

Protest of) Date: February 9, 1988
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 PAMELA J. SUTTON)
)
 Solicitation No. 948-82-87) P.S. Protest No. 87-110

DECISION

Ms. Pamela J. Sutton timely protests the contracting officer's determination that she is a nonresponsible bidder under Solicitation No. 948-82-87.

The solicitation, issued July 6, 1987, by the San Francisco Transportation Management Service Center (TMSC) invited bids for the highway transportation of mail on Deer Valley Road in Rescue, CA. Bid opening was held August 31, and Ms. Sutton's was second low of the five bids received. The low bidder was subsequently determined to be nonresponsible, and Ms. Sutton's bid became eligible for consideration.

The TMSC requested Ms. Sutton to complete a pre-award questionnaire which requested financial information. Ms. Sutton's completed statement indicated \$1,003 in checking accounts, that she and her mother had a combined monthly income of \$1,250, two vehicles registered in her mother's name and combined monthly expenses of \$800.^{1/} It also indicated that she had previously served on a highway contract route, and she included a statement of reasons for leaving that contract.

^{1/} Although the questionnaire requested a listing of assets and liabilities, Ms. Sutton's bottom line response was listed as "combined total incomes" and "living expenses total," which apparently refers to combined monthly incomes and combined monthly living expenses. It is unclear whether the money in the checking account is in Ms. Sutton's name, her mother's name or in a joint account.

The contracting officer declared Ms. Sutton nonresponsible on the basis of inadequate evidence of financial sufficiency. On October 20, Ms. Sutton mailed her protest which was received at the General Counsel's Office on October 21. In

a letter to the contracting officer of the same date as the protest, Ms. Sutton stated she had access to an additional \$5,000 from a source she did not identify.

By letter of October 28, the contracting officer advised Ms. Sutton that he was reconsidering his initial decision and requested that Ms. Sutton segregate her income and expenses from her mother's and clarify who was the registered owner of the two vehicles listed. Ms. Sutton responded, segregating the accounts as follows:

<u>Ms. Sutton</u>	<u>Ms. Sutton's Mother</u>
Earnings - \$950/mo.	\$300/mo.
Expenses - <u>\$500/mo.</u>	<u>\$300/mo.</u>
\$450/mo. surplus	0 surplus

Ms. Sutton also indicated that both vehicles were registered in her name.

Apparently Ms. Sutton's response failed to dissuade the contracting officer from his initial position because on October 30 he filed a statement with this office supporting his finding of nonresponsibility. The contracting officer cited as further reason to question Ms. Sutton's financial sufficiency the fact that she had declared bankruptcy. (At the request of this office, the contracting officer investigated Ms. Sutton's bankruptcy status and determined that she had been discharged from her debts on April 30, 1987.)

In the October 30 statement, the contracting officer also provided information concerning Ms. Sutton's abandonment of a highway contract route from the Georgetown, CA, post office to the Garden Valley, CA, post office. The contract had been awarded on June 24, 1986, for service beginning July 1, 1986. Eight days after she began service, Ms. Sutton wrote the contracting officer expressing her desire to quit the route. Memoranda from the Georgetown postmaster indicated that Ms. Sutton continually failed to perform the route on time, and often failed to complete the route at all. The postmaster indicated that he attempted to provide Ms. Sutton with additional training, which she often declined. For example, he offered to have her travel on the route with the former carrier on several occasions, but she declined these invitations. She did, however, accept his casing advice.

A July 30, 1986, letter from Ms. Sutton informed the contracting officer that she intended to terminate service on September 3, 1986. She explained that the work load was much greater than she anticipated, the road conditions were hazardous due to logging trucks on the road, and the cases and lighting in the office were inadequate. Based on Ms. Sutton's anticipatory breach, the contracting officer terminated the contract for default effective September 3, 1986. Claims and counterclaims concerning this termination are currently before the Postal Service Board of Contract Appeals.

The contracting officer submitted a supplemental statement in which he explained a second ground for finding Ms. Sutton nonresponsible -- that she lacked the tenacity to perform the contract.^{1/} The contracting officer relied on her abandonment of the prior highway contract route as evidence of lack of tenacity. Based upon his contacts with Ms. Sutton and his discussions with postmasters and divisional managers with recent contact with her, the contracting officer sees no change in her behavior since she was terminated.

Ms. Sutton responded to the contracting officer's supplemental report, stating that she has had little contact with the Georgetown postmaster or divisional managers since she abandoned her route, but concedes that the contracting officer has had conversations and exchanges of letters with her since the abandonment. She repeats her argument that the route she abandoned was onerous. She enclosed memoranda from the Garden Valley postmaster dated both before and after her termination requesting that the route be split because it frequently could not be delivered on time and because future growth was expected to worsen the situation.

The Postal Contracting Manual (PCM) sets forth the following minimum standards, among others, for determining a contractor's responsibility:

1-903.1 General Standards. Except as otherwise provided in this paragraph, a prospective contractor must:

(i) Have adequate financial resources, or the ability to obtain such resources as required during performance of the contract. The adequacy of a

^{2/}Supplemental contracting officer's statements may be accepted and the information contained within them relied upon. See Interscience Systems, Inc., Concom Systems, Inc., 59 Comp. Gen. 438, May 8, 1980.

contractor's financial resources is particularly important when an unusually low price is not founded on superior efficiency, techniques, or processes.

* * *

(iii) Have a satisfactory record of performance (contractors who are seriously deficient in current contract performance, when the number of contracts and the extent of deficiency of each are considered, shall, in the absence of evidence to the contrary or circumstances properly beyond the control of the contractor, be presumed to be unable to meet this requirement). Past unsatisfactory performance, due to failure to apply necessary tenacity or perseverance to do an acceptable job, shall be sufficient to justify a finding of nonresponsibility.

PCM 1-903.1(i) and (iii) (emphasis added).

The standard governing our review of a contracting officer's determination of nonresponsibility is well settled.

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.

Marine & Industrial Insulators, Inc., P.S. Protest No. 87-31, July 1, 1987; Pines Trailer Corporation, P.S. Protest No. 86-85, October 22, 1986; Year-A-Round Corporation, P.S. Protest No. 86-94, January 29, 1987.

The contracting officer found that Ms. Sutton lacks the "necessary tenacity or perseverance to do an acceptable job," a criterion for responsibility and sufficient reason on its own to support a nonresponsibility determination. H&M Leasing, P.S. Protest No. 81-55, December 30, 1981. "What is required to sustain a determination of nonresponsibility for lack of tenacity and perseverance to do an acceptable job is

a clear showing that a prospective contractor did not diligently or aggressively take whatever action was necessary to solve its problems." Spencer Contracting Company, Inc., P.S. Protest No. 87-78, September 8, 1987; Mesa Constructors, P.S. Protest No. 83-39, September 20, 1983. "We are concerned not with whether a firm has or can acquire the capability to perform, but whether a firm that is deemed to possess adequate capability applies it in a sufficient measure to insure satisfactory completion of the contract." Id., citing 51 Comp. Gen. 288 (1971).

Here, Ms. Sutton performed poorly on her former route, and further declined to participate in many offered training activities designed to improve her ability to perform. After only eight days on the job she wrote the contracting officer that she wanted to terminate the contract and after two months she abandoned the route. This is sufficient to support a finding of a lack of tenacity and perseverance.

Default terminations occurring in the remote past have not been reasonable bases to support findings of nonresponsibility. Levi Carver, P.S. Protest No 76-25, October 28, 1976 (unsatisfactory performance eight years earlier too remote to justify rejection); M. L. Hatcher Pickup and Delivery Services, Inc., P. S. Protest No. 80-69, December 10, 1980, affirmed on reconsideration, February 24, 1981 (default termination 22 months earlier too remote); Don L. Peterson, P.S. Protest No. 84-56, August 10, 1984 (default termination 19 months earlier too remote). However, default terminations in the more recent past may be relied upon. Magnum Haulers, Inc., P.S. Protest No. 85-90, March 7, 1986 (5 default terminations, the most recent being 16 months prior to the determination); National Fleetway, Inc., P.S. Protest No. 80-26, July 3, 1980 (deficiencies in prior contract performance occurring 6 to 7 months prior to the determination found to be a substantial basis for a nonresponsibility finding).

Ms. Sutton's abandonment and termination occurred 13 months prior to the nonresponsibility determination. Moreover, the contracting officer also had several current conversations and exchanges of letters with Ms. Sutton and he also surveyed managers who have had recent conversations and exchanges of letters with Ms. Sutton. The contracting officer sees no reason to believe that Ms. Sutton has changed since her recent abandonment. Ms. Sutton's arguments that the in-house equipment was old, traffic dangerous and workload too heavy have not been proven. Other contractors, before and after her attempts to perform, used the same postal facilities, and, although there is evidence to demonstrate that her former route was heavy, that does not justify her actions -- abandonment.^{1/1/}

^{3/}In reaching this conclusion we give great weight to the contracting officer's statement, relying on the

The protest is denied.

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

[checked against original JLS 3/15/93]

"presumption of correctness" which accompanies such statements. Year-A-Round Corporation, *supra*. Our decision, based as it is on standards of proof different from those obtaining before the Board of Contract Appeals, has no bearing on the outcome of Ms. Sutton's appeal to the Board regarding her abandonment

of the 1986 highway contract. In addition, we note that facts relied on by the contracting officer are or may be contested in litigation does not prohibit their use in reaching responsibility determinations.

Hunter L. Todd,

P.S. Protest No. 85-78, October 18, 1985; C & H Enterprises, P.S. Protest No. 84-70, December 6, 1984; Mark A. Carroll & Son, Inc., P.S. Protest No. 79-42, October 3, 1979.

^{4/}Because we find that the contracting officer's conclusion that Ms. Sutton lacks the tenacity to perform the job is supportable, we do not reach the issue of Ms. Sutton's financial responsibility.