

November 29, 2000

P.S. Protest No. 00-21

TROY A. MASSEY

Solicitation No. 980-129-00

DIGEST

Protest of determination of lack of capability to receive a mail transportation contract is denied. Contracting officer did not act arbitrarily in concluding that offeror had failed to demonstrate his financial capability to perform the route.

DECISION

Mr. Troy A. Massey protests his failure to receive award of a contract for Highway Contract Route (HCR) 98679, three daily round-trips of service between Longview, WA, and Kelso, WA.¹ Mr. Massey had been the previous contractor on the route. When he and the contracting office, the Western DNO, Seattle Branch, failed to reach agreement on the rate for a renewal of that contract, the contract expired on June 30, 2000.²

Initial replacement service was sought by means of an emergency contract. Mr. Massey's offer for that service was declined because he "failed to adequately demonstrate responsibility." Instead, the emergency contract was awarded to Mr. Michael L. Dawes. Mr. Massey did not challenge the award of the emergency contract.

On June 14, the Seattle Branch issued solicitation 980-129-00 seeking permanent service on the HCR. Section M.1 of the solicitation discussed the basis for award.³

¹ According to the solicitation, these two post offices are 1.8 mile apart; a one-way trip occupies fifteen minutes; and the route involves some 3,301 annual miles and 918 annual hours. The service occurs throughout the day, with Longview departures at 2 a.m., 5 a.m., and 5 p.m. Service is to be performed with a van with 1000 cubic foot capacity. Previously, a 600 cu. ft. vehicle was used.

² The "Summary of Contract Award" indicates that although there had been concerns about Mr. Massey's performance under that contract, "due to poor documentation by the [administrative official] there were not sufficient grounds [not] to . . . renew the contract."

³ M.1 GENERAL

. . . 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

(Footnote continued on next page.)

The offers of Mr. Dawes and Mr. Massey were received by the July 20 date offers were due. Mr. Massey's offer was lower. Both offers were reviewed, and letters sent to both offerors asked them to clarify their proposals.⁴

In considering Mr. Massey's offer, the evaluators took into account the opinion of the Longview administrative postmaster,⁵ which included the following:

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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. . . . 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. . . .

⁴ Mr. Massey was asked to explain figures on his cost worksheet for vehicles and fuel which appeared low and to reallocate funds for required insurance. Because "[he] failed to perform service on schedule[d] trips and provided a vehicle on occasion that was less than . . . required," Mr. Massey was asked to provide a management plan addressing "what actions that [he] will take, that if awarded the contract, these actions will not occur" and was asked to address "how [he] intend[s] to provide the required vehicle on the contract." The request also noted problems in Mr. Massey's credit report, including write-offs and delinquencies totaling in the low five figures, requesting advice "what action [he has] taken to eliminate the outstanding debt and insure that [his] creditors will not attach [his] contract if awarded."

Mr. Massey revised the worksheets and explained his costs. His management plan included the following:

I am sure that [my offer, which was \$12,000 per year more than his previous contract price] is going to be enough to operate efficiently. I plan to buy a newer truck, if awarded the contract, which I hope will have fewer breakdowns. I also have a large van for back-up should I need it.

When I had a break-down on [the] last contract, I had to rent a U-Haul - and when a large enough one wasn't available, I used my own personal vehicle rather than not show up at all.

With respect to his credit history, Mr. Massey provided an assets and liabilities statement which recited "at this time no credit cards or other outstanding debts" (with the exception of a home mortgage), and a February 11, 2000, bankruptcy court order in a Chapter 7 bankruptcy reflecting "no assets" and granting the debtor a discharge. The bankruptcy action had been filed in November, 1999.

⁵ Longview's opinion had been solicited by a letter which included the following:

[I]n previous conversations, you have indicated that Mr. Troy Massey has had poor performance in the past. We request that [you] conduct a face to face interview and have Mr. Massey indicate what actions he will take if awarded the contract to correct past deficiencies.

The file reflects that the requested interview was not conducted.

- He previous equipment was in poor shape, causing Longview to question “his capability to operate the route with increased vehicle size and the requirement for additional trips due to this office processing mail for another associate office.”
- Under the four years of the previous contract, he had 19 reports of irregularities (Forms 5500) for failure to observe schedule and 7 for the use of an improper vehicle.
- On February 29, 2000, Mr. Massey was involved in an accident when helping to obtain access to the loading dock at Kelso for his vehicle. A heavily loaded container of mail which he was pushing fell off a scissor lift and onto an adjacent postal vehicle, causing \$1,684 in damage.⁶ Mr. Massey rejected two demands that he reimburse the Postal Service for the damage.⁷ By letter dated June 13, the contracting officer issued a final decision and a contract route service order deducting the amount from payment due under Mr. Massey’s contract. Longview’s comments characterize this as “demonstrating his inability to compensate the U. S. Postal Service” for the incident.

The contract award summary questioned Mr. Massey’s asserted inability to rent an adequate substitute vehicle since in his area “vehicles should have been easy to rent.” It noted that Mr. Massey did not provide several of the financial documents requested (profit and loss statement, tax statements) and that he had not previously reported the bankruptcy⁸ and concluded:

Mr. Massey failed to provide satisfactory service on the previous contract, failed to provide satisfactory equipment, . . . has a poor credit history which places concern on his ability to be able to provide the equipment required on the contract, and has failed to pay for damages in good faith.

It is therefore the determination of the contracting officer that a positive determination could not be made concerning Mr. Massey’s capability to operate the contract.

Award went to Mr. Dawes, and an August 30 letter advised Mr. Massey that he did not receive award because “the Contracting Officer was unable to determine [his] capability.”

⁶ Although Mr. Massey contended that the container “knocked loose” the safety chain on the lift, allowing the container to fall, the accident investigation concluded that the chain must not have been connected, and faulted Mr. Massey for moving the container onto the lift when the safety chain was not secured.

⁷ The file reflects an intemperate phone call from Mr. Massey to the accident investigator declining to pay the claim and his written objection to a Form 5500 written to document the Postal Service’s claim.

⁸ Although Mr. Massey’s previous contract is not in the record, it presumably included, as this solicitation does, a clause requiring that the contractor furnish the contracting officer “notification of the bankruptcy . . . within five days of the initiation of the bankruptcy proceeding.” Purchasing Manual (PM) Clause 6-1, Bankruptcy (January, 1997). The similar clause that would have appeared in a 1996 contract was Procurement Manual (Pub 41) Clause 6-1, Bankruptcy (January, 1991).

Mr. Massey's September 2 protest discusses his dedication to this route, expresses an inability to understand how he could be found to lack capability, and recites that he feels that he has proved himself and is "capable of successfully completing this contract."

The contracting officer's statement replying to the protest begins by asserting Mr. Massey's offer "failed to demonstrate that he could meet all of the service requirements" because he "did not have the required [1000 cu. ft. van]" and his existing 600 cu. ft. van, which he proposed to use as a backup, did not meet the solicitation requirements.

Alternatively, the contracting officer contends that Mr. Massey lacks the capability to perform the route satisfactorily, noting his poor credit history, the previously undisclosed bankruptcy filing, and his failure "to explain what action he will take to avoid any liens on the contract."⁹ Further, he notes the protester's poor past performance as cited by the administrative official, contending that the "many PS Forms 5500" reflect the protester's "poor past performance." The contracting officer notes that the small amounts deducted for individual missed trips¹⁰ don't fully reflect the impact on service of those trips; he also notes the instances in which Mr. Massey substituted "an improper vehicle" and Mr. Massey's failure "to voluntarily reimburse the Postal Service" for the damage he caused.

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

DISCUSSION

Although the contracting officer does not say so explicitly, it appears that his initial contention that Mr. Massey failed to demonstrate that he could perform the service is an attempt to distinguish Mr. Massey's offer from Mr. Dawes' offer under the first sentence of subparagraph a. of solicitation provision M.1. because Mr. Massey's offer, unlike Mr. Dawes' offer, did not meet all of the service requirements of the solicitation. We reject that characterization of the selection process in this case.

Nothing in Mr. Massey's offer took any exception to the service requirements, nor did anything in his subsequent submissions. While the information provided makes it clear that he does not currently have a vehicle which met the solicitation requirements, it fully expressed his intention to acquire one once the contract was awarded.¹¹ What apparently concerns the contracting officer is whether, given the apparent state of his finances, Mr. Massey will be

⁹ The contracting officer's concern about liens and attachments here and in the request for clarification appears somewhat misplaced. The only procedure by which liens may be placed on the compensation of the mail transportation contractor is found at 39 U.S.C. § 5006, which provides for such liens only for a "[a] person who . . . performs service for a contractor or subcontractor in the transportation of mail." Here, the service was to be provided by Mr. Massey and his wife, with only occasional relief by a third driver, presenting only limited opportunity for such claims, and no likelihood that creditors of the sort disclosed in the credit report could attach the contract.

¹⁰ The protest file reflects two such deductions.

¹¹ A prospective supplier need not have the "resources . . . adequate to perform the work" to be found capable, as long as it has "the ability to obtain" them. PM 2.1.7.c 3.(b)(1).

able to fulfill that intention. That concern on the part of the contracting officer goes to Mr. Massey's capability to perform, not to his undertaking to perform less than all the required service. This conclusion is fully supported by the contract award summary and the notice of contract award, both of which refer to capability as the issue involved in the rejection of Mr. Massey's offer.

This office's review of 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 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 bases for the contracting officer's determination of Mr. Massey's lack of capability are three-fold. We reject two of them as clearly insufficient.

First, the documented record of Mr. Massey's poor past performance is scant. The administrative official cites 26 irregularity reports over a four year period. The contracting officer's report includes thirty some reports over this period (excluding multiple reports for the same instance of missed service). Ten of those involve late arrivals or departures, 12 involve missed trips, 7 involve the substitution of an unsatisfactory vehicle, and the others involve other matters. Virtually all of the irregularities involve only individual trips (not whole days of service), and there were more than 7,000 individual trips over the contract term. As the contracting officer apparently concluded with respect to the offer to renew of the prior Massey contract, 26 or 30 documented instances of irregularity in 7,000 trips is not substantial information of poor past performance.

Second, we attach no significance to Mr. Massey's refusal voluntarily to reimburse the Postal Service for the damage caused in the Kelso accident. It is clear that Mr. Massey disputed his responsibility for the mishap, as he was fully entitled to do.

The remaining ground of the determination of Mr. Massey's lack of capability is his lack of financial capability. Having adequate financial resources to perform are an important component of capability. PM 2.1.7.c. 3.(b)(1). And an offeror's failure to provide sufficient evidence of its financial capability is a basis to reject its offer. *Express by B&M*, P.S. Protest No. 91-02, February 12, 1991.

In this instance, Mr. Massey failed to provide several items describing his financial situation which the contracting officer had requested, and some of the items which he did provide were unclear or incomplete.¹²

¹²The contract award summary notes that while Mr. Massey provided information about his other sources of income, he did not indicate length of time during which the amount of income stated was earned. Further, we note, although the award summary failed to, that Mr. Massey's assets and liabilities statement con-

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As noted above, Mr. Massey's management plan sought to explain that his offer included a sufficient sum to compensate him for the cost of the new vehicle which the route would require. The contracting officer has not discussed the reasonableness of that amount, and we will assume that the additional amount over the four-year contract term would be sufficient to cover the cost of the vehicle. But that is not the heart of the contracting officer's reasonable concern, which involves Mr. Massey's current financial ability to acquire the required truck. Mr. Massey will receive the contract amount only over time in the course of contract performance. What he has failed to demonstrate is what resources he has now to secure the truck.

An individual with extremely limited assets who has just been discharged from a bankruptcy in which there were no assets to satisfy his creditors is not an attractive credit risk, and Mr. Massey has not satisfactorily demonstrated how, in the current circumstances, he can acquire the resources necessary to perform the contract. Where "we are faced with a situation in which the bidder lacks a vehicle adequate to provide the service and has minimal resources with which to obtain one and begin to provide the service[, t]he contracting officer's conclusion with respect to the protester's [lack of] financial [capability] must be upheld." *Ella Beachy*, P.S. Protest No. 87-05, April 17, 1987. It was not an abuse of the contracting officer's discretion to conclude that Mr. Massey lacked financial capability to perform the contract.

The protest is denied.

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fusingly expresses his liabilities not in terms of their total amount (as his assets are listed) but in terms of monthly cost and includes an incomplete list of monthly expenses. Most of these items are not, strictly speaking, liabilities in the balance sheet sense. However, even as a listing of current expenses, the listing is incomplete, since it omits obvious day-to-day expense items.