Protest of	)	Date: June 19, 1987
	)	
ALAN RITCHEY	)	
	)	
Solicitation No. 1-RR-87	)	P.S. Protest No. 87-27

DECISION

Alan Ritchey, the president of Western Mail Service, Inc., and other companies providing highway mail transportation services, timely protests the terms of a rail transportation contract solicitation on the grounds that eligibility to participate in the procurement is restricted to railroads.

The Transportation Administration and Procurement Division, Transportation and International Services Office issued Solicitation No. 1-RR-87 on February 6, 1987, for rail transportation[1/] between approximately 1,450 origin and destination city pairs, or segments. As revised by amendment two, the solicitation solicited proposals from Class I and Class II railroads, and Class III railroads with annual operating revenues in excess of $10 million for the past fiscal year.[1/] The solicitation sought offers for three different types of service: high volume/high frequency corridors; low volume/low frequency traffic lanes, and interline segments.

[1/]The protester contends that the solicitation does not require transportation by rail, noting that the solicitation defines "rail transportation" as "the use of rail or any combination of rail and highway service," and requires pickup and delivery of container units on wheels at postal facilities. The protester's interpretation is unrealistic; the structure and nature of the solicitation is such that rail companies proposing in response to the solicitation will undoubtedly provide the majority of their services by rail.

[2/]The Interstate Commerce Commission classifies railroads for purposes of accounting and reporting on the basis of annual operating revenues. See 49 CFR Part 1201, 1-1.

According to section V of the solicitation, offers were to be evaluated by the application to the offers received of a formula in which both price and speed of delivery would be considered.[1/]

Offers were due at 3 p.m. April 6. This protest was received at 1:52 p.m. on that date.[1/] In his initial protest, Mr. Ritchey contends that the restriction of the solicitation to rail carriers violates Postal Contracting Manual (PCM) 19-402(3),[1/] that highway transportation can provide equal or better service than railroads, and that the exclusion of trucking companies is an unfair restriction on competition.[1/]

In his initial comments on the protest, the contracting officer advises that the decision to limit this solicitation to rail service was the result of considered analysis with respect to the Postal Service's needs. Although the contracting officer contends that the statutory provision at 39 U.S.C. ' 5005[1/] gives the Postal Service "unfettered discretion in determining

[3/]According to the RFP, the formula is

$$B = \frac{O}{A} \times P$$

where P is a weighted average price based on volumes of railroad- and postal-furnished container units, A is the elapsed time between required cutoff and required availability and O is the elapsed time between required cutoff and offered availability.

[4/]One or more of Mr. Ritchey's companies submitted proposals to provide service on 25 of the segments provided in the solicitation. According to the protester, although the contracting officer received the proposal, he advised that they would not be further considered.

[5/]It provides:

> If the solicitation is an RFP, it must be conclusively determined that the only mode of transportation which can possibly perform the service required is rail. If one or more other modes could also provide the service, the RFP will be issued in accordance with Part 6.

(Part 6 of Section 19 of the PCM governs the procurement of intermodal surface transportation.)

[6/]

The contracting officer acknowledges that he did not make a determination under PCM 19-402(e), but in a subsequent submission points to a deviation issued on May 5 on behalf of the Assistant Postmaster General, Mail Processing Department (APMG), authorizing procurement under Solicitation 1-RR-87 by an RFP without the requirement of a determination under PCM 19-402(e). PCM 19-103.1 authorizes the APMG to approve deviations from the policies and procedures of Section 19 of the PCM that are "unique by reason of law or custom to mail transportation and related contractual services." The contracting officer also argues that PCM 19-402(e) is a regulation for the benefit of the Postal Service which confers no rights upon private parties.

[7/] Section 5005 provides, in pertinent part, as follows:

> (c) The Postal Service, in determining whether to obtain transportation of mail by carrier or

its transportation needs," he further advises that rail transportation represents the Postal Service's minimum needs, and thus is entitled to the deference accorded to determinations of minimum needs in bid protest decisions. The contracting officer then offers a point-by-point explanation of reasons why rail service is more suited for the transportation at issue here:

1. The nature of the mail to be moved under these contracts is such that there will be large, unpredictable fluctuations in the volumes originated from day to day. Railroads have inherent flexibility to add additional flatbed cars to accommodate mail tendered at the last minute. Highway service is generally better adapted to situations involving predictable, two-way mail movements, where occasional requirements for extra service can be met by making advance arrangements with the contractor.

2. The transportation schedules in the solicitation have been designed to meet the Postal Service's service standards for the classes of mail involved, bulk business mail and parcel post. Because it is generally

person under subsection (a)(1) of this section, by contract under subsection (a)(4) of this section, or by Government motor vehicle, shall use the mode of transportation which best serves the public interest, due consideration being given to the cost of transportation service under each mode.

faster than rail transportation, highway transportation of this mail matter could upset the balance which the Postal Service maintains between the service provided for First-Class Mail and the non-priority classes of mail.

3. Railroads have interchange agreements with each other which permit them to interchange flatcars and containers. They will not, however, interchange equipment with motor vehicle carriers. The Postal Service needs the flexibility afforded by interchange agreements because mail may have to be interchanged between carriers en route.

4. The Postal Service wants to foster a comprehensive transportation system for mail, including alternative transportation modes. Rail service is deemed less vulnerable to possible fuel shortages than is highway service.

The protester responded to the contracting officer's report in a submission rebutting both its general conclusions and specific points. Assuming, arguendo, that 39 U.S.C. ' 5005 grants the Postal Service discretion in the selection of modes of transportation, the protester notes that this discretion is not transmitted wholesale to individual contracting officers, noting the limitation imposed by PCM 19-402(e).

The protester seeks to distinguish the minimum need decisions cited by the contracting officer as inapposite, suggesting that those decisions do not establish that the contracting officer has not overstepped his discretion here, reiterating that the Postal Service's minimum needs are for "transportation," not "rail transportation." The protester refers to Doehler-Jarvis Division of N. L. Industries, P.S. Protest
No. 77-19, July 22, 1977, in which we sustained a protest against a specification in a solicitation for lock box nesting components requiring that they be fabricated from aluminum alloy, finding unpersuasive the contracting officer's justification for excluding plastic nestings.
Just as plastic would do the job as well as aluminum in Doehler-Jarvis, truck transportation can meet the Postal Service's needs as well as rail.

With respect to the specific points cited by the contracting officer, the protester responds as follows:

1. There is no impediment to a highway contractor providing the flexible service required by fluctuations in volume and frequency, and the protester is eager to have the contracting officer examine his firms' capabilities in that regard.

2. The contracting officer's statements that service of the speed which highway transportation can offer is not required is inconsistent with the solicitation's evalu- ation factor for speed of delivery. Under current postal contracting schemes, mail of the same class to comparable points is transported by differing services at different speeds.

3. There are and have been interchange agreements between highway contractors and railroads. The nature of the service for which Mr. Ritchey

> submitted proposals is point-to-point, and interchanges are not needed in most instances.
>
> 4. The asserted need to maintain the viability of the railroads should not preclude competitive offers from highway contractors. Mr. Ritchey's companies have never encountered a problem with fuel shortages.

The contracting officer submitted comments in response to the protester's further comments seeking to establish that transportation decisions are fundamentally different from purchase decisions made with respect to the procuring of "mundane items" such as have been the subject of this office's decisions on minimum needs, and those decisions are entitled to more discretion or are not subject to review at all, citing various decisions of the Comptroller General and the courts. In further comments, the protester sought to distinguish the decisions on which the contracting officer relied.

At a bid protest conference, the protester called to our attention the fact that various highway solicitations being solicited contemporaneously with this rail solicitation made reference to the rail solicitation and indicated that award would be made contingent on the non-award of the segment under the rail solicitation. We asked the contracting officer to identify the solicitations which so provided and to explain how the decision to award would be made.

In reply, the contracting officer identified 10 solicitations involving Bulk Mail Center (BMC) to BMC routes which contained such provisions, and indicated that the evaluation would include consideration of the impact on the railroads' commitments of the diversion of the BMC to BMC volume. He went on to describe various factors which influence the "modal determinations" which postal transportation planners make in the course of deciding which forms of transportation to use.

Comments were also received from one railroad participant in the solicitation, suggesting that if highway contractors were to be allowed to participate in rail solicitations, railroad companies should be allowed to participate in the competition for highway contracts.

Decision

Contrary to the contracting officer's suggestion, the regulation establishing the bid protest procedure, as reflected by our previous decisions, clearly allows review of the decision to limit this solicitation to railroad companies. See, e.g., Atchison, Topeka, and Santa Fe Railway Company, P. S. Protest No. 76-17, July 15, 1976 (applicability of protest procedures even to emergency solicitations), accord, Pan American World Airways, Inc., P. S. Protest No. 86-17, May 22, 1986 (emergency air transportation contract).

Our standard of review of challenges to the terms of a solicitation is as follows:

> The determination of the government's minimum needs, the method of accommodating them and the technical judgments upon which those

> determinations are based are primarily the responsibility of the contracting officials who are most familiar with the conditions under which the supplies and services have been used in the past and will be used in the future. Generally, when a specification has been challenged as unduly restrictive of competition, it is incumbent upon the procuring agency to establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

Portion-Pac Chemical Corp., P.S. Protest No. 84-49, August 1, 1984, quoting Amray, Inc., Comp.Gen. Dec. B-208308, January 17, 1983, 83-1 CPD & 43. See also Action Enterprises, Inc. and American Vending, Inc., P.S. Protest Nos. 87-14 and 87-15, March 13, 1987.[1/]

The contracting officer argues that 39 U.S.C. ' 5005 confers upon the Postal Service unfettered discretion in selecting modes of transportation, precluding review of its
transportation policies under the bid protest procedures. Selection of modes of transportation is also addressed in
39 U.S.C. ' 101(f), which establishes a postal policy that:

> In selecting modes of transportation, the Postal Service shall give the highest consideration to the prompt and economical delivery of mail and shall make a fair and equitable distribution of mail business to carriers providing similar modes of transportation services to the Postal Service.

While we do not find in sections 101(f) and 5005 support for the proposition that the Postal Service's selection of modes of transportation is unreviewable, it is apparent that Congress vested the Postal Service with clear discretion to select modes of transportation, and gave the Postal Service latitude to consider broader policy issues than just cost and efficiency in that selection. There is no reason to conclude that the individuals responsible for the establishment of the Postal Service's transportation policy have any less discretion than is afforded to other procurement decisions, or to afford that discretion any less deference in review. We thus adopt our general standard for consideration of the contracting officer's decision.

Although we find it irregular for the contracting officer not to have complied with the apparently applicable provisions of PCM 19-202(e), the subsequent obtaining

[8/] This standard of review was used in the Doehler-Jarvis decision relied on by the protester. In that decision, the conclusion that the contracting officer had abused his discretion in concluding that plastic post office box nestings were not acceptable rested in large part on the fact that such plastic nestings had been satisfactorily furnished under previous contracts, and the contracting officer had failed to provide a reasoned analysis why they would not be satisfactory in case at issue. Doehler-Jarvis thus stands as an extreme case in contrast to the vast majority of the decisions in which the contracting officer's discretion has been upheld. Because the protester has failed to demonstrate any compelling similarities between the situation in Doehler-Jarvis and the situation here, we do not find it persuasive.

of a deviation from the requirement removes the matter from our consideration. See Logistical Support, Inc., Comp. Gen. Dec. B-197488, November 24, 1980, 80-2 CPD & 391. Moreover, the regulation appears to be intended to foster contract competition for the benefit of the Postal Service,[1/] and confers no rights on potential offerors. See Servicemaster All Cleaning Services, Inc., Comp. Gen. Dec. B-223355, August 22, 1986, 86-2 CPD & 216.

Having set aside the contracting officer's contentions that his discretion to limit this solicitation to railroads is unreviewable, we turn to the reasons he asserts for that decision. In essence, they appear to be three in number:

1. The service provided cannot be provided by highway contractors.

2. Alternatively, highway contractors would provide faster service than is desired.

3. The service should be reserved for railroads to maintain them as a viable alternative form of transportation.

As the protester suggests, the first of these reasons is not persuasive. It is the prospective offerors, and not the Postal Service, who should determine in the first instance their capability to perform the service. The contracting officer may thereafter determine the offerors' responsibility in the course of offer evaluation.

The second and third reasons are more on point. The solicitation at issue here uses an evaluation scheme which rewards service over price in the context of the service which railroads can provide. The protester asserts that he can provide significantly better (i.e., faster) service than can railroads, but it is clear that the contracting officer does not require or desire service of that quality, at least not at the premium in price which the evaluation scheme of this solicitation would allow.

While it might be enlightening to observe a competition structured with evaluation factors which would allow a fair comparison of the strengths of intermodal alternatives, neither the statutory nor regulatory schemes for mail transportation require it.[1/] We conclude that the contracting officer acted within his discretion in

[9/] PCM 19-402(e) should be read in conjunction with PCM 19-402(f), which provides:

> If the solicitation is an IFB, it must first be conclusively determined that there is sufficient competition on the route to be served to ensure that the contract rate is the lowest reasonably obtainable. If there are less than two potential contractors capable of providing service on any segment of the route to be served, the procurement must be negotiated.

Together PCM 19-402(e) and (f) promote competition by requiring that the Postal Service solicit for intermodal service, which may be performed by rail or highway or a combination of both, unless either the service can only be performed by rail (PCM 19-402(e)) or there is adequate competition between rail carriers (PCM 19-402(f)).

[10/] See 39 U.S.C. " 101 and 5005, infra, and PCM section, 19, particularly 19-106 (authorizing contracts by type of transportation) and Parts 3 through 8 (each dealing with a particular contract type.

deter- mining that since the service which was required could be obtained from railroads the solicitation would be limited
to railroad companies.[1/]

The protest is denied.

William J. Jones
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Office of Contracts and Property Law

[Checked against original WJJ 3/3/93]

[11/]The alternative BMC to BMC highway solicitations cited by the protester do not contradict this finding. As we understand the contracting officer's explanation, they are not to be evaluated in competition with the rail offers, but to be considered with regard to segments of service as to which rail service, although solicited, is not offered, or is not offered in volumes sufficient to accommodate the mail.