

Protest of ) Date: October 23, 1990  
 )  
MELVIN R. KESSLER )  
 )  
Under Solicitation Nos. 150-102-90 ) P.S. Protest No. 90-36  
150-104-90 )

### DECISION

Melvin R. Kessler protests the Postal Service's termination for convenience of his highway transportation service contract and the contracting officer's failure to solicit proposals from him for the emergency contracts to serve his former route.

Mr. Kessler held contract HCR 25871 for box delivery service between Ghent, WV, and Princewick, WV, until the Postal Service terminated it for convenience effective July 13, 1990.<sup>1/</sup> On July 10, the Pittsburgh Transportation Management Service Center (TMSC) solicited offers by telephone from seven potential contractors. (Solicitation No. 150-102-90). Mr. Kessler was not among those contacted. Five offers were received and award was made to the lowest offeror. However, that contractor subsequently exercised his right to terminate the contract, requiring resolicitation of the route.

On July 18, six offerors were solicited by telephone for Solicitation No. 150-104-90. Again, Mr. Kessler was not contacted. The contracting officer awarded a contract to the low offeror for service beginning July 21 for a term extending through January 11.<sup>1/</sup>

By letter dated July 4 and received by this office July 10, 1990, Mr. Kessler complains of the termination of his contract and of the process being followed by the Postal Service for procurement of replacement service. He alleges that information concerning the expected emergency procurement provided to other prospective offerors was denied to him and objects to the fact that he was not solicited for the service. Mr. Kessler requests that this

<sup>1/</sup> The contracting officer advises that the contract was terminated because the Postal Service wished to reduce each daily trip by two hours, but Mr. Kessler declined to negotiate for a reduction of the trip time and compensation. See PM 12.4.12 c. and Mail Transportation Procurement Handbook (MTPH) 2.4.1. Notice of the termination was sent to Mr. Kessler on June 8. Replacement emergency service was necessary because procurement of permanent service generally required more than 30 days and because the Postal Service was considering other adjustments to the route.

<sup>2/</sup> Although the contract contains this termination date, emergency contracts may be terminated on notice by either party.

information be provided fairly and that this office supervise the award of emergency contracts.<sup>1/</sup> With regard to the convenience termination of HCR No. 25871, Mr. Kessler states that although the contracting officer terminated to effect schedule changes, he (Mr. Kessler) was willing to negotiate such schedule changes. Therefore, the termination was unnecessary.

In his report, received August 17,<sup>1/</sup> the contracting officer denies Mr. Kessler's allegations that he was denied information, contending instead that Mr. Kessler's requests for information had been directed to the administrative postmaster of his contract, who had been advised by a TMSC supervisor to direct all such inquiries to the TMSC. A notation at the bottom of the TMSC's copy of Mr. Kessler's inquiry to the postmaster confirms this. The contracting officer asserts that directing all inquiries to the TMSC ensures that all offerors receive the same information.

The contracting officer advises that he did not solicit offers from Mr. Kessler for the July 10 and July 18 solicitations because during the discussions prior to the termination of his contract, Mr. Kessler had told the contracting officer that he could not safely perform the service under the revised schedule which the contracting officer sought. As a result, the contracting officer apparently concluded that Mr. Kessler similarly could not have performed the emergency service on the revised schedule.

Finally, the contracting officer advises that offers for the emergency service were solicited and received by telephone pursuant to MTPH 6.2.1 A. and that all prospective offerors received the same information. He also suggests that when the protest was received by this office there was no solicitation being conducted which could have been the subject of the protest. With regard to Mr. Kessler's request that this office supervise the award of emergency contracts, the contracting officer states that he knows of no regulation which provides for such a practice.

Mr. Kessler has replied to the contracting officer's report. While repeating his earlier contentions, Mr. Kessler further states that the administrative postmaster did not tell him to contact the TMSC for information but told him the TMSC directed her not to tell him anything. He contests the contracting officer's assertions regarding his earlier statements about the safe operation of the route, arguing that the schedule for the emergency route was not the schedule about which he made the comments. Mr. Kessler continues to complain that the TMSC's last schedule change "did not give me enough time leaving Princewick and getting back to Ghent," but he does not assert that the emergency solicitation schedule does not share that failing. Finally, Mr. Kessler contends that the

<sup>3/</sup>The protest speaks throughout of the solicitation and opening of bids. In fact, emergency transportation contracts are solicited by a form of negotiated procurement, MTPH 6.1.1 A., so the term "bid" is inappropriate. This decision reflects the correct terminology.

<sup>4/</sup>When this office received Mr. Kessler's protest, we sent a copy to the TMSC in the normal course requesting the contracting officer's report on the protest. According to the contracting officer, the TMSC did not receive that request. This office discovered that fact when inquiry was made of the contracting officer why his report required by PM 4.5.7 e. had not been filed within the time allowed and provided to Mr. Kessler. Our office then immediately transmitted a new copy of the protest to the contracting officer. By that time, the second emergency contract had been awarded, and service thereunder had commenced.

TMSC should have delayed award until his protest was resolved.

The holder of the emergency contract has submitted comments, stating that he has had the route contract for one month and operated it in a safe manner. In addition, he states that the only information he was given prior to proposing was that a four-wheel drive vehicle was needed.

### Discussion

To the extent Mr. Kessler challenges the contracting officer's decision to terminate his former contract, HCR 25871, for convenience, this office lacks jurisdiction over the protest. E-Z Copy, Inc., P.S. Protest No. 89-85, December 1, 1989; G.L. Reubush, P.S. Protest No. 89-61, September 20, 1989. Such a termination relates to a matter of contract administration, and the terminated contractor's remedies, if any, are those set out in the contract. Specter Transit Company, P. S. Protest No. 76-33, July 20, 1976.

We turn to the exclusion of Mr. Kessler from the competition for the July 10 and 18 solicitations.<sup>1/</sup> While contracting regulations require that contracting officers solicit offers from incumbent contractors when soliciting for permanent highway transportation service, PM 12.4.5 e., there is no comparable requirement for solicitation for emergency service, MTPH 6.2.1. Postal Service regulations applicable to all solicitations require that purchases, including procurements of emergency transportation service, "be made on the basis of adequate competition whenever feasible." PM 1.7.1 a.<sup>1/</sup> Adequate competition is defined as "the solicitation and participation of a sufficient number of sources to ensure that the price paid by the Postal Service is fair and reasonable." Id. Generally, this office has held that the solicitation of three offerors meets the standard of adequate competition. See AHJ Transportation, Inc., P.S. Protest No. 89-18, May 4, 1989; Computer Systems & Resources, Inc., P.S. Protest No. 86-4, March 27, 1986.<sup>1/</sup>

The contracting officer was aware of Mr. Kessler's interest in submitting offers on the emergency contracts, but contends that Mr. Kessler's position during negotiations for a

<sup>5/</sup>Although the contracting officer in his report suggests that the protest was premature, we note that the initial telephone solicitation occurred July 10, the same day we received Mr. Kessler's protest. Thus the protest, although written and sent before the solicitation, accurately complains of the exclusion of Mr. Kessler from submitting an offer. We conclude the protest of this issue was not premature. Since Mr. Kessler had been notified that his contract would terminate July 13, it is disingenuous to suggest that no solicitation was being conducted until the moment of the July 10 telephone solicitation. As Mr. Kessler has noted in his comments, as of the date of his protest, an announcement of the forthcoming solicitation had been posted in the Ghent, WV, post office.

<sup>6/</sup> This requirement is specifically applicable to procurement of transportation service. PM Exhibit 12.1.1.

<sup>7/</sup> We have reviewed the "adequate competition" standard where a contracting officer inadvertently fails to send an incumbent contractor a solicitation notice or otherwise to comply with regulations intended to secure competition. In such cases, this office has found no corrective action necessary so long as the action was inadvertent, a reasonable price was obtained and a sufficient number of offers, generally three, was obtained. See Printco Enterprises, Inc. and Dodd Trucking & Leasing Co., P.S. Protest Nos. 90-29, 90-32, August 8, 1990; Paul J. Rocco d/b/a Paul's Trucking P.S. Protest No. 89-40, July 21, 1989. As the exclusion in this case was not inadvertent, we do not consider these cases applicable.

reduction in the previous service justifies his exclusion from the competition. We are not fully convinced that it does. While it is generally true that one need not solicit a defaulted contractor when replacement service is sought, see Jack Yanks Construction Co., P.S. Protest No. 75-56, August 13, 1975, the same is not the case when the contract has been terminated for the Postal Service's convenience. The contracting officer's view to the contrary is, in essence, a determination that Mr. Kessler would not have been a responsible offeror for the emergency service.<sup>1/</sup> It was premature and prejudicial to Mr. Kessler for the contracting officer to make that determination solely on the basis of the discussions which led to the previous contract action. Nothing in the record suggests that Mr. Kessler's previous objections would not have been altered when it became clear that the Postal Service intended to solicit the route at reduced hours nor does it justify excluding him from the competition.<sup>1/</sup> When Mr. Kessler sought information, he should have been given the necessary information and an opportunity to propose.<sup>1/</sup>

With regard to Mr. Kessler's request that this office supervise emergency solicitation awards, there is no provision within our regulations for such a procedure. The regulations do provide for review of such awards through the protest procedure.

Finally, Mr. Kessler questions the TMSC's failure to stay award pending resolution of his protest. As indicated above, the contracting officer advises that he was not aware of Mr. Kessler's protest at the time of the contract awards. Nothing on the record here provides any basis to challenge this assertion. Absent awareness of the protest, the contracting officer was under no obligation to defer the awards.

We agree that the procedure followed here was inappropriate, and direct that Mr. Kessler be given a full opportunity to compete in the shortly-forthcoming solicitation for permanent service.

<sup>8/</sup>To be responsible, a prospective contractor must affirmatively demonstrate its capability to perform the contract, including its ability "to comply with the required or proposed ... performance schedule...." PM 3.3.1 b.2.

<sup>9/</sup>Cf. Mildred Brown, P.S. Protest No. 76-52, September 22, 1976, in which a protester asserted that once a prospective offeror had indicated disinterest in performing a route, its subsequent offer should not be considered. As the decision noted, "[the offeror's] participation in the emergency solicitation established his interest in the route. We know of no way in which he could be excluded from participation as a result of his previous statements." Id.

<sup>10/</sup>An earlier decision of this office, Crist Trucking, Inc., P.S. Protest No. 76-12, May 11, 1976, "found nothing objectionable" when a contracting officer failed to solicit a potential offeror for emergency transportation service because the offeror's large number of irregularities on two currently operated routes caused him to question the offeror's ability to provide the emergency service. The evidence before the contracting officer there was far more substantive than the evanescent concerns available here.

The protest is sustained.

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**[checked against original JLS 6/7/93]**