

**May 13, 1999**

**P.S. Protest No. 99-06**

## **EXPRESS KING OF SC, INC.**

**Solicitation No. 228-19-99**

### **DIGEST**

Incumbent mail transportation contractor's protest that service is being solicited competitively instead of being added to its existing contract is denied. Neither the Postal Service's Incumbency Policy Statement or the provisions of the protester's existing contract entitle it to the added service.

### **DECISION**

Express King of SC, Inc., an incumbent highway mail transportation contractor in Greenville, SC, protests the issuance of a solicitation for additional service in that area.

On January 25, the Mid-Atlantic Area office, Distribution Networks, issued solicitation 22-19-99 for regular service on Highway Contract Route 296LO, between the Greenville Processing and Distribution Center (P&DC) and the Greenville Processing and Distribution Annex (Annex), which is 7.4 miles away. The solicitation called for 36 daily trips and four trips daily except Sunday, with estimated annual schedule miles of 106,571, and estimated annual schedule hours of 8,989. The service requires a two-axle tractor, a 2700 cubic foot trailer, and a 1200 cu. ft. van.

Express King currently is the contractor on five Greenville routes. One is HCR 296CA, between the P&DC, the Annex, and other postal stations and branches. The route requires three 1200 cu. ft. vans and one 900 cu. ft. van. It involves 77,144 estimated annual schedule miles and 9,840 annual schedule hours. Another is an emergency contract for route HCR 296MU, between the P&DC and the Annex, which is to be replaced by HCR 296LO. The equipment schedules for HCR 296LO and HCR 296MU are the same, but the frequency and number of trips on the two routes are different. HCR 296MU involves 9 daily trips, 29 trips daily except Sunday, and 10 Sunday trips.

By letter dated January 27, Express King's owner "appeal[ed] the new solicitation" to the Postal Service Board of Contract Appeals, contending that the service should have been added to its existing contract HCR 296CA. By an order dated February 2, the Board noted its lack of authority to consider protests involving Postal Service procurements, requested that Express King confirm its intent to protest, and forwarded the matter to this office.<sup>1</sup>

The protester's letter notes that it has operated HCR 296CA since 1978, and that the scope of its service has been extended as new stations were built. However, when the Annex was opened in October, 1997, HCR 296MU was solicited as emergency service, and awarded to Express King.<sup>2</sup> The protester states that "[i]n March, 1997 [sic] I met [the previous contracting officer] . . . who agreed with me that 296MU should be consolidated with 296CA, as incumbent contractor (local) with less than 500 miles involved in the contract." The protester also notes that such a result is appropriate because "the service will be terminated in approximately three years" when a new facility replaces the P&DC and its Annex.

The contracting officer's statement asserts that this office lacks jurisdiction over the protest. He cites the "Incumbency Policy Statement" set out in Special Transportation Bulletin 03-92, June 3, 1992. The statement includes the following:

This policy statement addresses the allocation of additional service an newly structured service to current Postal Service highway transportation contractors. It is intended to promote the fair and orderly procurement of newly structure service and confirms no legally enforceable rights upon the contractors. . . . Administrative appeals, however, are provided for in this policy.

The statement includes the following "General Rule": "The holder of a local incumbent contract MUST be offer any additional service which services the IDENTICALLY SAME LOCAL TERMINI with the SAME EQUIPMENT TYPE as are currently service by the incumbent contract" as long as the incumbent contractor is providing satisfactory service under its contract. (Emphasis in original.) Negotiations are to be undertaken with the incumbent contractor toward agreement on a competitive rate for the additional service. Paragraph 2.8 of the statement provides as follows:

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<sup>1</sup> This office resolves protests arising out of Postal Service contracting procedures and awards. Purchasing Manual 3.6.

<sup>2</sup> Other service between the Annex and stations served by Express King was solicited on emergency contract HCR 296NU, which went to another contractor, "causing many problems between our drivers." The protester states the understanding that the HCR 296NU service is being incorporated into its contract HCR 296CA.

A contractor who believes the contracting officer's action taken concerning matters address in these General Rules was arbitrary or capricious or outside of the General Rules may administratively appeal through the contracting officer to the General Manager, Surface Contracts Management Division.<sup>[3]</sup> Any such administrative appeal must be in writing and made within five days of when the contract knew or should have known of the contracting officer's action. . . .

The contracting officer contends that the protester's remedy should have come under that procedure, and that, having failed to take advantage of it within the available timeframe, it may not now protest.

By letter dated April 1, counsel for the protester submitted comments to the Manger, National Mail Transportation Contracting, with a copy to this office, contending that Express King's initial appeal to the Board of Contract Appeals should have been considered as a timely appeal under paragraph 2.8 of the Incumbency Policy Statement, and setting out reasons why Express King was entitled to perform the service under the statement. We are advised that the Manager has taken no action on the letter to date.

Several other mail transportation contractors in the Greenville area submitted comments supporting the contracting officer's intention to solicit the required service.

## **DISCUSSION**

It is clear that the Incumbency Policy Statement intends to create no rights in incumbent contractors other than the appeal right provided at paragraph 2.8. The Statement, accordingly, does not provide a basis for the relief Express King seeks here. It further appears, however, that the service being solicited is not "additional service" within the ambit of the incumbency policy statement because it requires different equipment (the tractor and trailer) than does the protester's existing contract for HCR 296CA. (Protester's submission to the Manager, National Mail Transportation Purchasing, recognizes that the difference in equipment may exclude the service from the application of the General Policy, but contends that the service should be added under paragraph 2.7 of the Incumbency Policy Statement, which provides, in part: "The contracting officer MAY . . . in the case of local contracts, offer to negotiate additional service into a contract which is not incumbent but reasonably resembles the additional service . . . ." (Emphasis in original.))

Previous decisions of this office have dealt with contractors' contentions that additional service should be added to their existing contracts, instead of being solicited

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<sup>3</sup> The Manager, National Mail Transportation Purchasing, is the successor to the General Manger, Surface Contracts Management Division.

separately. The contracting officer's statement has cited two such decisions. *Bean Trucking Co., Inc.*, P.S. Protest No. 80-60, October 23, 1980, denied Bean's protest objecting to the solicitation of an emergency contract for plant load service between a mailer's plant and a postal facility instead of adding that service as "extra trips" under Bean's existing contract, noting that the right to add extra trips was in the nature of a unilateral option exercisable by the Postal Service, and that the contract conferred upon Bean no entitlement to perform those extra trips. *Sodrel Truck Lines, Inc.; Dennis Truck Line Co. of Ohio*, P.S. Protest Nos. 92-01, 92-03, February 26, 1992, reached a similar conclusion.<sup>4</sup> Here, as in those instances, we are unable to identify any contractual basis on which Express King is entitled to the additional service sought.

The protest is denied.

William J. Jones  
Senior Counsel  
Contract Protests and Policies

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<sup>4</sup> See also *WEM, Inc.*, P.S. Protest No. 94-48, February 24, 1995, holding that we lacked "jurisdiction to review the decision made by the contracting officer to [provide for additional service by] modifications to existing contracts instead of issuing a regular solicitation" in a situation the reverse of *Bean* and *Sodrel*, but that we did have jurisdiction to consider whether the limited competition provisions of former Procurement Manual 12.4.6 d.3 and the portions of the Incumbency Policy Statement implementing those provisions were correctly applied.