

Protest of)	
)	Date: July 7, 1989
DHL AIRWAYS, INC.)	
)	
Solicitation No. ANET-89-01)	P.S. Protest No. 89-36

DECISION

DHL Airways, Inc., (DHL) timely protests the terms of Solicitation ANET-89-01, claiming that certain provisions are unduly restrictive of competition.

Solicitation ANET-89-01 was issued on April 28, 1989, by the Air Contracts Management Division, Office of Transportation and International Services, at Postal Service Headquarters with a proposal due date of June 2, 1989. The solicitation sought proposals for the air transportation of Express and Priority Mail by means of a "hub-and-spoke" network linking 30 cities to a common hub. As subsequently amended, the solicitation contained the following pertinent provisions:

- II.3. Proposals will not be accepted or considered from offerors, more than 10 percent of whose gross revenues were earned in calendar year 1988 from the carriage of letters outside the mails under the suspension of the Private Express Statutes for extremely urgent letters (See 39 CFR, section 320.6.)^[1/]

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42. AGREEMENT TO LIMIT COMPETITION

The contractor, including any affiliates and subsidiaries, shall not, during the term of the contract, increase its extremely urgent letter mail business to an extent which would have made it ineligible for award under Solicitation Part II, paragraph 3, Contractor Qualifications.

Shortly prior to the time set for receipt of proposals, DHL protested the inclusion of these terms in the solicitation. DHL claims that these "special standards of responsibility or responsiveness" lack any reasonable or rational basis, will not allow

^{1/}This regulation is entitled "Suspension for Extremely Urgent Letters." Letters dispatched under the suspension must meet various specified delivery time criteria, must have their value or usefulness "lost or greatly diminished" if not timely delivered, and must be endorsed with a legend establishing the availability of the suspension.

the Postal Service to obtain adequate competition or the best service at a reasonable price, and are unduly restrictive of competition. DHL requests that the provisions be deleted from the solicitation. Notwithstanding these provisions, DHL did submit a timely offer on the solicitation.

The contracting officer's report notes that the determination of the Postal Service's minimum needs and the technical judgments upon which those determinations are based are primarily the responsibility of the contracting officials. Once the contracting officer establishes prima facie evidence supporting a restriction's reasonable relation to Postal needs, the burden shifts to the protester to show that the requirements are clearly unreasonable. The contracting officer states that the restriction at issue here is intended to exclude only those companies "which are in direct competition with Express Mail." The business reasons justifying this restriction are a) that it is not in the interest of the Postal Service to provide direct competitors of Express Mail with a revenue base to support and expand their operations, and b) the successful offeror will have access to extremely sensitive business secrets and proprietary information about Express Mail customers and volumes which could be used by a competitor to gain an unfair advantage over the Postal Service. The 10% figure was used to provide a test of substantiality so as not to exclude potential offerors who carry next-day delivery letters only incidental to other business. The contracting officer notes that adequate competition was actually received on the solicitation, disclosing the actual number of competitors to this office only in order to preserve the confidentiality of this figure in accordance with Procurement Manual (PM) 4.1.2.k.3 (a). He maintains that the restriction is eminently reasonable and that the protest should be denied.^{1/}

DHL has responded to the contracting officer's position at length. First, DHL alleges that the contracting officer has failed to establish the necessary prima facie support that the restriction is reasonably related to the Postal Service's needs. It claims that the support set forth in the contracting officer's statement consists merely of "post hoc rationalizations" based on speculation and on exaggerated fear of competition. DHL notes that while the Procurement Manual, at section 3.3.1.c.,^{1/} permits the use of

^{2/}The contracting officer and DHL buttress their position by reference to a proceeding before the Department of Transportation (DOT) concerning the Flying Tiger Line/Federal Express merger. The contracting officer argues that DHL took the position before DOT that the merger would result in possibly discriminatory practices by the merged entity against it, including use of DHL's customer information. DHL responds that DOT held that its concerns were speculative and that it would take enforcement action against Federal Express if such practices occurred. Because of the substantial differences between a statutorily-based regulatory proceeding by an agency with enforcement powers and our bid protest review of alleged procurement irregularities, the decision in that proceeding is not directly relevant to the present decision. However, to the extent that DHL is here asserting that its previously-expressed objection did not present a valid business concern, we find its position disingenuous and afford it little weight. We assume it proceeded in good faith in the DOT proceeding.

^{3/}PM 3.3.1.c, applicable to this solicitation pursuant to PM Exhibit 12.1.1, provides:

Special Standards. When they are considered necessary for a particular purchase or class of purchases, the contracting officer may develop, with the assistance of appropriate specialists, special standards of responsibility. Special standards may be particularly desirable when

special standards of responsibility, the contracting officer has cited no experience which would justify the restriction. It claims the contracting officer's support is conclusory and speculative, altogether insufficient to provide the necessary prima facie basis.

Second, DHL claims that the restriction is clearly unreasonable. It claims that the 10% cut-off is arbitrary and does not carry out the contracting officer's expressed intent to protect the Postal Service from competitors, because carriers with less than 10% of their total revenue could well use the Express Mail information to compete with the Postal Service. DHL states that a provision requiring the awardee to not use any revenues earned or information gained under this contract in direct competition with Express Mail would adequately protect the Postal Service's interest. Such a "non-use agreement," enforceable by a suit for damages against a contractor who breached the covenant, as well as by an injunction in district court pursuant to 39 U.S.C. "409 (a), 3005, would represent a less restrictive alternative which would protect the Postal Service's expressed interests while maximizing competition. Calling the restriction an attempt to prescribe the end, rather than the means to the end, DHL cites several cases^{4/} for the proposition that where a less restrictive alternative meets the minimum needs of an agency, use of a more restrictive approach is unreasonable. DHL states that no statute, regulation, or established Postal Service policy allows the contracting officer the discretion to discriminate among overnight letter carriers for providing Express Mail service.

Further, DHL states that certain of the terms contained in the restrictions are ambiguous and subject to inequitable interpretation. It claims that what is included in gross revenues, and what constitutes an affiliate could have a great impact on the level of competition received.

Finally, DHL notes that while Section II.3 states that a proposal will not be considered from offerors not meeting the 10% restriction, DHL states that it has had its offer rejected as outside the competitive range without any determination by the contracting officer regarding whether it met the restriction.^{1/} DHL requests that the solicitation be

experience has demonstrated that unusual expertise or specialized facilities are needed for satisfactory contract performance. The special standards must be set forth in the solicitation and apply to all offerors.

In addition, PM 12.5.1.c provides that "[s]olicitations may establish other eligibility requirements as needed."

^{4/}Radix II, Inc., P.S. Protest No. 78-37, January 26, 1979; Doehler-Jarvis Division of N.L. Industries, P.S. Protest No. 77-19, July 22, 1977; Fry Communications, Inc., Comp. Gen. Dec. B-220451, March 18, 1986; University Research Corporation, Comp. Gen. Dec. B-216461, February 19, 1985, 85-1 CPD & 210; Precision Piping Incorporated; M&S Mechanical Corp., Comp. Gen. Decs. B-204024, 204024.2, March 9, 1982, 82-1 CPD & 215.

^{5/}DHL's rejection as being outside the competitive range is the subject of a separate protest before our office and is not dealt with in this decision.

revised to delete the 10% restriction and that the procurement be suspended pending the issuance of our decision.^{1/}

The contracting officer has responded to DHL's comments. He first states that DHL's protest should be dismissed as moot because DHL's offer was rejected as outside the competitive range for technical and price considerations but without consideration of the eligibility requirements which are the subject of this protest. He argues that because DHL is no longer eligible for award, it lacks standing to raise the issue of the restriction because it is no longer an interested party, citing Engineered Systems & Development Corp., P.S. Protest No. 88-15, June 9, 1988; Safety Technology, Inc. and Con-Serv, Inc., P.S. Protest Nos. 85-85, 85-86, December 31, 1985; and Strapex Corporation, P.S. Protest No. 85-33, July 11, 1985.^{1/}

As to the merits of DHL's argument, the contracting officer states that the restriction is necessary because the Postal Service will not be adequately protected by either the objective performance standards of the contract, the right to terminate the contract for default and assess liquidated damages in the event of unsatisfactory performance, or any covenant not to compete. He takes issue with DHL's characterization of his justifications as post hoc or based on visceral reaction to the advertising of the competitors. He notes that the actual figure could have varied slightly as to exactly where the line was drawn, but that this does not show that the line he drew was unreasonable. The contracting officer further states that he is unaware that use of a restriction such as that protested need be justified by actual experience, or a statutory or regulatory provision, and that, indeed, PM 3.3.1.c indicates otherwise. He distinguishes the cases cited by DHL on the factual basis of what restrictions were at issue and how they were justified, indicating their only common trait was that the protests were, in fact, sustained. Finally, he notes that the close collaboration and teamwork which is necessary with the successful contractor could not possibly occur with an entity whose major business is in direct competition with Express Mail.^{1/}

^{6/}DHL also requests protest costs and attorneys fees. However, unlike other foray in which bid protests may be filed, we lack either statutory or regulatory authority to make such awards, In the absence of such authority, we cannot award costs and fees to a successful protester See Alyeska Pipeline Service Co. v. Wilderness Society et al., 421 U.S. 240 (1975).

^{7/}In separate comments addressed to this issue, DHL disputes the contracting officer's position. It puts forth five reasons why it remains an interested party, despite the rejection of its offer: 1) the protest concerns a term of the solicitation, as to which the submission of an offer is irrelevant on the issue of standing; 2) in a June 19, 1989, letter responding to DHL's request for a debriefing, the contracting officer admitted that this issue was separate from the issue of the rejection of its offer and "remain[ed] in litigation; 3) the contracting officer's decision to reject DHL's proposal may have, in fact, been based in part on the eligibility restriction; 4) dismissal of the protest would endorse the contracting officer's improper restriction of competition; and 5) resolution of the protest is necessary to protect the integrity of the procurement process.

^{8/}DHL has filed comments on this response, which basically restate its position, contending that the contracting officer has admitted that the solicitation provisions are flawed and ambiguous, and allege that his justifications for the restriction amount to no more than "fear, speculation, conjecture, hyperbole, and cliché."

As a preliminary matter, we think that DHL remains an interested party as to this protest in spite of the rejection of its offer. Two rationales provide the bases for this conclusion. First, it is well settled that a protester who alleges that a specification is unduly restrictive does not have to submit an offer in order to have standing to protest the specification. See Deere & Company, Comp. Gen. Dec. B-212203, October 12, 1983, 83-2 CPD & 456; Silent Hoist & Crane Co., Inc., Comp. Gen. Dec. B-208386, December 28, 1982, 82-2 CPD & 583.¹⁷ This is so because the offeror will usually be unable to submit a technically acceptable offer precisely because of the restriction of which it complains. It would be quixotic to hold that, by submitting a proposal, DHL has limited the rights to dispute the solicitation restriction which it otherwise would have had. Second, DHL has separately protested the rejection of its proposal. Since the possibility exists that, if DHL's protest of that issue is sustained, it may be eligible for award, but for the 10% restriction. DHL is not completely foreclosed from being eligible for award, because of its pending protest on the rejection of its offer, so it remains an interested party for purposes of protesting the 10% restriction.¹⁷

The standard of review for challenges to the terms of a solicitation is well-settled:

The determination of the government's minimum needs, the method of accommodating them and the technical judgments upon which those determinations are based are primarily the responsibility of the contracting officials who are most familiar with the conditions under which the supplies and services have been used in the past and will be used in the future. Generally,

Comments were also received from three prospective offerors. Two parties agreed with DHL's position and one party agreed with the contracting officer's position. In addition, one commenter alleged that it did not receive Amendment 02 before bid opening. The contracting officer has submitted rebuttal to this allegation. On the record before us, the commenter has failed to show any issue which would justify reopening the solicitation process. See Tulsa Diamond Manufacturing Corp. et al., P.S. Protest Nos. 85-18, 85-20, 85-23, June 20, 1985; Swintec Corporation, et al., Comp. Gen. Decs. B-212395.2 et al., April 24, 1984, 84-1 CPD & 466.

^{9/}The cases cited by the contracting officer are distinguishable: Safety Technology, et al., supra, and Strapex Corporation, supra, dealt with protests against the low bidder by a bidder who did not protest any irregularities in the bids of intervening bidders; while in Engineered Systems & Development Corp, supra, we stated in dictum that, in addition to having filed its protest untimely, the protester, who was a nonresponsible offeror, was probably not an interested party either. None of these cases deal with an offeror who submits an offer while, at the same time, protesting a term of the solicitation which it argues will prohibit the Postal Service from considering its offer.

^{10/}There is an inconsistency between the solicitation, which indicates that offers will not be accepted or considered from offerors who fail to meet the 10% restriction, and the contracting officer's treatment of DHL's offer, by which he accepted and considered it without making a determination as to whether the restriction was met. However, we can discern no harm to DHL which arises from the contracting officer's failure to adhere to the strict mandate of the solicitation. It has filed a timely protest of the rejection of its proposal and, in the event that that protest is sustained, the contracting officer will then make a determination as to whether DHL meets the 10% restriction.

when a specification has been challenged as unduly restrictive of competition, it is incumbent upon the procuring agency to establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

Amray, Inc., Comp. Gen. Dec. B-208308, January 1983, 83-1 CPD & 43, quoted in Portion-Pac Chemical Corp., P.S. Protest No. 84-49, August 1, 1984; accord, Action Enterprises, Inc. and American Vending, Inc., P.S. Protest Nos. 87-14, 87-15, March 13, 1987.

We recognize at the outset the unique nature of the restriction which is before us. It is rare that a restriction in a government procurement arises from the business judgment of the procurement personnel that it is necessary to maintain the competitive status of one of that agency's primary services. While no case has been unearthed which is squarely on point, a brief review of some prior decisions of this office sheds light on the contracting officer's case of prima facie support for the restriction.

DHL draws our attention to Boiler, Pressure Vessels Inspection Agency, Inc., P.S. Protest No. 87-21, July 2, 1987. In that case, the requirement that an offeror employ its boiler inspectors full-time was found to be unduly restrictive of competition because the contracting officer's one-sentence rationale, which referred to the possibility of inadequate contract performance with insufficient personnel, was conclusory and inadequate.^{11/} DHL states that, given the contracting officer's "post hoc rationalizations," Boiler, Pressure Vessels is on point for the proposition that he has failed to make out a prima facie case in support of the restriction.

Other cases, however, indicate that Boiler, Pressure Vessels stands for a situation in which the justification advanced by the contracting officer is sparse indeed. In Crown Industries, Inc., P.S. Protest No. 82-83, February 6, 1983, the protester argued that it should be permitted to bid its bronze-painted steel stanchions on a solicitation for bronze-anodized aluminum stanchions. The contracting officer defended this restriction based on the Postal Service's need for standardization and interchangeability of stanchions, as well as the requirement of the steel stanchions for occasional repainting. We held that the restriction was reasonable, even in the face of evidence that a different contracting officer had revised another solicitation to allow bids on bronze-painted steel stanchions.

In Memorex Corporation, P.S. Protest No. 82-51, August 24, 1982, the restriction complained of was a "media interchange" switch on disk storage modules. The protester maintained that this switch, which allowed for recovery of data from a defective unit within five minutes, was unduly restrictive, because its machines, which did not have such a switch, could recover data in 15-30 minutes by use of an alternate procedure. The contracting officer, based on the analysis of his technical advisors, declined to find this alternative acceptable, as it would require a service call and 75

^{11/}The decision did, however, uphold the solicitation's requirement that the boiler inspectors be commissioned by an independent board of boiler inspectors.

minutes for the data recovery. We denied the protest, finding the restriction reasonable and the protesters alternative not equivalent.

Finally, in Comprehensive Health Services, Inc., P.S. Protest No. 83-46, October 28, 1983, the solicitation required offerors to have an established national system of affiliated physicians within 50 miles of 95% of a list of locations and previous work relationships in administering a national service contract. The protester urged that these restrictions were unnecessary and that they served to limit competition solely to the incumbent contractor. The contracting officer noted that this restriction had appeared on two previous solicitations for this requirement and that, while the restriction were severe, they were necessary. We upheld the provisions as not unduly restrictive.

Here, the contracting officer has asserted two justifications for the restriction of which DHL complains. Not wanting to provide existing established competitors of Express Mail with either financial or informational support, in order not to impair the market share of Express Mail appears to us clearly to establish prima facie support for the reasonableness of the restriction as required under Portion-Pac, supra. It is within the business judgment of postal employees to take necessary steps to ensure that its premier service maintains adequate market share and remains free from the possibility of disruption of the service arising out of the conflicting business interests of the firm providing the transportation essential to the service. This judgment is not based on unfounded fears and speculation, but on the real needs and concerns of the marketplace in which Express Mail must survive and which is marked by a great deal of competition.^{12/}

DHL's contentions of attempts to discredit these justifications amount, in sum, to disbelief that they could be the actual rationale relied upon by the contracting officer. DHL's intimations of collusion or some other improper motive which allegedly underlies the restriction runs afoul of the "presumption of correctness" which we give to statements of the contracting officer. See Tulsa Diamond Manufacturing Corp. et al., supra; Government Marketing Inc., et al., P.S. Protest No. 84-85, January 24, 1985. In the record before us,^{12/} there is no substantial evidence which indicates that the reasons for the restrictive provisions are anything other than what the contracting officer states them to be. Since there is insufficient evidence supporting DHL's theory that the

^{12/}We know of no principle of contracting which precludes attempts to ameliorate concerns before they present difficulties, and thus reject the protester's contention to the contrary. Sections 3.3.1.c. and 12.5.1.c. of the PM indicate that special responsibility criteria may be used when the contracting officer deems them necessary. There is no requirement that such standards be based on past experience; rather, these sections permit contracting officers to take affirmative action to avoid problems which may arise.

^{13/}Of course, our review of bid protests is based on the written record before us, the parties' and contracting officer's submissions, and relevant documentation submitted to us for review. We do not conduct independent investigations or adversary proceedings. See Bingo Motors, Inc., P.S. Protest Nos. 84-40, 84-41, July 25, 1984; Hasselrig Construction, On Reconsideration, P.S. Protest No. 76-2, March 22, 1976.

restriction was, in fact, included for an improper reason, we hold that the contracting officer has established adequate prima facie support for the restriction.

DHL argues that the restriction is clearly unreasonable in two ways; there is a less restrictive alternative which would meet the Postal Service's expressed minimum needs and the 10% level is arbitrary and capricious because Express Mail's market share could be hurt just as much by a company with 9% total revenues in the overnight delivery category. We think that these arguments are insufficient.

DHL correctly states the law that, where a less restrictive alternative exists which meets the government's actual minimum needs, a more restrictive option is unduly restrictive. However, the alternative proposed by DHL of "non-use covenants" do not protect the Postal Service sufficiently from the dangers which the restrictive provisions are meant to alleviate. Despite DHL's suggestion of a separate, wholly-owned subsidiary for contract performance, it seems clear that, in one way or another, moneys received by an established competitor of Express Mail will benefit that company by increasing its revenue base.¹⁴ Its suggested protection of the confidential information that the contractor will possess by means of an injunction pursuant to 39 U.S.C. " 409, 5005 appears to founder on the likely possibility that the Contract Disputes Act of 1978 may limit injunctive relief against the contractor. In addition, the delay and expense of obtaining an injunction, along with the uncertainty of success, may make this avenue, as a practical matter, unappealing. DHL's alleged alternative approach does not obviously protect the Postal Service's expressed interests adequately.

As to whether the 10% figure used by the contracting officer is arbitrary and capricious, the same could be said of any number chosen. It is in the nature of a specification to restrict competition. The question is whether competition is unduly restricted. The contracting officer chose 10% to allow offers from carriers whose expedited mail transportation is only an incidental portion of its revenues. We cannot say that this number is clearly unreasonable, and we will not substitute our judgment for that of the contracting officer and his technical advisors in that regard. See Owl Resources Company, Comp. Gen. Dec. B-221296, March 21, 1986, 86-1 CPD & 282.

DHL's final issue concerning the potential of some of the solicitation terms to be read in ambiguous and arbitrary fashion must be dismissed as premature. As to these issues, DHL is not alleging a specific action by which it has been harmed, but rather possible actions which may, at some point in the future, harm it. "A speculative protest which anticipates agency action is premature and will be dismissed." Kahn Industries, Inc., P.S. Protest No. 85-56, August 26, 1985; Dennison Manufacturing Company, P.S. Protest No. 85-51, August 8, 1985. As there is no determination as to these terms which has prejudiced DHL, we dismiss this ground of its protest as premature.

¹⁴The feasibility of such an approach seems further limited by the solicitation's requirements that the offeror maintain a valid Federal Aviation Administration air carrier operating certificate issued and Part 121 of title 14 of the Code of Federal Regulations and demonstrate that it is an air carrier as defined in the Federal Aviation Act whose primary business is direct air transportation and that it is engaged in that business on a day-to-day basis. See Sections II.1 and II.2 of the solicitation.

We have considered all the issues raised by the protester. We conclude that the restriction complained of is reasonably related to actual minimum Postal Service needs and is not unduly restrictive.

The protest is dismissed in part and denied in part.

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

[checked against original JLS 5/24/93]