

December 2, 1998

P.S. Protest No. 98-21

JANICE REILLY

Solicitation No. 980-114-98

DIGEST

Protest of cancellation of solicitation for box delivery highway mail transportation contract is denied. Contracting officer acted within his discretion in determining that low offer with rate per mile 47% higher than average of comparable routes was excessive in price.

DECISION

Ms. Janice Reilly protests her failure to receive a contract for the box delivery of mail and the contracting officer's decision to resolicit the requirement.

The Seattle Branch, Western Distribution Networks, issued solicitation 980-114-98 on May 13, 1998, requesting proposals for HCR 98667, box delivery service out of the White Salmon, WA, post office in south-western Washington, about 40 miles east of Portland, OR, for a term from August 15, 1998, to June 30, 2000. The service involved delivery to 295 boxes over a 42.7 mile route, a total of 12,941 estimated annual miles and an estimated 1,869 annual schedule hours.

The solicitation required a station wagon with 90 cubic feet of load space, and, in winter, 4-wheel drive. Under the "Box Delivery Contractor Pilot Program," the vehicle was required to be white in color and not more than five years old at the start of the contract term and to be replaced at the contractor's expense when it becomes more than eight years old during the contract term. The solicitation included a Department of Labor Service Contract Act wage determination dated June 1, 1997, establishing the wages for hired drivers, contractor employees who must be compensated at wages set by the Secretary of Labor. (An individual contractor performing the driving himself or herself need not receive Service Contract Act wages.)

Proposals were due June 29. Three proposals were received, of which that of Ms. Reilly was the lowest. Ms. Reilly's proposal appears to have met the solicitation's service requirements completely.¹

Ms. Reilly's price was compared to other routes using the Highway Contract Support System computer to prepared a Form 5427. The computer selects routes within the same area as the selected route and which are similar to the base route in terms of miles and hours. The Form 5427 listed five comparable routes, four in Washington state and one in Oregon, whose annual hours ranged from 1,495 to 2,187, whose mileage ranged from 10,819 to 15,183, and which involved from 185 to 414 box deliveries.² The annual rates on the comparison routes were adjusted by the consumer price index to bring them to current comparability. Ms. Reilly's offered rate per mile was more than 47% higher than the average rate per mile of those five comparison routes.³

The contract specialist who reviewed the price comparison recognized that Ms. Reilly's offer exceeded the comparables, but, in the absence of the contracting officer, proceeded with a determination of Ms. Reilly's capability. At a pre-award conference with Ms. Reilly on July 28 various matters were discussed, including adjustments in the allocation of costs on Ms. Reilly's cost worksheet (but no change in the overall annual cost), the fact that a new wage determination had been issued and would be incorporated into any resulting contract,⁴ and the contract specialist's advice that Ms. Reilly's "cost was excessive in comparison to like contracts" and that "the Contracting Officer had been out of the office, and that the award to her had not been approved."

Following his return to the office, the contracting officer reviewed Ms. Reilly's offer, concluding that her price "was not fair and reasonable" and that the solicitation would be canceled and the service readvertised. Ms. Reilly was so advised, and requested

¹ The solicitation's provision describing the basis of award (M.1) gave "first consideration" to "proposals which meet all of the service requirements specified," and among such proposals, to the lowest priced.

² The comparison form does not disclose the vehicle requirements for the comparison routes. We are advised that three of the routes required passenger vehicles with 40 cubic feet load capacity, one required a 150 cu. ft. mini-van, and one required a 4-wheel drive 40 cu. ft. passenger vehicle.

³ In her final comments in the course of the protest, Ms. Reilly contended that the fifth comparable, which had the lowest rate per mile, should not have been used because its rate per mile was more than 20% less than her rate per mile. That contention was based on a misreading of the contracting officer's discussion of the basis on which the comparable routes were selected, and would lead to the illogical requirement that only routes with rates per mile within a 20% range of the route being evaluated could be used for the comparison.

⁴ Ms. Reilly's offer contemplated the part-time use of a hired driver for approximately a third of the annual scheduled hours. The new wage determination requires an hourly wage for driver/casars on rural route delivery of \$10.52 an hour instead of \$10.21 an hour as previously required.

that the decision be reconsidered. The contracting officer declined to reinstate the solicitation and award to Ms. Reilly, and so advised her, furnishing her in the process information about the cost comparison which had been made.⁵

Ms. Reilly's protest followed. In two letters dated August 21, one to the contracting officer, and the other to this office, she makes the following points:

- The protester was not treated properly in the contract award process, because she was not timely advised of concern about her price in the course of the pre-award consideration of her offer.
- The protester contemplates operating the route with a new Legacy L station wagon with full-time all-wheel drive. The comparison on Form 5497 was improper because those contracts did not require vehicles newer than five years old. Comparison to the current contractor was similarly inappropriate because "he drives an old car."
- It was improper to require the contractor to absorb the cost of a new wage determination into the contract, as she had been advised at the pre-award conference would be necessary.⁶

⁵ Ms. Reilly was furnished a copy of the Form 5427 setting out the rates of the comparison routes. Because the form disclosed information from those routes which was deemed proprietary to the contractors, the route numbers which would have identified the contractors, were deleted from the form.

⁶ This contention is irrelevant to the protest, since the cancellation of the solicitation prevents the circumstance to which the protester objects. According to the applicable regulation (Purchasing Manual (PM) 9.8.5), a wage determination received subsequent to the receipt of offers would not be automatically applicable to the resulting contract. While the new determination could be included in the contract by contract amendment, the contractor would be entitled to an appropriate contract adjustment for the change. The contracting officer's statement is to the same effect, stating that "if there were hired driver wages, the contractor would be entitled to any allowable increases as a result of [the] application [of the new wage determination to the contract]."

— If the route is to be offered without the Pilot Program requirements, as the protester asserts she was advised, such a change should have been negotiated with her.⁷

The contracting officer's statement on the protest explains that the previous regular contractor on this route and another White Salmon route (HCR 98673) was terminated for default for failure to maintain the required insurance. Service on both routes was the subject of emergency contracts, and each route was solicited for a regular contract. The low offer for HCR 98673, a "difficult route" involving a long layover, was 14% higher than the routes to which it was compared, but award was made at that price. He further notes that "contracts this year have been coming in about 10% to 15% higher than comparable routes."

Ms. Reilly's offer, however, more than 47% higher than its comparables, was not considered fair and reasonable. Her complaint that the comparisons to other routes was unfair was not valid because the solicitation requires only a vehicle less than five years old at award and less than eight years old during the contract term, not a new vehicle. Most contractor vehicles fall within those parameters.

In response to this office's request for clarifications, the contracting officer provide information on the location of the comparison routes and their vehicle requirements, as summarized above.

The protester submitted comments on the contracting officer's statement which made the following points:

— The higher price noted on HCR 98673 was due to the Pilot Program requirements, not the layover. At a recent star route contractor's meeting, a Seattle Branch representative noted that Pilot Program "routes had been coming in about 10% to 15% higher." The protester's offer here is about 23% higher than the previous contractor's price, and if compared to other routes in the Pilot Program, it is not excessive.

— The previous contractor's defaults were the result of his extremely low price; he not only lost his insurance, he lost his vehicle and home through bankruptcy.

— Route HCR 98673 was widely advertised, but received a low response; the offerors who did respond were experienced contractors. The reasons for the low response were the difficulties of the route, which include frequent hazardous

⁷ Inasmuch as the contracting officer asserts that any resolicitation *will* include the Pilot Program requirements, this issue is also moot.

conditions which are the result of local weather (freezing rain, black ice, high wind and snow).

— The comparison routes differ from this route both with respect to vehicle requirements as to size (cube) and drive. Station wagons cost more than compact cars, and four wheel drives cost more than two wheel drives.

— The cancellation of this solicitation does not meet the criteria that “[a]s the solicitation process is costly to the [P]ostal [S]ervice, solicitations should be canceled [for only] the most compelling reasons and cancellation should be made as early in the process as possible.”⁸

The contracting officer was asked to comment on the protester’s comments. His response made the following points:

— The previous contractor was the son of the long-time contractor on the route (since 1964) who submitted the lowest offer in 1991. The Seattle Branch “does not have information” that his price was so low that “it would result” in his losing the contract and becoming bankrupt.

— Contrary to the protester’s view, the Pilot Program has not caused “a significant spike in costs” with respect to new or renewed highway contracts. The advice given at the Star Route Association meeting concerning Pilot Program costs, related to the contract specialist’s area, Seattle/Tacoma. That area, which has full employment and a high cost of living, is not comparable to the White Salmon area. The high costs seen there are related to factors other than the Pilot Program.

— The first of the five comparables used here has weather comparable to, if not worse than, the weather here. The second comparable is only 20 miles from White Salmon and also requires a four wheel drive vehicle. The other three comparables are in higher-cost areas than White Salmon.

— The station wagon vehicle required here is a passenger vehicle which has purchase and maintenance costs comparable to the passenger vehicles used in the other comparable contracts.

— The process of award evaluation sometimes is time consuming, and sometimes requires more than the 45 days contemplated for it. In those cases, the

⁸ Although the protester does not identify the source for this statement, it comes from PM 4.2.2.h., Cancellation of Solicitations.

start of performance may be postponed from the start date contemplated by the solicitation.⁹

— Ms. Reilly was treated properly by the Seattle Branch despite her objections to the delay in award and the eventual decision to cancel the solicitation.

The protester submitted comments on the contracting officer's rebuttal which reasserted several points previously made. The protester reasserts that White Salmon remains a unique route, both in terms of weather and vehicle requirements, and that the Pilot Program requirements have a significant effect on price.

DISCUSSION

"We will overturn [a contracting officer's decision to cancel a solicitation and resolicit] only if it is arbitrary, capricious or not supported by substantial evidence." *Barretti Carting Corporation*, P.S. Protest No. 92-92, December 23, 1992.

As the protester's comments recognize, under the Purchasing Manual's guidance, solicitations should be canceled only for a compelling reason. That all offers were received were excessive in price is a compelling reason. *Lewis F. Rice*, P.S. Protest No. 96-14, July 25, 1996. See also *Russell L. Kingston*, P.S. Protest No. 93-13, August 27, 1993, (upholding rejection of bids as excessive where the lowest bid was 55% higher than that of a comparable route, and 14% higher than the contracting officer's estimate for the route and noting earlier decisions upholding the rejection of all offers when the low offers were 16.5% and 18% higher than the postal estimate, and that the Comptroller General had upheld rejection of a low bid only 7.2% higher than the government estimate).

The protester's contention is, however, that her price is not excessive, asserting that differences between the terms of this solicitation and those of the comparison contracts (notably with respect to vehicle requirements) and differences in the conditions of the various routes warrant her higher price.

In making the comparison, we look at the solicitation's requirements, and not solely to the low offer, which contains elements which exceed those requirements. While the comparison routes did not include Pilot Program vehicle requirements, and it may be those prices should be adjusted to some degree to reflect them, the contracting officer is correct in noting that those requirements do not mandate the offeror's approach of

⁹ Since the solicitation provided at least ten days between contract award and the start of contract performance, and since the protester could withdraw her offer at any time before award, she was not prejudiced by any delay in advising her of the status of award.

providing a new vehicle. Accordingly, they cannot be fully responsible for the difference in price between the protester's offer and the comparables.¹⁰

Similarly, although the protester contends that weather and road conditions warrant a higher price than shown in the comparables, the contracting officer notes that two of the five comparable routes (one of which requires a four wheel drive vehicle) are in the vicinity of this route and thus subject to comparable weather and road conditions. Those routes are the second and third lowest in terms of rates per mile among the comparable routes, and as compared to those routes, protester's offer is 59% percent higher. Tthe protester takes no exception to feasibility of performance within the solicitation's estimate of the annual hours, so the schedule adequately accommodates the route's difficulty.¹¹ (Cf. *Lewis Rice, supra*, (contracting officer within his discretion in rejecting offer twice the rate per mile of comparable routes notwithstanding offeror's contention that factors such as Alaska's roads, weather, darkness, and mail recipients' large numbers of dogs warranted higher price).)

"[Because the] contracting officer has considerable discretion to determine whether to cancel a solicitation when offers are excessive in price, . . . this office will not overturn that decision unless the contracting officer has clearly abused his authority." *Russell L. Kingston, supra*. While she disagrees with the contracting officer's conclusions, the protester has not demonstrated such abuse here.

The protest is denied.

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Contract Protests and Policies

¹⁰ If, as the protester contends, the Pilot Program requirements explain the 14% increase in the price of the other White Salmon route, 98673, they do not fully explain the significantly larger increase in her price. Nor does the fact that the route requires a station wagon, rather than a sedan, necessarily suggest a higher price. Subaru's Manufacturer's Suggested Retail Price for a Legacy L station wagon is \$200 less than the suggested price for its Legacy L sedan.

¹¹ A route's difficulty might be evident from the speed at which it may be performed, expressed in terms of miles per hour. If this route's annual miles are divided by its annual hours, we get 6.92 miles per hour, only slightly less than the average of the comparables (7.54 mph), and its cost per hour is about 35% higher than the average rate per hour for all five comparables and similarly higher (34.9%) than the average rate per hour of the two routes which the contracting officer has identified as most directly comparable in terms of weather and driving conditions.