Protest of	)	
	)	Date: August 18, 1988
OSM CORPORATION	)	
	)	
Solicitation No. 059990-88-A-0013	)	P.S. Protest No. 88-36

DECISION

OSM Corporation (OSM) timely protests its rejection as a nonresponsible bidder on Solicitation No. 059990-88-A-0013 for Carrier Cases and Tables with Dividers. The solicitation was issued on March 31, 1988, by the San Bruno, CA, Procurement and Materiel Management Service Office with an offer due date of April 25. Nine bids were received. OSM was the low bidder on the carrier cases and tables.[1/]

The contracting officer, accompanied by the quality assurance program coordinator (QAPC) visited OSM on May 11 for a pre-award survey. The results of this survey were memorialized by the contracting officer in a May 18 memorandum entitled "Determination of Non-responsibility." The contracting officer noted the following problems with OSM:

a) OSM had severe financial difficulties, including a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, an inadequate line of credit from its bank, and very weak financial strength based on a Dun & Bradstreet report and its financial statements;

b) the bidder's plant was inadequately set up to manufacture the items within the required delivery schedule, including the lack of swivel for painting all sides of the unit, lack of drying ovens, inadequate metal preparation area, inadequate assembling, packaging and storage area and quality control problems;

c) inability to make any necessary changes in the production line in time for the accelerated first article testing and production delivery;[1/]

[1/]Award of the dividers portion of the solicitation was made to D.V. Industries on May 16 and is not at issue in this protest.

[2/]The cases and tables are in critically short supply, which accounted for reduced time frames for first

d) no firm commitments from any suppliers or vendors as to the raw materials used in the items; and

e) the other contracts performed by OSM were of much less complex items and were not, therefore, good evidence that OSM could perform under this solicitation.

On June 6, OSM was orally notified that it had been found nonresponsible, based on the above analysis. OSM protested on June 7, disputing the contracting officer's finding that its plant was inadequate, which it stated was the only reason it had been found to be nonresponsible. OSM claimed that, based on a 16-hour workday, it could paint twice the required number of units monthly, that it had a warehouse next door, as well as additional storage space available to it, that it had successfully performed all its prior contracts and that it was confident that it could successfully perform on this requirement.

The contracting officer's report restates her rationale for finding OSM to be nonresponsible. Her report directly addresses the issues mentioned in OSM's protest and notes that they are purely speculative assertions. She notes that the additional storage facility mentioned by OSM was inadequate, and that one of OSM's prior contracts with the Postal Service had had packaging problems.

OSM has presented a lengthy rebuttal of the contracting officer's position. As to the question of its financial integrity, OSM strongly urges that loan package which its bank has approved includes a $150,000 letter of credit and is adequate for a contract of $1,600,000. OSM dismisses the contracting officer's analysis of its financial capability as speculative and biased.

As to its ability to manufacture the items in a timely and successful manner, OSM notes that the hooks are moveable and could accommodate items up to eight feet wide, that OSM's electrostatic paint system does not require the item to be painted to swivel, and that the modifications to the paint line could have been accomplished in sufficient time to manufacture the units in a timely manner. OSM further cites its successful completion of other government contracts and its immediate production of two sample units as further indicia that it has the necessary production capacity and capability. It further states that it never makes firm arrangements with materiel suppliers prior to notification that it has received award of a contract. OSM concludes that the contracting officer and QAPC assumed that it was nonresponsible, rather than basing their determination on facts.

article testing (30 calendar days after award) and production deliveries (commencing 60 calendar days after first article approval).

The contract specialist and QAPC have responded to OSM's comments. The contract specialist disputes OSM's statement of financial health and asserts that the bank loan was not necessarily to be used to support performance on this solicitation and that it was highly conditional in nature and subject to the occurrence of several contingencies, such as an appraisal of OSM's business assets, a meeting with bank counsel to discuss the loan terms, and the inclusion in the loan agreement of certain unspecified terms. He strongly objects to OSM's lack of supplier quotations, concluding that bidding on this requirement without such pricing would be very difficult. The QAPC reiterates that OSM's paint line was too small and could not rotate the units. He states that there was no evidence to support OSM's unsubstantiated claim that it would get the paint line modified. Indeed, the insufficiency of the paint line was said to be a problem on a current Postal Service contract for pouch racks. The QAPC also notes with disapproval OSM's lack of vendor quotes and maintains that his review was based on his experience with necessary requirements for manufacture of these items and his observations of the state of OSM's operations.

OSM's rebuttal restates many of the points previously stated. OSM argues that the QAPC has made serious mistakes in his analysis based on incorrect assumptions, that he has exaggerated OSM's past performance and quality assurance problems, that he has dismissed out of hand the sample units manufactured by OSM, and that he generally has treated OSM unfairly. OSM recounts conversations with the contracting officer which indicate that she was satisfied with its financial capability. It states that the sample units it produced were equivalent to first articles and fully representative of what the finished product would be. OSM also notes that it keeps open blanket orders for materials, which it then orders off of for contract performance. OSM strongly urges that it has been dealt with in an unfair and unprofessional manner and that it has all the necessary capabilities to perform the contract successfully.

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 well 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.

Pamela J. Sutton, P.S. Protest No. 87-110, February 9, 1988; 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. "When the decision of the contracting officer is based on the judgment of technical personnel, the protester must show that such judgment was fraudulent, prejudiced, or arbitrary and capricious." Year-A-Round

Corporation, P.S. Protest No. 87-12, June 12, 1986. The contractor bears the heavy burden of proving that either the pre-award survey was inaccurate or the resulting nonresponsibility determination was unreasonable. ARA Food Services Company, P.S. Protest No. 78-35, September 5, 1978. In resolving factual conflicts between the protester and the contracting officer, the statements of the contracting officer are given a "presumption of correctness" which the protester bears the burden of overcoming. See E-Z Copy, Inc., P.S. Protest No. 88-18, May 10, 1988; Edsal Machine Products, Inc., P.S. Protest No. 85-84, January 29, 1986.

The first issue concerns OSM's financial capability. It is undisputed that OSM is currently in reorganization proceedings pursuant to Chapter 11 of the Bankruptcy Code and that its financial situation is very weak. A bidder's status as undergoing Chapter 11 reorganization does not, without more, require a finding of nonresponsibility, but it can be considered as a factor in making a nonresponsibility determination. Dohrman Manufacturing Co., Inc., P.S. Protest No. 84-8, March 13, 1984; Wallace & Wallace, Inc., et al. - Reconsideration, Comp. Gen. Decs. B-209859.2, B-209860.2, July 29, 1983, 83-2 CPD & 142. Additionally, it was well within the contracting officer's scope of discretion to rely on OSM's questionable financial situation in finding OSM to be financially incapable of performance. Dohrman Manufacturing Co., Inc., supra; Hungate Enterprises, P.S. Protest No. 79-5, May 25, 1979.

OSM responds that any possible question about its financial condition should have been cleared up by the letter from its bank approving a $500,000 loan package. However, the letter is couched is conditional language and, while it uses the word "approval," cannot be said to have been a firm commitment. "[I]t is well within the discretion of the contracting officer to require that a financial commitment be firm and in writing." Currency Technology Corporation, P.S. Protest No. 85-22, July 8, 1985. In addition, the contracting officer's determination that $150,000 was too little to support contract performance was not an abuse of her discretion. The fact that OSM may have successfully performed contracts of similar dollar value does not automatically render the contracting officer's decision arbitrary. Based on the facts in the record before us, the contracting officer was justified in rejecting OSM as nonresponsible based on its financial situation.

Concerning OSM's technical ability to perform the contract within the required delivery schedule, its protest is very similar to that of Fairfield Stamping Corporation, P.S. Protest No. 88-04, June 3, 1988. In Fairfield Stamping, the QAPC, during a pre-award survey, reached conclusions far different both in substance and degree from the bidder's perceptions. We upheld the contracting officer's determination, which relied on the QAPC's analysis, that Fairfield was nonresponsible. Here, we have reviewed the detailed conflicts concerning OSM's technical capability and find that even if the QAPC's analysis contains some minor inaccuracies,[1/] it is based on substantial

[3/]There are several discrepancies in the record which are not satisfactorily addressed. There are factual disputes over whether the units at issue have inside letter pockets and plastic leg caps. However, since

evidence and is not arbitrary or capricious.[1/] As such, it provides a sufficient basis for the contracting officer's determination of OSM's nonresponsibility.

OSM claims that its past successful performance on other government contracts and its production of two sample units conclusively proves its responsibility. This is incorrect. Post-contract performance is an element of a responsibility determination only insofar as that performance is applicable to the solicitation under review. Fairfield Stamping Corporation, supra; Cal-Chem Cleaning Company, Incorporated, Comp. Gen. Dec. B-179723, March 12, 1974, 74-1 CPD & 127. The prior contracts to which OSM refers are not for items similar enough to those being solicited to bolster substantially its argument that it is responsible. Similarly, the fact that OSM manufactured sample units which conformed to the specifications does not require that it be found responsible in the face of other substantial evidence supporting OSM's nonresponsibility.

OSM alleges that it should have been informed of the contracting officer's findings and been given a chance to rebut those findings prior to her determining OSM to be nonresponsible. However, a contracting officer does not have to discuss negative findings of a pre-award survey or otherwise afford bidders an opportunity to explain or defend against evidence which supports a finding of nonresponsibility prior to a determination of nonresponsibility. CCP Manufacturing Corporation, P.S. Protest No. 85-31, July 3, 1985; Currency Technology Corporation, supra.[1/] Therefore, there is no impropriety as to the contracting officer's making her determination without further input from OSM.

Finally, OSM alleges that postal employees have acted towards it throughout the evaluation process in a biased and prejudicial manner. To prove that postal personnel have acted towards a bidder with impermissible bias, the protester must show, by

neither party provided this office with a copy of the drawings for the item, we are unable to determine which position is correct. Similarly, the extent and nature of the quality problems OSM encountered on the previous postal contract is disputed. We hold only that, even if the QAPC was in error on these issues, there was sufficient probative evidence before him to support the contracting officer's determination of nonresponsibility.

[4/]Inaccuracies as to minor, secondary issues which do not detract in any substantial way from the areas in which a bidder was found deficient do not impair the ultimate nonresponsibility determination. Fairfield Stamping Corporation, supra; Omneco, Inc.; Aerojet Production Company, Comp. Gen. Decs. B-218343, B-218343.2, June 10, 1985, 85-1 CPD & 660.

[5/]While the contracting officer is under no legal obligation to discuss the basis for her determination prior to her decision, we note that OSM strongly urges that it has been unfairly treated because it was misled into thinking that it had received a favorable review, when, in fact, it had not. Insofar as frank discussion of the negative aspects of a bidder's capacity and capability would reduce the possibility of surprise, the contracting officer and QAPC may wish to consider this in future procurements. As in Fairfield Stamping Corporation, supra, it is disconcerting when the pre-award survey and the bidder's statement conflict so dramatically and on so many points.

sufficient affirmative evidence (Good & Good Contractor, P.S. Protest No. 81-16, August 27, 1981), "... virtually irrefutable proof that the officials had a specific and malicious intent to harm the protester, since contracting officers otherwise are presumed to act in good faith. Prejudicial motives will not be attributed to such officials on the basis of inference or supposition." I.C., Inc., P.S. Protest No. 86-06, April 25, 1986, quoting Rodgers-Cauthen Barton-Cureton, Inc., Comp. Gen. Dec. B-220722.2, January 8, 1986, 86-1 CPD & 19. OSM's allegations amount to a differing view of the facts, and are insufficient to meet the required burden of proof of impermissible bias. We have considered all the issues raised by OSM and have found no irregularities of sufficient magnitude to justify the reversal of the contracting officer's determination.

The protest is denied.

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[checked against original JLS 2/24/93]