Protest of	)	
	)	Date: August 29, 1991
L & J TRANSPORTATION INC.	)	
	)	
Solicitation No. JAX:53:91	)	P.S. Protest No. 91-42

DECISION

L & J Transportation Inc. (L&J) protests the determination of the contracting officer at the Jacksonville Transportation Management Service Center (TMSC) that it is a nonresponsible prospective contractor under Solicitation No. JAX:53:91 for highway transportation service between the South Florida Mail Processing Center and Plantation Branch.

Bids were received under the solicitation on April 8, 1991. By letter dated May 24, the contracting officer informed L&J that its bid had been rejected because "[t]he recent termination of HCR 33437 leaves us no alternative except to declare you non-responsible on the subject solicitation". On that same day, award was made to Edward Zengel & Son Express.[1/]

The contracting officer has furnished his report to this office noting that his finding of nonresponsibility resulted from L&J's improper subcontracting on Highway Contract Route 33437, West Palm Beach, FL, to Boca Raton, FL, which resulted in the termination of that contract for default effective May 23.[1/]

L&J initially protested the finding of nonresponsibility to the contracting officer on May 28. The contracting officer, on June 12, denied this protest as obviously without merit for the same reasons described above. L&J received the contracting officer's denial letter on June 17. L&J then sent a letter addressed to the Chairman, Board of Contract Appeals, which was received on July 1. The letter expressed L&J's disagreement with the contracting officer's denial of L&J's protest as obviously without merit. The Board transmitted L&J's letter to the Associate General Counsel on July 5, noting that the

[1/] Edward Zengel & Son Express was the fourth low bidder. Apparently, in addition to the protester, the contracting officer found two other lower bidders to be nonresponsible, although his report fails to so specify.

[2/] Postal Service highway contractors may not subcontract regular mail service without the permission of the contracting officer. Clause 9, Basic Surface Transportation Services Contract General Provisions, P.S. Form 7407; PM ' 12.4.13 a.2 and 3.

Board had no jurisdiction over protests of a contract award.[1/]

L&J, in its protest letter, makes two points. First, it states that payroll records would be submitted to demonstrate the lawfulness of its treatment of personnel under HCR 33437. Second, it states that the contracting officer rejected L&J's bid because it was owned by a minority woman.

In his report, the contracting officer responded to L&J's protest letter. He asserts that a Mr. George C. Weller was a subcontractor on HCR 33437. The contracting officer indicated that he did not approve this subcontract. Because of the unauthorized subcontracting, the contracting officer terminated L&J's HCR 33437 on May 24. The contracting officer's report indicated that L&J has appealed this termination decision to the Board of Contract Appeals. Finally, the contracting officer denied that the fact that L&J was owned by a minority woman influenced his finding of nonresponsibility.

L&J has provided comments in response to the contracting officer's report. Those comments present L&J's contention that its driver on HCR 33437 was an employee rather than a subcontractor and make certain allegations of impropriety on the part of the awardee. L&J also challenges the relevance of the records upon which the contracting officer relied. Finally, L&J asserts that the awardee, Edward Zengel & Sons, is improperly using different equipment from that described in its bid to provide service on the contract for which her bid was rejected.

Edward Zengel & Son Express presented comments which stated its belief that the contracting officer acted properly in denying L&J award because L&J had recently been terminated on another contract. The awardee asserted its belief that the fact that L&J was owned by a minority woman had no part in the contracting officer's decision.

Although no party has addressed the issue of timeliness, we may do so sua sponte because it affects the jurisdiction of our office to adjudicate L&J's assertions. Coopers & Lybrand, P.S. Protest No. 89-91, March 21, 1990. Our protest regulation, PM 4.5.4 e., provides that

> [i]f a protest has been filed initially with the contracting officer, any subsequent protest to the General Counsel received within ten working days of the protester's formal notification of, actual knowledge of, or constructive knowledge of initial adverse action by the contracting officer will be considered, provided the initial protest was received in accordance with the time limits in paragraphs b through d above.

L&J's protest was received by this office on July 5, 13 working days after L&J received notice of the contracting officer's denial of its earlier protest as obviously without merit.[1/]

[3/] The Board of Contract Appeals lacks jurisdiction over bid protests. Five Star Catering, PSBCA No. 2396, November 21, 1988.

[4/] Although L&J transmitted its protest to the Board of Contract Appeals on July 1, our regulations require that protests be filed with either the contracting officer or the General Counsel. PM 4.5.3 a. In past instances of incorrect submittal to the Board, we have applied the date we received the Board's

This protest is untimely under our standard. EDAIR, Inc., supra.

The timeliness requirements imposed by our regulations are jurisdictional, and we cannot consider the merits of any issue which has been untimely raised. International Jet Aviation Services, P.S. Protest No. 87-36, September 1, 1987. Omnicopy, Inc., P.S. Protest No. 84-24, June 25, 1984. We have no authority to waive or disregard the timeliness issue in a particular case. POVECO, Inc. et al., P.S. Protest No. 85-43, October 30, 1985.

We comment briefly, however, on the central points of the protest.

> 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. ... [W]e 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.

To be determined responsible, a contractor must have a sound record of integrity and business ethics PM 3.3.1 b.4. Recent demonstrations of improper conduct or performance, evidenced by a default termination, can justify a determination of nonresponsibility. See Ron Garson d/b/a Ron's Trucking, P.S. Protest No. 91-33, July 15, 1991; E.H.O. Trucking, P.S. Protest No. 91-28, June 24, 1991. However, the fact that a contractor is challenging a termination for default does not preclude consideration of the default in subsequently determining responsibility. DWS, Inc., P.S. Protest No. 87-100, November 6, 1987.

L&J's assertion that the determination of nonresponsibility was based on its ownership by a minority woman is mere speculation unsupported by evidence. Speculation is insufficient to support the protester's claim. BWN Contracting Co. Inc., P.S. Protest Nos. 89-38, 89-50 and 89-57, August 31, 1989 ("No factual substantiation of this allegation [of a discriminatory motive] was supplied by the protester, and we may not make such a finding based on speculation"); Hunter L. Todd, d/b/a Courier Express Mail & Package Delivery Service, P.S. Protest No. 85-78, October 18, 1985.

subsequent transmittal to this office as the date of receipt. EDAIR, Inc., P.S. Protest No. 88-33, May 31, 1988; Five Star Catering, P.S. Protest No. 88-68, January 31, 1989;Thomas J. Seitz Co., Inc., P.S. Protest No. 88-49, September 8, 1988.

The protest is dismissed.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[compared to original JLS 8/16/93]