

**May 21, 1999**

**P.S. Protest No. 99-08**

## **TRANS UNION TRANSPORT**

**Solicitation No. 100-7-09**

### **DIGEST**

Protest of determination of offeror's lack of capability to perform mail transportation contract is denied. Offeror's substantial understatement of costs associated with route supported the determination; contracting officer did not have obligation to conduct discussions with offeror when offer could not be improved without substantial revision; and offer as revised in the course of the protest remained unrealistic.

### **DECISION**

Mr. Eric B. Harrison, a sole proprietor trading under the name Trans Union Transit, protests the contracting officer's decision not to award him a highway mail transportation contract.

Distribution Networks, New York Metro Area, issued solicitation 100-7-98 for Highway Contract Route 07437 for 32 different trips between the Paterson, NJ, Processing and Distribution Center and nearby New Jersey postal facilities.<sup>1</sup> The solicitation contemplated 150,021 estimated annual schedule miles, 8,336 estimated annual schedule hours, using two single-axle tractors, one 32 foot trailer, and one 45 foot trailer.

Solicitation section M 1. a. provided, in part that "[f]irst consideration will be given to proposals which meet all of the service requirements specified. If one or more pro-

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<sup>1</sup> The shortest trip is 7 miles; the longest trip is 31.5 miles. Twenty trips operate daily except Sundays and holidays, four trips operated daily except Saturdays, Sundays, and holidays, four trips operate Sundays and holidays, and two trips operate Saturdays except Saturday holidays.

posals offers service that meets the service requirements, award will be made to the low, responsible offeror.”<sup>2</sup>

Nineteen offers were received in response to the solicitation, of which that of Trans Union Transport was the lowest, with an annual rate of \$193,742. The contracting officer reviewed the cost worksheet which accompanied the offer, and concluded that Mr. Harrison had understated various elements of his costs.<sup>3</sup>

The worksheet indicated a total cost for driver wages and benefits of \$125,332.<sup>4</sup> The contracting officer calculates Service Contract Act straight time wages to be \$122,039 (8,336 hours at \$14.64) plus fringe benefits (“Social Security, Workman’s Compensation, Federal Unemployment, Health & Welfare, Vacation, and Holiday”) of \$54,326, for a total annual cost of \$176,385. Trans Union’s worksheet showed only \$3,004 allocated to fuel. The contracting officer estimates that 30,000 gallons of diesel fuel will be used annually, requiring \$47,400 for fuel at the \$1.59 per gallon price reflected on Trans Union’s worksheet.

Trans Union’s statement of assets and liabilities identified various owned vehicles and a residence as assets, plus a bank account containing a small amount of cash. The statement listed nothing in the “liabilities” column, although it appeared from the statement that the residence and at least one of the vehicles was financed in some amount. The contracting officer concluded from the limited liquid assets indicated on the statement that Trans Union “did not have . . . assets to offset the minimum costs that would be incurred in the operation of the route.”

The contract for the route was awarded to Al Lastella, Inc., the third low offeror, at the annual rate of \$234,000. (The second lowest offeror was rejected for a history of poor past performance.) Lastella had been operating the route under an emergency contract for more than a year, and had performed well on that route and on several others.

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<sup>2</sup> “Responsibility” is the term previously used to describe what the current regulations and the contracting officer statement here refer to as “capability.” See *RAF Technologies, Inc.*, P.S. Protest No. 98-24, January 11, 1999.

<sup>3</sup> The worksheet, which is not part of the offer, allocates the annual rate among various cost elements for the purpose of subsequent adjustments. Information in an offeror’s worksheet may be considered in the termination of the offeror’s capability. See, e.g., *FWH Motor Transit, Inc.*, P.S. Protest No. 84-30, May 21, 1984.

<sup>4</sup> Specifically, the worksheet contemplated two full-time drivers, and provided for 8,336 hours of straight time at \$14 per hour, for a stated total of \$120,000. (The actual product is \$116,704.) The worksheet also provided \$1,300 for workers compensation and \$2,240 and \$1,792, respectively, for vacation and holiday pay. It contained no entries for social security payments or for health and welfare fringe benefits. The box “Contractor’s wages, personal driving or supervision” listed no quantity of annual hours or an hourly rate, but did list a total of \$1,100.

Its worksheet costs for drivers, fuel, and other elements were deemed realistic, and it was deemed to have liquid assets sufficient to perform the route.

Mr. Harrison's protest to the contracting officer complained of the award to Lastella at a higher price than it offered, contending that he was "entitled to bid what I feel is right." Noting that the contracting officer had advised, after award, that the postal estimate for the route was \$294,000,<sup>5</sup> the protester asserts that although his price was less than that estimate, so was Lastella's price.

The contracting officer did not timely respond to the protest.<sup>6</sup> Mr. Harrison complained to the contracting officer's supervisors at Postal Service headquarters, who advised the contracting officer to submit the protest to this office.

The contracting officer's statement on the protest concludes that "Trans Union's price proposal . . . was not realistic," that given the total cost of hired drivers, and the annual cost of fuel and insurance Trans Union would have operated an annual loss of \$39,000, that Trans Union was not capable, and that it could not perform with its stated available financial resources. The statement notes that the solicitation provided that award might be made without discussions,<sup>7</sup> and that at the time these offers were being evaluated, fourteen other solicitations were also being evaluated.

The protester submitted comments on the contracting officer's statement. A substantial portion of the comments is devoted to objections to the contracting officer's delay in responding to the protest. With respect to merits of the contracting officer's determination of his capability, the protester contends that Trans Union's price was appropriate because he intended to do some of the driving himself, as owner, at a flat salary not subject to the Service Contract Act. The protester includes a worksheet which, he asserts, demonstrates his ability to perform and make a profit within the amount contained in his offer. He also includes a bank statement for his company's business checking account which reflects a low five-figure balance.

The contracting officer replied to the protester's comments, contending that the protester's revised worksheet remains unrealistic. The contracting officer's calculations invoke provisions of the Federal Motor Carrier Safety Regulations which limit the time

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<sup>5</sup> In preparation for the evaluation of offers, the contracting officer prepared a "scratch worksheet" establishing an annual cost estimate. The contracting officer advises that the scratch worksheet estimate was actually \$277,242. Nine of the 19 offers were at prices below that estimate.

<sup>6</sup> The regulation governing protests, Purchasing Manual (PM) 3.6, provides that initial protests may be submitted either to the contracting officer or to the General Counsel. PM 3.6.3.a. When a contracting officer receives a protest, it is to be determined meritorious or obviously without merit, "within 10 days after its receipt" or it is to be referred to the General Counsel for resolution. PM 3.6.6 c.

<sup>7</sup> Section K of the solicitation included PM provision A-9, Award Without Discussions, which allowed such an award.

which drivers may work to not more than ten hours following eight hours off duty, and not more than 60 hours in any seven consecutive days, and take into account not only the hours associated with the trip schedule, but also travel hours between the protester's base of operations in Baldwin, NY, and the New Jersey head-out points. According to those calculations, the contract will require three drivers, not two, and the cost of two hired drivers, plus the fixed annual salary asserted for the owner-operator, will exceed the protester's calculations by almost \$78,000. Further, the contracting officer suggests that the protester's fuel costs remain understated by the amount associated with travel between its base of operations and the head-out points.

With respect to the newly-provided information about Trans Union's finances, the contracting officer notes that the information could have been provided earlier, and that the solicitation stated that the failure to provide financial information when it was requested could serve as a basis for the rejection of an offer.

The protester submitted comments on the contracting officer's further statement which take exception to his conclusions, noting, *inter alia*, that Trans Union's base of operations is not in Baldwin, NY, but rather in Queens, NY, and asserting that the ten-hour driver limitation does not apply to local drivers operating exclusively within a 100-mile radius. Further, the protester complains that the contracting officer "denied my company a contract without asking any questions," contending that he should have been afforded the opportunity to explain any errors on its worksheet. He asserts that the contracting officer "knows nothing about trucking," and has totally incorrectly estimated the costs and hours associated with the required service.

## **DISCUSSION**

Initially, we note that the contracting officer's delay in forwarding the protest to this office is "inimical to the objectives of the Postal Service's protest process" (*AHJ Transportation, Inc.*, P.S. Protest No. 89-19, September 7, 1989) and, as such, is not to be condoned. However, the delay does not provide a basis for us to conclude that the protester is entitled to relief for which it would not otherwise be eligible. Accordingly, we turn our attention to the merits of the protest.

This office's reviews of determinations of . . . capability are limited[.] The contracting officer's determination of an offeror's lack of capability is subject to limited review by this office: A capability determination is a business judgment which involves balancing the contracting officer's conception of the requirement with available information about the contractor's resources and record. We well recognize the necessity of allowing the contracting officer considerable discretion in making such an evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is not capable, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

*Victor Partners*, P.S. Protest No. 98-34, March 19, 1999 (Citations and internal quotations omitted).

The protester faults the contracting officer for failing to call to his attention the various errors he found in Trans Union's calculation of its offer. However, the contracting officer had no obligation to do so:

Discussions may be held in order to (1) allow for the clarification of matters contained in a proposal which raise questions regarding acceptability or evaluation score; (2) address suspected mistakes or questionable assumptions, and (2) obtain the best value to the Postal Service and establish final contract terms and conditions. *Discussions need not be held with individual suppliers when, after evaluation and comparison of their proposals, it becomes apparent that their proposals do not offer the best value to the Postal Service and could not be improved to do so without extensive and substantial revision.*

PM 4.2.5.c 2. (emphasis added).

In this instance, the contracting officer found Trans Union's offer unrealistically low, based on analysis of the cost worksheet submitted with the offer. Further, he concluded from the information which the offeror had submitted about its finances that the offeror lacked the resources to perform the contract.

The contracting officer's analysis was fully consistent with the information which the offeror supplied. That information indicated the offeror's intention to operate the service exclusively with two hired drivers, and did not indicate the owner's intention to perform any of the driving himself. Further, the worksheet indicated substantial understatement of the requirements which the contract imposed concerning wages and benefits of hired drivers, and a significant understatement of the cost of necessary fuel. The protester does not deny these errors, contending, instead, his intention to operate the route in a different manner than his proposal indicated. The changes which the protester has made in the course of the protest clearly comprise "extensive and substantial revision[s]" within the context of the quoted regulation, and need not be accommodated by discussions.

The protester asserts that the Postal Service could and should have asked for answers to [the] questions [which arose concerning elements of the offeror's proposal]. However, the solicitation gave notice that award could be made on the basis of initial proposals received, without discussions. The burden was on the offerors to submit adequately written and complete proposals.

*Gould Metal Specialties, Inc.* P.S. Protest No. 94-51, February 8, 1995 (citations and internal quotations omitted). *Accord, Circle-A Construction Company, Inc.*, P.S. Pro-

test No. 96-12, July 12, 1996; *CIR Industrial Automation, Inc.*, P.S. Protest No. 95-47, April 29, 1996.

In any event, it is clear that HCR 07437 cannot be operated in the manner which the protester has proposed in his submissions in the course of the protest. The operating schedule requires 160 hours of service a week,<sup>8</sup> or 80 hours for each of the two drivers Trans Union has proposed. Eighty hours of service exceeds the 60 hours in any seven day period and the 10 hours after 8 hours off limitations imposed on driver's hours of service by the Motor Carrier Safety Regulations (49 CFR Part 395). (The portion of this regulation attached to the protester's comments in support of his contention that local drivers are not subject to the 10 hour rule does not establish that point. It provides an exception only for "drivers of motor vehicles engaged solely in making deliveries from retail stores and/or retail catalog businesses to the ultimate consumer, . . . during the period from December 10 to December 25, both inclusive, of each year," 49 CFR § 395.1(f), an exception not applicable to a year-round contract for deliveries between postal facilities.)

The contracting officer's conclusion that the protester was not capable was not arbitrary, capricious, or unsupported. The protest is denied.

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Contract Protests and Policies

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<sup>8</sup> This calculation does not consider time involved in transit from the contractor's base of operations to the head-out points. Although the protester contends that its base is closer to those points than the contracting officer assumed, based on the protester's business address, the transit time involved in daily round trips from Queens, NY, to Paterson, NJ. would not be unsubstantial.