

August 30, 2000

P.S. Protest No. 00-12

YEAR-A-ROUND CORPORATION

Solicitation No. 052684-00-A-0078

DIGEST

Protest of determination of offeror's lack of capability is dismissed as untimely. Protester is responsible for protest's nondelivery when submission was incompletely addressed.

DECISION

Year-A-Round Corporation (YAR) protests its failure to receive award of a contract for two items of postal equipment.

The Purchasing and Materials Service Center, South San Francisco, CA, issued Solicitation 052684-00-A-0078 seeking offers for basic and option quantities of Seven Shelf Tray Carts (PSIN 1226C) and Throw-Back Carrier Cases (PSIN 129). Paragraph a. of provision M.3 stated: "We will make an award to the supplier with the lowest price who is capable of meeting the requirements of the solicitation and has a satisfactory past performance record[] and the capability of performing upon award of a contract."¹

Solicitation Clause E-4, Quality Assurance I - Supplies, (June, 1999),² provided that "[t]he supplier must use a documented quality control system acceptable to the Postal Service" which addresses controls and record-keeping in specified areas. "A quality system in compliance with ISO 9002 meets the requirement." The clause gives the

¹ The contracting officer's award determination was consistent with this statement, even though paragraph b. of provision M.3. stated that "[p]roposal specific and supplier specific performance evaluation factors . . . are considered to be *more important* . . . as [sic] *price* and price related factors," and that "[p]rice will not be the determining factor in choosing among all offerors which meet the minimum acceptable performance evaluation factors." (Emphasis added.) In the posture of this protest, the inconsistency is not material.

² The clause is promulgated as Clause 2-2 in Appendix B of the Purchasing Manual (PM) and submissions in the protest refer to it as "Clause 2-2."

Postal Service “the right to evaluate the acceptability and effectiveness of the supplier’s quality system before award.”

YAR offered the lowest price for the total quantity (base and option) of PSIN 1226C, and the second-lowest price for the total quantity of PSIN 129. The lower-priced offer for PSIN 129 was rejected for the offeror’s lack of capability, placing YAR’s offer in line for consideration.

The contracting officer declined to consider either part of YAR’s offer. The Best Value Determination supporting the award explained that YAR “still do[es] not meet Quality Assurance I, Clause 2-2,” and that it “do[es] not have a satisfactory past performance record.” The determination noted that YAR’s contract 052684-98-B-0536 (contract 536) had recently been terminated for default “for poor performance and continued noncompliance with Clause 2-2,” and that inspections of eight PSIN items manufactured by YAR under other contracts “reveal [it is] not manufacturing the items according to specification.” A contract for the carts and cases was awarded to Superior Jamestown Corp. Upon receipt of the notice of award to Superior, YAR timely requested a debriefing. It subsequently was provided a written debriefing which elaborated the contracting officer’s belief that YAR’s quality assurance system did not meet the requirements of Clause 2-2.³

YAR’s counsel protested the award by letter dated May 12 and dispatched by private carrier on that date. The protest was addressed to the Senior Counsel, Contract Protests and Policies, by title, but did not include the Senior Counsel’s name or room number⁴ or a reference to the Senior Counsel’s organizational unit (“General Counsel”). The protest was received at Postal Service headquarters on May 15, but was not delivered to the Senior Counsel, apparently because mailroom personnel did not

³ The written debriefing restates the previously given advice of YAR’s poor past performance and “noncompliance to . . . Clause 2-2.” In addition, it states that “on April 25, [a Supplier Development Specialist in Supplier Development and Diversity, Headquarters, (the SDS)] informed us that you still do not meet Clause 2-2.”

As part of its debriefing with respect to the instant award, YAR was given a May 2, 2000, contractor performance report describing its unsatisfactory performance on contract 536. YAR asserts that it had never received a performance report of this sort before, and it has responded to the May 2 report.

⁴ The former was known to YAR, whose counsel’s office had been in touch with the Senior Counsel by telephone and facsimile before the protest was dispatched, and the latter was available on the internet website which the Postal Service’s protest regulations (PM 3.6.7.m.) identify as the repository of protest decisions or would have been supplied upon request.

associate the title "Senior Counsel" with the General Counsel's office.⁵ They held the submission, expecting that the intended addressee might inquire about it, thus allowing delivery. Since, however, the protester had neither alerted the Senior Counsel to expect a protest nor inquired when its receipt was not acknowledged, the Senior Counsel had no way to know of the uncompleted delivery. On June 19, the mailroom returned the dispatch to the private carrier. YAR's counsel resubmitted the protest to the Senior Counsel by letter of June 23, and it was received on June 26. In view of the issue of timeliness presented by the circumstances of the delivery of the protest, the contracting officer and the protester were asked to address that issue in their submissions.

The protest recites YAR's long history of performance under postal contracts and discusses its view of the circumstances surrounding its current disagreements with the Postal Service. In that view, the problem began in February, 1999, with the default termination of its contract 056284-98-B-0294 (contract 294) for PSIN 1338 (three door key cabinet) after a delivered cabinet emitted "a noxious odor." YAR contends that the problem was the result of a failure of product design, in that a specified metal alloy reacted with a specified paint.

After the termination of the cabinet contract, disagreements developed with respect to its contract 536 for PSINs 155A and 155B (general delivery tables and cases with 40 and 60 separations, respectively). The protest recites that although the first article of PSIN 155B had passed inspection before the problem with PSIN 1338, the first article of the essentially similar PSIN 155A failed its first article inspection in May, 1999, after the PSIN 1338 problem, and both items subsequently failed re-inspections. The protest notes that a substantial portion of the PSIN 155A inspection involved "reviewing items related to PSIN 1338" (that is, the painting process). The protester attributes these failures to the Postal Service's retaliation against YAR because it had asserted that the problem on contract 294 was the result of the requirements of the cabinet specification. Further, it contends that the faults identified in the tables and cases were either corrected by YAR or were the result of interpretations of "gray areas" in the specification inconsistent with YAR's interpretation.⁶

The protester contends that the items produced under contract 536 in 1998 and 1999 were equal in quality to those previously produced, and that its quality control process,

⁵ The organizational listing of the General Counsel's office as published in the Headquarters Telephone Directory does not include listings at the Senior Counsel level.

⁶ The protest also notes that in October, 1999, the SDS provided a memorandum to all contracting officers with YAR contracts which discussed YAR's performance, noting that "[o]f late, we have experienced substantial quality performance problems with this firm," and proposed the use of a "circuit rider" to assess YAR's quality and capability issues. The protester asserts that it subsequently submitted to the SDS "requested documentation and instructions to show compliance with Clause 2-2," which the SDS has declined to review.

which previously had been approved, remained the same for that production. However, contract 536 was terminated for default on March 13, 2000. An appeal of that termination to the Postal Service Board of Contract Appeals was made in April, 2000.

The protest contends that the contracting officer's determination was arbitrary, capricious, and not based on substantial information to the extent that it was based on the termination for default of contract 536 while that termination is on appeal; on the post-award evaluation of YAR's contract performance, on the SDS's April 25 characterization of YAR, and in all other respects.

The contracting officer's statement contends that the protest was "incorrectly addressed," and that the protester did not, in the words of PM 3.6.4.d, "submit [the] protest in a manner that will ensure its timely receipt." She requests that the protest be dismissed as untimely.

On the merits, the contracting officer denies that the termination of contract 536 was prompted by the contractor's rebuttal to the termination of contract 294, noting, for example, that the first article for item 155A was rejected before YAR's submission of the third-party comments on the key cabinet specification issue. The 155A inspection focussed on "the paint process and not the paint itself." She explains that YAR's submissions on its quality control process were not reviewed because they were submitted piecemeal, and that in response to a February, 2000, request for a "complete quality manual," an "eight months old" manual dated October 1999 was finally submitted.

The contracting officer is unable to substantiate YAR's contention that its recently manufactured items 155A and B were equal in quality to those previously supplied. She contends that contract 536 was terminated only after YAR had been given "a more than reasonable time to comply with Clause 2-2" but was unable or unwilling to do so. She notes that on June 6, YAR's seven other contracts for eight PSIN's were terminated for default for similar reasons by the three contracting officers involved.

Responding to the contracting officer's statement, the protester contends that only PM 3.6.4.a. sets out a protester's obligation regarding the submission of protests, that the PM does not provide an address for the submission of protests, that the "address on the [protest] contained sufficient identification to allow USPS personnel to identify the Senior Counsel" and that the failure of mailroom personnel to do so was outside the protester's control and within the Postal Service's control. Contending that PM 3.6.4.a. was met in this case, the protester seeks consideration of the protest on its merits.

With respect to those merits, the protester contends that the "problems involving the PSIN 1338's" was the only thing that had changed between the acceptance of the PSIN 155B (when a product evaluation checklist reflected "that the quality system

processes used . . . passed inspection”) and the rejection of the first lot of PSIN 155A. The protester furnishes a thread of e-mail correspondence between various postal personnel including a quality inspector, the requiring activity, and the contracting officer at the time of the PSIN 155A inspection to demonstrate that relationship. Further, while acknowledging that contracting officers’ bad faith must be established by “well-nigh irrefutable proof” (citing *Graphic Technology, Inc.*, P.S. Protest No. 85-66, December 30, 1986), the protester contends that the e-mail discussion demonstrates such bad faith.

DISCUSSION

That a protest be timely received is a requirement for this office’s jurisdiction. See, e.g., *Carl J. and Betty B. Kollenberg*, P.S. Protest No. 97-06, June 5, 1997. Accordingly, we turn our attention to that issue.

The protester’s contention that its protest was adequately addressed to assure its delivery is incorrect as a matter of fact, since the protest was not delivered, but returned to the sender. That it was not delivered was directly attributable to the incompleteness of the address used. As discussed above, the address lacked the Senior Counsel’s name, room number, or organizational unit, the inclusion of any one of which would have been sufficient, in this office’s experience, to assure its delivery.⁷ We see no reasoned basis on which to excuse the delay here when it has not been excused in other cases in which protests were otherwise misaddressed. See, e.g., *Holmes Construction Co., Inc.*, P.S. Protest No. 92-02, February 25, 1992; *Front Porch Gallery and Studio*, P.S. Protest No. 87-48, August 21, 1987; *Rogelio Herrera*, P.S. Protest No. 86-34, June 2, 1986; *Don L. Peterson*, P.S. Protest No. 85-16, May 3, 1985.

We will, however, comment on the issue which the protest raises. The contracting officer concluded that YAR had an unsatisfactory record of past performance and lacks an acceptable inspection system, elements which impact the protester’s capability. As the protester recognizes, this office’s review of such determinations of an offeror’s lack of capability is limited:

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 discre-

⁷ While counsel notes the lack of any address as set out in the protest regulations, he overlooks the fact that the regulations are phrased throughout in terms the delivery of a protest to or receipt of a protest by “the General Counsel.” (See, e.g., PM3.6.3.a; 3.6.4.a). The Senior Counsel, in contrast, is identified only once (PM 6.3.2.c) as “the General Counsel’s representative” with respect to protest matters. Protests addressed to the General Counsel at this headquarters are routinely received by the Senior Counsel.

tion 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).

Past performance is one of two supplier-specific evaluation factors. PM 2.1.7.c 1. "A company . . . that has performed well on previous contracts is likely to perform well on similar contracts in the future. Including past performance as an evaluation factor helps ensure quality suppliers." PM 2.1.7.c 2.(a).⁸

The PM also discusses the role of quality requirements as part of planning considerations:

2.2.1.a Policy

1. The Postal Service holds the supplier responsible for providing supplies or services in conformance with the purchase requirements, and to provide reasonable assurance that requirements are met. The Postal Service retains the right to verify the provided supplies and services through process audits, inspections and testing.

2. The purchasing team must determine what quality requirements are needed, and the contracting officer must put them in all solicitations and contracts. The type and extent of contract quality requirements depend on the purchase and the Postal Service's experience with suppliers. The quality requirements may range from acceptance inspection to a quality assurance program.

3. Suppliers are responsible for complying with contract requirements, and the Postal Service may verify that the supplier is doing so. Some contracts may call for specialized inspections or tests to be performed by the Postal Service or a third party.

⁸ This is consistent with the similar emphasis of other government purchasing regulations. See, e.g., Federal Acquisition Regulation 42.1501.

2.2.1.b Quality Assurance Requirements. In most cases, the supplier performs all necessary inspection and testing for conformance before delivery. . . .^[9]

⁹ There has been a shift from reliance on government inspection to reliance on contractor-based total quality management practices. See, e.g., Best Practices—Commercial Quality Assurance Practices Offer Improvements for DOD, Report to the Subcommittee on Acquisition and Technology, Committee on Armed Services, United States Senate, General Accounting Office/National Security and International Affairs Division, GAO/NSAID-96-162, August 26, 1996:

[I]ntense competition has led some U.S. companies to adopt total quality management practices that are prevention based. Consequently, quality assurance has taken on a broader meaning, to include virtually all key design and engineering elements during development, the transition to production, and production itself.

There is general agreement across government and industry that DOD's inspection-based quality assurance practices have added unnecessary costs to acquisitions because they require DOD and contractor personnel and resources for oversight that are separate from the production process.

* * *

Many companies have effectively evolved from an inspection-oriented quality assurance process, and the culture and infrastructure to support it, to a standard in which quality is an integral part of each stage of the design and production process.

The difference between how a manufacturer operates on a military contract versus how it operates on a commercial contract is often startling. For example, we visited a company that manufactured military and commercial products with similar specifications and uses; both manufacturing processes were in the same building. On one side of the hallway, the commercial process used automation and process control throughout the production process to continually reduce nonvalue-added inspections. On the other side of the hallway, the military process included two large test facilities at the end of the production process, used at least four test stations, and added about 10 days to the process.

* * *

The companies [GAO visited] had developed or adopted advanced quality concepts that went beyond the basic ISO-9000 standard and that emphasized finding the cause of quality problems by gathering data and then eliminating those causes from the manufacturing process. . . .

Representatives from [the] companies credit the use of these advanced quality guidelines for reducing defects while eliminating the need for end-item inspection.

* * *

The commercial world has proven that it can design and manufacture consistently high-quality products by focusing on building quality into the product's design, understanding the key characteristics of the product and the manufacturing processes necessary to build it, training production personnel to control those processes throughout production, and instituting quality programs with suppliers based on these same principles. We saw

(Footnote continued on next page.)

The protester's objections to the contracting officer's determination boil down to the following: The determination was flawed either because it lacked a factual basis (e.g., that YAR's recent contract performance was satisfactory and that its quality system met the requirements of Clause 2-2) or because the determination arose from an improper cause (e.g. the Postal Service's pique over YAR's reaction to the termination of its contract 294 for default). The record does not support the protester's objections in either regard.

Contrary to the protester's assertion, that the offeror is or may be challenging in litigation some of the facts relied on by the contracting does not prohibit her use of those facts in reaching this determination. See, e.g., *E.H.O. Trucking*, P.S. Protest No. 91-28, July 24, 1991.¹⁰ That the termination resulted from an inspection following the contractor's prior default which focussed on the same area of performance (painting or surface preparation) strikes us as less surprising than the protester suggests.¹¹ As noted above, the fact of default is an appropriate item to consider in evaluating past performance.

(Continued from previous page.)

convincing evidence that these practices improve product quality and reduce time and labor spent on quality assurance oversight by making it unnecessary.

Ibid. pp. 1, 7, 12, 16.

¹⁰ See also, e.g., *MAC's General Contractor*, Comp. Gen. Dec. B-276755, 97-2 CPD ¶29, July 24, 1997:

The [protester's] termination for default clearly provides a reasonable basis for the contracting officer's concerns about the firm's past performance. The fact that [the protester] may be appealing the [Armed Services Board of Contract Appeals] decision upholding the termination does not mean that it was unreasonable for the agency to rely on the termination as evidence of the firm's past performance. . . . In this regard, an agency's evaluation of past performance may be based on its reasonable perception of inadequate prior performance even where, as here, the contractor disagrees with the agency's position. [Citations omitted.]

¹¹ Nothing in the material which the protester has submitted indicates, as the protester would have it, that the Postal Service was reacting to YAR's response to the termination rather than to the termination itself. YAR's response was not particularly contentious; while it submitted some third-party information disputing its responsibility for the problem identified, it has not exercised its available right to appeal the termination decision. (On inquiry to confirm that fact, protester's counsel noted that the time within which an appeal might be taken had yet to run.)

Further, the protester's defense of the adequacy of its quality system *vis a vis* the requirements of Clause 2-2 is less than fully persuasive. It does not undertake to demonstrate that adequacy in terms of how it meets the clause's requirements, but instead seeks to establish that it must be in compliance now because it was not previously found to be out of compliance.

The protester also suggests, citing *Mesa Constructors*, P.S. Protest No. 83-39, September 20, 1983, that the contracting officer could not properly “rely upon any allegations made against YAR in a post-award evaluation of YAR’s contract performance” For the reason set out in the margin, *Mesa* does not stand for that proposition.¹²

In its rebuttal comments, YAR contends that a comment in one of series of e-mail messages by the USPS inspecting group quoting a senior purchasing manager “that ‘if we have to inspect our suppliers['] products, we are doing business with the wrong suppliers’” constitutes adequate evidence of the inspector’s bad faith with respect to their inspection of YAR’s products. In the protester’s words, “[n]o product[] being inspected by inspectors who have that attitude[] would pass muster.”

The protester takes its quoted comment out of its context, which is wholly consistent with the change in approach from inspection to quality management discussed at footnote 9, *supra*. The quoted e-mail message also states:

Quality Clause 2-2 is not an option, it’s a contractual requirement. If suppliers are not documenting and controlling the areas covered in the clause they are in default of the contract[,] period. Does that mean we terminate contracts just because they are not fully compliant with our clause-NO! What we do is assess their situation and look for a commitment for improving to get in compliance with our clause.

If our suppliers are not committed to improving their quality the we should look at alternatives. Bottom line[,] they need to mane their own quality system and they need to be committed to continually improving their system. [Emphasis in original.]

The sentiments expressed in the cited e-mail messages are not inconsistent with the terms of YAR’s contract nor do they demonstrate bad faith, as the protester must, by

¹² *Mesa*, “perhaps the high[]water[]mark of this office’s non-responsibility jurisprudence” (*Ed Wilson, Inc.*, P.S. Protest Nos. 96-18; 19, February 4, 1997), sustained a protest against a determination of nonresponsibility (in the parlance of the PM, a determination of lack of capability). It discussed five construction projects in which *Mesa* participated, concluding that none of the information provided constituted substantial evidence of *Mesa*’s lack of tenacity and perseverance. *Mesa* objected to an unfavorable report about one project, in part because it was written after the contract was completed and “was timed to coincide with the contracting officer’s pre-award survey.” While the decision faulted the contracting officer’s reliance on that report on several grounds, its timing was not among them.

Mesa also objected to reliance on information about other projects which were the subject of concurrent litigation. As to two of those projects, the decision faulted reliance on an early analysis of the parties’ positions which failed to consider subsequent developments in the litigation, including a judge’s “tentative findings” in *Mesa*’s favor; as to a third, the decision did not adopt the protester’s suggestion that it was improper to rely on a matter which remained in litigation before the Postal Service Board of Contract Appeals, but noted other reasons why the matter was not chargeable to *Mesa*. Accordingly, *Mesa* is not inconsistent with *E.H.O. Trucking*, discussed above.

well-nigh irrefragable proof such as evidence of specific intent to injure the plaintiff, as, for example, actions which are “motivated alone by malice.” or conduct which was designedly oppressive. *A-1 Transmission*, P.S. Protest No. 93-14, October 29, 1993.

The protest is dismissed.

William J. Jones
Senior Counsel
Contract Protests and Policies