

Protests of)	Date: December 11, 1992
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TODD'S LETTER CARRIERS, INC.)	
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Solicitation Nos. 608--92)	P.S. Protests Nos. 92-39
608-16-92)	92-40
608-24-92)	92-41

ON RECONSIDERATION

Todd's Letter Carriers, Inc., ("Todd") requests reconsideration of various elements of our decision of October 21, 1992, which upheld the contracting officer's determination that Todd was a nonresponsible contractor with respect to three solicitations for highway transportation service.

The request for reconsideration raises the following points:

1. The decision failed to consider the fact that Todd was not included on the Department of Transportation's Unsatisfactory Safety Ratings Report. The solicitation did not define the term "contractor," for the purpose of excluding from consideration contractors who were on the list, to include entities such as principal officers or shareholders. The decision fails to provide a rationale why Todd was denied the bid on this ground.

2. The decision is unclear in failing to indicate whether there were reasons other than the inclusion on the DOT list of Todd's principal. The protester seeks clarification of the following:
 - a. If, as the decision indicates, the challenge to the contracting officer's previous decision not to allow transfer of various contracts operated by Mr. Snyder's sole proprietorship, TLC Trucking ("TLC"), to Todd by novation was not for consideration in the protest, why did footnote 9 of the decision discuss the matter. If the matter was to be discussed, footnote 9 failed to recognize that under "general principles of agency law," the acts

of the contracting officer's agents (who had advised that the novation would be approved) bind the contracting officer.

b. There was no discussion of what issues of TLC's previous performance of its other contracts supported the determination of nonresponsibility. The decision is unclear to what extent the cases which it cites concerning the consideration of that performance are relevant to the decision.

c. The assertion set out in footnote 10 of the decision, that a "prospective contractor has no right to review or defend information used in a responsibility determination" requires reconsideration because otherwise the protest procedure would have no validity.

d. The decision failed to consider the transportation specialist's advice to Mr. Snyder that information concerning TLC would not be relevant to the consideration of Todd's bid, so that Mr. Snyder should not be subject to a negative inference for "compliance with the dictates of Post Office personnel in the bid process."

The request for reconsideration also requested copies of the decisions cited in the initial decision, and requested the opportunity to submit further comments. Those comments were received November 30. They make the following points:

1. The exclusion of Todd because of TLC's inclusion on the DOT safety list was arbitrary and capricious; there is no legal basis for imputing TLC's listing to Todd. The contracting officer has overstepped the solicitation's requirement that "the contractor may not be rated unsatisfactory" since TLC was not the contractor, but Todd, which was unlisted, was.
2. There is no documentary proof that Todd was included on the DOT list.
3. The decision's reliance on Colorado Piping and Mechanical, Inc., P.S. Protest No. 90-23, June 20, 1990, was misplaced. That decision had to do with a bidder's refusal to provide information about itself, not, as here, to provide information about another entity (TLC).
4. It was inappropriate for the contracting officer to look beyond Todd, the corporation, to determine its responsibility, a conclusion supported by the discussion in Package Express, Inc., P.S. Protests No. 87-57, 87-58, and 87-64, July 27, 1987, which notes that it is inappropriate to look to the principals of the corporation to determine the corporation's responsibility.
5. At the time the solicitations at issue in this protest were issued, TLC did not

have an unsatisfactory DOT listing; that listing came into being prior to bid closing. Citing a discussion in Todd's Letter Carriers, Inc., P.S. Protest No. 92-74, November 20, 1992, the protester contends that it is the solicitation date, rather than the date of bid opening, which should be controlling.^{1/}

Discussion

Our review of reconsideration requests is very narrow:

Reconsideration is not appropriate where the protester simply wishes us to draw from the arguments and facts considered in the original protest conclusions different from those we reached in that decision. Reassertion of arguments previously considered and rejected by this office does not constitute a ground for reconsideration. Similarly, where information and arguments were known or available to the protester during the development of its protest but were not presented in the original proceeding, such information and arguments may not be considered in a request for reconsideration.

Fort Lincoln New Town Corporation, On Reconsideration, P.S. Protest No. 83-53, November 21, 1983 (citations omitted).

Here, much that the protester requests us to reconsider plows old ground, and thus is not available as a basis for reconsideration. We note the following, however, concerning the protester's repetitive contentions:

-- Contrary to protester's several assertions, the previous decision fully and adequately reflected that Todd, the corporation, had not been found to have an unsatisfactory safety record by the Department of Transportation. The decision is clear that it was Todd's President and principal stockholder, Mr. Snyder, who was so listed, and explained why it was appropriate to attribute Mr. Snyder's listing to Todd: "[A]ny other result would allow unsafe operators to continue to obtain new postal contracts by the simple expedient of creating new corporate entities without correcting the underlying problems which occasioned the listing."

-- The decision need not have resolved whether the evidence of TLC's less than satisfactory performance would have supported the finding of Todd's nonresponsibility on its own, because the DOT listing was a sufficient ground in itself.

^{1/} Protest 92-74 involved issues similar to those presented in the initial decision here, but also involved the application of a policy promulgated by a Transportation Bulletin dated July 30, 1992, with an effective date of August 1, 1992, to the terms of a solicitation issued on July 1, 1992, on which bids were opened August 5. The solicitation had not been amended to incorporate the changes, and for that reason the decision noted that the policy would not apply to the contract awarded under the solicitation.

-- Since the decision concluded that the circumstances surrounding the Postal Service's decision not to approve the novation of the TLC contracts to Todd was not relevant to the issue of Todd's responsibility, the footnote concerning the reasonableness of Todd's expectation of novation is clearly dicta. In any event, not all "general principles of agency" apply to the exercise of contracting authority by government agents, for example, the application of principles of apparent authority. Federal Crop Insurance Corp. v. Merrill, 332 US 380 (1947).

-- The reference in footnote 10 to the prospective contractor's lack of a right to defend the information used in a responsibility determination involved the course of the determination itself, and not subsequent challenges by protest or otherwise.

-- The decision took into account the effect of the transportation specialist's assertion that "information pertaining to TLC was irrelevant" in concluding that Todd's subsequent failure to supply, in response to specific requests, information relevant to the interrelationship of its finances to TLC.

With respect to specific issues arising out of the decision's citations, we note the following:

-- While Colorado Piping and Mechanical, Inc., supra, did involve a prospective contractor's failure to provide financial information about itself, rather than about a related entity, that difference does not affect the outcome here. Cf. Wallace & Wallace, Inc.; Wallace & Wallace Fuel Oil, Inc.--Reconsideration, Comp. Gen. Decs. B-209859.2, B-209860.2, 83-2 CPD & 142, July 29, 1983 (it was appropriate for the government to investigate the financial condition of bidder's affiliates, and bidder "must suffer the consequences of its inability to establish its financial capabilities").

-- The protester cites Package Express for a principle which differs from the one for which it was cited in the decision. There, the offeror sought to establish the financial responsibility of a corporation by reference to the separate financial assets of the corporate principals. The decision concluded that this was incorrect because it was only to the corporate assets, and not to the individual ones, that the Postal Service could look for contract performance. Package Express thus involves a different proposition than the one which the initial decision advanced, citing other cases which the protester does not here challenge, that it is appropriate for the Postal Service to look to the responsibility of a new corporation's principals when the corporation lacks experience itself.

Finally, the contention that TLC's inclusion on the DOT list should be measured as of the date of the solicitation, and not as of the bid opening date, is a new one, and as

such is clearly untimely raised. Procurement Manual 4.5.4 d. In any event, it is also incorrect, since the relevant provision specifically stated that it was at the time of bid opening that bidders' compliance with the DOT listing requirement would be met. We do not understand the decision in Protest No. 92-74 to require a different result.

The initial decision is affirmed.

For the General Counsel:

William J. Jones
Senior Counsel
Contract Protests and Policies