March 19, 1999

P.S. Protest No. 98-34

VICTOR PARTNERS

Solicitation No. 980-122-98

DIGEST

Protest of determination of partnership's lack of capability is denied; concerns about its capability arising out of failure to allocate wages for hired drivers and from the termination for default of other contracts involving the partnership's principal partner was not arbitrary or capricious. Assumptions about possible consequences of ongoing Department of Labor inquiry into possible wage violations did not, however, support the determination.

DECISION

Victor Partners protests its failure to receive award of a highway transportation contract.

The Seattle Branch, Western Area Distribution Networks, issued solicitation 980-122-98 for service between Idaho Falls, ID, and Victor, ID. Five proposals were received in response to the solicitation, of which the offer of Victor Partners was second low. After the lowest offeror withdrew its proposal, Victor Partners' proposal was in line for consideration.

The Seattle Branch wrote to William Skinner,[1] who had signed the partners' offer, seeking clarification of various matters concerning the allocation of costs on the worksheet which accompanied its offer, noting, particularly, that all wage related costs were shown on the line for "Contractor's wages, personal driving or supervision." The letter set out the Branch's assumption "that you plan to run this route yourself since

[1] Mr. Skinner was the partner's principal contact with the Postal Service. References herein to "Mr. Skinner" refer to William Skinner, not Dennis Skinner, another member of the partnership.

you failed to include sufficient money to hire drivers. . . . You are reminded that you are required to pay hired drivers in accordance with the [Service Contract Act] Wage Determination issued by the Department of Labor (DOL). . . . It is our understanding that the Department of Labor maintains that only one (1) partner is exempt from [the requirements imposed by the] Wage Determination." Victor Partners was given the opportunity to realign its costs on the worksheet.

Mr. Skinner replied to the Branch's request for additional information. He did not address the concern expressed about hired driver's wages, but indicated that William Skinner would perform 861 of the contracts' 1661 annual hours, and that the other two partners would perform 200 and 600 annual hours, respectively. A new worksheet was submitted which, like its original worksheet, provided the same figure for driver compensation as "contractor's wages" at an annual rate about two-thirds of the hourly rate which the Branch calculated that the DOL wage determination required.

Mr. Skinner is or has been a member of numerous other partnerships holding contracts with the Postal Service, including two Oregon contracts that had been terminated for default in late 1997.[2] The Branch asked the partnership to explain the circumstances of those defaults and to explain how similar defaults would be prevented here. Mr. Skinner responded to that letter noting differences in the service required and the availability of personnel.

On October 30, 1998, the contracting officer awarded the contract for the route to the third low offeror, L-J Trucking, at a price slightly higher that Victor Partners' offer. Victor Partners requested a debriefing on the award. A memorandum of the debriefing recited various contacts of investigators of the Department of Labor with the Seattle Branch concerning various of Mr. Skinner's partnerships and their payment of hired drivers' wages, and the conclusion of the Branch that "[a]lthough DOL has not provided any final decisions[,] the liabilities associated with [Mr. Skinner's] current contracts for any back pay or penalties would jeopardize his ability to conduct business." Consequently, the Branch had concluded that "it was not in the best interest of the [Postal Service] to award [the contract] to Victor Partners."

In the debriefing, Mr. Skinner acknowledged that DOL investigators had requested information from him concerning current contract work hours, but he characterized the matter as "a complaint by a disgruntled partner."

Victor Partners' protest objects to the Seattle Branch's reliance on the oral information from the Department of Labor investigator. While noting its own communications with the investigator, the protester contends that DOL had not given it any written notice of

[2] The contracting officer's report lists 25 contracts held by Mr. Skinner or his partnerships.

the investigation or made any written demands, nor had it advised "that partnerships are not exempt from the [Service Contract] Act."

The protest noted that the Branch had been aware of DOL's interest in Mr. Skinner's partnerships since at least August, 1997, while awarding Mr. Skinner's partnerships two contracts in October of that year, and that Victor Partners had been operating the Idaho Falls route and another route in Tetonia, ID, under emergency contracts since July, 1998, which it took as "administrative approval for the means in which Victor Partners operates." It contends that it was "denied due process," and that "had [it] been given an opportunity to describe [its] position," it would have received the contract.

The contracting officer's statement recites various circumstances involving Mr. Skinner and his partnerships, including the August,1997, referral of various wage complaints to the Department of Labor; the telephonic advice of the DOL investigator in May, 1998, "that all of the 'partners' on Mr. Sinner's routes were considered service contract employees"; and the investigator's later reiteration of that point. The contracting officer recites his conclusion that Victor Partners was planning to operate as had Mr. Skinner's other partnerships, and sought confirmation from the DOL that such operation would be inconsistent with the Service Contract Act. According to the contracting officer such a confirmation was again provided telephonically by the DOL investigator:

> As a result of our discussions with the US-DOL, the cost estimate sheets provided by Victor Partners (again reflecting proposed wages/ benefits less than those prescribed by the US-DOL), and the default termination of two other partnerships in which Mr. Skinner was a principal, I determined that Victor Partners was not a responsible contractor, and award to it was not in the best interests of the Postal Service.

The statement recited the contracting officer's concern about the potential back wages which the DOL "will be seeking," which the contracting officer estimated as exceeding $150,000. He concluded that that "liability would likely jeopardize all the contracts operated by Mr. Skinner."

With respect to the two emergency contracts awarded to Victor Partners, the contracting officer notes that those contracts could be quickly terminated on notice, unlike the regular contract here solicited, which was for a longer period and with fewer rights of termination, requiring "a greater level of scrutiny regarding the contractor's ability (and intention) to perform . . . ." In that regard, the contracting officer noted Mr. Skinner's previously defaulted contracts as "relevant to my award determination."

The protester responded to the contracting officer's report. The protester restates its claim that it was denied due process, contending that the contracting officer either "should have involved us in his decision process" with respect to his questioning of

the partnership's compliance with the Service Contract Act or should have waited for written guidance from the Department of Labor concerning that matter.

The protester sets forth its understanding of the Service Contract Act and an explanation how its offer was consistent with the Act. It also offers its explanation of the circumstances which occasioned the default termination of the two contracts by its related partnerships, asserted that while the "root cause" of each default was a failure of backup coverage, a "primary contributing cause" in each case was "turmoil over the application of the Act" which it elsewhere characterizes as a "mutiny . . . over the applicability of the Act." The protester takes exception to the consideration of those partnership's defaults with respect to this partnership, asserting that "[i]t is unfair and overbearing to penalize an enterprise for the perceived actions of an legally independent and unrelated entity."

The response also objects to the characterization of the performance of Mr. Skinner's partnerships on its numerous postal contracts, asserting that, with the exception of the two defaulted routes, the routes are being run "in exemplary manners," as reflected by the fact that the Postal Service has offered to renew them.

The contracting officer subsequently provided this office with a December, 1998 letter from the Department of Labor concerning its investigation of Mr. Skinner's contracts which recited the application of the Act: "[I]f a person is engaged in performing any work called for under a covered contract, such person must be paid the wage and fringe benefits provided under the Act, irrespective of any alleged 'independent contractor' or non-employment relationship." The letter included the determination that "this contractor [*i.e.*, Mr. Skinner] has been found to owe nine employees $7,072 in back wages" and that, in view of his agreement "to comply in the future," DOL would close its file upon evidence that the back wages had been paid.

The contracting officer submitted comments contending that the DOL supported his determination, because it established that Mr. Skinner's partnerships had not been in compliance with the Service Contract Act and that the noncompliance extended beyond one or two disaffected partners. The contracting officer suggests that while Victor Partners may be eligible for future contract awards by reason of its agreement with DOL, the earlier determination should be sustained on the basis of the information which was available when it was made.

DISCUSSION

As noted above, the contracting officer found that Victor Partners was not responsible for three somewhat interrelated reasons: Concern about the partnership's allocation of costs for hired drivers' wages, the possible liability of the partnership's principal partner for underpayment of driver's wages on other contracts, and performance problems which had lead to the termination for default of two of that partner's other contracts.

This office's reviews of determinations of responsibility (now known as capability, *see, e.g., RAF Technologies, Inc.*, P.S. Protest No. 98-24, January 11, 1999) are limited:

> The contracting officer's determination of an offeror's [lack of capability] is subject to limited review by this office: A [capability] 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 [not capable], 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 (Standard stated as to determinations of nonresponsibility; internal quotations and citations omitted.).

The protester's contention that the partnership was denied due process by the contracting officer's failure to discuss with it its concerns about its compliance with the Service Contract Act is both without merit and factually incorrect.

The concept of due process is not applicable to the administrative determination of capability.

> [T]here is no requirement that an offeror be advised of a determination of nonresponsibility before awarding a contract.
>
> > [S]ince responsibility determinations are administrative in nature, they do not require the procedural due process, such as notice and an opportunity to comment, which is otherwise necessary in judicial proceedings. Accordingly, a contracting officer may base a determination of nonresponsibility upon the evidence of record without affording bidders an opportunity to explain or otherwise defend against the evidence, and there is no requirement that bidders be advised of the determination in advance of contract award.

Doric Noble, Inc., supra, citing Lithographic Publications, Inc., Comp. Gen. Dec. B-217263, March 27, 1985, 85-1 CPD ¶ 357, citations omitted.

In any event, the contracting officer specifically raised the issue of the allocation of the offeror's hired driver costs, to which the offeror declined to respond. While the protester subsequently offered an explanation in response to the contracting officer's statement, it cannot complain of the contracting officer's failure to consider that explanation earlier, since it failed to make it when was afforded the opportunity.

Similarly, the protester is incorrect in asserting that the performance of unrelated entities may not be considered in determining an entity's capability. It is not unreasonable to consider the performance of other partnerships in which this partnership's principal partner has had a similar relationship. *Cf. Jeff Talano*, P.S. Protest No. 94-54, January 26, 1995 (in evaluating responsibility of partnership, it was reasonable to consider the performance of a prior contract in the name of the father of the partnership's principal partner on which that partner performed the service); *see also Todd's Letter Carriers, Inc.*, P.S. Protest Nos. 92-39, -40, -41; October 21, 1992 (reasonable to consider performance of new corporation's principal under contracts operated as sole proprietor).

The contracting officer's determination that the partnership lacked capability because of concerns about the reasonableness of its price in view of its Service Contract Act obligations, and performance problems which had led to termination of contracts involving the principal partner's other partnerships was not arbitrary or capricious or unreasonably based. Accordingly, the protest must be denied.

In reaching that conclusion, however, we do not rely on the contracting officer's concerns arising out of the ongoing investigating of Mr. Skinner's partnerships and his estimate of the potential liability that might result from it. (As the subsequent DOL letter indicated, that estimate turned out to be substantially incorrect.)

Bill Cooper/Ray Cooper LLP, P.S. Protest No. 95-14, July 25, 1995, involved the Seattle Branch's determination of a highway transportation bidder's nonresponsibility based in part on a pending DOL investigation of wage violations by a construction company owned by one of the two partners. While the decision upheld the determination that the bidder was nonresponsible, it explicitly noted:

> [W]e do not rely on the existence of pending DOL investigations into possible violations of DOL regulations by Bill Cooper's company, Blue Top Construction, or the contracting officer's suspicions and speculations about those investigations and their effect on the Coopers' partnership. *See Spencer Contracting Company, Inc*., P.S. Protest No. 87-78, September 8, 1987 (The contracting officer improperly "relied on assertions of unspecified statutory violations, lacking documentary support, and a report of an ongoing, and therefore presumably incomplete, investigation of other violations" in finding a bidder nonresponsible.).

We reach a similar conclusion here.

The protest is denied.

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Contract Protests and Policies