

Protest of) Date: April 17, 1987
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 ELLA BEACHY)
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 Solicitation No. 432-041-86) P.S. Protest No. 87-05

DECISION

Ms. Beachy has protested the decision of the Manager of the Columbus, OH Transportation Management Service Center that she is a nonresponsible prospective contractor under Solicitation No. 432-041-86 for highway transportation service between Millersburg and Winesburg, OH. Ms. Beachy submitted the low bid at an annual rate of \$20,290.31. Prior to receipt of the protest a contract was awarded to the second-low bidder at an annual rate of \$23,190.22.

Although this issue was not raised by either party, the record before us shows that Ms. Beachy's protest was not timely filed. The contracting officer's determination of nonresponsibility was received by Ms. Beachy on December 17, 1986. Ms. Beachy's protest was received by the contracting officer on January 9, 1987.

Our bid protest regulations provide that "protests must be received not later than 10 working days after the information on which they are based is known or should have been known, whichever is earlier...." Postal Contracting Manual (PCM) 2-407.8 d.(3). We have consistently held that our timeliness requirements are jurisdictional and that we have no authority to waive or disregard them. See Motorola, Inc., P.S. Protest No. 86-93, December 22, 1986; Evergreen International Airlines, Inc., P.S. Protest No. 86-07, May 5, 1986; Dennison Kybe, P.S. Protest No. 85-69, October 31, 1985; Poveco, Inc., et al., P.S. Protest No. 85-43, October 30, 1985. Since Ms. Beachy's protest was not received within 10 working days of the date on which the information on which it was based was known to her, it is untimely and may not be Ella considered by this office. If it were considered on the merits, however, the protest would be denied.

The contracting officer has presented two reasons for his determination: (1) that Ms. Beachy did not have the financial means to perform the service, and (2) that she shared a residence with an individual recently convicted of obstruction of the

mails.^{1/}

Following bid opening, Ms. Beachy completed P.S. Form 5472-A, Statement of Assets and Liabilities. The only assets shown on the form were two automobiles. No cash assets were shown. The form showed outstanding debts of two-thirds of the value of the identified assets. The specifications required that the contractor provide a passenger automobile with a minimum of 65 cubic feet of usable loading space. Neither of Ms. Beachy's automobiles would meet the contract requirements. Ms. Beachy informed the contracting officer at a pre-award conference that she would borrow from her housemate a truck with which to perform the contract service.

The contracting officer regards it as critical for the contractor to have some cash reserve to pay for fuel, maintenance, insurance, and other items for the 30 to 60-day period before receipt of the first contract payment. In the course of the protest conference, Ms. Beachy claimed additional financial assets consisting of \$400 in a bank checking account, \$800 in cash, child support payments of \$100 per month, entitlement to continuation of pay from her present job for three weeks at \$208 per week, and a reduction in her previously stated liabilities. She advises that she informed the contracting officer of the child support and job payment assets at the pre-award conference. Ms. Beachy also states that she no longer shares a residence with the convicted individual, is not under his influence, and would, if required, purchase a vehicle of her own instead of borrowing his truck.

Our standard of review of a determination of nonresponsibility is limited:

A responsibility 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 a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

United Chem-Con Corporation, North American Manufacturing Corporation, P.S. Protest Nos. 86-45, 86-47, August 27, 1986. The PCM requires that all elements of responsibility be affirmatively determined before a contract may be awarded.^{1/}

^{1/} The record reflects that a judgment on this charge was entered after a guilty plea in July, 1986, and that the individual was fined \$25.00 and sentenced to six months imprisonment, of which all but the time already served was suspended.

^{2/} PCM 1-902 provides that:

One element of responsibility is "hav[ing] adequate financial resources, or the ability to obtain such resources as required during performance of the contract." PCM 1-903.1(i).

We may not overrule the contracting officer's judgment as to the adequacy of Ms. Beachy's financial resources absent evidence of fraud, prejudice or arbitrary and capricious action. Graphic Technology, Inc., P.S. Protest No. 85-66, December 30, 1985; Hi-Line Machine and Gardner Industries, P.S. Protest No. 85-6, March 7, 1985. We find no such evidence before us. Even if we accept Ms. Beachy's representation that she advised the contracting officer of her severance pay and child support income,^{1/} 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. The contracting officer's conclusion with respect to the protester's financial responsibility must be upheld. Similarly, we find no basis to overturn the contracting officer's determination with respect to the second ground, which we take to relate to PCM 1-903.1(iv)'s requirement that the prospective contractor "have a satisfactory record of integrity."

The protester acknowledges that she lived, since the conviction, with the individual identified by the contracting officer, but asserts that she is not now living with him^{1/} and proffers evidence that the offense for which he pleaded was a misdemeanor, rather than a felony. On the other hand, at the time of the pre-award conference, she looked to the individual as the prospective provider of the vehicle she would use on the route.

Although the file lacks details of the offense, we cannot conclude that the contracting officer acted beyond his authority in concluding that the degree of association established between the bidder and one convicted of an offense having to do with the mails precluded an affirmative finding of the bidder's integrity. The offense at issue was obstruction of the mails, a matter closely
(. . . continued)

The contracting officer shall make a determination of nonresponsibility if after compliance with 1-905 and 1-906, the information thus obtained does not indicate clearly that the prospective contractor is responsible.... Doubt as to productive capacity or financial strength which cannot be resolved affirmatively shall require a determination of nonresponsibility.
[Emphasis added].

^{3/} The evidence of additional cash resources first submitted after contract award is not for consideration. See Great Lakes Dredge and Dock Company, Comp. Gen. Dec. B-221768, May 8, 1986, 86-1 CPD & 444.

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^{4/} The case cited at footnote 3 also applies here. The bidder's intent like the bidder's financial situation, is not to be measured after contract award.

related to the circumstances of contract performance. It is not surprising for the contracting officer to take the association seriously.

The protest is dismissed.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[Checked against original 2/18/93 WJJ]