

March 31, 1999

P.S. Protest Nos. 98-36; 98-38

TLC

Solicitation No. 632-296-98; 632-311-98

DIGEST

Protest of determinations of offeror's lack of capability for award of two highway mail transportation contracts is denied. Record of offeror's past poor performance supported determination, notwithstanding offeror's claims to the contrary.

DECISION

Todd Snyder, a highway mail transportation contractor trading as TLC, protests his failure to receive award of two contracts under solicitations issued by Distribution Networks, Midwest Area.

Solicitation 632-296-98 (-296) sought service on Highway Contract Route (HCR) 53014, for several daily trips between the Milwaukee, WI, and the Madison, WI, Processing and Distribution Centers (P&DC). Although each trip comprised only 75 miles, the estimated annual mileage for the contract was 707,995 miles, requiring 18,692 annual workhours. The contractor was to supply at least four tractors and seven trailers.

Solicitation 632-311-98 (-311) sought service on HCR 530LO, one round trip daily, six days a week, between the Milwaukee P&DC and the Grand Rapids, MI, Processing Annex, a one-way distance of 306 miles, comprising 187,927 estimated annual miles and 5,092 annual workhours, and requiring two tractors and two trailers.

Each solicitation contemplated award to the "low, responsible offeror" offering the to meet "all of the service requirements specified," but, if no offer met all the service requirements, award would be made on the basis of a trade-off between the service offered and price. Offers on the two solicitations were due on September 28 and Octo-

ber 11, respectively. Although TLC was not the lowest offeror on either solicitation, the lower offerors were eliminated from the competition, placing TLC's offers in consideration for award.

On November 6, a pre-award conference was held between Mr. Snyder and representatives of Midwest Distribution Networks, including the acting contracting officer, with respect to solicitation –296, at which concerns were expressed about Mr. Snyder's "responsiveness to paperwork, and his failure to respond to PS Forms 5500, Contract Route Irregularity Report[s], and the poor condition of equipment utilized on other TLC mail routes." Specific concern was expressed about TLC's failure to respond to service change paperwork on HCR 53056, Milwaukee – Waukesha, and to forms 5500 for equipment problems on HCR 53011, Madison – Oshkosh. Concern was also expressed about Mr. Snyder's unavailability by telephone; calls were not answered in person, and messages left on his voice mail were either not returned or were returned in an untimely manner. At the conference Mr. Snyder responded to those concerns by promising to provide good equipment for the Madison route, and to provide a person to answer his telephone during business hours and a pager number for non-business hours.

After the conference, inquiry was made to other offices concerning TLC's current contract performance. Great Lakes Distribution Networks cited performance problems and problems contacting TLC concerning HCR 60724 Chicago – Cincinnati. Allegheny Distribution Networks advised of communications problems with TLC concerning its HCR 17016, Harrisburg, PA, to Kansas City, MO.

Following those discussions, in late November decisions were made to find TLC nonresponsible and not to award it either contract because of its communications problems, its equipment problems, and its failure to respond to official correspondence. On December 15 and 14, respectively, award was made to Sheehy Mail Contractors on –296 and to Eagle Express Lines, Inc., on –311, each at prices higher than TLC's offers.

TLC's protests contend that the determinations of nonresponsibility are "arbitrary, capricious, [the result of] bias, and not reasonably based on substantial information," citing its recent receipt of other contracts, specifically HCR 53011, Milwaukee – Oshkosh (said to be similar to the Madison route); HCR 531AQ, Milwaukee – Waupaca Publishing; HCR 530L1, Milwaukee – St. Louis (said to be similar to the Grand Rapids route); and HCR 530AS, Milwaukee – Pleasant County. The protest on –296 notes various submissions it made after the pre-award conference responsive to the concerns there discussed.¹

¹ Handwritten notes faxed on November 8 provided information about the trailers it proposed to acquire for the Madison service, asserted that "all outstanding 5500's have been answered and sent

(Footnote continued on next page.)

The protest of –296 recites the oral advice of a Midwest Area transportation specialist in a telephone conversation of October 26 that “he was close to awarding [both] contracts to TLC”; the protest of –311 recites a call from the same specialist that “TLC was in the area of consideration for the contract.” The protests note that the particular specialist subsequently left the Midwest Area and responsibility for the two solicitations was reassigned to another specialist.

The contracting officer’s statements on the two protests recite the facts leading up to the determinations of nonresponsibility set out above. With respect to the specific contracts identified by the protester, the statements note the following:

- HCR 53011. While this route, which was renewed with TLC in July, 1998, is similar in its equipment to –296, it has only about 60% of that route’s annual mileage and hours. The “route has many problems which Mr. Snyder . . . is responsible for correcting.” TLC’s unsatisfactory service on the route was the subject of a November, 1998, formal conference.
- HCRs 531AO and 531AS. These are temporary plant load contracts, substantially smaller than the solicited routes, and not comparable to them.
- HCR 530LI. When this contract was awarded in August, 1998, Midwest DN had information from Milwaukee that TLC’s equipment and service were improving, and was not aware of the performance problems identified by the Great Lakes and Allegheny offices. Thereafter, further problems arose on 53011 that lead to the November formal conference.

The statement on –296 questions the accuracy of the remarks attributed to the Midwest transportation specialist, noting that only the contracting officer decides to award a contract, and further noting that while Mr. Snyder was told at the subsequent pre-award conference that a decision on the award would be made “in the near future,” no promises or statements were made that TLC would receive the award. The statement on –311 does not dispute the specialist’s representation that TLC was within the area of consideration for the Grand Rapids award.

(Continued from previous page.)

in,” recited instructions to office personnel “to answer the phone during normal business hours . . . (. . . subject to availability)” and provided an emergency pager number. A subsequent typed letter faxed on December 15 discussed “changes in policies and procedures to help overall performance,” including “newer trucks and trailers and call[-]in procedures for drivers,” efforts to resolve problems with postal trailer dispatching out of Milwaukee, and asserted that a Milwaukee transportation specialist had said that “he has noticed our efforts to improve service.” (The contracting officer’s statement on –296 asserts that this facsimile cannot be found in the files.)

Each contracting officer's statement concludes with the assertion that each determination of nonresponsibility was reasonably based on substantial information, and notes that such determinations will not be overturned absent a showing that they are arbitrary, capricious, or not supported by substantial evidence, contending that the protester has failed to make such a showing.

The protester submitted comments on the contracting officer's statements on each protest. With respect to the three bases on which TLC was found nonresponsible, it recites as follows:

— Communications problems. The contracting officer's statement includes a favorable reference from the Great Lakes Area that "TLC has improved on their voice mail responses." TLC complains that its contracts do not require that a person answer phone calls, but instead that a contact "be easily accessible in the event of emergencies," a requirement which the pager accomplishes.

— Equipment problems. The protester quotes the contracting officer's reference to Milwaukee's comments of TLC's improvements in the areas of equipment and service, and notes that Milwaukee had inspected a sample trailer for the Madison route, which was said to be "great," and "very nice."

— Failure to respond to official correspondence. The protester reasserts that after the pre-award conference he promptly responded to "all outstanding 5500's," and to the request for a service change.

The protester contends that the formal conference on HCR 53011 was timed and scheduled deliberately and with bias "for the sole purpose of having a basis to deny the award[s]." He criticizes the contracting officer for failing to investigate the circumstances which occasioned the conference or the substance of what was discussed at the conference. The protester contends that the scheduling of a conference implies only "that a problem exists and needs attention," not "contractor failure," and asserts that this conference

Further, he asserts that the fact that neither the Milwaukee administrative official nor the transportation specialist attended the conference demonstrated its insignificance, and contends that the major topic discussed was the errors of the Milwaukee postal dispatchers, in "misaligning our trailers onto routes they were not set up to be on."

The protester restates his October conversation with the transportation specialist, which involved TLC's eligibility for these two routes and a third route (HCR 530EE, Milwaukee – SE Area HASP), which TLC declined.

Finally, the protester's offers phone records to demonstrate transmission of the December 15 letter by facsimile.

DISCUSSION

This office's reviews of determinations of responsibility (now known as capability) 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 will 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.

Victor Partners, P.S. Protest No. 98-34, March 19, 1999, citations and internal quotations omitted.

The contracting officer's decision not to award these contracts to TLC was based on concerns arising out of TLC's past performance. The contracting officer documented instances of TLC's poor past performance, which included instances of the provision of unsatisfactory equipment, unavailability of TLC's management to respond to emergencies, and its failure to respond to official communications. The protester's responses to those concerns include denials that some of the requirements exist; attribution of blame for some of the problems to postal personnel; and, as to the remainder, statements or promises that the conditions either have been or will be corrected. Those responses are not sufficient to require that the contracting officer's decision be overturned.

A contracting officer need not view a contractor's completion of required paperwork and responses to unanswered official communications only after his failures to do so have been called to his attention as indicative of improved performance. Similarly, given that each of the sources contacted (Milwaukee, Great Lakes, and Allegheny) noted problems reaching Mr. Snyder and his representatives with respect to contract performance, a contracting officer need not accept promises of improved communications in the future as necessarily predictive. In this regard, it is not encouraging that a prospective contractor has not assure the availability of personnel to answer telephones during business hours,² and offers only one pager number for availability outside of business hours for routes which include substantial periods of performance in evening, nighttime, and early morning hours.

The protester's reading of the contracting officer's statement and its attachments to suggest that "all . . . communication, paperwork, service, and equipment problems . . .

² The protester's citation to support its claim of improved communication is selective. While Great Lakes did note improvements in TLC's responsiveness to messages left on its voice mail, it went on to note "[the Great Lakes] office rarely gets a live voice when they contact TLC."

have gotten better” since it was awarded the four contracts on which it relies is clearly incorrect. The thrust of the contracting officer’s statement is that at the time of those awards in July and August, TLC’s service was seen as better than it was perceived at the time of the pre-award conference and thereafter.

The contention that the service conference regarding HCR 53011 was contrived for an improper purpose is supported only by surmise, which is far less than the “well-nigh irrefragable proof” which is necessary to overcome the presumption that the government acts in good faith. See, e.g., *Preservation, Inc.*, P.S. Protest No. 95-29, November 30, 1995.

The comments of the transportation specialist prior to the pre-award conference are not significant; he could not and did not bind the contracting officer. That the protester’s December 15 facsimile submission cannot be located is also not significant; its contents added little to its previous submissions and it was sent after award of one of the contracts and coincident with the award of the other.

The protests are denied.

William J. Jones
Senior Counsel
Contract Protests and Policies