



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Mail Boxes Etc.

File: B-281487

Date: February 16, 1999

Jane Walters for the protester.

Kerry L. Miller, Esq., Government Printing Office, for the agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably determined that protester was nonresponsible based upon conclusion that protester lacked equipment necessary to perform the contract where protester failed to provide sufficient evidence to show that it had or could obtain the required equipment in time to meet the solicitation's delivery schedule.

DECISION

Mail Boxes Etc. (MBE) protests the determination by the Government Printing Office (GPO) that it is nonresponsible under invitation for bids (IFB) No. 2085S for electrostatic copying services for the Department of Agriculture, the U.S. Forest Service, and various other agencies located in the Juneau, Alaska area. MBE argues that the nonresponsibility determination lacks a reasonable basis.

We deny the protest.

The IFB contemplated the award of a fixed-price, indefinite-delivery, indefinite-quantity requirements contract for copying services. IFB at 4. The successful bidder is to produce flat forms and books requiring such operations as electrostatic, thermal or other copying process, color copying, binding, packing, labeling, and delivery. Id. at 6. The IFB estimated an average of 42 orders each month, with as many as 10 orders placed in one day, for approximately 504 orders annually. Id. The IFB also listed estimated quantities of copies per order, ranging from 20 to 2,000 copies per order of flat forms and from 1 to 3,000 copies per order of books. Id.

MBE submitted the low bid by the October 15, 1998 bid opening date. In order to make a responsibility determination, the contracting officer (CO) requested that MBE provide a list of all of its equipment and suppliers, as well as information regarding the firm's financial resources. In response, MBE provided GPO with the requested information, including a list of its equipment which MBE set out under

two categories: "EQUIPMENT ON PREMISES" and "EQUIPMENT ON ORDER/READY TO BE SHIPPED." MBE provided no further details or explanation regarding the equipment it identified as being "on order."

The CO reviewed MBE's response and concluded that MBE did not have the necessary equipment on hand to perform the contract and had not provided any evidence of its ability to obtain the necessary equipment in sufficient time to begin performance in accordance with the IFB's schedule.¹ In a letter received by MBE on October 22, the CO informed MBE that the firm was considered nonresponsible because it did not currently have all of the equipment on hand necessary to perform the contract. Specifically, the CO's letter informed MBE that the firm was found nonresponsible² because the firm had not performed any GPO contracts; that its equipment was on order contingent upon MBE receiving the award; and that it could not be determined exactly when the equipment would be installed and ready for use in performing the contract. On October 22, MBE filed an agency-level protest, and before the CO could issue a decision on that protest, MBE filed the instant protest in our Office.

The GPO's Printing Procurement Regulations (PPR) require the CO to make an affirmative determination that a firm is responsible before awarding a contract to that firm. PPR I-5.1. In order to receive a favorable responsibility rating, an offeror must meet several minimum standards applicable to the procurement, including having a satisfactory record of performance regarding both quality and timeliness on previously-awarded contracts, and possessing, or having the ability to obtain, the necessary equipment, technical skills, and productive capacity to perform the contract. PPR I-5.4(iii) and (iv). The PPR specifically state that prospective contractors must affirmatively demonstrate that they are responsible through satisfactory performance on prior similar contracts or by presenting evidence of their ability to satisfy the contract requirements. PPR I-5.5. The PPR require that the CO make a nonresponsibility determination if, based on the available information, there is no clear indication that the prospective contractor meets those

¹The IFB stated that GPO contemplated making a single award for a base year from October 1, 1998 to September 30, 1999, with up to three 1-year option periods. The IFB stated that deliveries under the contract must be made within from 1 to 10 workdays, with the majority of deliveries required from 1 to 5 days. Approximately 2 percent of the orders would require same-day delivery. IFB at 10.

²Despite MBE's status as a small business concern, the nonresponsibility determination was not referred to the Small Business Administration because GPO is a legislative agency and is not subject to the referral requirements of the Small Business Act, 15 U.S.C. § 637(b)(7) (1994). See Fry Communications, Inc., B-207605, Feb. 1, 1983, 83-1 CPD ¶ 109 at 2-5.

minimum standards. PPR I-5.6. The CO is required to determine a firm nonresponsible where there is doubt as to the offeror's productive capability which cannot be resolved affirmatively. Id.

The CO is vested with broad discretion in exercising his or her business judgment in making a nonresponsibility determination. Document Printing Serv., Inc., B-256654, B-257051, July 8, 1994, 94-2 CPD ¶ 13 at 3. Our Office generally will not disturb a nonresponsibility determination unless a protester can show either that the procuring agency had no reasonable basis for the determination or that it acted in bad faith. Id. In our review of nonresponsibility determinations, we consider only whether the negative determination was reasonably based on the information available to the CO at the time it was made. Id. at 4. Based on our review of the record here, we think that the CO's nonresponsibility determination is reasonably supported.

The CO's determination that MBE is nonresponsible was primarily based on his finding that MBE lacked the necessary equipment to perform the contract. Specifically, the CO explained in his findings and determination that the IFB's specifications require that the contractor's copy equipment be able to accept electronic storage media such as "imoega Zip and Jaz disks and 3/4" floppy disks," and also have the ability to accept and send "FTP files and CDs." CO's Findings and Determination, Oct. 21, 1998. The CO found that MBE's equipment lacked these capabilities. The CO further noted that MBE indicated that it had a variety of equipment required to perform the contract "on order," contingent upon award of the contract. The CO explained, however, that, even if awarded the contract, "[MBE] will not have this equipment in place and running for at least another week and therefore would not be prepared to perform [the contract]." Id. The CO further explained in his findings and determination that he did not believe that MBE could be ready to perform the contract within 1 week of award since the equipment that MBE identified as being "on order" had to be installed, and MBE's personnel would require training on the new equipment. Id.

In our view, the CO's nonresponsibility determination is reasonably supported by the record. The IFB stated that deliveries under the contract must be made within 1 to 10 workdays, with the majority of deliveries required within 1 to 5 days. IFB at 10. Additionally, the IFB stated that approximately two percent of the orders would require same-day delivery. Id. MBE does not dispute the CO's finding that it lacked all of the equipment required to meet the IFB's delivery schedule, and does not take issue with the CO's conclusion that the equipment it did have available did not have the required capabilities. Further, MBE does not disagree with the CO's determination that the equipment it had identified as being "on order" would require at least 1 week to deliver and install, and that its personnel would require training in the use of that equipment. Clearly, if MBE did not have all of the required equipment on hand to begin performance, it could not meet the IFB's relatively

short delivery schedule if awarded the contract. Based on the information available to him at the time, the CO reasonably determined that MBE was nonresponsible.

MBE argues that the CO's determination was not reasonable because "no pre-award survey was ever conducted" and because the CO did not make further inquiries to obtain detailed information "about the status and shipping arrangements that MBE had in place" MBE also maintains that the CO should have asked for "clarification or even additional information if he had doubts" about the information MBE had provided.³ Comments at 2-3.

The protester's arguments are without merit. A pre-award survey is not a legal prerequisite to a responsibility determination; COs have broad discretion concerning whether to conduct such surveys and may use, as was done here, other information available to them concerning a firm's responsibility. See Mine Safety Appliances Co., B-266025, Jan. 17, 1996, 96-1 CPD ¶ 86 at 5. In any event, given that MBE did not have at its facility all of the equipment required to perform the contract, and the equipment it did have did not have the required capabilities, we fail to see, and the protester does not explain, how an on-site pre-award survey of MBE would have affected the CO's nonresponsibility determination.

Further, as already explained, the burden is on the prospective contractors to affirmatively demonstrate that they are responsible through the satisfactory performance on prior similar contracts or by presenting evidence of their ability to satisfy the contract requirements. PPR I-5.5. Here, there is no evidence in the record showing, and the protester does not contend, that MBE had previously performed any similar contracts. In addition, the record shows that except for submitting a list of the equipment it identified as being "ON ORDER/READY TO BE SHIPPED," MBE provided no evidence to the CO that it had entered into any sales agreement or lease arrangement showing that it could obtain the equipment required to perform the contract; nor did MBE provide any explanation about any shipping arrangements MBE alleges it "had in place."⁴ Contrary to the protester's

³MBE also argues that the CO's determination was made in bad faith. However, to show bad faith there must be a showing that the agency intended to harm the protester. Complere Inc., B-257946, Nov. 23, 1994, 94-2 CPD ¶ 207 at 4. MBE has made no such showing.

⁴After GPO found MBE nonresponsible, several of MBE's suppliers submitted letters to the CO indicating their willingness and apparent capability to perform various services in support of MBE if it was awarded the contract. These letters, however, were not submitted in response to the CO's request that MBE provide evidence of its responsibility. In any event, they are not legally binding contractual arrangements with MBE which the CO would have been required to accept as evidence that MBE could obtain the equipment necessary to perform the contract.

suggestion, there is no legal requirement for the CO to obtain additional information or seek clarification about the firm's ability to obtain the required equipment.

In sum, we conclude that the CO reasonably determined that MBE was nonresponsible based on the lack of evidence showing that MBE was capable of obtaining the equipment required in sufficient time to meet the solicitation's delivery schedule.

The protest is denied.

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