

Protest of)
TPI INTERNATIONAL AIRWAYS, INC.) Date: January 29, 1988
Solicitation No. ANET-87-02) P.S. Protest No. 87-40

ON RECONSIDERATION

TPI International Airways, Inc. (TPI) requests reconsideration of our decision in TPI International Airways, Inc., P.S. Protest No. 87-40, October 30, 1987, which sustained TPI's protest that its proposal for Express Mail transportation services was unfairly evaluated, but declined to order relief. TPI states that it is entitled to the termination of Evergreen's contract and award of a contract to it.

TPI notes that we acknowledged that the procurement deficiencies at issue here were serious and that it was prejudiced thereby. It takes issue with the reasons which justified our failure to order relief.^{1/} TPI alleges that termination of Evergreen's contract and award to it would actually save the Postal Service \$16 million, because the \$6 million cost of terminating Evergreen's contract would be more than offset by the \$22 million which the Postal Service would save by having TPI serve the system from January 15, 1988 to June 6, 1989. Thus, TPI asserts that the Postal Service will actually reap a huge cost savings from termination of Evergreen's contract. Second, TPI admits that the urgency of the procurement was a valid consideration, but notes

^{1/}That decision held as follows:

In light of the factors enunciated in Inforex Corporation, we must decline to order termination of Evergreen's contract. It is true that the procurement deficiency which we have identified is serious, and that TPI has been prejudiced thereby. Other factors, however, argue against ordering termination of the contract. The cost to the Postal Service of terminating Evergreen's contract would be over \$6 million, the amount of the liquidated damages to be provided pursuant to General Provision 24C of the contract. The requirement's urgency is shown by the short time frames within which the service was procured. Evergreen has performed for almost 5 months, which is approximately 20% of the total contract period. There has been no allegation that postal employees have acted in bad faith in this procurement. Finally, there is no certainty that TPI is a responsible offeror and would have received award even if its proposal had been properly evaluated. Therefore, we are unable to order any relief under the particular facts of this case, but we note that "the degree of prejudice to the interests of the competitive procurement system will prove to have not been great provided that the lessons of this procurement are observed in future procurements" Dwight Foote, Inc. supra, quoting Inforex Corporation, supra.

that it is ready, willing, and able to take over the system immediately whenever Evergreen's contract is terminated, so that the urgency issue is not relevant as to whether Evergreen's contract should be terminated and award made to it. TPI vigorously disputes our finding that there were no allegations of bad faith by TPI on the part of the postal procurement officials. While TPI admits that it never used the term "bad faith" in any of its pleadings, it strongly asserts that numerous allegations it made were equivalent or amounted to bad faith, and that it actually proved that the contracting officer actually exhibited bad faith toward it. Finally, TPI claims that it is clearly a responsible offeror, a fact proven by the contracting officer's failure to accuse it of being nonresponsible.

The contracting officer has responded to TPI's request for reconsideration. She states that TPI's assumption that it would have been awarded a contract if its proposal had been evaluated correctly is mistaken. Although she never conducted a detailed analysis of its responsibility, she has cited pertinent sections of PCM 1-900 *et seq.* (made applicable to transportation contracts by PCM 19-122), in support of her doubts as to whether TPI was a responsible offeror. She considers TPI's position as to the composition of its system to be vague, contradictory and unspecified as to location and composition of its hub transfer operations, in contrast to Evergreen's successful performance. Accordingly she notes that if the evaluation process were to be reopened there is no guarantee that TPI would receive award. Further, the contracting officer notes that almost all of TPI's allegations of bad faith consist of vague, general statements which are unsupported by any evidence in the file. The only specific allegation of bad faith, an asserted failure to respond to a Freedom of Information Act (FOIA) request, is explained to the effect that TPI was furnished with all the documents it requested and that her failure to answer TPI's follow-up letter was inadvertent.

TPI's rebuttal comments disagree with the contracting officer's conclusions. It states that she has not addressed the enormous cost savings attributable to termination of Evergreen's contract and award of the remainder of the contract to it. TPI reiterates that it remains ready to begin service at a moment's notice and alleges that Evergreen's service has been inferior. TPI also reiterates that it has charged the contracting officer with and proven several instances of her bad faith, including the FOIA withholding. TPI goes into great detail to prove that it is, without doubt, a responsible offeror with superior bona fides in all areas.^{1/}

TPI's arguments stem, almost entirely, from the mistaken premise that this office can order a contracting officer to award a contract. While we have, in appropriate cases, ordered contracting officers to reopen negotiations, reevaluate proposals or terminate improperly awarded contracts, (see, e.g., FWH Motor Transit, Inc., P.S. Protest No. 84-30, May 21, 1984; Carini's, Inc., P.S. Protest No. 83-65, December 13, 1983; Le Prix Electrical Distributors, Ltd., P.S. Protest No. 80-13, April 15, 1980; John Schomaker, P.S. Protest No. 75-49, January 20, 1976. Copico, P.S. Protest No. 77-37, September 16, 1977), we have not ordered a contracting officer to award a contract to any particular offeror. Thus, TPI's assumption that any relief we would order would automatically result in award to it is mistaken; the most we would order would be a termination of Evergreen's contract and recompetition.

^{2/}TPI objects to the contracting officer's citation of a Postal Service bid protest case. The bid protest regulations permit the contracting officer to seek the advice of assigned counsel in regard to matters which arise in the course of bid protest proceedings. PCM 2-407.8 f. (3).

TPI's calculation that termination of Evergreen's contract will save the Postal Service money is premised upon the assumption that it would receive the subsequent award. Since, as noted above, the relief available would be termination of Evergreen's contract and a resolicitation of the remainder of the requirement, it would be speculative, at best, whether the outcome of that recompetition would be more or less costly than the present Evergreen contract. The only cost which can be calculated with certainty at this point is the \$6 million in damages which the Postal Service would have to spend to terminate Evergreen's contract. Given the uncertainty of the savings of any reprocurement contract and the certainty of the cost of the termination of Evergreen's contract, the cost of providing relief strongly militates in favor of our prior decision.

TPI acknowledges that the procurement was urgent, but explains this factor away as immaterial because it would be able to take

over contract performance immediately. TPI's allegation more directly addresses the continuity of service than urgency of the procurement. It remains undisputed that the procurement was accomplished in a very short time frame and that the urgency of the requirement was a motivating force. TPI's claim that it would provide continuous service does not detract from this fact.

As to our finding that TPI had not alleged bad faith on the part of the contracting personnel, we note that the legal definition of bad faith is very narrow and specific:

The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. "[B]ad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

Black's Law Dictionary, (5th ed. 1979) 127.^{1/} While many of TPI's accusations charge contracting personnel with incompetence, gross negligence, and failure to comprehend elementary procurement statutes and regulations, only in a couple of cases did TPI even come close to alleging affirmative, intentional wrongdoing with malicious intent and it never used the actual term "bad faith" in its submissions dealing with the protest. Therefore, whether TPI alleged bad faith on its face is tenuous at best.

"The protester bears a heavy burden of proof when alleging bad faith on the part of Government officials; it must show by virtually irrefutable proof that these officials had a specific malicious intent to injure the protester." Irwin I. Grossman, On Reconsideration, P.S. Protest No. 84-55, December 7, 1984, quoting Kalvar Corporation, Inc. v. United States, 543 F.2d 1285, 1301 (Ct.Cl. 1976); see also Garden State Copy Company, P.S. Protest No. 84-31, July 5, 1984; Health Services International Inc., Comp. Gen. Dec. B-205060, May 25, 1982, 82-1 CPD & 495. Contracting officials are presumed to act in good faith. Irwin I. Grossman, supra; J.F. Barton Contracting Co., Comp. Gen. Dec. B-210663, February 22, 1983, 83-1 CPD & 177. Even where TPI has alleged bad faith, it has not proven its allegations.

Finally, TPI appears to believe that this office can make determinations of responsibility. We cannot. Such determinations are reserved to the contracting officer. PCM 19-122; 1-905.1 (a); see, e.g., L.P. Fleming, Jr., Hauling, Inc., P.S. Protest No 83-64, December 19, 1983; Garden State Copy Company; Southern California Copico, Inc., P.S. Protest No. 82-84, September 1, 1983; Lewis R. Hoechstetter, P.S. Protest No. 79-30, July 20, 1979. Contracting officers exercise their discretion in making such determinations, and our office is without the authority and expertise to make such determinations; our function consists only of reviewing a particular determination within the appropriate legal standard.^{1/} See, e.g. Dohrman Manufacturing Company, P.S.

^{3/}TPI defines bad faith as a "breach of faith, willful failure to respond to plain, well-understood statutory or contractual obligations". NLRB v. Knoxville Publishing Co., 124 F.2d 875, 883 (6th Cir. 1942). That definition is unsatisfactory because it fails to emphasize sufficiently the "sinister motive" necessary to constitute bad faith.

^{4/}This standard is that the determinations of a contracting officer will not be overturned unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence. POVECO, Inc., et al., P.S.

Protest No. 84-8, March 13, 1984 (not an abuse of discretion for different contracting officers to reach different responsibility determinations as to the same bidder); Southern California Copico, Inc., P.S. Protest No. 83-76, March 5, 1984 (our office does not conduct independent investigations, but merely review the correctness of determinations made by the contracting officer). In the instant case, the contracting officer has not made a determination of TPI's responsibility; although TPI has furnished considerable material which might bear on such a determination, the posture of this protest is not such that the question of its responsibility is before us.

We can understand TPI's disappointment at not receiving any relief from this office, but this does not change the facts of this protest, which call for the withholding of relief. Cf. Garden State Copy Company, P.S. Protest No. 85-61, September 17, 1985.

We have considered all the evidence presented by TPI and the contracting officer. On reconsideration, we decline to modify our prior decision.

William J. Jones
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Office of Contracts and Property Law

[Compared to original 3/3/93 WJJ]

Protest No. 85-43, October 30, 1985; American Airlines, Inc., P.S. Protest No. 84-72, December 14, 1984.