

June 24, 1994

P.S. Protest No. 94-16

MARCY L. BAKER

Solicitation No. 150-82-94

DIGEST

Protest against determination that bidder is nonresponsible with respect to mail transportation contract is denied when that determination is not abuse of contracting officer's discretion.

DECISION

Mrs. Marcy L. Baker protests the contracting officer's determination that she is a nonresponsible bidder on a solicitation for the highway transportation of mail.

Solicitation 150-82-94 was issued February 2, 1994, by the Allegheny Area Distribution Networks office seeking bids for service between the Columbus, Ohio, post office annex, and the Columbus Air Mail Facility (AMF). The contract contemplated approximately 16 nineteen-mile one-way trips per weekday (567.5 annual trips, comprising 87,456 estimated schedule miles and 3,723 annual schedule hours); the contractor was to provide one two-axle tractor and three 45-foot tandem axle trailers. The same office also issued Solicitation 150-80-94 for service between the Columbus annex and the Columbus post office. When bids on both solicitations were opened on March 3, Mrs. Baker was the low bidder on each solicitation. The annual rate bid for solicitation -82 was \$90,675.

The following facts are summarized from the contracting officer's statement and its supporting documentation. Mrs. Baker was requested to provide various items of pre-award information with respect to each solicitation, which she provided by March 14. On April 4, a contract specialist sought to discuss the bids by telephone with Mrs. Baker.¹ The contract specialist's call was returned that same day for Mrs. Baker by David Baker, who

¹ The protester states that this conversation occurred on April 7, not April 4.

advised that he would be running the business. In the course of the conversation, Mr. Baker indicated that the bids submitted on the two solicitations were "too low to run both," and that they would need an additional amount to provide service on both routes. When the contracting officer advised that no additional amount could be provided and that each bid would have to stand as submitted, Mr. Baker sought to withdraw the bid on solicitation - 80. He was advised that the bid could not be withdrawn.

Discussion then turned to the manner in which the Bakers planned to provide service on the AMF route.² The contract specialist noted that the route required two full time drivers, that someone would have to be on twenty-four hour call, that the Bakers lived in Indianapolis, IN, and that Mrs. Baker's bid did not provide for hired drivers' wages.³ Mr. Baker advised that it was his intention to provide some of the service by "driv[ing] down to Columbus a couple of days a week," and to have the remainder of the service provided by hired drivers. The contract specialist was skeptical of that response, concluding that because of the distance between Indianapolis and Columbus, it was more likely that hired drivers would be used exclusively. Accordingly, the contract specialist calculated the costs of the contract assuming the exclusive use of hired drivers. He calculated that, so operated, contract costs would exceed the annual rate bid by almost \$21,000 per year, a deficit which Mrs. Baker's pre-award financial disclosures suggested she could not cover.⁴

The contract specialist spoke to Mr. Baker again on April 11, when he again advised of his intention to drive to Columbus to perform some of the service. The contract specialist felt

² The information previously submitted included a pre-award questionnaire on which Mrs. Baker identified herself as the contractor on an existing route and identified herself and David W. Baker as the individuals intended to have access to the mails during performance of the new contract. Mrs. Baker's bid had been accompanied by a bid worksheet, Form 7468A, which indicated that the contract would be operated by two full-time drivers, and which contained no provision for salaries and benefits for hired drivers, providing instead for contractor's wages for 3,900 hours of "personal driving or supervision" at a rate of \$13.25 per hour.

³ Hired drivers, the employees of a contractor, must be compensated at wages established by the Secretary of Labor pursuant to the Service Contract Act. An individual contractor performing the driving himself or herself need not receive Service Contract Act wages. The contract specialist's calculations assume a cost per hour for hired drivers of \$13.61 plus \$3.10 in payroll taxes and benefits.

⁴ The contracting officer's statement recites that the actual annual loss was calculated as \$20,982 per year, or \$1,748 per month, and that in the telephone conversations the monthly figure may have been rounded to \$2,000 per month, accounting for the \$24,000 annual figure cited in the protest.

The protest file includes the worksheet used to arrive at this loss amount. It assumes the use of two hired drivers and no driving by the contractor. A second worksheet assumes the use of one hired driver for 1,323 hours per year (about 26 hours per week), and the contractor's performance for an additional 2400 hours per year (slightly more than 41 hours per week). By that calculation, annual costs exceed the amount bid by \$7,200 per year.

Both worksheets assume a fuel cost of \$1.00 per gallon, rather than the \$.91 per gallon used on the bidder's worksheet, and the second worksheet values the contractor's time at \$15.24 per hour, rather than the \$13.25 per hour figure used by the bidder. Because the contracting officer has offered no explanation for the adjustments, we have recast the calculations to reflect the bidder's figures. As so recast, the loss associated with the use of two hired drivers becomes \$19,678 per year and the loss associated with the use of a part time driver becomes \$113 per year.

that Mr. Baker was being evasive and was denying him access to Mrs. Baker. On April 21 the contract specialist recommended to the contracting officer that Mrs. Baker be found nonresponsible on both routes.

Concerned that the contract specialist had not spoken to Mrs. Baker, the contracting officer directed him to try to contact her again. She returned the call on April 22 and confirmed her husband's prior advice about how the route would be operated. The contract specialist expressed his skepticism in that regard and his conclusion that the route could not be run at a profit using hired drivers. According to the contract specialist, Mrs. Baker stated that while she had signed the bid, "she didn[']t know anything about operating the route or the costs involved" and that the contract specialist would have to discuss that with Mr. Baker. Following that conversation, the contract specialist again recommended that the contracting officer find Mrs. Baker nonresponsible. The contracting officer adopted that recommendation. By letter dated April 21,⁵ Mrs. Baker was advised of the contracting officer's determination, and its reason, as follows:

We have determined that you do not have sufficient costs for hired driver wages in your bid to operate this route and to continue to operate the other highway contracts that you currently hold.^[6]

⁵ The contracting officer's statement recites that he made his determination of nonresponsibility after the contract specialist's conversation with Mrs. Baker, *i.e.*, on April 22. The discrepancy between that assertion and the April 21 date of the letter containing that determination (which Mrs. Baker asserts she received on April 29) is not explained.

⁶ As noted above, the protest record identifies only one other contract held by the bidder. The extent to which a bidder's other contract obligations may impact his or her ability to perform new service is a reasonable factor to consider in determining responsibility. *Minatee Transportation*, P.S. Protest No. 82-44, November 30, 1982.

Mrs. Baker's protest followed.⁷ It makes six enumerated points which we paraphrase as follows:

Contracts with similar hours and equipment requirements have been awarded at or below the amount of the Baker bid.

The contracting officer's "implication that [Mrs. Baker] would not be a reliable contractor" is incorrect.

The contracting officer's contention that the contractor would lose \$24,000 per year is incorrect.

The contracting officer did not try to discuss the operation of the contract with Mrs. Baker before finding her nonresponsible.

The determination to find Mrs. Baker nonresponsible preceded the contract specialist's April 22 telephone conversation with her, which was held "only . . . to correct the error that [she] had never been contacted."

The contract specialist's attitude was "arbitrary and capricious" in each of the conversations he had with the Bakers.

The protester's version of the telephone conversations with the contract specialist differs somewhat from the contracting officer's. Mrs. Baker recounts only Mr. Baker's initial conversation and her April 22 conversation. Her account of the first conversation contends that Mr. Baker told the contract specialist that the hired driver would be used only 20 hours per week, and she contends that in the second conversation it was agreed that Mrs. Baker would provide additional information to the contract specialist April 25 when he returned to the office. She states that she was unable to reach the contract specialist between April 25 and 29, when Mrs. Baker learned she had been found nonresponsible.

After receiving the adverse determination, Mrs. Baker did speak to the contract specialist and the contracting officer. She states that in that conversation she explained how a hired driver would be used twenty hours a week, and how even adopting the contract specialist's figure of \$28,000 for a hired driver,⁸ her contract worksheet's figure of \$51,675 in contractor's wages would allow such a payment while leaving nearly \$24,000 for the contractor's efforts. Noting that the contract already had been awarded to the next lowest bidder, the contracting officer declined to alter his determination.

The contracting officer's statement recites the circumstances leading up to his determination of Mrs. Baker's nonresponsibility as set out above. The contracting officer contends that the determination was properly based on Mr. Baker's request for additional

⁷ While Mrs. Baker was also found nonresponsible with respect to solicitation -80, that determination has not been the subject of a protest.

⁸ The contract specialist's analysis using one hired driver involved an annual salary and benefit expense of \$27,388.

funds to operate both routes, his assertion that he would "drive down to Columbus" to operate the routes, Mrs. Baker's lack of knowledge about the routes, and the conclusion that operation of the route would lead to a significant annual loss.

The protester has not responded to the contracting officer's statement.

DISCUSSION

The legal standard by which this office reviews a contracting officer's determination that an offeror is nonresponsible 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.

Craft Products Company, P.S. Protest No. 80-41, February 9, 1981; see also *Lock Corporation of America*, P.S. Protest No. 89-14, March 10, 1989; *Marshall D. Epps*, P.S. Protest No. 88-47, September 15, 1988.

PM Section 3.3.1 a. sets forth general standards for determining whether a prospective contractor is responsible, as follows:

Contracts may be awarded only to responsible prospective contractors. The award of a contract based on price alone can be false economy if there is subsequent default, late delivery, or other unsatisfactory performance. To qualify for award, a prospective contractor must affirmatively demonstrate its responsibility. . . .

Among the elements which must be demonstrated to establish responsibility are having "financial resources adequate to perform the contract" (PM 3.3.1 b.1.), being "able to comply with the required . . . performance schedule, taking into consideration all existing commitments" (PM 3.3.1 b.2.), and having "the necessary organization, experience, . . . technical skills, . . . or the ability to obtain them" (PM 3.3.1 b.6.).

Here, although the contracting officer's statement has offered various other bases for the determination,⁹ the determination itself was based on the insufficiency of the bid to cover

⁹ Contrary to the contracting specialist's suggestion, an adverse impression need not be drawn from the bidder's unsuccessful effort either to withdraw its bid or to seek adjustment of its price. The contract specialist was correct in advising Mr. Baker that absent evidence of mistake, the bids could neither be withdrawn nor increased. PM 12.7.6, *cf. Carol Johnson*, P.S. Protest No. 92-46, August 3, 1992. The error must be a demonstrable clerical or mathematical mistake, not simply an error in judgment. *Id.*

the cost of hired drivers. It is implicit in that determination, and explicit in the contracting officer's statement and contemporaneous documentation of the contract specialist, that Mr. Baker's assertion that he would drive a portion of the route had not been credited, and that the contracting officer accordingly had adopted the contract specialist's assumption that all of the service would be performed by hired drivers. As so performed, the contract cost for the first year of service would exceed the contract rate by approximately 20 per cent.¹⁰

When the bidder's representative indicated to the contract specialist that the bidder planned to operate the route in a manner inconsistent with the material previously submitted--that is, by the use of a hired driver in addition to the bidder's own labor, rather than exclusively by the bidder's labor¹¹--it was the bidder's obligation to explain the revised operating plan in a manner sufficient to establish its reasonableness. The explanations which were given were uncertain and imprecise, failing to indicate the hours which the contractor would provide and the hours which would be provided by an employee. It was well within the contracting officer's discretion to conclude that the explanations of Mr. Baker and Mrs. Baker insufficiently established how the bidder intended to operate the route using Mr. Baker's labor along with the labor of a hired driver.¹²

Mrs. Baker's remaining points are unavailing. That other similar contracts may have been awarded to self-employed contractors at similar prices is not significant; in those other

¹⁰ While the fact that a bid or bids may have been too low does not necessarily provide a ground for a contract not to be awarded, *Canteen Service, Inc.*, P.S. Protest No. 90-68, November 15, 1990, it is appropriate to consider the financial ability of the bidder to perform. In making that determination in the case of a self-employed contractor, however, it is inappropriate to assume that the contractor cannot subsidize costs from his or her salary. *James E. Toney*, P.S. Protest No. 88-45, October 6, 1988. Accordingly, it would not have been appropriate for the contracting officer to have concluded that the Bakers' operation of the route using one hired driver and Mr. Baker would not have been financially feasible. As the preceding text indicates, however, and contrary to the protester's contention, that was not the basis of the determination.

¹¹ As noted above, the bidder's worksheet indicated that the services of two full-time drivers would be required, and that all of the driving would be done personally by the contractor. In this regard, we assume, without undertaking to resolve the issue, that it is permissible for an individual bidder's spouse to perform driving services without receiving Service Contract Act wages as the contractor's employee. We note, however, that the worksheet which accompanied Mrs. Baker's bid on solicitation -80 indicated that the contractor would personally perform service requiring three full-time drivers; the bidder's ability to do so consistent with the Service Contract Act is questionable.

¹² While we accept the contracting officer's version of the conversations (in disputes of fact, we adopt the contracting officer's version of the facts absent sufficient evidence to overcome the presumption of correctness which attaches to that position, *QMC, Inc.*, P.S. Protest No. 91-52, December 27, 1991), the conclusion we reach would not differ if we adopted Mrs. Baker's account, which contended that the contract specialist was advised that the hired driver would be used only 20 hours per week. The service solicited would comprise almost 72 hours per week, so about 52 service hours would be required of Mr. Baker in addition to those of the hired driver. How Mr. Baker would provide that service while commuting from Indianapolis, a 352 mile round trip, was not explained. The remoteness of a contractor from the route is a reasonable factor to consider with respect to responsibility. *Stephen W. Du Puy*, P.S. Protest No. 92-51, October 9, 1992.

cases the bidders may have adequately indicated how the service would be provided. Mrs. Baker may not complain about any failure of the contracting officer or his representatives to discuss the contract with her when her representative undertook to return the contracting officer's calls and asserted that he would speak on her behalf. In any event, we accept the contracting officer's statement that he did not adopt the contract specialist's recommendation until after the contract specialist had spoken to Mrs. Baker.

The protest is denied.

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