

Protest of) Date: August 6, 1987
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 RIC MARINKOVICH)
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 Solicitation No. 900-46-87) P.S. Protest No. 87-63

DECISION

Ric Marinkovich has protested the Los Angeles Transportation Management Service Center's (TMSC) issuance of Solicitation No. 900-46-87 and the award of a contract thereunder for emergency highway transportation service on a route from Los Angeles Worldway Postal Center to Palm Springs, CA.

Mr. Marinkovich was the incumbent contractor for the route under a contract which expired on June 30 (Highway Contract Route (HCR) No. 90021). Mr. Marinkovich contends that he negotiated and entered into a renewal contract for HCR No. 90021 for a term commencing July 1, and that the emergency solicitation violates his rights under that renewal contract. Mr. Marinkovich also contends that the emergency solicitation was issued, and the award made, without proper authority. The contracting officer maintains that the contract with Mr. Marinkovich was not renewed and that the emergency solici- tation and award were properly authorized.

We glean the following facts from the protest and contracting officer's report. In April, 1987, the TMSC opened negoti- ations with Mr. Marinkovich for a renewal contract for HCR No. 90021.¹⁴ On April 29 the TMSC received Mr.

¹⁴ Renewal of highway transportation contracts with the incumbent contractor or subcontractor by mutual agreement is authorized by 39 U.S. Code ? 5005(b)(2) and Postal Contracting Manual (PCM) 19-310.

Marinkovich's written offer to renew the contract at an annual rate of \$270,904.91. On May 8 the contracting officer wrote Mr. Marinkovich rejecting his offer as excessive in price and making a counteroffer to renew at an annual rate of \$245,309.25. The counteroffer was conveyed in the following paragraph:

Enclosed find completed form 7468-A reflecting an offer to you. If you agree to our offer of \$245,309.25 to renew; please sign, date and return form 7468-A.

The letter required that a reply to the counteroffer be received not later than May 11.^{2/} On May 11 a telephone conversation took place between Mr. Marinkovich and Alvin Daigre, a transportation specialist at the TMSC. The parties sharply disagree as to the substance of that discussion. Mr. Marinkovich asserts that in the course of the conversation he stated his acceptance of the contracting officer's renewal contract offer.^{3/} The contracting officer states that Mr. Marinkovich informed Mr. Daigre during the conversation that he did not wish to renew the contract.

On either May 13 (contracting officer's report) or May 16 (initial protest) the protester met with Mr. Daigre (initial protest) or Mr. Otis Davis, supervisor of transportation (contracting officer's report and protester's reply comments) in connection with a request to be relieved of several contracts other than HCR 90021.

On May 18 the contracting officer wrote Mr. Marinkovich advising him with reference to earlier correspondence in February that service on HCR 90021 "continues to remain unsatisfactory." Accordingly, the letter advises, "renewal of HCR 90021 ... will not be offered." The

^{2/} The protester notes that May 8 was a Friday and May 11 was the following Monday. The protester asserts that the May 8 letter was not received until the 11th, making it impossible for him to reply in writing by that date.

^{3/} Mr. Marinkovich's counsel represented during a bid protest conference that several contractors in Southern California have verified to him that it is the TMSC's frequent practice to enter into oral agreements for contract renewals, with the agreement reduced to writing weeks later. The contracting officer disputes this allegation.

letter made reference to the contractual appeal rights provided in General Provision 26 of Mr. Marinkovich's contract. The contracting officer views this letter as withdrawing his counteroffer of May 8.

By letter dated May 22, Mr. Marinkovich appealed the decision not to renew the contract. The appeal did not raise the issue of the contractor's acceptance of the TMSC's May 8 counteroffer. On June 1 the General Manager, Transportation Administration and Procurement Division, denied the appeal, noting the unacceptability of service on HCR 90021 as documented by fifteen irregularities between March 3 and May 20.

On June 18 the TMSC issued emergency Solicitation 900-46-87 for service between Worldway and Palm Springs.^{4/} The contracting officer advises that he obtained the oral approval of the next higher level contracting officer, required by PCM 19-902(c) for the issuance of an emergency solicitation in this instance, during a meeting with the aforementioned General Manager and his immediate superior, the Director, Office of Transportation and International Services, on June 17.

This protest was filed on June 23, raising the issue of the previous agreement on the terms of the renewal contract. On July 14, while the protest was pending, the contracting officer awarded an emergency contract under the solicitation to Clem-Trans, Inc. In a subsequent submission, the protester argues that the award violated PCM 2-407.8 g.1.,^{5/}

^{4/} Although the solicitation which appears in the file shows a date of May 29, the contracting officer advises in response to a telephonic inquiry that May 29 was the date of the solicitation's preparation, not its issuance. Similarly, although the contracting officer's report asserts that the solicitation was issued on June 19, we were subsequently advised that the 18th is the correct date.

^{5/} The subparagraph provides, in pertinent part:

Where a protest has been filed with either the contracting officer or the General Counsel before contract award, award must not be made until the matter has been resolved, unless the cognizant Assistant Postmaster General, in the case of USPS Headquarters procurements, or the cognizant Regional Postmaster General, in the case of all other procurements, after consulting with assigned Postal Service counsel determines that the Postal Service will be seriously injured, financially or otherwise, by delaying award until the protest has been resolved, and that the award should be made without awaiting the decision.

because the approval required by that section was not obtained.

The contracting officer has provided a copy of his written request for higher-level authorization to award the emergency contract which request bears the rubber-stamped and signed approval of the Regional Counsel, Western Region, dated June 29. The authority of the Regional Counsel to act on behalf of the Regional Postmaster General in this regard is not established in the record.

The gravamen of Mr. Marinkovich's protest is that the procurement of the emergency contract to replace Mr. Marinkovich's expired contract for HCR No. 90021 is in derogation of his rights under a renewal contract for the route, the existence of which Mr. Marinkovich claims and the contracting officer denies. The claim is thus one for breach of contract. Such a claim arising out of a contract is subject to the procedures set out in the Contract Disputes Act of 1978 and the contractual provisions, such as the Claims and Disputes clause, implementing the Act. Complaints resolvable under those procedures are not amenable to resolution under the bid protest procedures of PCM 2-407.8. Hunter L. Todd, d/b/a Courier Express Mail & Package Delivery Service, P.S. Protest No. 86-30, May 28, 1986; Jack Yanks Construction Co., P.S. Protest No. 75-56, August 13, 1975; J&J Maintenance, Comp. Gen. Dec. B-208966, 82-2 CPD ? 313, October 6, 1982. Accordingly, we must dismiss this aspect of the protest for want of jurisdiction.

The allegation that the emergency solicitation was issued without next higher level contracting authority approval is without merit. The contracting officer has advised that he obtained such approval orally, and the protester does not contest that assertion. Rather, the protester's position is that the approval has to be documented in writing. PCM 19-902(c) does not require that such approval be in writing, and, in any event, the protester has not established that the regulation creates any rights in prospective offerors. The regulation is merely for the protection or guidance of the Postal Service. The protester cannot be heard to complain that it was not followed. Bank Street College of Education -- Request for Reconsideration, Comp. Gen. Dec. B-213209.2, October 23, 1984, 84-2 CPD ? 445. While it should be obvious that written documentation of such approvals is preferable, we cannot conclude that they are

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required, or that the protester was harmed by the omission here.

The circumstances of the award of the contract while the protest was pending are more troubling, but we conclude that

no omission which may have occurred provides a basis for substantive relief.

The decisions of this office have often noted the extent to which the existence of an awarded contract limits or prevents the availability of a remedy in instances in which protests are found to have merit. See, e.g., Memorex Corporation, P.S. Protest No. 83-78, January 16, 1984; Kisco Company, Inc., P.S. Protests Nos. 83-58 and 83-60, December 19, 1983; Rentco Division, Fruehauf Rental Equipment, Inc., P.S. Protest No. 75-74, December 19, 1975. We understand PCM 2-407.8 g.l. to recognize this fact, and as intended to limit the number of bid protests received before award in which relief will be thwarted by contract award. Since the protester is an obvious beneficiary of this provision in this regard, he has standing to raise the violation of this provision.

In this case, however, there is no basis to conclude that any violation has affected the protester's interests. First, we have concluded that we are without jurisdiction to respond to the protest, so no relief is due. Second, there has been no plausible showing that the failure to obtain the Regional Postmaster General's concurrence here occasioned a contract award which otherwise would not have occurred. It appears that the Postal Service had a continuing need for the mail transportation services previously provided under the Marinkovich contract, and a strong likelihood that the test of serious injury would be met. Third, the emergency contract awarded here, unlike the majority of postal contracts, could quickly be terminated by the Postal Service without any obligation to the contractor for convenience termination costs or an indemnity. It thus provided a much more limited impediment to protest relief than most other contracts, once awarded, would provide.

The protest is dismissed.

William J. Jones
Associate General Counsel
Office of Contracts and Property

Law

[Compared to original 3/8/93 WJJ]