes that solicitation section M.1.b recites that award would be made on the basis of best value and not necessarily to the offeror with the lowest price and that Section M.2 set out the factors to be used in evaluating an offeror's service capability, of which past performance was the most important, and that Purchasing Manual (PM) 2.1.7.c.2 notes that "[a] company . . . that has performed well on previous contracts is likely to perform well on similar contracts in the future." Further, he notes that the Purchasing Manual uses the term "supplier capability" for what previously was known as "supplier responsibility," and that he could not make an affirmative determination of Mr. Conner's responsibility "[b]ased on the information supplied by the protester, I was unable to establish that he had any record of past performance on which to build any . . . future expectations [of successful future performance]."

The contracting officer also concluded that Mr. Conner lacked adequate financial resources to perform because Mr. Conner had provided "no financial or bank statements . . . and no other banking or other financial institution information." Finally, because Mr. Conner was not a current mail transportation contractor, and only he of the several potential employees he identified "had been screened by the Postal Service for access to the Mails," the contracting officer concluded that he "could not determine with reasonable certainty that he had sufficient manpower or operational capacity to meet the delivery schedule." The contracting officer's statement goes on to explain the basis on which Mr. Lorico was found to be responsible. Contract performance has been postponed pending resolution of this protest.

In a supplement to his statement, the contracting officer amplified his explanation of the evaluation of Mr. Conner's offer. He asserts that the offer "was not rejected for failure to provide any additional information" after the offer was received, but for "failure to provide information that should have been included with his proposal," noting that the solicitation provided for the possibility of award without discussions, and that Mr. Conner's proposal, as submitted, lacked sufficient information to satisfy the contracting officer that the offeror had sufficient capability.

The contracting officer's statement on the other two protests recite points similar to those asserted as to Mr. Connor's protest. Specifically, he asserts that the offerors' failure to provide "any financial data" and "no documents attesting to [their] financial capability", and his inability to determine, from the information provided, "any record of

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<sup>5</sup> Cindie Duncan, who signed Priority Express' offer, also submitted a higher offer in her own name.

past performance” precluded an affirmative determination of responsibility in each case.<sup>6</sup>

None of the protesters responded to the contracting officer’s statement.

## **DISCUSSION**

As the contracting officer’s statement reflects, although the solicitation makes reference to the determination of offerors’ responsibility, that term is no longer current.

[U]nder the Postal Service’s current purchasing regulation, the correct term is “capability.” Supplier capability is a supplier-specific evaluation factor which is “evaluated in order to determine a supplier’s ability to perform upon award.” Purchasing Manual (PM) 2.1.7.c.3.(a) While the key elements of supplier capability, set out at PM 2.1.7.c.3.(b), are similar to the key elements of responsibility as defined in the Postal Service’s previous purchasing regulations (see, e.g., Procurement Manual (Pub. 41) 3.3.1.b.), the two terms differ in that capability is considered and established in the supplier-selection process (PM 2.1.5), while responsibility was considered and determined separately from the evaluation of offers prior to contract award (Pub. 41 3.3.1).

*RAF Technologies, Inc.*, P.S. Protest No. 98-24, January 11, 1999.

Although the PM states that both of the supplier-specific performance evaluation factors, past performance and capability, are to be evaluated during the purchasing process (PM 2.1.7.c. 1.; 2.1.7.d.; where price is the determining factor, “past performance and supplier capability should be reexamined before awarding the contract”), this solicitation apparently contemplated the consideration of the two factors in different circumstances. Capacity was to be considered with respect to offers which otherwise fully met the solicitation’s requirements (M.1.a.) and as to which only price and capability were to be considered, while past performance was to be a factor in evaluating offers which did not fully meet the solicitation’s service requirements (M.1.b.). Because there is no indication that any of the three protesters took exception to the service requirements, the evaluation factors set out at M.2, which related only to evaluation under M.1.b., never came into play.

PM 2.1.7. c.3.(c) describes various sources of information relevant to the determination of a supplier’s capability. They include internal “records and experience data, including the knowledge of other contracting officers . . .”; “the supplier’s proposal information, business profile, financial data, . . . [and] questionnaire replies”; and “[s]ubcontractors, customers, financial institutions, and government agencies who have done business

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<sup>6</sup> Neither protester completed the pre-award questionnaire included in the solicitation.

with the supplier.” These sources are similar to those which 3.3.1. e.3. of Pub. 41 previously identified as sources of information about responsibility. If these sources are not sufficient, pre-award surveys may be used in determining capability. PM 2.1.7. c.3.(d).

“The supplier must establish its current capability” (PM 2.1.7.c.3.(a)), and a contracting officer may properly draw a negative inference from a supplier’s failure to provide information concerning its capability when that information is requested.<sup>7</sup> However, in this instance the solicitation did not seek the information that the contracting officer faults the protesters for failing to supply. Expecting an offeror to supply information which has not been requested “place[s] too much of the burden of proving his [capability] on the [offeror] and taints the . . . determination [of lack of capability]. *Robin P. McGinnis*, P.S. Protest No. 92-04, March 25, 1992 (as to the similar determination of responsibility).

As discussed above, Section J. of the solicitation directed offerors to provide only limited information, none of which related to the offeror’s past performance or its finances. None of the forms specifically referenced in J.4. of the solicitation request that information, nor did that provision require it as part of the “technical information” which was sought.

The only place that past performance and financial information was requested was on the pre-award questionnaire. While that form was listed as an attachment in section I. of the solicitation, nothing else in the solicitation directed offerors to complete it or warned them of the consequences of failing to do so.<sup>8</sup> Given the solicitation’s failure to indicate that the form was to be completed, together with its indication that financial information and other information necessary for the determination of an offeror’s responsibility (*i.e.*, capability) might be the subject of the contracting officer’s inquiry after offers were received but prior to contract award, it was improper for the contracting officer

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<sup>7</sup> See, *e.g.*, *Express by B & M*, P.S. Protest No. 91-02, February 12, 1991:

[A]lthough the contracting officer cannot place the entire burden of establishing responsibility on the prospective contractor, a bidder's failure to provide information uniquely within its purview justifies a finding of nonresponsibility if the information available to the contracting officer from other sources is insufficient to affirmatively establish the bidder's responsibility. [Footnote omitted.]

<sup>8</sup> Historically, Form 5472 has been used to determine the responsibility of bidders on formally advertised mail transportation contracts following receipt and opening of bids when one or more of the low bidders (but usually not all the bidders) were asked to complete it. See, *e.g.*, *Desiree Dais*, P.S. Protest No. 94-55, February 7, 1995.

to reject these offers solely for the offeror's failure to provide evidence of their financial or other capability.<sup>9</sup>

A finding of capability is a mandatory requirement prior to the award of a contract. However, it is not the function of this office to make that determination, which is properly the discretionary judgement of the contracting officer. Accordingly, the matter is remanded to the contracting officer to determine whether the protesters are capable and otherwise eligible for award. In making his determination, the contracting officer is to rely on all the information available to him, including information that may be obtained from the offerors and the other sources of information discussed at PM 2.1.7.c.3. See, e.g., as to the similar determination of responsibility, *RKM Construction Company, Inc.*, P.S. Protest No 94-04, March 18, 1994, quoting *L.P. Fleming, Jr. Hauling, Inc.*, P.S. Protest No. 83-64, December 19, 1983.

The protests are sustained.

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Contract Protests and Policies

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<sup>9</sup> Further, the financial information that the contracting officer faults the offerors for failing to provide extends beyond that requested on Form 5472. While that form includes a statement of assets and liabilities, it does not solicit any information about "financial or bank statements" or "banking or financial institution information" which the contracting officer believes should have been provided.