

September 22, 1995

P.S. Protest No. 95-27

K & B ENTERPRISES

Solicitation No. 632-132-95

DIGEST

Protest against nonresponsibility determination is denied where contracting officer reasonably based the determination on inadequate documentation of the bidder's financial resources.

DECISION

Mr. Raymond D. Lewis, Jr., a sole proprietor operating under the name of K & B Enterprises, timely protests the contracting officer's determination that he was a nonresponsible offeror for a contract for the highway transportation of mail.

Solicitation 632-132-95 was issued April 7, 1995, by the Midwest Area Distribution Networks Office (DNO), seeking bids for highway transportation service between Portage and New Lisbon, WI, for a term which was to begin July 1, 1995, and end June 30, 1999. Bids were opened May 8. Mr. Lewis, a contractor on two other postal routes,¹ submitted the lowest of the nine bids received.

On May 12, the DNO sent letters to the lowest bidders asking them to submit information demonstrating responsibility. The letters asked for references and a statement describing their experience, and included a preaward questionnaire and an assets and liabilities statement for the bidders to complete.² The protester's assets and liabilities statement indicated \$2,000 cash in a bank, \$10,000 in savings bonds, and a home and five vehicles

¹ Mr. Lewis currently holds two mail transportation contracts, HCR 54478 (Wausau, WI, to Medford, WI) and HCR 54580 (a box delivery route out of Hazelhurst, WI).

² The May 12 letter asked Mr. Lewis to supply information on K & B Enterprises' assets and liabilities and its contract personnel, driving records, a fuel purchase receipt, and a Department of Transportation Rating, "if applicable" in order to demonstrate responsibility. The letter stated that the Pre-Award Questionnaire and the Statement of Assets and Liabilities "should be completed in a clear and precise manner" and stated that documentation to support financial claims "would be helpful, and should be submitted as an attachment to this form." A response to the letter was due May 26.

which brought his assets to \$102,000. The protester listed \$49,100 in liabilities related to the truck home and two vehicles. Mr. Lewis also indicated that he intended to hire one full time and one part time employee for this contract. On June 1, a purchasing specialist conducted a telephone preaward interview with Mr. Lewis in which the protester indicated that the \$2,000 which had been listed under assets "was no longer in the [credit union]." Mr. Lewis also did not provide documentation supporting his claim to have \$10,000 in bonds.³ On June 5, the contracting officer found Mr. Lewis nonresponsible due to inadequate financial resources and an unsatisfactory performance history consisting of five irregularity reports on HCR 54478 since November.⁴ This protest followed. Award of the contract has been postponed until this protest is resolved.

The protester states that there had been a "gross misunderstanding" between him and the procurement specialist who conducted the telephone interview. "I was under the impression that documentation on loan verification from the [credit union] was not necessary." The protester also claims that he cannot get a letter of credit until the award has been made. Further, the \$2,000 had been withdrawn from savings for a down payment on a truck to be used for this contract, and "the bonds have been cashed in to pay on our home." The protester claims that four of the five irregularity reports were due to vandalism for which police reports were made and "one was due to a relief driver I was training who did not show up for work, and I was not notified of this for nearly 2 hours after his scheduled departure time." The protester asserts that he is normally one-half hour early "rather than being right on time and taking a chance on being a few minutes late on the other end."

In reply to the protest, the contracting officer refers to the protester's preaward questionnaire and assets and liabilities statement which also contained "a brief narrative, and a fuel receipt." The contracting officer stresses that "[n]o documentation was provided to substantiate the bonds or other entries on the statement" during the preaward process.

Further, while the contracting officer admits that five irregularity reports since November, 1994, "may not be an accurate indication of poor performance," he does consider the performance "questionable." The contracting officer states that the combination of the

³ In a June 1 memorandum, the purchasing specialist who had interviewed Mr. Lewis wrote that he was "concerned that [Mr. Lewis] is spreading his operation over too wide [] an area and will not be able to maintain adequate control over three HCRs in different portions of the state." On the same date, the contracting officer wrote that although Mr. Lewis "has two other routes he has failed to convince me he has adequate financial resources In my opinion . . . this contractor should concentrate on improving service and building up capital before trying to expand his business."

⁴ A June 5 letter from the contracting officer informed Mr. Lewis that he was found nonresponsible for solicitation 632-132-95 because of his "failure to provide information clearly showing that you have adequate financial resources to operate the service . . . and your performance record on HCR 54478 . . . is not satisfactory." The letter stated:

You admitted . . . during a preaward telephone conference . . . that you did not have \$2,000 in your credit union account as shown on [the assets and liabilities statement]. You claimed to have \$10,000 worth of savings bonds and could obtain a loan from the [credit union], however, you did not supply any documentation to verify these claims.

questionable performance and the fact that Mr. Lewis planned to operate the route "using a seven-year-old truck with 226,000 miles" makes "the prospects of continued questionable service appear good."

The contracting officer concludes:

It is my opinion, based on the bidder's failure to provide information clearly showing that K & B Enterprises has adequate financial resources to operate the service in the solicitation and in consideration of the bidder's questionable performance record on HCR 54478, this bidder is non-responsible in accordance with the Procurement Manual [PM] Section 3.3.1.

In reply to the contracting officer, Mr. Lewis asserts that the nonresponsibility determination was invalid because:

-- The bonds reported to be worth \$10,000 were cashed in and used for payments on his home.

-- He withdrew \$2,000 from his credit union for a down payment on another. "Also, current savings [have] been built back up to \$1500."

-- The five late notices on HCR 54478 may be excused, as two were due to acts of vandalism; one was due to a "relief driver in training who failed to show up at the post office as scheduled. . . . I was not notified of this until after the second truck out had already taken our load, so I was not given time to compensate"; one was due to frozen brakes; and one was due to "outright mechanical failure." In the latter two instances he delivered the First-Class Mail "in my personal vehicle."⁵

-- "I have sufficient financing at the [credit union]."

-- It is not unusual to operate the route with a truck having 200,000 miles on it as "these vehicles normally run over 500,000 miles before a major overhaul is necessary."

DISCUSSION

"To be determined responsible, a prospective contractor must:

1. Have financial resources adequate to perform the contract;

* * *

⁵ The protester does not explain the inconsistency between this recollection and his earlier claim in his protest which did not mention mechanical failures and attributed four of the five incidents to vandalism. The record indicates that the contracting officer was informed by a postal official in Wausau, WI, that two of the irregularities were due to mechanical failures, one was a late departure, one was due to a "no show," and only one was the result of vandalism.

3. Have a good performance record;

* * *

6. Have the necessary organization, experience, accounting and operational controls, technical skills, and production and property controls, or the ability to obtain them;

* * *

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

PM 3.3.1 b. "To qualify for award, a prospective contractor must affirmatively demonstrate [his] responsibility. . . ." PM 3.3.1 a.

The standard for our review of a contracting officer's finding of nonresponsibility is well established:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement[s of the contract] 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.

North American Manufacturing Corporation, P.S. Protest Nos. 29; 30, September 16, 1994; *OSM Corporation*, P.S. Protest Nos. 91-59; 91-61; 91-67, December 29, 1991; see also *A-1 Transmission*, P.S. Protest No. 93-14, October 29, 1993; *Wetler Corporation*, P.S. Protest No. 89-12, April 26, 1989.

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.

Here, the contracting officer reasonably based his conclusions on a lack of evidence showing adequate financial resources. Although 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 the May 12 letter to and subsequent telephone interview of Mr. Lewis. While the protester has stated that he has the financial resources to perform, he did not submit evidence which supports that

statement despite several opportunities to do so.⁶ Cf. *Bill Cooper/Ray Cooper L.L.P.*, P.S. Protest No. 95-14, July 25, 1995.

The contracting officer also reasonably concluded that, given Mr. Lewis' obligations on two other postal contracts, his resources could have been stretched beyond their limits by a new contract, and that it would be preferable for Mr. Lewis to concentrate on performing his existing contracts. See *Jeff Talano*, P.S. Protest No. 94-42, January 26, 1995.

Mr. Lewis has failed to meet his burden of showing that the contracting officer's determination was not supported by substantial evidence and this office, therefore, has no reason to overturn it. Compare *Lobar, Inc./Marroquin, Inc.*; *Benchmark/Hercules Limited*, P.S. Protest Nos. 92-49; 53, October 14, 1992.

The protest is denied.

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⁶ We need not reach the issue whether the bidder's prior performance record on HCR 54478 justified the nonresponsibility determination because the contracting officer did not abuse his discretion in determining K & B Enterprises to be nonresponsible based on a lack of documentation of financial resources adequate for this contract.