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| Protest of | ) | Date: November 13, 1991 |
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| CHEROKEE CARRIERS, INC. | ) | |
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| Solicitation No. 021-95-91 | ) | P.S. Protest No. 91-46 |

DECISION

Cherokee Carriers, Inc. ("Cherokee") timely protests the contracting officer's determination that it is an ineligible contractor under Solicitation No. 021-95-91. That solicitation was issued on April 15, 1991 by the Transportation Management Service Center (TMSC), Rockland, MA, for mail service between Brockton and Springfield, MA. That route had previously been operated by Cherokee under Contract No. HCR 021TK, which expired on June 31, 1991. R & F Transportation Co., Inc., subsequently commenced servicing the route on July 1 under Contract No. 02390.
The issue of Cherokee's eligibility arises out of the corporation's control by Maureen DelFarno, the spouse of Alan DelFarno, an individual debarred by the Department of Labor for violation of the Service Contract Act. By letter dated March 4, 1991, the Brockton TMSC requested information concerning Alan DelFarno's involvement in and control over Cherokee in connection with an earlier solicitation, not the subject of this protest. The TMSC noted Alan DelFarno's participation at a February 28, 1991 pre-award conference on that solicitation, observing that he "was providing the information relative to the cost statement figures, the operation of the route, and information on driver assignment."

Maureen DelFarno, President of Cherokee, responded to the TMSC by letter dated March 6, 1991. It noted that she was the owner and only officer of Cherokee Carriers but that Mr. Delfarno "will be working with me in the office. Any and all statements and commitments made by [Mr. DelFarno] both verbally and in writing do represent Cherokee Carriers, Inc. and myself." By letter dated March 15, 1991, the contracting officer advised Cherokee that it was ineligible for award on that contract because Alan DelFarno actively participated in the pre-award conference.

The issue of Mr. DelFarno's participation in Cherokee arose again in connection with its contract for HCR 021TK. By letter dated May 17, the TMSC notified Cherokee that it would not be offered a renewal on Contract No. HCR 021TK when it expired June 30. Citing Procurement Manual (PM) 3.3.2 d.3.,[1/] the TMSC explained that it deemed

[1/] PM 3.3.2 d.3. provides:

Cherokee to be a debarred contractor because of Alan DelFarno's substantial interest in the corporation.

Cherokee took exception to the TMSC's finding that Mr. DelFarno has a substantial interest in Cherokee, emphasizing that Mrs. DelFarno was the President of Cherokee and owner of Cherokee Carriers, Inc. and neither she nor Cherokee Carriers, Inc. were on the debarred contractor list. It appealed the determination not to review to the Surface Contracts Management Division (SCMD), Washington, D.C. By letter dated June 7, 1991, the SCMD sustained the Brockton TMSC's decision. The SCMD found Mrs. DelFarno's March 6 letter instructive in concluding that Mr. DelFarno's participation in Cherokee was extensive.

Meanwhile, solicitation 021-95-91 was issued on April 15, with offers due May 17. Cherokee was the low bidder, offering an annual rate of $355,788. Cherokee and the next two low bidders were asked to respond to a preaward questionnaire. Subsequently, on June 10, 1991, the Rockland TMSC advised Cherokee that it had been found ineligible for the award of the contract "[b]ased on the fiduciary relationship that exists between Maureen L. DelFarno, President, and Alan DelFarno. . . ."

Through counsel, Cherokee protested to the contracting officer by letter dated June 17, 1991. Cherokee argued that the fact of Mr. DelFarno's marriage to the corporate owner was not a sufficient basis to impute his debarment to the corporation. Further, Cherokee contended that the Postal Service violated its socioeconomic policies encouraging women-owned enterprises and Mrs. DelFarno's constitutional rights by denying award to Cherokee. Cherokee emphasized that the contracting officer had never deemed Cherokee to be a nonresponsible bidder. In addition, it noted that the TMSC's mere allegation of the DelFarnos' fiduciary relationship is not a legitimate ground to deny Cherokee the right to participate.

Cherokee also alleged invidious discrimination on the part of the Postal Service suggesting that "it is quite archaic to assume that a woman who legally owns and operates a corporation is controlled by her husband." Finally, Cherokee stated that Mr. DelFarno was not an "affiliate" as defined in PM 3.3.2 b.7.[1/]

The contracting officer determined Cherokee's protest to be obviously without merit by letter dated July 2. Counsel for Cherokee received the contracting officer's decision on July 8. By letter dated July 15, Cherokee requested that the contracting officer reconsider his decision and requested a conference with this office. Upon receiving Cherokee's protest, the contracting officer forwarded it to this office, where it was

> The debarment, suspension, or ineligibility of a contractor does not of itself affect the rights and obligations of the parties to any existing contract. However, except for service changes under mail transportation contracts, the contracting officer may not add new work to the contract by supplemental agreement or by exercise of an option unless the responsible department head makes a determination [that there is a compelling reason to do so].

[2/] That section defines "affiliates" as "[c]ontractors so related that one either directly or indirectly controls or has the power to control the other. . . ."

received on July 18.[1/]

The July 15 letter objects to the contracting officer's unwillingness to recognize Mrs. DelFarno's independence from Mr. DelFarno and contends that the Postal Service's position is discriminatory. The letter was accompanied by a letter from Mrs. DelFarno of even date, advising that "Mr. Alan DelFarno is no longer affiliated with Cherokee Carriers, Inc. He has not been the Operations Manager since I received notification from the Postal Service several months ago."

The contracting officer's statement asserts that his determination regarding Cherokee was not based solely upon the DelFarnos' marital status, but rather that it was based upon the fact that a debarred individual (Alan DelFarno) maintains a "substantial interest" in Cherokee.[1/] The contracting officer contends that prior to Mrs. DelFarno's July 15 letter, no information had been provided that Cherokee had hired a new manager or that Alan DelFarno was no longer authorized to act on behalf of Cherokee.[1/]

The protester has responded to the contracting officer's statement. The protester states that the Postal Service had been verbally advised at some unstated prior date that Mr. Louis Wagner would be the contact person for Cherokee and Mrs. DelFarno. According to counsel for the protester, Mr. Wagner has had most of the contact with the Postal Service, and the Postal Service is "well aware" of that contact.

Cherokee claims that the legal memorandum cited by the contracting officer supports Cherokee's position. Specifically, the protester contends that since, contrary to the

[3/] We consider Cherokee's July 15 letter to be a new protest filed under 4.5.4 e, which allows consideration by this office of protests initially filed with the contracting officer. The PM does not contemplate a request for reconsideration of a protest determination by the contracting officer. Cf. Korby Construction Company, P.S. Protest No. 89-79, February 2, 1990, n.3 ("By expressing dissatisfaction and requesting corrective action, [a protester's] letter constitute[s] a protest").

The request for a conference was subsequently withdrawn.

[4/] The contracting officer indicates that in reaching his conclusion he relied upon a memorandum written by a postal attorney. That memorandum discussed the standard established by 41 U.S.C. ' 354 (1988) that no contract be awarded to an entity in which a debarred individual has a "substantial interest." The memorandum cites implementing regulations of the Department of Labor, including 29 C.F.R. " 4.188(b)(6)(c) and (c)(2) (1990), which conclude that a substantial interest may arise where the debarred individual has, inter alia, the authority to control or manage contract performance, and may even arise absent such control where the debarred person occupies a position "such as manager, supervisor, or consultant. . .whether compensated on a salary, bonus, fee. . .or other basis. . ., including indirect compensation by virtue of family relationships. . . ." The memorandum concludes that because of Mr. DelFarno's identification as Mrs. DelFarno's corporation's Operations Manager, a "substantial interest" existed and the corporation could be found ineligible for a postal contract.

[5/] The contracting officer makes note of an August 9 memorandum from a distribution specialist at Springfield, MA, that sometime approximately during the week of June 17, she received a telephone call from Alan DelFarno on behalf of Cherokee concerning the disposition of a matter arising under another Cherokee contract, HCR 01029. Cherokee's counsel denies that the contact occurred.

circumstances prevailing when the memorandum was prepared, Mr.DelFarno no longer occupies any position with Cherokee, he does not have a substantial interest in it. According to the protester, the fact that Alan DelFarno is married to Maureen DelFarno is not sufficient to disqualify Cherokee. The protester asserts that Mr. DelFarno owns and operates his own business and receives no compensation, directly or indirectly, from Cherokee.

Discussion

Under PM 3.3.2 d.2, contractors which have been declared ineligible for contracts on the basis of statutory or other regulatory procedures are excluded from receiving contracts from the Postal Service. Mr. DelFarno was debarred by the Department of Labor for violation of the Service Contract Act. His name appears of the list of debarred contractors maintained by the General Services Administration, where it appears that he cannot be awarded a contract through October 26, 1993.

Title 41 of the United States Code, Section 354, a section of the Service Contract Act, provides that no contract of the United States can be awarded to any entity where an individual on the Comptroller General's debarred list has a "substantial interest" until the debarment period has elapsed. The Act does not define a "substantial interest." However, the Department of Labor considers a debarred person to have a substantial interest in the entity when the person "has participated in contract negotiations, is a signatory to a contract or has the authority to establish, control or manage the contract performance and/or the labor policies of a firm." 29 C.F.R. ' 4.188(c)(2) (1990). In addition, the Department of Labor suggests that other factors are instructive, such as:

> [T]he sharing of common premises or facilities, occupying any position such as manager, supervisor, or con-

29 C.F.R. ' 4.188(c)(2) (1990). Furthermore, "[a] firm will be particularly closely examined where there has been an attempt to sever an association with a debarred firm or where the firm was formed by a person previously affiliated with the debarred firm or a relative of the debarred person." 29 C.F.R. ' 4.188(c)(2) (1990).

The actions of the contracting officer in refusing to consider Cherokee as an eligible contractor because of the debarment of its former "operations manager," who remains the spouse of its sole stockholder are neither arbitrary, capricious, nor not based upon substantial information. The letter of Mrs. DelFarno of March 6 that "[a]ny and all statement and commitments made by Alan [DelFarno] both verbally and in writing do represent Cherokee Carriers, Inc. and [Mrs. DelFarno]" provided a reasonable basis for the contracting officer's actions. The protester's assertions to the contrary are unavailing. The substitution of Mr. Wagner as Cherokee's contact with the Postal Service did not affect Mr. DelFarno's substantial interest in Cherokee, and it was only long after the contracting officer's determination of Cherokee's ineligibility that Mrs. DelFarno announced Mr. DelFarno's disassociation from the corporation.[1/]

[6/] When the statements of the protester and the contracting officer conflict, we accept the contracting officer's statement in the absence of evidence sufficient to overcome the presumption of correctness which attaches to the contracting officer's action. Neil Gardis and Associates, Inc, P.S. Protest No. 89-44, September 15, 1989; Fairfield Stamping Corporation, P.S. Protest No. 88-04, June 3, 1988. The

Similarly, to the extent that the protester is alleging that the Postal Service did not adhere to its policy concerning woman-owned businesses, it is incorrect. PM 12.4.9, governing these matters, provides that: "[c]ontracting officers must encourage the participation of small, minority-owned and woman-owned businesses in accordance with 10.1 (except 10.1.4.c [dealing with negotiation and award]) and current Postal Service policy directives." This provision does not require any particular special consideration of offers from women-owned businesses, nor does it preclude the elimination of ineligible women-owned businesses from consideration.

The contracting officer should recognize that any determination of Cherokee's eligibility for subsequent contracts must be based on the information available to the contracting officer at that time, including any subsequent advice from the corporation about Mr. DelFarno's involvement with it. Any future determination should be based on a complete record consistent with the Department of Labor's regulations.

The protest is denied.

**[Signed]**

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

**[Compared to original 5/17/95]**

time for the determination of a bidder's eligibility is at the time of award. AHJ Transportation, Inc., P.S. Protests No. 88-18, 19, May 12, 1988. The protester had not persuasively demonstrated that the contracting officer was advised of any change in Alan DelFarno's status with Cherokee by the time of award.