

December 12, 1995

P.S. Protest No. 95-42

THURO METAL PRODUCTS, INC.

Solicitation No. 198525-95-A-0930

DIGEST

Protest against nonresponsibility determination is denied where contracting officer did not abuse his discretion in basing it on recent poor performance of another postal contract.

DECISION

Thuro Metal Products, Inc., timely protests the contracting officer's determination that it was a nonresponsible offeror on a solicitation for the production and supply of 60,000 "roller assy. idlers."

Solicitation 198525-95-A-0930 was issued on July 5, 1995, by the Topeka Purchasing Center, Topeka, KS, with an offer due date of August 4. Award was to be made to the responsible offeror submitting the lowest-priced technically acceptable proposal. Thuro, holder of current Postal Service contract 198525-95-A-0037, submitted the third lowest-priced proposal of the eight offers received; however, the two lowest-priced offerors withdrew their offers. The contracting officer then made responsibility determinations regarding Thuro and QMI, the next lowest-priced offeror after Thuro. On September 14, the contracting officer notified Thuro that it had been found nonresponsible due to its "poor performance record" on its current postal contract.¹ Award was made to QMI on September

¹ That contract for production and supply of steel shafts called for delivery of 40,000 units in April, 1995, and of another 40,000 units in April, 1996. The contracting officer's September 14 letter referred to the "late delivery" of the 40,000 units due in 1995 and cited Procurement Manual (PM) 3.3.1 b.3 for the principle that a responsible contractor must "have a good performance record," and PM 3.3.1 a., which states:

14. This protest followed.

The protest contends that the contracting officer's determination of nonresponsibility for this solicitation combined with a previous nonresponsibility determination "plus his intention to continue issuing such determinations, constitutes constructive debarment for which due process has been denied."

The protester alleges the following:

-- The contracting officer bases his nonresponsibility determination on an erroneous judgment that Thuro's performance of its current contract for the delivery of shafts has been poor.

-- The first delivery under Thuro's contract was delayed because of "an accident which damaged raw materials in transit. . . ." However, once delivered, all items "conformed with the requirements " of the contract and were accepted by the Postal Service."

-- In August, Thuro proposed on solicitation 198525-95-A-0867 for plate assemblies. Thuro was advised that it was deemed nonresponsible by a different contracting officer because of its poor performance record on contract A-0037.² Thuro had been the low offeror on that solicitation.

-- After Thuro proposed on the solicitation at issue in this protest, the contracting officer advised Thuro in "an almost identical letter" [to the one issued by the contracting officer³ on solicitation A-0867] that Thuro was found nonresponsible due to

(..continued)

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. . . .

In addition, the contracting officer wrote:

[A] prospective contractor that is or recently has been seriously deficient in contractor performance shall be presumed to be nonresponsible. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility. Unsatisfactory performance need not have resulted in a formal termination for default in order to support a determination of nonresponsibility.

² Thuro has not protested that nonresponsibility determination; such a protest would now be untimely. PM 4.6.4 d.

³ The protester's submissions refer to one contracting officer, although the contracting officer in this case does not administer Thuro's current contract and did not find Thuro nonresponsible for solicitation A-0867. We use "the contracting officer" to refer only to the individual involved with solicitation A-0930, and, therefore, with this protest.

its poor performance record on the same previous contract. Thuro was again the low offeror.

-- The contracting officer advised Thuro that "Thuro's existing contract with the Postal Service would continue to be the sole basis for evaluating the 'have a good performance record' responsibility element [of the PM criteria] and that only timely delivery of the second quantity in April 1996 would 'help establish your firm'. The meaning was clear. There would be no determinations of responsibility until completion of the second delivery in April 1996 and no contract awards from the Postal Service as a result thereof."

The protester alleges that the contracting officer, by relying solely on Thuro's one late delivery, has violated PM standards by failing to utilize current information on responsibility:

No other purchasing offices were contacted. No government agency contracting officers were contacted about Thuro's past performance. Thuro was not asked to explain the reason for its lateness. There was no pre-award survey conducted as contemplated in Section 3.3.1 e.5 when "available information does not provide an adequate basis for determining the responsibility or nonresponsibility of a prospective contractor"

Thuro states that as a "result of an accident which damaged raw materials in transit that were ordered for contract performance, Thuro's first delivery of shafts was delayed" and that the 40,000 units due in April were delivered in four installments on May 26, June 21, June 30, and July 17.⁴

The protester states that "[s]ome time in Late June or early July of 1995 (exact date unknown), the Postal Service provided a contract modification to Thuro which would have extended the delivery schedule to the actual delivery schedule, in return for a price reduction in the amount of \$400.00" and that a "few days later, . . . the Contracting Officer [told Thuro] that it would not be necessary for Thuro to sign the modification or to pay the \$400.00." The protester asserts that it "tore up the proposed modification" and "reasonably assumed that Thuro was not being considered by the Postal Service as a 'delinquent' contractor." By denying Thuro "two awards based on determinations of non-responsibility that we believe had no rational basis" and by indicating that "there will be no further award to Thuro . . . until, at the very least, April 1996, the scheduled date for the second delivery under the existing contract," Thuro has been constructively debarred without due process, citing *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 641 F.2d 953 (D.C. Cir. 1980).

The protester asks that the award to QMI be set aside and award made to Thuro, and that

⁴ Thuro's recitation of the facts of the four deliveries reflects delivery of quantities in excess of 40,000: May 26 (11,500), June 21 (12,000), June 30 (10,500) and July 17 (10,000). The contracting officer repeats Thuro's numbers without explaining the discrepancy, but asserts that Thuro's dates are those on which the items were shipped and that the Postal Service received the deliveries on June 6, July 3, July 14, and August 4, respectively.

we direct the contracting officer to "cease and desist" from issuing nonresponsibility determinations based on the first delivery under its current contract.

In response to the protest, the contracting officer confirms that Thuro's poor performance of its current contract--specifically, the late deliveries cited in footnote 4--was the basis for his nonresponsibility determination for the solicitation at issue here. The contracting officer further asserts that Thuro did not communicate to the U.S. Postal Service [about] any problems they were having in obtaining raw materials," which are said to be common, and "apparently made no attempt to obtain [them] earlier from another source." He emphasizes that the "important point is that the U.S. Postal Service *was not* notified of any problems" and that the only communication he received from Thuro was an October 25 letter asking to ship the second quantity early.⁵ The contracting officer notified Thuro that "our stock levels for this item did not indicate early shipment and that the original schedule should be used."

Regarding the modification establishing a revised schedule for the delivery of the remaining units and assessing Thuro \$428.00 as consideration for the revised schedule, the contracting officer states that Thuro was told not to sign it only after "Thuro's refusal to sign the modification in the first place." The Postal Service "cannot force anyone to sign a modification."⁶

The contracting officer states that after Thuro refused to sign, the Postal Service considered terminating its contract for default, but decided not to do so because a delay in receiving the product due to a resolicitation "would not be in the best interest of the [Postal Service]." Therefore, Thuro was allowed to "deliver at their schedule. . . ."

The contracting officer points out that Thuro "was months late in performing an extremely simple contract":

The item, shaft, on [Thuro's contract] is described by one drawing. The material called for is Steel Bar, Round .375 inches diameter or equal. Very minimal machining is required and the finish is to be black oxide. Any machine shop could make this piece. . . .

On the other hand, the part required by [this solicitation] has eight drawings which require[] many component parts that have to be assembled into a finished product. In evaluating Thuro Metal's offer . . . and their unacceptable delivery schedule for a very simple shaft versus a much more complex item . . . made the evaluation much easier for the U.S. Postal Service to make. [It] made a business decision based on past performance and the apparent difficulty encountered by Thuro Metal to make a very simple shaft.

⁵ The protester repeats that offer in its protest, stating that "[p]roduction leading to the second delivery . . . is well ahead of schedule and could even be accelerated at no additional cost, if the Postal Service wanted an earlier delivery."

⁶ While the contracting officer's statement is correct, we direct his attention to his authority to change the contract unilaterally and negotiate an equitable adjustment associated with the change. PM 6.5.1 e.2.; 6.5.2.

Regarding Thuro's allegation that he improperly relied on only one piece of information, the contracting officer states that he conducted a computerized search and found no other postal contracts held by Thuro within the previous two years, and asserts that recent poor performance on a postal contract without a default termination is sufficient to support a nonresponsibility determination, citing *A-1 Transmission*, P.S. Protest No. 93-14, October 29, 1993.

The contracting officer denies that Thuro has been constructively debarred because his finding "only applies to this particular contract. It does not prevent Thuro Metal from submitting offers to the Postal Service or other agencies in future solicitations," again citing *A-1 Transmission, supra*. "The Postal Service will make each award decision as a new situation. If Thuro Metal is determined to be the best value in a future procurement and can demonstrate its present responsibility in the future, it will be awarded a contract. Thuro Metal must, however, affirmatively demonstrate its present responsibility." The contracting officer states that in proving its responsibility Thuro should "provide substantial verifiable evidence of successful past performance for other customers" and that such evidence with respect to other governmental agencies "would be particularly useful" while a pre-award survey as suggested by the protester would not demonstrate that Thuro has overcome its difficulties. In conclusion, the contracting officer asserts that Thuro "has failed to demonstrate that it is willing to do what is necessary to timely deliver quality products" and asks that the protest be denied.

Replying, the protester disputes that the raw materials for the shaft were common and easily obtained, stating that their "specialized and unusual nature" caused Thuro's delays. The protester asserts that the argument that the current solicitation involves a more complex product is "irrelevant" because the nonresponsibility determination was based solely on the "alleged poor performance" and "had nothing to do with the relative nature or complexity of the items." Further, Thuro states that it is not correct that the solicited product is more complex, but rather "just has a greater number of components" and requires no more time to manufacture.

Thuro also alleges that the contracting officer knew at the time of the nonresponsibility determination that Thuro was manufacturing two "major components"--the roller spindle and the bolt shaft--of the assembly for the then-prime contractor for the assembly. "At the very least, this should have prompted some inquiry, if not a full pre-award survey, before the Postal Service decided to spend almost \$25,000 more for the item." The protester also complains that the contracting officer made "no attempt . . . to find out what really happened" to cause Thuro's delivery problems on its current contract before making the nonresponsibility determination. Thuro also asserts that its failure to inform the Postal Service of its difficulties would not "have made any real difference" and "has little to do with Thuro's present responsibility to perform contracts for the Postal Service."

Thuro characterizes its performance deficiency as a "relatively minor lateness in delivery" and asserts that Thuro had been "misled . . . into thinking that it was not important to sign the modification and that failure to sign it would not, in any way, be held against Thuro." The protester restates its position that it has been constructively debarred because it "has already been denied two significant awards and the Contracting Officer implied that the

performance on the 'delinquent' contract, since it was the only thing the Postal Service has to evaluate Thuro on, would continue to be the basis for future determinations of responsibility."

Responding to the contracting officer's assertion that the burden is on Thuro to show evidence of its successful past performance, the protester states that there was "no requirement in the solicitation"⁷ to show this and faults the Postal Service for failing to conduct a pre-award survey "which might have indicated to Thuro that the Postal Service was concerned with Thuro's past performance." Thuro "was never given the opportunity" to provide evidence of its good performance record and that is the "whole point of our argument that Thuro was denied due process."

Finally, the protester claims that the awardee was given opportunities to demonstrate its responsibility that were denied to Thuro, in that the contracting officer sought financial information from QMI which was not requested from Thuro.

In rebuttal, the contracting officer asserts that since Thuro "performed poorly in its current contract, it was particularly important for Thuro to demonstrate from other experience a 'good performance record.' Thuro failed to do so and I therefore found it to be a non-responsible contractor."⁸ The contracting officer characterizes Thuro's explanations of its late deliveries as "further demonstrat[ion] of its non-responsibility" evidencing lack of investigation of sources and lack of planning. The contracting officer states:

Thuro had seven (7) months before the first delivery of 40,000 units was due on [April 21]. In all that time, not one word was heard from Thuro about any problems. Not until the modification to extend delivery with a price consideration did the Postal Service hear anything from Thuro--but still no explanation . . . about any problems . . . except the strong unwillingness to sign the delivery extension with monetary consideration. When the contracting officer called to seek status on the modification, Thuro became adamant that [it] would not sign.

The contracting officer emphasizes that he has no assurance that Thuro "will not act in the same manner on future contracts. . . . Excuses, blame-shifting, and poor performance is all the Postal Service has available in making evaluations of Thuro's effectiveness."⁹

⁷ Past performance is a criterion of responsibility whether or not it is listed in the solicitation. PM 3.3.1 b.3.

⁸ The contracting officer also states that he "was not concerned with Thuro's financial ability because [he] already knew that it had a poor performance record. Given its prior failures and the PM obligation to prove its affirmative responsibility, Thuro should have [come] forward with substantial evidence to prove that it generally has a good performance record."

⁹ The contracting officer denies that he was informed that Thuro was the manufacturer of two major components of the assembly, and states: "Of the two components mentioned by Thuro, only one (the Bolt Shaft) is a component of the Roller Assy., Idler. Thuro is confused about the other component being used in this particular assembly, as the purchase description calls for no such part. Besides, one component does not make a complete assembly."

In surrebuttal, the protester argues that in a letter dated before this nonresponsibility determination, it informed the contracting officer of its successful completion of a contract worth one million dollars and that it asked for a pre-award survey to show that it was responsible, and that the contracting officer knew of another supply contract held by Thuro. Thuro again complains that its offer to accelerate the second delivery on its postal contract was rejected by the contracting officer and that the solicitation at issue here "did not permit the furnishing of performance information. . . ." Finally, Thuro emphasizes that the contracting officer improperly ignored the fact that "the performance problems had already been rectified and production was back on schedule. We believe that this is substantial evidence of constructive debarment."

DISCUSSION

The contracting officer's determination of an offeror's nonresponsibility is subject to limited review by our office:

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.

A-1 Transmission, supra.; *Robertson & Penn, Inc.*, P.S. Protest No. 87-68, July 28, 1987; *Year-A-Round Corporation*, P.S. Protest No. 87-12, June 12, 1987. Where a factual conflict occurs between the statements of the contracting officer and those of the protestor, the "presumption of correctness" which attaches to the contracting officer's statements requires that we accept such statements as true. See *Multigraphics*, P.S. Protest No. 87-24, June 12, 1987; *Lancom, Inc.*, P.S. Protest No. 85-48, October 9, 1985.¹⁰

Further, it is the protester's burden to show that the contracting officer's determination was not supported by substantial evidence. *Lobar, Inc./Marroquin, Inc.*; *Benchmark/Hercules Limited*, P.S. Protest Nos. 92-49 and 53, October 14, 1992. Thuro's arguments do not suffice to carry its burden of proof.

PM 3.3.1 a., footnote 1, *supra*, sets forth the general standards for determining whether a prospective contractor is responsible. PM 3.3.1 b.3 states that to be determined responsible, a contractor must have a good performance record. PM 3.3.1 e.3. requires that the contracting officer "possess or obtain information sufficient to be satisfied that a

¹⁰ The protester does not deny that its first delivery was late. The disagreements between the protester and the contracting officer over the circumstances involving the unsigned modification or the complexity of the two contracts and their raw materials provide no basis for overturning the contracting officer's determination of nonresponsibility. Cf., *Robertson & Penn, Inc.*, *supra*.

prospective contractor meets applicable standards of responsibility," and describes the sources from which that information may be obtained. The protester appears to understand the requirement that a determination be reasonably based on substantial information to mean that the contracting officer must consult all possible information. That understanding is neither realistic nor reasonable. PM 3.3.1 e.3. lists several possible sources of information but does not require the contracting officer to consult all of them.

The failure of an offeror to perform in a timely manner under prior contracts may provide a reasonable basis for a nonresponsibility determination. *Year-A-Round, supra*; see also, *Lithographic Publications, Inc.*, Comp. Gen. Dec. B-217263, March 27, 1985, 85-1 CPD 357. Further, "a record of recent unsatisfactory performance on a postal contract, even without a termination, can justify a finding of nonresponsibility." *Ron Garson d/b/a Ron's Trucking*, P.S. Protest No. 91-33, July 15, 1991; *Year-A-Round Corporation*, P.S. Protest No. 87-12, June 12, 1987 (failure of contractor to perform in timely manner under prior contract may be reasonable basis for nonresponsibility determination); see also, *Firm Erich Bernion GmbH*, Comp. Gen. Dec. B-233106, December 28, 1988, 88-2 CPD 632.¹¹

Here, the contracting officer reasonably based his determination upon a documented history of the protester's performance deficiencies during its previously-awarded contract. The protester completed delivery in August of items required in April. That is poor performance.¹² Further, the Postal Service was not obligated to accept the second delivery six months early; it was not unreasonable to expect Thuro to adhere to the agreed-upon schedule.¹³ The failure to terminate Thuro's contract after the first delivery was several months late in completion benefitted the protester but did not obligate the Postal Service to contract with it again.¹⁴ *A-1 Transmission, supra*.

¹¹ Performance within the last twelve months is "recent." See *Pamela J. Sutton*, P.S. Protest No. 87-110, February 9, 1988.

¹² The protester's characterization of its performance as "relatively minor lateness in delivery" is less than persuasive. Further, PM B.2.1 a.(8) prescribes the inclusion in contracts such as Thuro's contract clause B.15, Notice of Delay, which directs the contractor to notify the contracting officer immediately upon becoming aware of any difficulties that might delay deliveries under [this] contract."Thuro's failure to do so is further evidence of unsatisfactory performance.

¹³ There could be many reasons for not accepting delivery six months early; insufficient storage space is but one. It is not difficult to imagine the chaos which would result if supply contractors were allowed to operate on their own schedules without communicating with the Postal Service and without regard to the requirements of their respective contracts. See PM 3.3.1 a. (footnote 1, *supra*.) (timely delivery is an element of responsibility).

¹⁴ "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 for default and the contractor disputes the agency's interpretation of the facts. . . ." *Applied Power Technology Company and Contract Services Company, Inc.*, Comp. Gen. Dec. B-227888, 87-2 CPD 376, October 20, 1987.

Thuro has strongly protested what it perceives as a lack of opportunity to explain its poor performance or to demonstrate its responsibility before the award. Thuro should have realized without specific notice that in light of its previous performance, it, rather than the contracting officer, bore the burden of offering any positive evidence of responsibility, which it failed to do.¹⁵

The extent of the contracting officer's research was consistent with the requirements of PM 3.3.1 e. A pre-award survey is not required in every case; it must be performed only "[i]f available information does not provide an adequate basis for determining the responsibility or nonresponsibility of a prospective contractor." PM 3.3.1 e.5.(a). A pre-award survey is not required to provide an opportunity for an offeror to rebut other information available to the contracting officer. *Orlotronics Corp.*, Comp. Gen. Dec. B-180467, May 13, 1974, 74-1 CPD 245. And, contrary to the protester's contention, there is no requirement that an offeror be given the opportunity to respond to a negative responsibility determination.

[S]ince responsibility determinations are administrative in nature, they do not require the procedural due process, such as notice and an opportunity to comment, which is otherwise necessary in judicial proceedings. Accordingly, a contracting officer may base a determination of nonresponsibility upon the evidence of record without affording bidders an opportunity to explain or otherwise defend against the evidence, and there is no requirement that bidders be advised of the determination in advance of contract award.

Lithographic Publications, Inc., *supra*. (citations omitted).

Finally, no constructive or *de facto* debarment has occurred. The contracting officer is correct that his determination applies only to the services solicited for this particular contract. The determination does not prevent Thuro from submitting offers to the Postal Service or other agencies in the future and thus does not amount to a debarment. *Campbell Industries*, Comp. Gen. Dec. B-238871, July 3, 1990, 90-2 CPD 5; *Firm Erich Bernion GmbH*, Comp. Gen. Dec. B-234680, B-234681, July 3, 1989, 89-2 CPD 1. *Old Dominion Dairy Products*, cited by the protester, *supra*., is inapposite. In that case the court held that the plaintiff had been barred "from virtually all government work due to charges that the contractor lacks honesty and integrity." The court acknowledged that the contracting officer's determinations of dishonesty were reasonably based on available evidence; however, because a "liberty interest" was involved, the court decided that the plaintiff should have "some opportunity to respond." *Old Dominion*, 641 F.2d at 955. That is not the situation here.

The contracting officer asserts that responsibility determinations have been and will be made on a case by case basis. It was not an abuse of discretion for the contracting officer to be concerned about Thuro's ability to perform the requirements of this solicitation in light

¹⁵ Thuro should have been aware of the wisdom of providing such an explanation when it was told that it was nonresponsible for the earlier solicitation, which was several weeks prior to the determination it protests here.

of the difficulties Thuro has experienced in its current contract, which is of the same type but less complex. We expect, however, that the Topeka Purchasing Center will give due consideration in its future responsibility determinations to Thuro's demonstrable progress toward fulfilling its 1996 obligations under contract A-0037.

The protest is denied.

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