

May 25, 1999

P.S. Protest No. 99-09

DONOVAN McCLELLAN

Solicitation No. 150-27-99

DIGEST

Protest of failure to receive award of mail transportation contract is denied. Determination that offeror was not capable was reasonable when offeror could not operate route personally along with other contracts currently held, and route could not otherwise be operated economically.

DECISION

Mr. Donovan McClellan protests his failure to receive award of a mail transportation contract.

Transportation Contracts, Allegheny Area, issued solicitation 150-27-99 for Highway Contract Route (HCR) 166L1, four trips of service between the Altoona, PA, Processing and Distribution Center and Osterburg, PA. The route requires a 600 cubic foot van and involves an estimated 28,715 annual schedule miles and 1,881 estimated annual schedule hours. Solicitation section M 1. a. provided, in part that “[f]irst consideration will be given to proposals which meet all of the service requirements specified. If one or more proposals offers service that meets the service requirements, award will be made to the low, responsible offeror.”¹

Mr. McClellan proposed to operate the route for the annual rate of \$23,129. According to the contracting officer, the route can be economically operated at that rate only by an owner-operator who drives the route himself. In the worksheet accompanying his offer, Mr. McClellan indicated that he intended to operate the route in that fashion. (Op-

¹ “Responsibility” is the term previously used to describe what the current regulations refer to as “capability.” See *RAF Technologies, Inc.*, P.S. Protest No. 98-24, January 11, 1999.

erating the route otherwise, using hired drivers, requires that the drivers receive wages and benefits established by the Department of Labor pursuant to the Service Contract Act; the contracting officer calculates the applicable wages and benefits as \$50,097, far more than Mr. McClellan's offer.)

Mr. McClellan, however, is currently the incumbent contractor on two other routes. HCR 159BG, Johnstown, PA, - Breezewood, PA, involves 1,780 annual schedule hours, and HCR 15932, Johnstown, PA, - Central City, PA involves 1,330 annual hours. The contracting officer advises that it is "at least possible" for an owner-operator to operate those two routes himself, but that when Mr. McClellan did so, service problems arose. According to the contracting officer, "Mr. McClellan has managed to improve his performance by procuring a part time employee to cover some hours, but I have concerns about how he can feasibly maintain wage payments to that employee at the legally authorized rate."

HCR 166L1 would present obvious schedule conflicts with Mr. McClellan's other two contracts. The contracting officer advises that in a telephone conversation subsequent to the submission of his offer, Mr. McClellan said that he wished to operate HCR 166L1 because it was convenient to his home, and that, if awarded the route, he would "give up" one of his other contracts.

Because he concluded that Mr. McClellan could not operate HCR 166L1 in addition to his existing contracts, the contracting officer determined that he was not a capable offeror and rejected his offer for the service. Instead, award was made at a slightly higher rate (\$24,550) to Mr. Max Hershberger, an owner-operator who did not have any other postal contracts.

Mr. McClellan's protest of the rejection of his offer does not discuss his operation of the service in conjunction with his other contracts. Rather, it recites his previous purchase of a van in anticipation of award a route which he did not receive, the particular suitability of the vehicle for that route, and his objection to the award at a higher price than his offer.

The contracting officer's statement on the protest recites the facts set out above, notes Mr. McClellan's legal obligations to perform the contracts he currently holds, whose terms expire in 2000 and 2001, and his concern, in the alternative, that had he undertaken to perform all three contracts, he would pay less than the required Service Contract Act wages to hired drivers on one or more of the contracts.

The protester submitted no comments on the contracting officer's statement.

DISCUSSION

This office's reviews of determinations of . . . 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 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.

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

One element of capability is the ability "to meet the require or proposed delivery schedule, considering all existing commitments . . ." PM 2.1.7 c.3.(b)(2). "The extent to which a bidder's other contract obligations may impact his or her ability to perform new service is a reasonable factor to consider in determining responsibility [now capability]." *Marcy L. Baker*, P.S. Protest No. 94-16 June 24, 1994, citing *Minatee Transportation*, P.S. Protest No. 82-44, November 30, 1982. Given Mr. McClellan's current contracts, it was reasonable for the contracting officer to conclude that Mr. McClellan could not personally operate this route in addition to the others, and that it was not economically feasible for Mr. McClellan to operate the route otherwise. Alternatively, Mr. McClellan had no right to "give up" an existing contract in order to obtain a new one.

The protest is denied.

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