

February 1, 2000

P.S. Protest No. 99-28

W.W. FRY AND SON, INC.

Solicitation No. 150-125-99

DIGEST

Fourth lowest offeror on mail transportation contract lacks standing to challenge determination of low offer's capability, since it would not be in line for award if the protest were to succeed. Further, affirmative determinations of capability are not for review absent evidence of fraud, abuse of discretion, or failure to apply definitive criteria of capability, and record here reflects that determination was not an abuse of discretion.

DECISION

W.W. Fry and Son, Inc., protests the award of a contract for highway mail transportation to Charles I. McClellan Trucking.

On June 14, 1999, Distribution Networks, Allegheny Area, issued solicitation 150-125-99 for "as-needed" plant load service between a major mailer's site in Duncanville, PA, and the Pittsburgh, PA, Bulk Mail Center. Award was to be made on the basis of price. Six offers were received, of which that of McClellan was low. Fry submitted the fourth-lowest offer. The contracting officer awarded the contract to McClellan on September 9.

Fry received a debriefing the award on September 17. Its timely protest was received by this office on September 20. The protest contends that McClellan had previously serviced the Duncanville site unsatisfactorily, and was not dependable or reliable;¹ and that McClellan "has been the subject of an investigation . . . as [a] compan[y]

¹ Enclosed with the protest was a copy of a letter that the mailer had sent to the contracting officer recommending award to Fry, and noting some dissatisfaction with McClellan.

whose accident[s], driver[s] and equipment fall[] on or below national standards.² The protest also suggests an inquiry into McClellan's payment of wages.

The contracting officer's statement describes the process of determining McClellan's capability to perform the route. It notes that both the postal administrative office in Altoona, PA, and the mailer had recalled problems with McClellan's prior performance between February, 1995, and March, 1998, but that neither could "produce any documentation or cite any specific examples." Review of the contract files disclosed three Form 5500 irregularity reports concerning the contractor; one, involving a failure to pick up a load, was refuted by the contractor. The second involved a failure to have a trailer available at the mailer, and occurred when all the trailers required by the contract were in use. The third involved the inability to reach McClellan by telephone, a problem which the contractor has corrected. According to the contractor, some of the problems on McClellan's previous contract were the result of the mailer requiring more service than the contract required.

Solicitation provision B.8., Additional Information, provides at c. as follows:

In order to be awarded a contract, a supplier may not be rated unsatisfactory on the Department of Transportation (DOT) Unsatisfactory Safety Rating Report at that time when the contracting officer makes the determination of responsibility.

According to the contracting officer, McClellan had a "conditional" rating with the Department of Transportation, which did not preclude the award.³

The contracting officer states that he was aware "that McClellan had an issue with the Department of Labor," but inquiry to the Department of Labor indicated that any problems were being resolved to the Department's satisfaction.

The contracting officer noted that McClellan is successfully operating eight other highway contracts, and that its service on this route subsequent to the award has been satisfactory.

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

² The protest referenced a report on NBC's "Dateline" television program on the safety of trucks broadcast in January, 1998, and a local NBC affiliate's newscast asserting that McClellan was "on a list of unsafe trucks compiled" for the Dateline report but noting McClellan's representation that it "has its Department of Transportation certification." A transcript of the Dateline report included on the msnbc.com web site makes no reference to any such list.

³ Under the Federal Motor Carrier Safety Administration procedure, carriers are rated as either Satisfactory, Conditional, or Unsatisfactory. "Conditional safety rating means a motor carrier does not have adequate safety management controls in place to ensure compliance with the safety fitness standard that could result in occurrences listed in Sec. 385.5(a) through (k)." 49 C.F.R. § 385.3.

DISCUSSION

There is an initial question of Fry's standing to challenge the award to McClellan. As previous decisions of this office have noted, "offerors lack standing to protest an award if they are not in line to receive the award if their protest is successful. While such circumstances are most commonly evident in the case of advertised contracts, in which all bids are exposed and the rank order of the bidders is known at the time of bid opening, the rule also is applicable to negotiated procurements such as this, where the protester may be unaware of its relative standing *vis a vis* the successful offeror." *Earth Management Inc.*, P.S. Protest No. 95-43 December 18, 1995 (citation and internal quotation omitted).

The abstract of offers indicates that two other offers lower than Fry's offer were received, and the contracting officer notes that these offerors are presently performing satisfactorily. Accordingly, Fry, which was not next in line for award and has failed to raise any issue about the acceptability of the intervening offeror, lacks standing to protest.

"The well-established rule regarding determinations of responsibility (or, as here, capability),^[4] is that an affirmative determination . . . is a matter within the broad discretion of the contracting officer and is not subject to being overturned by this office in the course of a protest absent fraud, abuse of discretion, or failure to apply definitive responsibility criteria." *RAF Technologies, Inc.*, P.S. Protest No. 98-24, January 11, 1999 (citation and internal quotation omitted).

Applying this standard here, the record affords no basis to overturn the contracting officer's determination that McClellan was capable. The record reflects that issues relevant to the determination such as those raised by the protester were considered in the course of making the determination. The contracting officer did not abuse his discretion in concluding that the information available to him did not justify declining to accept McClellan's low offer.

The protest is dismissed for lack of jurisdiction.

⁴ 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, 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 (Procurement Manual, Pub. 41, 3.3.1).

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