

April 25, 2000

P.S. Protest No. 99-32

WEST-WILSON ENTERPRISE

Solicitation No. 632-286-99

DIGEST

Protest of failure to receive award of highway mail transportation contract is sustained. Where low offeror proposed to provide service as specified, solicitation evaluation scheme did not contemplate consideration of "best value" factors in award decision, and offeror was entitled to award if found capable. While partners' past performance information could be considered in that determination, some of the information relied on was stale, and record did not reflect why offeror was not capable here when it had previously been found capable on another contract upon consideration of the same past performance information.

DECISION

West-Wilson Enterprise, a partnership,¹ protests its failure to receive award of a contract of a mail transportation contract.

Distribution Networks, Midwest Area, St. Louis, MO, issued solicitation 632-286-99 for highway service on HCR 630A5 from the St. Louis Processing and Distribution Center to Catawissa, MO, with various intermediate stops. The route contemplated one daily round trip comprising about 132 miles, with service every day except Christmas and New Years. Section M.1 of the solicitation discussed the basis for award.²

¹ Its offer lists Verna West-Wilson as its 51% majority partner and Paul Wilson as its 49% minority partner. This decision refers to the partnership as "the Wilsons."

² M.1 GENERAL

Four offers were received. Because the contracting office believed all four offers to be higher-priced than prices for comparable routes, each offeror was requested to revise its offer. Although West-Wilson's original offer was not the lowest offer received, the partnership's offer became the lowest offer as revised. Although West-Wilson had submitted the lowest offer, the contracting officer declined to award it the contract. Instead, award was made to William D. Murphy, the incumbent contractor on the route under an emergency contract, whose \$62,050 offer was the second lowest, as revised. The contract was awarded on August 3, with service to begin on August 14.

The protester was advised of the award by a notice of award dated August 30. By letter dated September 9, they requested a written explanation why award was made to a higher-priced offer. The contracting officer replied by letter dated September 16, which included the following:

(Continued from previous page.)

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.

Provision M.2., Evaluation of Technical Management Information, provided in part as follows:

If an evaluation is performed pursuant to M.1.b., the Postal Service will assess each offeror's Technical/Management information to determine (i) the degree to which it offers to meet the solicitation requirements and (ii) its underlying realism.

The factors that will be used in evaluating Technical/Management information are stated below . . . in descending order of importance

- a. Past Performance
- b. Schedule
- c. Type of Equipment and Capacity

As stated to you during a conference held in this office, the Midwest Area emphasizes satisfactory route performance, adherence to schedules, and contractor compliance to contract requirements. Since your company had not previously operated routes in the Midwest Area, this office needs positive performance information on your company before we can consider award of another contract. We felt awarding HCR 633LO, St. Louis P&DC to Jonesburg, MO, demonstrated our desire to give you an opportunity to demonstrate performance in the Midwest Area. HCR 633LO began August 14, 1999, and at this time, we do not have enough information to effectively rate your performance.

During the award process on HCR 633LO, the Western Area informed us of negative prior performance on routes in which you had an interest. This information, and the lack of experience in highway contract routes by the majority owner of West-Wilson Enterprise, contributed to our non-award of HCR 630A5 to you.

The protest takes exception to the evaluation, contending that, by virtue of Mr. Wilson's prior contracting experience, the partnership "should not have been considered as a new contractor." Further, the protest complains of the "subjective" evaluation of Mr. Wilson's performance offered by a Western Area postal employee, the failure to consider countervailing assessments by other postal personnel familiar with that service, and the consideration of a default in 1997 and a debarment which prevented Mr. Wilson from contracting from 1994 to 1997.³ Noting a concern expressed that the offeror not "get too big too fast," the protester contends that it could have operated both this contract and its previously awarded route.

The contracting officer's statement responding to the protest includes the following points:

— Solicitation provision M.1.b. specifically provides that "[a]ward will not necessarily be made to the offeror who provides the best service or to the offeror who offers the lowest price."

— Mr. Wilson had previously performed contracts in Alaska and California as Silver Fox in a joint venture with B&W Trucking.⁴ Postal experience concerning that performance was mixed; B&W defaulted on HCR 92033 in California and

³ The protester contends that the default should not be considered "because a default was only to be held against you for one year," and also since Mr. Wilson's "name was not on the contract." With respect to the debarment, the protester contends that Mr. Wilson was told "that once his three years were up, he would not have to answer to that misdemeanor again."

⁴ The file elsewhere describes the Alaska contracts as operated under the name Wilson and Son or B&W Trucking.

was placed on the GSA debarred list, a former employee's written statement complained of non-payment and equipment problems that Mr. Wilson was advised of but ignored, "numerous Form 5500's were filed regarding performance problems with the California contracts," and Mr. Wilson's credit rating was poor.

— It was appropriate to consider West-Wilson as a new contractor because it had not previously operated any postal contracts, and also to evaluate Mr. Wilson's past performance as "key personnel" of the new partnership.

— The information considered concerning Mr. Wilson's past performance was "objective" and "properly used in determining best value to the Postal Service. It was appropriate to consider his past performance as "the only individual" in the partnership with postal experience.

— There is no prohibition on considering a 1997 default; Purchasing Manual (PM) 2.1.7.c 2.(d) provides that "review of past performance should generally be limited to contracts completed within the last 3 years, . . . longer periods may be reviewed when . . . appropriate."

— No one at the meeting with the Wilsons recalls making the ". . . too big too fast" statement; the partnership was advised that satisfactory performance on the Jonesburg route would be needed "in order to be considered for other contracts."

— The determination that Mr. Murphy "provided the best value to the Postal Service" was neither arbitrary nor capricious; the protest is without merit.

The protester did not reply to the contracting officer's statement.

DISCUSSION

To the extent that the contracting officer justifies the award to Mr. Murphy on a comparative evaluation of the offers pursuant to subparagraph b. of the evaluation scheme at solicitation provision M.1, the justification is misplaced. Comparative evaluation pursuant to b. is available only when “no award can be made under [subparagraph] a.” (that is, when no proposals received “meet all of the service requirements”). In this instance, West-Wilson, the low offeror, took no exception to the solicitation’s service requirements. As a result, it was entitled to the award unless it was not a “responsible offeror,” and there was no opportunity for the contracting officer to perform any sort of “best value” analysis weighing the advantages of Mr. Murphy’s offer against its higher price.

What previous postal purchasing regulations referred to as “responsibility” is now referred to as “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. Among the elements of capability are “resources (financial, . . . etc.) . . . adequate to do the work,” “a sound record of integrity and business ethics,” and “the necessary organization, experience, . . . and . . . technical skills.” PM 2.1.7.c 3.(b)(1), (3), and (5).

West-Wilson’s pre-award questionnaire listed prior experience on three routes in Alaska (HCRs 99731, 99732, and 99511) in 1987 – 1993 and HCR 92355 in California (1993 – 1997). It is with respect to one of the Alaska contracts those contracts (99732) that the former driver complained of not being paid and reimbursed for expenses. The file indicates that HCR 92355 was operated under the name “B &W Trucking and Silver Fox J.V.” and a 1993 certificate of fictitious name lists that as a joint venture of Paul Wilson and Jeanette Bailey. The file also contains a March, 1997, route service order terminating for default HCR 92033, (Midway P&DF – Escondido), operated by B&W Trucking, but the file reflects Mr. Wilson’s assertion (consistent with the protest) that he was “not part” of that contract. Other references in the file refer to B&W Trucking having been debarred by GSA, but do not identify the cause for the debarment.

The file includes references by contracting personnel familiar with both the Alaska and California contracts of constant contacts with creditors, and the file contains considerable information about the Wilsons' current finances, but nothing in the evaluation of the partnership's capability makes specific reference to concerns in that regard.

In general, it is appropriate to consider the prior contracting experience of a partner in determining the partnership's capability (*Jeff Talano*, P.S. Protest No. 94-42, January 26, 1995; see also PM 2.1.7.c 2.(c), "[i]f a newly-established supplier cannot prove past performance information of the supplier's key personnel on similar projects may be evaluated"), and in the absence of more recent information, there is no reason why information about unsatisfactory performance in 1997 may not be considered in determining current capability.⁵ Given the file's uncertainty, it is not clear why the 1997 information about B&W Trucking's default on HCR 92033 is properly chargeable to Mr. Wilson in the absence of more specific information identifying Mr. Wilson as a principal of B&W Trucking (rather than of Silver Fox or the Silver Fox./B&W Trucking joint venture). See *GT Transportation, Inc.*, P.S. Protest No. 96-07, June 18, 1996 (that principal of offeror has been associated with another contractor some of whose contracting efforts have not been successful is of less relevance than the principal's individual past contracting experience, where there is no indication that the principal was directly involved with those past performance difficulties).

Some of the information which the contracting officer cites in questioning the Wilsons' capability, is more than three years old. That includes both the information offered by the former employee on Alaskan HCR 99732 (seven years old or more), and the unidentified instance which occasioned Mr. Wilson's debarment (six years or more).⁶

⁵ Some earlier decisions of this office reflect an unwillingness to consider defaults and similar performance problems more recent than three years as appropriate to support a determination of present responsibility. See, e.g., *M.L. Hatcher Pickup & Delivery Services, Inc.*, P.S. Protest No. 80-36, November 21, 1980 (two terminations "more than one year in the past"), *Don L. Peterson*, P.S. Protest No. 84-56, August 10, 1984 (termination for default in November, 1982; finding made in April, 1984), *Don L. Peterson*, P.S. Protest No. 87-03, February 25, 1987 (terminations in 1982 and 1984 "too remote in time," but nonresponsibility established on other grounds). In those instances, however, the contracting officers had no regulatory guidance like PM 2.1.7.c 2.(d), which, as the contracting officer notes, supports the consideration of past performance within the last three years and, in appropriate circumstances, even earlier experience.

⁶ Unless it relates to a statutory or regulatory ground applicable to or adopted by the Postal Service which would make the debarred party ineligible for a postal contract (for example, a debarment by the Department of Labor for violation of the Service Contract Act), "debarments by other government agencies do not, *per se*, preclude award of a Postal Service contract. Rather, [PM 3.7.1.c 4] provides that [such a debarment] may be the basis for a [debarment] by the Postal Service. In the absence of such action by the Postal Service, [debarment] by another agency is not an absolute bar to award, although the fact of that [debarment] is a matter which may be taken into account by the contracting officer in determining the bidder's responsibility." *D/A Capitol, Inc., et al.*, P.S. Protests Nos. 87-75; -77; -80, August 28, 1987 (footnote omitted).

Absent any indication from the contracting officer, however, why it is “appropriate,” in the words of PM 2.1.7.c 2.(d), to consider this information, it appears insufficiently relevant to a determination of the Wilsons’ current capability.

Also troublesome is that the circumstances which the contracting officer asserts justify the denial of this contract to the protester were developed and thus fully known when it was decided to award the partnership the Jonesburg, contract.⁷ “[A]lthough . . . [capability] determinations need not be fully consistent, and the conclusion that an offeror is responsible in one instance need not require that the same offeror be responsible in another,” *GT Transportation, Inc, supra*, for the same contracting officer to reach differing conclusions about an offeror’s capability based on the same information relating to its past performance is less than fully satisfactory unless the reasons for the differing conclusions can be elaborated and justified. Here, that justification is lacking, because of the contracting officer’s misunderstanding, discussed above, that he was proceeding under M.1 b.

The analysis of the Wilsons’ (apparent) lack capability was flawed for the reasons set out above. It is not the role of this office to make such a determination, which is properly lies within the discretionary judgement of the contracting officer. Accordingly, the matter is remanded to the contracting officer to determine whether the protester is capable and otherwise eligible for award. In making his determination, the contracting officer is to rely on all the currently information available to him, including new information that may be obtained from the protester and the other sources of information discussed at PM 2.1.7. c.3. *Conner Trucking, et alia*, P.S. Protest Nos. 98-27; -30; -32. February 3, 1999. The protester’s performance since the award of HCR 6333LO, as well as the contracting officer’s evaluation of the adequacy of the protester’s resources to perform this contract along with the contract previously awarded will necessarily be highly relevant to that determination.

If the Wilsons are found to be capable and otherwise eligible for the award, the current contract should be terminated for the convenience of the Postal Service and awarded to the partnership.

The protest is sustained.

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Contract Protests and Policies

⁷ The file contains little information describing the Jonesburg contract in terms of size, complexity, or the like. If the contracting officer’ contention is that the Wilsons lack the resources to perform more than one contract, that point has not been adequately elaborated in the material submitted.