

**March 3, 2003**

**P.S. Protest No. 02-19**

**EARL'S MAIL SERVICE**

**Solicitation No. 948-64-02**

**DIGEST**

Protest of contracting officer's determination of offeror's lack of capability is sustained. Record does not support finding that offeror lacks sound record of integrity and business ethics; existence of tax liens is not, *per se*, disqualifying where record lacks evidence of impact of liens on offeror's capability to perform.

**DECISION**

Earl's Mail Service (Earl's) protests its failure to receive award of a mail transportation contract under solicitation 948-64-02 for Highway Contract Route 95633, Sacramento CA to Placerville, CA.

The solicitation was issued on August 9, 2002, by the Pacific Area Transportation Contracting office; offers were due September 10. The solicitation contained evaluation criteria common to mail transportation contracts which included the following:

**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. . . .

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. Award will not necessarily be made to the offeror who provides the best service or to the offeror who offers the lowest price. . . .

Earl's submitted the lowest priced offer at the annual rate of \$270,997; it took no exception to the solicitation's service requirements. Paula Gonzales submitted the next higher offer at \$276,666. Award was made to Ms. Gonzales on November 21.

Earl's owner, Greg Masterson, had spoken to the contracting officer on November 20 and wrote him on November 25. The letter recited Mr. Masterson's belief, based on statements made by a transportation specialist, that Earl's had received award of the contract, and explained why it should have received the contract. Replying by letter of November 27, the contracting officer "again offer[ed his] apology for the error [the transportation] specialist . . . made in telling you that you either had been or would be awarded [the] contract . . . . In fact, as I informed you during our telephone conversation, although we were close to making a decision, no final decision had been made, even as late as November 20." With respect to the decision not to award to Earl's, the letter stated, in part: "Based on all information available to me at the time, it was my judgment as Contracting Officer, that Earl's Mail Service should be determined Non Responsible (Non-Capable) in relation to this particular solicitation."

Earl's protested to the contracting officer on December 6, contending that it should have been awarded the contract because it had the lowest offer, had seven postal contracts in good standing in Stocton, CA, and had been awarded the contract by the transportation specialist, who had told an Earl's employee "on 11/4/02 it was OK to purchase 3 trucks because . . . EMS had won contract 95633."<sup>1</sup>

A contemporary letter of December 6 from Mr. Masterson to another individual at Transportation Contracting repeated the substance of the November 25 letter, discussing the actions Earl's took on the basis of its conversations with the transportation specialist, and also discussing the concern that "a few [of Earl's] former disgruntled employees . . . have contacted [the contracting officer, who] . . . may be reacting to unfounded charges without knowing all the actual facts." Toward the end of the letter, Mr. Masterson states:

In June of 2000, . . . [an outside audit found] so many problems created by my ex partner . . . [that] the partnership ended [and the partner is being sued]. We are working with the IRS and we are very close to a final settlement.

A second problem did arise because the office manager . . . did not enter the correct wage determination into the payroll system and she failed to

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<sup>1</sup> When this office received the protest Earl's was advised that the claim of award "is not for consideration in the protest process. Rather, if you believe that you have a contract and are entitled to proceed under it, a remedy is provided through the process established by the Contract Disputes Act for contract disputes. Accordingly, this office will not undertake to determine the merits of your contract claim in the protest process. Cf. *Leisure Investment Co.*, Comp. Gen. Dec. B-233904.2, April 4, 1989, 89-1 CPD ¶ 353, April 4, 1989." Accordingly, we will not resolve this contention here.

make payroll update changes. Two people did file claims with the Dept. of Labor. I am working with . . . an inspector for the Labor Department . . . [who] found we did *nothing illegal* and will take *no further* action against EMS or myself. [Emphasis in original.]

The contracting officer's statement in response to the protest initially contends that pursuant to provision M.1(b) of the solicitation, price would not necessarily be the determining factor in an award, that pursuant to provision M.2., past performance, schedule, and type of equipment and capability factors would be evaluated, and that pursuant to provision M.3, price would be evaluated for reasonableness.

The statement then notes that Purchasing Manual (PM) 2.1.7.c.3.(b) summarizes the criteria for evaluating a supplier's capability, including the requirements that a supplier must "[h]ave, or have the ability to obtain, resources (financial, technical, etc.) adequate to perform the work . . . [and h]ave a sound record of integrity and business ethics."<sup>2</sup> The contracting officer asserts that he "cannot establish an affirmative finding of Responsibility/Capability in relation to the referenced standard(s)" because of "concerns regarding the ongoing investigation of [Earl's] by the Department of Labor for possible violations of the Service Contract Act relating to the payment of driver wages," but primarily because of the existence of "multiple Federal Tax Liens against [Earl's] totaling more than \$587,028."<sup>3</sup>

Responding to the contracting officer's statement, Earl's recites its history of past service, reprises previous problems as outlined in its earlier letters, summarized above, and contends that it "has not violated any State or Federal laws [or done anything illegal] according to the [Department of Labor] . . . [and that] the DOL has not and will not take any action against EMS." (Emphasis omitted.)

Concerning the tax liens, Earl's denies that it has any state tax liens, and asserts that the dollar amount quoted by the contracting officer is overstated, and that the current amount of the federal liens is "around \$285,000."<sup>4</sup> Earl's notes that it was awarded previous contracts while liens were outstanding against it, and that "the tax liens have never been a problem in the past, nor are they a problem now." Earl's attaches a letter from its attorney which contends that the contracting officer's statement fails to reflect the correct amount of the current outstanding tax liens, their cause, and how Earl's is resolving the matters. According to counsel, "these tax liens have no bearing on [Earl's]

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<sup>2</sup> The contracting officer's citation is to Transmittal Letter 1 of the PM, dated January 31, 1997. The current version of the PM, TL 2, January 31, 2002, includes the same requirements at 2.1.9.c.3.

<sup>3</sup> Copies of the tax liens which accompany his report disclose \$577,214.41 in federal tax liens and \$9,813.83 in state tax liens.

<sup>4</sup> Earl's provides no explanation why that is the case, and nothing on the face of the various lien documents provided for our review suggests that they are anything other than cumulative.

current economic performance nor the service . . . which it can provide. . . .” Counsel faults the contracting officer for making further inquires “which would have rendered the current [tax lien] filings irrelevant.”

## DISCUSSION

The issue here is whether Earl’s has the capability to perform the required service.<sup>5</sup> While the solicitation and the contracting officer occasionally refer to the determination of a prospective supplier’s responsibility, our current regulation, as the contracting officer recognizes, speaks instead of a supplier’s capability; while the terms are similar in their requirements, they differ in that capability is considered and established in the supplier-selection process (PM 2.1.5), while responsibility was previously considered and determined separately from the evaluation of offers prior to contract award. *Cf. RAF Technologies, Inc.*, P.S. Protest No. 98-24, January 11, 1999.

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).

As the contracting officer notes, capability includes requirements that the prospective supplier must have, or be able to obtain, financial resources adequate to perform the

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<sup>5</sup> While the contracting officer’s statement suggests that Earl’s, the lowest-priced offeror, was not necessarily first in line for the award, there is no merit to that contention. Given the solicitation’s evaluation scheme, when an offeror takes no exception to the solicitation’s service requirements, there is no opportunity for the contracting officer to perform any sort of “best value” analysis weighing the advantages of a higher offer. As we have previously noted with regard to a highway solicitation using these evaluation criteria:

Comparative evaluation pursuant to [M.1.]b. is available only when “no award can be made under [subparagraph M.1.]a.” (that is, when no proposals received “meet all of the service requirements”). In this instance, [the protester], 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 [another offer] offer against its higher price.

*West-Wilson Enterprise*, P.S. Protest No. 99-32, April 25, 2000.

work and must also have a sound record of integrity and business ethics. The contracting officer's contention that Earl's lacks a sound record of integrity and business ethics is unsupported. While the contracting officer apparently relies on issues arising out of matters involving Earl's calculation of its employees' wages under the Service Contract Act to reach that conclusion, the record fails to flesh out the natures of its violations under the Act or rebut Earl's contentions that the violations were attributable to personnel no longer associated with it. Accordingly, Earl's may not be found lacking in capability on that basis.

That a supplier has tax liens filed against it is not, *per se*, disqualifying; the issue is whether the supplier will be able to perform should the holder of the lien seek to levy against payments due for that performance. *David W. Baker*, P.S. Protest No. 87-53, July 1, 1987.

The existence of a tax lien does not require a finding of nonresponsibility. *Echelon Service Company*, Comp. Gen. Dec. B-209284.2, December 2, 1982, 82-2 CPD ¶ 499. However, it is a factor which may be considered in making such a determination. See *Gil Trucking*, P.S. Protest No. 84-87, February 11, 1985. . . .

The contracting officer appears to have considered the tax lien as the sole dispositive factor in his determination. Consideration of the tax lien alone is improper grounds for rejection and does not meet the . . . substantial [information] standard.

. . . The issue is whether [the protester] can perform the contract in a reliable manner if he is not paid as a result of the tax lien. [The protester] has sought to show that he can . . . . The contracting officer should now consider whether, based on the impact of the tax lien on [the protester's] overall financial situation, he can perform the contract in a reliable manner.

*David W. Baker*, P.S. Protest No. 87-53, July 1, 1987.

Here, the contracting officer apparently did no more than compare the total amount of the tax levies to the dollar amount (in annual terms) of the contract to be awarded. This was not enough. The analysis failed to take into account matters such as Earl's overall situation, such as whether it had other income and assets sufficient to satisfy the debts,<sup>6</sup>

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<sup>6</sup> Indeed, contrary to the contracting officer's view that the award of an additional contract in light of the existing levies would worsen Earl's ability to perform its existing contracts, if the new route would be profitable for the supplier, it might put Earl's in a *better* position to satisfy its debts.

or, as appears to be relevant here, whether it has defenses to the claims on which the liens were based.<sup>7</sup>

The analysis of Earl's lack of capability was flawed for the reasons set out above. It is not the role of this office to make a new determination of the offeror's capability, a matter which lies within the discretionary judgment 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 2.1.9. c.3. *Conner Trucking, et al.*, P.S. Protest Nos. 98-27; -30; -32; February 3, 1999.<sup>8</sup>

The protest is sustained to the extent indicated.

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Contract Protests and Policies

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<sup>7</sup> It is strange that in a situation in which the contracting office was obviously discussing the status of its offer with the protester that it failed to solicit Earl's responses to any concerns that it had with respect to the liens or other aspects of its offer. That omission was inconsistent with the PM's direction concerning the use of discussions in the determination of capability. See PM 2.1.9.c.3.(d).

<sup>8</sup> It appears that in recent days the IRS levied on postal monies due to the supplier and subsequently withdrew the levy. The determination of Earl's capability should undertake to establish the present posture of any IRS claim.