

January 26, 1995

P.S. Protest No. 94-42

JEFF TALANO

Solicitation Nos. 608-6068-94; 608-6073-94

DIGEST

Protest against nonresponsibility determinations is denied where the contracting officer reasonably based the determinations on substantial information and the bidder failed to supply required information pertaining to responsibility.

DECISION

Mr. Jeff Talano, principal partner of Talano Transportation, timely protests the contracting officer's determinations that he and his partnership are nonresponsible bidders on two solicitations for the highway transportation of mail issued by the Great Lakes Distribution Networks Office (DNO), Carol Stream, IL.

Solicitation 608-6068-94 ("6068") was issued June 3, 1994, seeking transportation service from Highland Park, IL, to a postal facility at O'Hare Airport, Chicago, IL. The contract's term was to be from August 20, 1994, to June 30, 1997. Bid opening was July 7. Of the nine bids received, Mr. Talano's was third lowest. Solicitation 608-6073-94 ("6073") was issued June 17, seeking transportation service from the Chicago Processing and Distribution Center to the Postal Service's Eagle Hub facility at Indianapolis, IN. The term was to be from August 20, 1994, to June 30, 1996. Bid opening was July 18. Twenty-seven bids were received, including two from Mr. Talano, of which one was the lowest bid received.

On July 21, the contracting officer sent a letter to several of the lowest bidders on both solicitations asking for information in order to make responsibility determinations. The letters to Mr. Talano were identical and asked him to demonstrate, among other things, that he had financial resources adequate to perform the contract; a "sound record of integrity and business ethics"; and was "able to comply with the required performance schedule." In addition, the letters asked Mr. Talano to respond to the following questions:

What conditions have changed since a Letter of Warning was issued on June 22,

1994, to Jeffery Talano and James Talano on Highway Contract Route 60564 for Unsatisfactory Service?

What conditions have changed since a Letter of Warning was issued on June 22, 1994, to Jeffery Talano and James Talano on Highway Contract Route 60433 for Unsatisfactory Service?^[1]

The July 21 letters also pointed out that Mr. Talano had not submitted cost statements for either solicitation, and requested the submission of several documents, including a current bank account balance sheet.

In response, Mr. Talano submitted three letters dated July 23. The first referred to both solicitations and stated, in answer to the two questions above, service "has been as restored and operations support improved." Mr. Talano stated that he had adequate financial resources to perform both contracts and was able to comply with the required schedules. "I am prepared to respond and/or demonstrate that I have the following . . . necessary to operate [both contracts]: Organization Experience[,] Technical Skill[,] Quality Control[,] Equipment[,] Facility. Moreover, to my knowledge, I and all partners are qualified and eligible to receive an award under applicable laws and regulations." A second letter dated July 23 referred to solicitation 6073 only and stated that Mr. Talano would submit a cost statement after the "outcome of the low bidder's offer" was determined. The third letter of July 23 referred to both solicitations and stated that Mr. Talano would submit cost statements after receiving contract award and when service was scheduled to commence. "The reason I do not submit a cost statement with my bid is that it is not a part of the awarded contract and has nothing to do with a determination of responsibility to operate said contract."

Instead of an account balance sheet, Mr. Talano submitted his own estimate of his total accounts receivable per month and his monthly operating expenses. He also stated: "The Great Lakes [DNO] already has copies of . . . letters of experience, letters of business reference, and driving abstracts from the State Department of Motor Vehicles for all officers of the company."

In a Pre-Award Questionnaire and an Assets and Liabilities Statement submitted with respect to solicitation 6073,² Mr. Talano described himself as the owner-operator of a partnership. He listed his father, James Talano, and one other person as partners. The protester's father also was listed as a driver.

¹ The record contains both of the warning letters. The letter for HCR 60564 primarily cited scheduling problems; the warning for HCR 60433 primarily cited failures to operate.

² Mr. Talano did not submit a preaward questionnaire for solicitation 6068.

Mr. Talano submitted his bid for solicitation 6068 as the "CEO" of Talano Transportation using his individual tax identification number, and for solicitation 6073 in his own name, using the same tax identification number. Talano Transportation is a partnership of which Jeff Talano is the principal partner. The record indicates that all documents pertinent to responsibility cover both Jeff Talano and Talano Transportation. The contracting officer intended his nonresponsibility determinations to apply to both Jeff Talano and his partnership; accordingly, so will this decision.

Awards on both solicitations were made on August 5. Solicitation 6068 was awarded to the fourth lowest bidder, PALS Cartage Co. Solicitation 6073 was awarded to the second lowest bidder, Phyllis Foust Trucking, Inc. In separate letters dated August 5, the contracting officer notified Mr. Talano that he was found nonresponsible for both solicitations because of his poor performance record and his failure to submit required information.³

Mr. Talano filed his protest against both awards with the contracting officer on August 11. The contracting officer forwarded it to this office, where it was received on September 15. The protest states:

The reasons are many; however, the synopsis is that [the contracting officer] fraudulently represented my inadequacies as a contractor, avoided following up on anything that would be to my benefit, and furthermore refused to acknowledge that I answered [his] questions

In his statement in response to the protest, the contracting officer asserts that he found Mr. Talano and his partnership nonresponsible primarily due to an unsatisfactory record of prior performance. Although he states that the nonresponsibility determinations were based on the "aggregate of known information," the contracting officer lists the following contributing factors:

- Two contracts, HCRs 604MU and 604NU in James Talano's name, were terminated for default on December 23, 1993.
- The performance of HCR 60433 and 60564, currently held by James and Jeff

³ The August 5 letters were virtually identical. Each included the following:

The bid is rejected because I am not able to make a[n] affirmative determination of your responsibility.

One of the criteria I must consider is your record of performance on other Postal Transportation Contracts. As you know a Letter of Warning was issued on June 22, 1994, to Jeffery Talano and James Talano on Highway Contract Routes 60433 and 60564.

In my letter dated July 21 . . . I requested various information from you that would assist me to make such a determination. This included information as to what measures have been implemented by you since the Letter of Warning was issued that would allow me to determine you [are] responsible. Your response consisted of information that contained nothing to lead me to the belief that your situation with regard to maintaining a satisfactory performance record has changed. You also failed to submit financial documentation [or] a current balance sheet not more than thirty days old listing assets for Talano [Transportation].

Therefore I am required by the Procurement Manual [PM] to make a determination of non-responsibility for failure to demonstrate your ability to maintain a good performance record and supply documentation of adequate financial resources.

Talano, has been unsatisfactory with "numerous irregularities" and both contracts have been subject to cure notices. (See footnote 1.)

The contracting officer asserts that although the protester's bid for solicitation 6068 was signed by Jeff Talano as CEO of Talano Transportation and the bid on solicitation 6073 was submitted only in Jeff Talano's name, "Jeff Talano's performance as part of the partnership can reasonably be used in my assessment of his responsibility as an individual." The contracting officer concludes:

In my judgment, the poor service performance of this contractor is a matter of record. It is my business judgment that the contractor must demonstrate sustained improvement and maintenance of satisfactory service on contracts presently held for me to be able to affirmatively determine that he is responsible

In response to this office's inquiry, the contracting officer further states:

With regard to . . . HCRs 60433 and 60564, service seems to have improved; however, I have had forwarded to me copies of fifteen (15) PS Forms 5500 for service irregularities on HCR 60516 . . . (another contract operated by James and Jeff Talano). Fourteen of these irregularities have occurred [since the nonresponsibility determinations of August 5]. I have not terminated either HCR 60433 or 60564; however, my letters of warning remain in full force and effect. I believe that Mr. Talano is making strides toward service improvement on the contracts operating under warning; however, there may be indications that such improvement has been made at the expense of service on other contracts. I remain convinced that my decision was proper and based upon fact, with due consideration to the bidder. To award the protester further contracts would in my judgment further jeopardize service on existing Talano contracts.^[4]

⁴ The contracting officer submitted more information pertaining to the protester's responsibility obtained or generated since August 5, including the following:

-- For a subsequent solicitation and in response to a letter requesting information, Mr. Talano submitted on September 11 a bank statement showing \$9,300, but no cost statement. A preaward questionnaire showed James Talano as a partner with 10% interest (and two other individuals having 10% each) but indicated that James Talano was the only person other than Jeff Talano who had been screened by the Postal Service for access to the mails.

-- An agreement between James and Jeff Talano to the effect that Jeff would be the majority partner and "CEO" and would oversee the business.

-- The contracting officer learned that Mr. Talano had been default terminated on March 24, 1994, from HCR 54433, a contract administered by the Midwest DNO. According to the contracting officer, Jeff Talano never mentioned this termination.

-- On October 5, 1994, in connection with other solicitations, the contracting officer received credit reports with negative information on James and Jeff Talano.

-- In October, 1994, in connection with other solicitations, driving records which "disqualify

In reply to the contracting officer's statement, the protester claims that he answered "clearly and concisely" the questions regarding changed conditions since the cure notes were issued. He admits that he did not submit a current balance sheet in response to the contracting officer's July 21 inquiry but feels that he "adequately explained why I did not." He states: "Unless presenting a 'current balance sheet not more than thirty days old' is a prerequisite to being awarded a postal contract, I feel this is a moot point."

The protester points out that he told the contracting officer to contact him for any necessary further information and asserts that he stated that he had adequate financial resources. He concludes:

[F]or a contracting officer to make a fair decision with regard to a contractor's responsibility, he must first take the time to accumulate and review relevant information. If he asks the contractor questions that are not relevant . . . and then makes a negative judgment based on accurately presented, requested information with the explanation that the contractor did not explain what he was asked, when in fact [he] did explain what he was asked . . . this judgment would have been reached in error.

DISCUSSION

Before awarding a contract, the contracting officer must make an affirmative determination of the bidder's responsibility. "[A] prospective contractor must affirmatively demonstrate [his] responsibility. . . ." PM 3.3.1 a.

To be determined responsible, a contractor must:

1. Have financial resources adequate to perform the contract;

* * *

3. Have a good performance record;

4. Have a sound record of integrity and business ethics;

[Jeff Talano] from driving on Postal contracts per Management Instruction [MI] PO-530-91-8 [Screening Mailhandling Contract Employees]." These records include numerous traffic violation citations which had been issued to Mr. Talano between 1991 and 1994, and a letter dated October 24, 1990, from a Chicago postal transportation facility to James Talano stating that Jeff Talano had been denied driving privileges and access to the mails based on earlier violations.

-- A letter dated October 19, 1994, from the contracting officer in this case to Jeff Talano pointing out that "your driving record does not necessarily preclude you from holding contracts" but advising that the contracts could be terminated for default should he undertake to perform service on those contracts himself.

* * *

6. Have the necessary organization, experience, accounting and operational controls

* * *

8. Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

PM 3.3.1 b.⁵

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 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.

Todd's Letter Carriers, Inc., P.S. Protest Nos. 92-39; 92-40; 92-41, October 21, 1992.

As stated at PM 3.3.1 e.1, in the absence of information clearly showing that a prospective contractor meets standards of responsibility, the contracting officer must make a determination of nonresponsibility. See *Illinois Lock Company*, P.S. Protest No. 89-35, September 26, 1989; *Innovative Sales Brokers, Inc.*, P.S. Protest No. 89-41, August 31, 1989.

In this case, the contracting officer reasonably based both determinations of nonresponsibility on a recent (less than eight months previous to the determinations) record of poor performance. See *Pamela J. Sutton*, P.S. Protest No. 87-110, February 9, 1988 (upholding a nonresponsibility determination based on poor performance 13 months earlier).⁶ He also based his determinations on the bidder's failure to provide documentation

⁵ In addition, PM 3.3.1 e.3. states:

Before making a determination of responsibility, the contracting officer must possess or obtain information sufficient to be satisfied that a prospective contractor currently meets applicable standards of responsibility.

⁶ The numerous irregularity reports on Mr. Talano's previous contracts could be used by the contracting officer in determining responsibility even if the protester disagreed with the substance of the reports. *Todd's Letter Carriers, Inc.*, *supra*. Further, a nonresponsibility determination "may be based upon the contracting agency's reasonable perception of inadequate prior performance, even where the agency did not terminate the prior contract[s] for default and the contractor disputes the agency's interpretation of

necessary to demonstrate responsibility. While a contracting officer should consider information as current as possible in making his responsibility determination, *Automated Business Products, Inc.*, P.S. Protest No. 91-16, June 12, 1991, the contracting officer here fulfilled his affirmative duty to seek out responsibility information through his letters dated July 21, which informed Mr. Talano of the information which was required.

It is the offeror which must bring changed circumstances to the contracting officer's attention to show his responsibility affirmatively. *Year-A-Round Corporation*, P.S. Protest No. 87-12, June 12, 1987. While the protester stated that he had adequate financial resources and the ability to comply with required schedules, he did not support that statement with documentation. Although he stated that he was "prepared to respond and/or demonstrate" that he had the qualifications mentioned in the contracting officer's letter, he did not actually do so. Mr. Talano has not met his burden of documenting responsibility, PM 3.3.1 a., and his failure to provide information uniquely within his purview is properly charged against him. *AHJ Transportation, Inc.*, P.S. Protest No. 88-85, February 2, 1989; *Marshall D. Epps*, P.S. Protest No. 88-47, September 15, 1988.⁷

Mr. Talano's comment about presenting a current bank account balance sheet (*supra*, p. 5) illustrates his misunderstanding of his role in the preaward process. It is responsibility which is the prerequisite for postal contract award, and a balance sheet is evidence which may demonstrate financial responsibility, one aspect of overall responsibility. Mr. Talano has admitted that he did not provide bank balances, cost statements or other requested documentation.⁸ Thus, Mr. Talano failed to meet his burden of showing that the contracting

the facts. . . ." *A-1 Transmission*, P.S. Protest No. 93-14, October 29, 1993, quoting *Applied Power Technology Company and Contract Services Company, Inc.*, Comp. Gen. Dec. B-227888, 87-2 CPD 376, October 20, 1987.

It was not unreasonable for the contracting officer to prefer that Mr. Talano's resources be used to improve service on his existing contracts to awarding him new ones. Further, it was reasonable for the contracting officer to include in Jeff Talano's performance record those contracts which bear his father's name but for which Jeff Talano performs service. Mr. Talano failed to submit a preaward questionnaire for solicitation 6068, but he indicated on the questionnaire for solicitation 6073 that his father would drive for that contract. In the absence of the bidder's information to the contrary, it was reasonable for the contracting officer to assume that the Talanos planned to operate that route jointly as they have the others; it was also appropriate for the contracting officer to consider the recent performance records on all Talano contracts (of which he was aware) in making his current responsibility determinations. See *Mike and Candace Russell*, P.S. Protest No. 91-13, May 6, 1991; PM 3.3.1 b.6., *supra* (experience as a general standard of responsibility).

⁷ The protester failed to supply crucial information prior to August 5; that plus his performance record as of August 5 was sufficient to support the contracting officer's determinations. Since August 5, the contracting officer received additional negative information regarding Mr. Talano's responsibility, including the fact that another contract had been terminated for default on March 21, 1994. Footnote 4, *supra*.

⁸ Mr. Talano did not rebut the contracting officer's statements about specific facts. In the absence of evidence sufficient to overcome the presumption of correctness accorded a contracting officer's version of facts, we adopt the position of the contracting officer. *Mike and Candace Russell, supra.; Todd's*

officer's determinations were not supported by substantial evidence. *Lobar, Inc./Marroquin, Inc.; Benchmark/Hercules Limited*, P.S. Protest Nos. 92-49; 53, October 14, 1992.⁹

The protest is denied.

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Contract Protests and Policies

Letter Carriers, Inc., supra. Mr. Talano consistently has failed to make the distinction between declaring himself to be responsible and furnishing evidence of responsibility.

⁹ On December 22, the contracting officer forwarded to this office an October 14 protest from Mr. Talano against determinations of his nonresponsibility with respect to two subsequent solicitations, and a November 18 protest of a nonresponsibility determination made relative to a third solicitation. The October 14 protest states that the contracting officer's doubts as to Talano Transportation's financial ability to operate those routes are "unfounded," as is the contracting officer's fear that he lacks the ability to perform adequately on additional contracts. He also complains that "the fact that I have improved service on routes that I am a partner in already is not enough at this point in time" No supporting documentation accompanied the protest. The November 18 protest states that Mr. Talano's position was outlined in his "recent correspondence" with respect to previous nonresponsibility determinations.

In response, the contracting officer states that he found Mr. Talano and Talano Transportation nonresponsible on the three additional solicitations because of the information explained in his report on this protest, the fact that Mr. Talano never disclosed his termination for default of March 21, 1994, and "several negative recent entries" on Mr. Talano's credit report, which, "given his assertion that he controls 70% of the partnership . . . , causes me to doubt his financial ability to take on additional responsibilities." The contracting officer also points out that Mr. Talano's protest letter of November 18 is untimely, as it was received November 25, which was more than 15 working days after the October 24 contract award. See PM 4.5.4 d.

Since Mr. Talano's October 14 protest contains the same unsupported allegations as those he has submitted against the determinations at issue in this case, and since the contracting officer has shown that he based those determinations on substantial evidence (see also footnote 4, *supra.*), the October 14 protest may be denied on the same basis. The November 18 protest is dismissed as untimely.