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| Protests of                   | ) | Date: February 26, 1992  |
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| SODREL TRUCK LINES, INC.      | ) |                          |
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| and                           | ) |                          |
|                               | ) |                          |
| DENNIS TRUCK LINE CO. OF OHIO | ) |                          |
|                               | ) |                          |
| Solicitation Nos. 431-E046-92 | ) | P.S. Protest Nos. 92-01, |
| 431-E047-92                   | ) | 92-03                    |

DECISION

Sodrel Truck Lines, Inc. (Sodrel) protests the issuance and terms of emergency solicitation 431-E046-92 ("solicitation 46"), issued by the Columbus Transportation Management Service Center (TMSC) seeking bids for the highway transportation of plant load quantities of mail on an "as needed basis" between a publisher's printing plant located at Lebanon Junction, KY and various postal facilities in Cincinnati, OH. Solicitation 46 was issued on December 20, 1991, with a closing date of December 30. Bidders were required to respond telephonically by the closing date. Five bidders did so, of which Sodrel was fourth low. Because Sodrel protested before award, no award has been made.<sup>1</sup>

Dennis Truck Line Co. of Ohio (Dennis) protests the issuance of emergency solicitation 431-E047-92 ("solicitation 47"), issued by the TMSC seeking bids for the highway transportation of plant load quantities of mail on an "as needed basis" between Columbus, OH and the Cincinnati, OH Bulk Mail Center (BMC). Competition for solicitation 47 was conducted by phone on December 24, 1991, and Dennis was second low of the five bidders who were solicited. Award was made on December 24 to the low bidder, Pennsylvania Truck Lines. Dennis' protest dated December 27, 1991, was received by the TMSC on December 31. Due to the similarity of the issues they present, we consolidate the protests for decision.

<sup>1</sup>Procurement Manual (PM) 4.5.5 states in pertinent part:

When [a] timely protest has been filed with either the contracting officer or the General Counsel before contract award, award may not be made until the matter has been resolved....

In its protest, Sodrel states that the contracting officer's use of an emergency solicitation was inappropriate since no emergency exists.<sup>2</sup> Furthermore, Sodrel maintains that the terms of the solicitation are ambiguous because the vehicle requirements and specifications section of the solicitation provides in one place that the contractor must have four trailers whereas a later section lists a requirement for six trailers.<sup>3</sup>

In his report on the protest, the contracting officer indicates that an emergency contract, rather than a temporary contract, was solicited because this is the first solicited service from the Lebanon Junction plant and that the emergency contract will allow the TMSC a chance to evaluate the new service and "fine-tune" the service for the benefit of the publisher.<sup>4</sup>

In its protest, Dennis maintains that the posting of solicitation 47 was inappropriate because Dennis, which is currently providing service between four Columbus area plant load mailers and the Cincinnati BMC, has sufficient equipment to provide the solicited service and it believes it is entitled to the opportunity to service all needs in, or between, the city it serves.<sup>5</sup> Furthermore, Dennis maintains the issuance of a solicitation in such circumstances violates the "spirit of Project 2000 by requiring more vehicles to transport mail which can be transported by vehicles existing within the incumbent contract."

<sup>2</sup>The service is provided through use of excess capacity and extra trips on Sodrel's contract service between Louisville, KY and Cincinnati, OH with shuttle service from the mailer's plant to Louisville provided by Doug Thompson Trucking. As discussed below, Thompson has submitted comments on the protest.

<sup>3</sup>Specifically, paragraph 15, Vehicle Requirements and Specifications, states the contractor must provide at a minimum four trailers; subsection C of that paragraph states that the contractor may have a total of six trailers in service to meet the needs of the contract.

<sup>4</sup>In the statement, the contracting officer addresses only in passing the issue of the ambiguity of the solicitation's trailer requirements. In rebuttal comments, he indicates that the initial statement that the contract service requires four trailers is qualified by the solicitation's statement that that number is the minimum. (Emphasis in the original.) He adds that this distinction is carried forward in subsection C. of paragraph 15 of the solicitation,

The number of vehicles outlined above is the minimum vehicle requirement ... The contractor may have up to a total of six (6) trailers in service to meet the needs of the plant. Any equipment over six (6) will be compensated at a [negotiated] rate....

The contracting officer in his report and Sodrel in his comments also address the cost-effectiveness of soliciting this service. Because of our resolution of the protest, we do not discuss this issue.

<sup>5</sup>Dennis mistakenly refers to the subject solicitation as a solicitation for a temporary contract. The solicitation, however, was for an emergency contract.

In his report on the Dennis protest, the contracting officer indicates the decision to incorporate service in an existing contract is fact-specific, related to, among other things, the cost of soliciting the service versus the cost of a service change. As to the relevance of Project 2000, he notes "Project 2000 is an internal postal term which refers to a consultant[']s review of Logistics operations within the Postal Service. The project has no direct relationship to the protest matter."

Both Sodrel and Dennis have submitted comments on the contracting officer's statements. Sodrel, through counsel, reiterates that solicitation 46's equipment requirements are ambiguous, adding that under an emergency solicitation negotiated service changes are not allowed. Sodrel also raises concerns over the clarity of the requirement to "reposition equipment" and the resulting risk placed on the contractor since the contractor will not be compensated for repositioning.

Doug Thompson Trucking (Thompson) has submitted comments in the Sodrel protest in which it indicates that no emergency exists to justify the use of an emergency solicitation since it and Sodrel are currently providing service from the Lebanon Junction plant through Thompson's highway contract number 400AR (originally serving only the publisher's Shepherdsville, KY plant to Louisville, KY) connecting with Sodrel's highway contract number 40090, Louisville, KY to Cincinnati BMC. Thompson also raises a panoply of other concerns it has with the solicitation's terms. Thompson states that the solicitation identifies mileage only to three of the four points from which trips are required, the solicitation wrongly estimates the split of trips to the destinations, making it impossible for the bidder to calculate the actual miles, and the required number of trips cannot be performed with the one required tractor.

Dennis has submitted comments on the contracting officer's statement on its protest which it states are also relevant in part to the Sodrel protest. The comments address the rationale of awarding service to incumbent contractors and the inappropriateness of the contracting officer's issuance of solicitation 47. Dennis offers an analysis of the renewal provision contained in 39 U.S.C. {5005 (b)(2)}<sup>6</sup>, arguing that it reflects a congressional intent to allow incumbent contractors "a healthy rate per mile with opportunity to service any and all mail within its contract corridor." Dennis maintains that issuance of solicitation 47 violated congressional intent and previous postal policy.

The contracting officer has submitted rebuttal comments to Sodrel's comments. Citing PM 12.4.12 f.<sup>7</sup>, the contracting officer notes that negotiated changes in service and

<sup>6</sup>The cited section states:

a contract [for surface transportation] may be renewed at the existing rate by mutual agreement between the contractor or subcontractor and the Postal Service.

39 U.S.C. {5005 (b)(2)}.

<sup>7</sup>The cited section states in pertinent part:

The service and rate of compensation under emergency contracts may not be changed unless

compensation are allowable for emergency contracts, if the contract specifically authorizes such changes and in this case the contract so specifies. As to Sodrel's concerns about the repositioning requirement, the contracting officer states that such a requirement is common to plant load contracts and any repositioning would be only between the termini identified in the solicitation.

The contracting officer has also submitted rebuttal comments to Thompson's comments. First, the contracting officer reiterates that the emergency solicitation was used to allow the TMSO time to evaluate the new service and make changes to the transportation, if necessary. As to the trip estimates in the solicitation, the contracting officer states that trips were listed to four destinations with the potential of other railyard destinations to cover all contingencies and that the split of service to the different facilities will depend on operational decisions made during the term of the contract. As to the mileage estimates, the contracting officer states that the determination of actual miles to the specific destinations is the bidder's responsibility. With respect to the trailer requirement, the contracting officer reiterates that the minimum number of trailers is four, but that the contractor may need more to perform the service. Lastly, the contracting officer disputes Thompson's view that the service cannot be provided with one tractor.

### Discussion

As a preliminary matter we must consider the timeliness of the Dennis protest. As we have previously noted;

We are without authority to consider a protest which is untimely. Unlike the Comptroller General, we have no regulatory authority to waive or disregard an issue of timeliness in a particular case. Even where actions of the contracting officer have contributed to the untimeliness of a protest, our past decisions have been to the effect that the timeliness standard cannot be ignored.

American Telephone Distributors, Inc., P.S. Protest No. 87-117, February 23, 1988 (citations omitted). PM 4.5.4 b. directs that protests "based upon alleged deficiencies in a solicitation that are apparent before the date set for the receipt of proposals must be received by the date and time set for the receipt of proposals." Application of this standard to this protest must take into account applicable regulations and guidelines which allow emergency transportation services to be procured orally. PM 12.4.6 c.3. and Mail Transportation Procurement Handbook 6.2.1 A.

Dennis' protest alleges a deficiency in solicitation 47 in that Dennis challenges the issuance of the solicitation since it has sufficient equipment to provide the service. Although an oral emergency procurement requires quick action by an interested party it

specifically authorized in the contract....

PM 12.4.12 f.

does not create an exception to our jurisdictional timeliness standards. Here, Dennis could have informed the contracting officer that it believed the issuance of solicitation 47 was unnecessary when it was contacted telephonically on December 24 concerning the service and then followed up with a protest letter on that day. See generally, Blackhorse Services Corp. d/b/a Maaco Auto Painting and Bodyworks, P.S. Protest No. 91-71, December 3, 1991. As we have previously stated,

Our protest regulations require the prompt raising of protests and do not allow an offeror to sit quietly with a possible basis for a protest to see how he fares in the competition, raising the protest only if he does not succeed.

Donald Clark Associates, Inc., P.S. Protest No. 91-34, September 4, 1991. Since Dennis did not address a protest to the TMSC until December 27 and that protest was not received until December 31, well after the date set for receipt of proposals, Dennis' protest must be dismissed as untimely. Blackhorse Services Corp. d/b/a Maaco Auto Painting and Bodyworks, supra.

Turning to the issues raised by Sodrel's protest, review of the exercise of emergency contracting authority is within our jurisdiction. Air Transport Association of America, P.S. Protest No. 90-02, March 23, 1990; Pan American World Airways, Inc., Air Transport Association of America, P.S. Protest Nos. 86-17 and 86-22, May 22, 1986. The standard of review is whether the contracting officer abused his discretion in determining to use an emergency contract. Id.; Atchison, Topeka and Santa Fe Railway Company and Illinois Central Gulf Railroad, P.S. Protest Nos. 76-17, 76-18 and 76-19, July 15, 1976. Each emergency situation is governed by the specifics of its circumstances. Id.

Postal regulations implementing the statutory authority to procure emergency transportation contracts, codified at 39 U.S.C. { 5001, are found at PM 12.4.6 c.3. The regulation indicates that emergency contracts may be entered into only when an emergency exists and must terminate when the emergency ceases. Circumstances in which an emergency contract may be appropriate include:

- (a) A catastrophic event has interrupted normal transportation operations.
- (b) Strikes or other labor disputes are causing service interruptions.
- (c) A mail transportation contractor has been suspended or removed or a contract terminated.
- (d) A sole highway contractor has died or become incompetent and the estate representative will not continue service.
- (e) The generation of mail at unanticipated locations, or an unexpected increase in the volume of mail at regular locations, exceeds the mail hauling capacity of the Postal Service or regular contractors."

Id. While the examples listed in the PM are illustrative and not exclusive, the

circumstances which the contracting officer cites here cannot reasonably be said to amount to an emergency within the meaning of the regulation. Nothing in the regulations governing service procured under the authority of { 5001 contemplates the acquisition of emergency service in order to "evaluate the new service and to adjust to any requirements that need to be fine-tuned."<sup>8</sup> Thus, the condition precedent to the use of an emergency contract has not been met.

Because we conclude that this procurement is flawed we need not reach the other broader issues raised by this protest. Pan Am, supra. We note, however, that the decision to use an incumbent contractor for additional service on a route is a matter of contract administration and, therefore, not within our bid protest jurisdiction. See Ginny Baker, P.S. Protest No. 90-04, March 16, 1990. Furthermore, contract language concerning extra trips creates a unilateral option subject to exercise by the Postal Service with no right or entitlement to extra trips conferred on the contractor. Bean Trucking Co., Inc., P.S. Protest No. 80-60, October 23, 1980.

Having concluded that the procurement is flawed, we turn now to the remedy. Because a contract has not been awarded, solicitation 46 should be withdrawn and another posted in accordance with the guidance of this decision.

The Sodrel protest is sustained; the Dennis protest is dismissed.

William J. Jones  
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Office of Contracts and Property Law

<sup>8</sup>If anything the contracting officer's reasons for selecting an emergency contract make prima facie case for using a temporary contract since the latter contract type is to be used when the need for service has been established but the duration, frequency, or volume of mail is not certain. PM 12.4.6 c.2.