

**October 18, 2000**

**P.S. Protest No. 00-17**

**DORENE S. AMBER**

**Solicitation No. 980-104-00**

**DIGEST**

Protest of award of a mail transportation contract is denied. Emergency contract was not subject to renewal; low offeror was entitled to award according to the stated evaluation criteria; and protester's remaining contentions did not warrant relief.

**DECISION**

Ms. Dorene S. Amber protests the award of a contract for Highway Contract Route (HCR) 59141, daily service, Sundays and holidays excepted, from the Billings, MT, Processing and Distribution Center to Belfry, MT, and return, with stops at four other post offices. Prior to March, 2000, service on HCR 59141 had been performed by a contractor who abandoned the route due to illness. Ms. Amber was awarded an emergency contract to perform that service beginning March 4.

On May 8, the Western DNO, Seattle Branch, issued solicitation 980-104-00 seeking permanent service on the HCR. The service required one four-wheel-drive van with a 300 cubic foot capacity,<sup>1</sup> and comprised an estimated 46,673 annual miles and 1,794 annual hours. Section M. of the solicitation discussed the basis for award.<sup>2</sup>

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<sup>1</sup> This was a change from the previous requirement, which specified four-wheel-drive only during the winter months and a 220 cubic foot capacity.

<sup>2</sup> M.1 GENERAL

Offerors are encouraged to submit their best offers both whether within or outside the service requirements specified in Section B, Statement of Work, and Specifications (the "service requirements"). Offers will be evaluated in the following way:

- a. First consideration will be given to proposals which meet all of the service requirements specified. If one or more proposals offer service that meets the service requirements, award will be made to the low, responsible offeror. However, if no fully compliant offer is received, or the only offer or offers are excessive in price, no award will be made, and the procedure outlined in M.I.b. will be followed.
- b. If no award can be made under M.I.a., the contracting officer will reevaluate the proposals received to determine the extent to which they deviate from the service requirements. Proposals will be more favorably considered to the extent that they demonstrate a high degree of

(Footnote continued on next page.)

Five offers were received by the June 9 date offers were due, of which that of High Plains Protective Service, Inc., (High Plains) was lowest, and that of Ms. Amber was second lowest. Both Ms. Amber and High Plains were asked to complete pre-award questionnaires. High Plains' questionnaire indicated that it owned two 3/4 ton four-wheel-drive pickup trucks and that it planned to purchase an enclosed trailer which it planned to use on the route. The Western Branch advised High Plains that the District office had determined that a straight body or single unit vehicle would be required and that a trailer would not be acceptable. Accordingly, High Plains was asked to "clarify and/or reconsider the actual vehicle you will use." High Plains did so, stating that a shell of appropriate size would be acquired for use with the pickup trucks.<sup>3</sup>

The DNO found this acceptable, and following an inquiry by Billings, MT, Administrative Official, it found High Plains to be capable. The contract was awarded to High Plains on July 12, with service to begin on August 12. The unsuccessful offerors were notified of the award by letters dated July 12.<sup>4</sup>

Ms. Amber sent a letter dated July 24 to the Manager, National Mail Transportation, at Postal Service headquarters complaining about the award. She faxed a copy of the letter to the Western Branch, which considered it to be a protest within this office's jurisdiction and forwarded it for our consideration.

The protest includes the following points:

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compliance with the service requirements at a reasonable price. . . . Award will be made to the responsible offeror who proposes the best value — i.e., the best combination of price and service for the service requirements. Award will not necessarily be made to the offeror who provides the best service or to the offeror who offers the lowest price. . . .

#### M.2., Evaluation of Technical Management Information

If an evaluation is performed pursuant to M.1.b., the Postal Service will assess each offeror's Technical/Management information to determine (i) the degree to which it offers to meet the solicitation requirements and (ii) its underlying realism.

The factors that will be used in evaluating Technical/Management information are stated below . . . in descending order of importance . . . .

- a. Past Performance
- b. Schedule
- c. Type of Equipment and Capacity

<sup>3</sup> It appears from the record that Ms. Amber is performing and proposed to perform using a four-wheel-drive pickup truck with a shell enclosing the cargo bed.

<sup>4</sup> The initial notification letters misstated the contract term as extending to June 30, 2003, instead of June 30, 2001, as the solicitation had provided. Corrected letters were sent out on July 18.

- Ms. Amber was disadvantaged as the incumbent contractor because the price of her contract was available to the other offerors. It was not coincidental that High Plains offered a price only slightly lower than her existing price.
- Ms. Amber should have had the opportunity to renew her contract, consistent with provision H.17 of her contract.<sup>5</sup>
- Noting that that provision M.1.a. provided that “first consideration will be given to proposals which meet all of the service requirements specified”; that provision M.1.b provided that “[a]ward will not necessarily be made to the offeror who provides the best service or . . . the lowest price”; and that provision M.2. provided for the evaluation of past performance, schedule, and type of equipment and property, the protester contends that she was “already qualified and in place,” while High Plains was not and “did not even propose the correct required equipment.” The protester also questions the delay in the contract award as evidencing favoritism to the awardee.
- Noting other provisions of the solicitation regarding negotiation, the encouragement of small, minority and women-owned businesses, and the requirement that suppliers take affirmative action to employ qualified handicapped individuals,<sup>6</sup> the protester complains that these policies were not followed in her case.

The contracting officer’s statement responds to the protest as follows:

- The price of Ms. Amber’s emergency contract was a matter of public knowledge, and therefore was not a disadvantage.
- Ms. Amber was aware, when the emergency service was solicited, that the contract’s term would be limited. Although the solicitation included provision H-17 regarding renewal, Purchasing Manual (PM) 4.5.6 e. clearly provides that emergency contracts may not be renewed.
- The protester quotes portions of the award criteria of solicitation section M selectively. That section provided that price and supplier capability would be the basis for award.
- The process by which the offerors were evaluated and asked to clarify their proposals was typical, not unique. Since High Plains’ response to the questionnaire identified several available vehicles, including one (the trailer) which was not acceptable, it was “requested that [it] clarify and/or reconsider the actual vehicle to be provided.” High Plains did so.

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<sup>5</sup> Although Ms. Amber’s emergency contract is not in the record, the contracting officer’s statement confirms that it included at provision H-17 the text of clause B-78, Renewal (January 1997), which states “This contract may be renewed by mutual agreement of the parties.”

<sup>6</sup> Ms. Amber describes herself as suffering from a disability.

- The award was not delayed to accommodate High Plains. Award occurred thirty-three days after offers were received, well within the sixty days normally available for award.
- The Postal Service’s policy of encouraging the participation of small, minority, and women-owned businesses was followed in this case. Ms. Amber was encouraged to participate in the solicitation. The DNO did advise Ms. Amber that no directive provided a preference in award for minority, disabled, or handicapped offerors.

Ms. Amber submitted comments responding to the contracting officers’ statement:

- The vehicle she supplied under the emergency contract already met the enhanced requirements for the permanent solicitation, and she has met its vehicle inspection and driver screening requirements. High Plains should not have been found to meet the vehicle requirements since it proposed an unacceptable trailer.
- Ms. Amber intended her letter to be an appeal, as well as a protest.<sup>7</sup>
- The prices of emergency contracts, unlike the prices of “awarded contracts,” should not be public information. The disclosure of those prices, coupled with the policy of not renewing emergency contracts, places the incumbent emergency contractor at a great disadvantage.
- Ms. Amber asserts that she was not solicited for the emergency contract, found out about it by chance, and she had to inquire several times to obtain a solicitation package.
- Ms. Amber’s emergency contract should have been subject to renewal since the contract included a provision that it could be renewed.
- The Postal Service requested that Ms. Amber train High Plains’ drivers on the route, although she was not afforded any training when she took the route and had to train herself.<sup>8</sup>
- Ms. Amber’s offer was more favorable to the Postal Service than High Plains’ offer since she based her price on actual fuel costs, not a lower price which would be the subject of subsequent adjustment.<sup>9</sup>

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<sup>7</sup> What the protester intends by this statement is not clear.

<sup>8</sup> As noted, Ms Amber assumed this route when the prior contractor abandoned it, and presumably was unavailable to train her. That Ms. Amber, who was available to train her successor, was requested to do so does not suggest any disparate treatment.

<sup>9</sup> While an unreasonable indicated fuel cost may be the subject of inquiry in the evaluation of offers, nothing in the solicitation suggests that the potential fuel price adjustments which the contract allows are to be considered in the evaluation process.

## DISCUSSION

This protest presents a number of issues which we address individually.

It was not improper for the rate of Ms. Amber's emergency contract to be disclosed. In general, contract prices are a matter of public record, and there is no basis on which to distinguish Ms. Amber's emergency contract from a regular contract in that respect.<sup>10</sup> *Cf. Anthony Owens*, P.S. Protest No. 94-32, September 7, 1994: "[I]t would not be inappropriate for a postal employee to disclose the price being paid to an incumbent or previous contractor, since those prices are a matter of public record."

That the protester's contract included a provision indicating that it could be renewed does not provide a basis to challenge this award. It appears that provision B-68 was included in Ms. Amber's contract in error, since, as the contracting officer notes, the Postal Service's contracting regulations specifically provide that emergency contracts cannot be renewed.<sup>11</sup> (PM 4.5.6.a, not cited by the contracting officer, complements PM 4.5.6.d by limiting the privilege of renewal to "regular and temporary mail transportation contracts," categories of contracts other than emergency contracts as defined at PM 4.5.5.b.) However, even if the inclusion of the renewal provision in the emergency contract had the effect of *allowing* its renewal, it did not *require* that the contracting officer renew it, and a contracting officer's decision not to renew a transportation contract is a matter outside this office's jurisdiction to consider. *TLC*, P.S. Protest No. 98-14, July 21, 1998.

The solicitation's evaluation scheme contemplates evaluation of offers differently in two situations. In the first, which is governed by M.1. a. of the solicitation, award is made on the basis of price from among the offerors who offer "service that meets the service requirements." In the second, which is governed by M.1. b., and which comes into consideration only if M.1. a. does not, offers are evaluated on the basis of the service that is offered and their price.

In this instance, Ms. Amber appears to contend that evaluation under M.1. b. was appropriate because High Plains, by offering to perform the service with an unacceptable trailer, in the terms of M.1. a., did not "offer service which met the service requirements," or was not "fully compliant." If High Plains' offer took that exception to the service requirement,<sup>12</sup> it revised its offer in that regard prior to award, as it was entitled to do (PM 4.2.3.b) Since its revised offer fully met the service requirement, it was entitled to have that offer evaluated pursuant to M.1. a., which considered only price and responsibility or capability. When an offeror takes no exception to the solicitation's service requirements, there is "no opportunity for the contracting officer to perform any sort of 'best value' analysis weighing the advan-

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<sup>10</sup> The protester may have in mind the distinction between unsuccessful bids in the context of formal advertising, which are subject to disclosure, and unsuccessful offers in negotiated purchasing, which are not disclosed. However, the distinction has no relevance with respect to successful bids or offers.

<sup>11</sup> PM 4.5.6.e prescribes the use of the B-78, Renewal, only for "transportation contracts that may be considered for renewal."

<sup>12</sup> While the contracting officer attributes that exception only to High Plains' response to the post-award questionnaire, the exception was at least suggested in the Highway Transportation Contract Cost Worksheet, Form 7468A. which accompanied its offer, which included a cost element for "trailers" at item 1A.2.

tages of [a higher] offer against its higher price” in comparison to the lower offer. *West-Wilson Enterprise*, P.S. Protest No. 99-32, April 25, 2000.

While Ms. Amber contends that she is more qualified than High Plains to perform the route by reason of her prior experience, the offerors’ relative experience levels are not relevant, and the contracting officer’s determination that High Point is capable “is not subject to being overturned by this office in the course of a protest absent fraud, abuse of discretion, or failure to apply definitive responsibility criteria.” *W.W. Fry and Son, Inc.*, P.S. Protest No. 99-28, February 1, 2000. Since there is no evidence suggesting an such error, the determination is not for our review.<sup>13</sup>

Ms. Amber’s remaining objection does not support her claim of entitlement to the award.

While postal purchasing policy encourages the participation of such entities, *inter alia*, in the Postal Service’s supplier base (Purchasing Manual (PM) 3.2.1.a), and undertakes not to exclude suppliers from competition on the basis of race, sex, and other inappropriate criteria (PM 3.2.1.b), there is no enforceable requirement that award be made to such suppliers or that orders be placed with them.

*Technology TEAM, Incorporated*, P.S. Protest No. 00-09, June 28, 2000.

The protest is denied.

William J. Jones  
Senior Counsel  
Contract Protests and Policies

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<sup>13</sup> The time within which award was made does not, contrary to the protester’s contention, suggest any undue delay for the awardee’s benefit.