

August 27, 1993

P.S. Protest No. 93-13

RUSSELL L. KINGSTON

Solicitation No. 980-96-93

DIGEST

Protest against rejection of all bids as excessive in price is denied where contracting officer's decision is not shown to have been a clear abuse of discretion.

DECISION

Mr. Russell L. Kingston protests the cancellation of solicitation 980-96-93 for highway mail transportation services. The solicitation was issued April 21, 1993, by the Seattle Branch, Western Distribution Network Office, seeking bids for the transportation of mail on Highway Contract Route (HCR) 98032 between the Seattle, WA, General Mail Facility, and Vashon, Burton, and Dockton, WA.¹ Bids were due May 24.

Two bids were received by the time set for bid opening. The lower bid was that of War Eagle Express, at an annual rate of \$53,226.00. The higher bid, that of Mr. Kingston, was at an annual rate of \$58,196.62. The contracting officer concluded that both bids "were excessive in amount considering the prevailing rates for similar service in the same area and with the cost of the service previously being operated on the route." Accordingly, the contracting officer rejected both bids. By letter dated May 27, the contracting officer

¹ These three points are all located on Vashon Island in Puget Sound, and are reached by a ferry from Fautleroy, WA.

advised Mr. Kingston of the rejection of the bids and that the requirement would be the subject of a new solicitation. The new solicitation, No. 980-116-93, was issued on June 4 and bids were due July 16.

By letter dated June 7, Mr. Kingston protested to the contracting officer the rejection of his bid. The protest noted that Mr. Kingston had been the incumbent contractor on the route, and that he had declined to renew his contract at the current rate "because it was not . . . sufficient . . . to provide a reasonable income for the work performed." The protest asserted that Mr. Kingston's current bid was reasonable.

By letter dated June 23,² the contracting officer denied Mr. Kingston's protest as without legal merit, noting that section II.C.4.aof Form 7469, Highway or Domestic Water Transportation Contract Information, included in the solicitation, reserved to the Postal Service "the right to reject all bids and proposals whenever the interest of the service requires," and that the contracting officer "rejected all bids submitted . . . [as] excessive in amount considering the prevailing rates and . . . the cost of the service currently being operated." The denial also asserted that the protest "failed to include a complete statement of the alleged defects or grounds that make [sic] the solicitation terms defective."

By letter dated July 7, Mr. Kingston replied to the contracting officer, objecting to the denial of his protest. The letter sought a conference with the contracting officer or the next higher level contracting authority so that Mr. Kingston could demonstrate why his bid was not excessive. In the absence of such a conference Mr. Kingston suggested his intention to appeal to the "Contractors Board of Appeal [sic]."³ The letter also sets forth Mr. Kingston's substantive objections to the basis on which his protest was denied, noting alternatively that his bid was not rejected "for the good of the service," but because it was excessive in cost; that various factors contribute to the cost of the route; that his bid was based on the previous contract rate adjusted by the consumer price index, the specified cost increases, and the cost of a relief driver; and that his initial protest had fully described the "defect" which he was protesting, the determination to reject his bid as excessive.⁴

² We note that the contracting officer apparently failed to act on the protest within the ten working days which Procurement Manual (PM) 4.5.6 b. allows for the resolution of protests by contracting officers.

³ Jurisdiction over protests such as this rests with this office, rather than with the Postal Service Board of Contract Appeals. Accordingly, the contracting officer forwarded the protest to us for consideration under PM 4.5.4 e.

⁴ Mr. Kingston lists eight points which he contends make this route different from others:

1. Mr. Kingston's previous contract provided no amount for vehicle cost or maintenance.
2. The new contract requires a bigger truck than the previous contract.
3. Insurance costs would be higher because rates have increased and the larger truck would increase those costs.
4. The "new B&O tax rate" doubles the amount of tax.
5. The ferry rate has increased.
6. Because of the contract hours, the contractor cannot get six hours of sleep off duty, requiring the acquisition of a place to sleep onVashon Island during the

The contracting officer's statement on Mr. Kingston's July 7 protest notes that the bids on the original solicitation were found to be excessive based on an analysis of the route's projected costs. That review compared the low bid of \$53,226 to the \$34,181 annual rate of a route said to be comparable, HCR 985AB. The file also contains the office's calculation of the annual costs of Mr. Kingston's route, \$46,668. The contracting officer's statement asserts that while the protester's analysis includes various cost items which Mr. Kingston believes are appropriate for consideration, they are not part of the criteria which the contracting officer uses to determine when all bids are excessive in cost. The contracting officer notes that the resolicitation of the route resulted in eight bids, five of which (including that of Mr. Kingston) were lower than Mr. Kingston's original bid.⁵

The protester furnished comments on the contracting officer's statement. He notes his understanding that War Eagle, the low bidder on the first solicitation, had sought to withdraw its bid because it had omitted the ferry tolls from its costs;⁶ that the contracting officer's comparison route, HCR 985AB, is unusually low in price, so that it is not a "prevailing rate[] for similar service" in the words of PM 12.7.7 d.3; and that when fixed and operating costs and ferry tolls are removed from the contracting officer's cost statement for HCR 98032, an unrealistically low hourly rate for wages remains. The protester contends that the estimate understates the costs of the ferry tolls, general overhead, and driver wages, and he offers alternative cost calculations which, consistent with his previous contentions, contemplate the part time use of a hired driver and provision of a terminal on the island for the driver.

We solicited the contracting officer's comments on the protester's further submission and additional information on the comparable route. His response explained that comparable routes are selected using a computer program. In this case, the comparable route was similar to the route bid in terms of annual schedule miles and hours;⁷ both schedules

day.

7. The 6 day schedule (approximately 90 hours a week) requires a relief driver.
8. When this route is compared to other routes on a rate-per-mile basis, its higher cost per mile is justified by the time spent with the ferry, the cost of ferry tolls, and the time spent waiting on Vashon Island.

⁵ The abstract of bids reflects bids of annual rates ranging from \$42,994 to \$83,843, with Mr. Kingston second low at \$48,464 and War Eagle third at \$56,631. Two other bids were under \$57,000. While the decision to reject bids as unreasonably high must be measured from the information available when the decision is made, the results of a subsequent resolicitation may be used to support the decision. *Freund Precision, Inc.*, Comp. Gen. Dec. B-207426, 82-2 CPD 509, December 7, 1982.

⁶ The contracting officer denies that any withdrawal occurred. The protest file reflects that the low bidder protested to the contracting officer the rejection of its bid as excessive in price, but did not pursue its protest beyond the contracting officer's initial denial.

⁷ HCR 98032 had 15,864.6 annual miles, 2,408 annual hours, and 311.07 annual trips; the comparison route 985AB had 16,820.5 annual miles, 2,425 annual hours, and 303.07 annual trips. Both routes called for service to be performed six days a week.

included driver layovers, and that although the comparison route did not include ferry tolls, when tolls were added, the rate remained \$18,000 lower than Mr. Kingston's bid.⁸ The contracting officer notes that it is not usual to compensate drivers for free time between trips or for terminal lodging, and that the annual hours do not justify the use of a part-time hired driver.

DISCUSSION

The cancellation of a transportation solicitation after bids have been opened is governed by PM 12.7.7 e., which provides, in pertinent part:

e. Cancellation of Solicitation After Opening

1. To preserve the integrity of the advertised sealed bidding system, award must be made to the responsible bidder submitting the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the solicitation. . . . [A] solicitation may be canceled after the opening of bids only when the contracting officer determines in writing that:

* * *

- (d) All otherwise acceptable bids received are excessive in amount (see subparagraph d.3 above);

The referenced section of PM 12.7.7 d.3. reads as follows:

d. Rejection of Individual Bids

* * *

3. Any bid that is excessive in amount must be rejected. For a bid to be considered excessive, it must state a rate that is unreasonably high for the service called for in the solicitation. Rate reasonableness should be determined by comparison with prevailing rates for similar service in the same area, and with the cost of the service currently being operated on the route, all as adjusted to reflect any unique or changed circumstances.

The contracting officer has considerable discretion to determine whether to cancel a solicitation when offers are excessive in price, and this office will not overturn that decision unless the contracting officer has clearly abused his authority. *AHJ Transportation, Inc., P.*

⁸ The actual difference between Mr. Kingston's bid and the cost of HCR 985AB is \$19,045; the record does not explain the discrepancy. The protester and the contracting officer offer different estimates of the annual cost of tolls; the protester's figure is \$3,832, the contracting officer's figure is \$2,576.

S. Protest No. 89-05, May 3, 1989. A decision to reject excessive bids will not be overturned absent a showing that the decision was arbitrary, capricious, or not supported by substantial evidence. *American Contractors, Inc.*, P.S. Protest No. 87-123, February 4, 1988.

Here, the contracting officer compared the route to another route which was comparable in many respects, finding that both initial bids were substantially in excess of that bid amount as well as of the contracting officer's estimate for the route itself.⁹ While he disagrees with the contracting officer's calculations, the protester has not demonstrated that the contracting officer abused his discretion in selecting the comparable route or in rejecting the initial bids as excessive.

The protest is denied.

William J. Jones
Senior Counsel
Contract Protests and Policies

⁹ In determining whether all bids are excessive in price, it is the lowest bid which is significant. The contracting officer's calculations indicate that War Eagle's low bid was at least 55% higher than the cost of the comparable route, and 14% higher than the contracting officer's estimate for HCR 98032. These figures are within ranges in which we will not challenge the contracting officer's decision. In *American Contractors, Inc.*, *supra*, we upheld the rejection of all bids when bids were 16.5% and 18% higher than the postal estimate, and noted that the Comptroller General had upheld rejection of all bids when the low bid was 7.2% higher than the government estimate.