

Protest of) Date: October 30, 1987
TPI INTERNATIONAL AIRWAYS,)
INC.)
Under Solicitation ANET-87-02) P.S. Protest No. 87-40

DECISION

TPI International Airways, Inc. (TPI) protests award of an air transportation contract for Express and Priority Mail to Evergreen International Aviation, Inc., (Evergreen), contending that its proposal was not properly evaluated.^{1/}

Solicitation No. ANET-87-02, issued March 6, 1987, by the Office of Transportation and International Services, Mail Processing Department, U.S. Postal Service Headquarters, requested proposals for air transportation of Express Mail and Priority Mail within a 21-city network. Proposals were due April 3, with service commencing on or after June 6.

The solicitation provided, in pertinent part, as follows:

Offers must be in the form of a closed loop network consisting of a matrix of city points. While the proposed network need not include all the points shown in Specifications Part A, the number of such points served will be considered in the Postal Service's evaluation of proposals for award.

Offerors were required to include in their proposals a complete description of the operation of the offered network, including its city points and airports, the proposed tender and delivery times at each origin-destination pair, flight itineraries, specification of block times for departures and arrivals, and type of aircraft. If the proposal used a "hub-and-spoke" operation (rather than direct flights), the offeror was required to state the location of the hub and the origin-destination pairs to be served out of each hub.

^{1/}This is one of five protests against the Evergreen award. See CF Air Freight, Inc., P.S. Protest No. 87-43, August 7, 1987.

In the evaluation of proposals, the relative superiority of proposed service would be a greater factor than price; however, for closely ranked proposals, price advantage would be more significant than technical superiority. The solicitation ranked service factors in the following order of importance:

- (1) the degree to which an offeror's proposed network would speed delivery of the mail and enhance the efficiency of postal operations;
- (2) the total volume of mail for which an offeror's proposed network would provide air transportation;
- (3) the number of points listed in Specifications Part A which are included on an offeror's proposed network;
- (4) the length of time between required tender and deliver (with tighter time frames preferred); and
- (5) the extent to which the proposal offers to provide service via aircraft dedicated to the transportation of mail under the solicited contract.

Eighteen offers were received, including one from TPI. TPI's initial proposal offered service to all 21 cities by dedicated aircraft through a hub at Smyrna, TN. Representatives of the contracting officer held negotiations with all offerors in the competitive range, including TPI. The notes of the TPI negotiation of April 9 indicate that the postal negotiators did not feel that TPI had adequately planned its hub operations. These notes indicate that there was no mention of training for the people to be used for hub operations, and that TPI had identified possible subcontractors to accomplish the ground tasks, but had not made a final decision whether these operations would be subcontracted. In addition, the negotiators believed that the 30 minute turn around time between the last arriving plane and the first departing plane was insufficient. The notes also indicate that TPI would only have 65 minutes to transfer all the mail. This belief stemmed from the fact that TPI had not enclosed a copy of its hub schedule with its proposal. These two items led to an overall feeling that award to TPI would entail significant risk.

Evergreen proposed a hub-and-spoke arrangement of dedicated aircraft, with its hub at Cincinnati, OH.^{1/} Hub operations were to be conducted by a subsidiary of Evergreen. The turnaround between the last arriving flight and the first departing flight was 20 minutes, and the total time for transfer of all the mail was five hours and 55 minutes. Evergreen was also deficient in its lift capacities for a some routes. These concerns were communicated to Evergreen during the negotiations, and, as noted below, were modified in Evergreen's best and final offer.

All negotiations were completed by April 19, and best and final offers were requested from the offerors within the competitive range. The contracting officer has stated that no actual date for receipt of best and final offers was established, but that it was made known to the offerors that award would be

^{2/}The hub was changed to Smyrna, TN, in Evergreen's best and final offer.

made by April 24.^{1/} TPI submitted a best and final offer on April 20, and Evergreen on April 21. TPI's best and final offer stated that either it or a specifically named subcontractor would be responsible for ground operations at the hub and other network points. The time between its last arriving and first departing flights remained 30 minutes, and the total time for transfer of the mail was 2 hours and 10 minutes. Evergreen remedied the cases in which its lift had been deficient and increased its time between the last arriving and first departing planes to 35 minutes.

Between April 20 and April 23, the members of the evaluation committee met to conduct their final review of those proposals within the competitive range.

On April 23 they ranked the top seven offers in order of technical preference and made their recommendations to the contracting officer. TPI was ranked last and Evergreen first among the offerors. The file contains a handwritten memorandum, entitled "Basis for Non Award -- TPI" as follows:

Although the carrier submitted a lower annual cost, they were not awarded a contract on the basis of their questionable hub operations. i.e.

- o No indication as to whom would perform the transfer operations;
- o Total volume of mail, 274,530 pounds, must be unloaded, sorted, and reloaded within 2:10 hours; All aircraft are scheduled into the hub between 0100 and 0135 with the first aircraft due out at 0205 to CLE and OTW requiring the loading of 15,900 pounds.

The above indicates that a successful hub operation is highly unlikely.

Lift deficiencies existed at
EWR as an origin and destination
ORD as a destination
These were not corrected.^{1/}

Note: Offeror was requested to furnish schedules for inbound to hub and outbound to destination. These were not included in the original proposal.

^{3/}The failure to establish a common cut-off for best and final offers was inconsistent with Postal Contracting Manual (PCM) 19-131.74(b) which requires that all offerors shall be informed of the specified date of closing of negotiations and that any revisions should be submitted by that date.

^{4/}This statement is not supported in the record, does not appear to have been drawn to TPI's attention during the negotiations, and has not been relied upon by the contracting officer as a reason for rejecting TPI's proposal.

Additionally, a May 7, 1987, memorandum from one of the negotiators to the contracting officer states the following rationale for the rejection of TPI's proposal:

TPI's proposal was discounted on the basis of a lack of information regarding their hub operation. They intended to train ground handlers at the hub at start-up. They did not furnish actual inbound/outbound schedules but during negotiations it was determined that they only allowed 65 minutes to transfer 274,500 pounds of mail.

By such lack of planning at the hub could [sic] account for the low rate proposed.

On April 24, the contracting officer telephoned the Chairman of the Board of Evergreen and stated that the Postal Service had accepted Evergreen's best and final offer. On April 27, her staff called the other offerors, including TPI, informing them of the award to Evergreen. While there is dispute about what was said during this conversation, it is clear that TPI was informed that it had not received award because its hub operations were not sufficiently detailed.

TPI's Protest

TPI contends that the contracting officer failed to evaluate its proposal in accordance with the requirements of the solicitation. It states that the technical deficiencies for which it was penalized were a result of misunderstanding or omissions by the Postal Service negotiators. TPI states that it gave the negotiators complete details of the working of its hub in Smyrna, Tennessee, and that postal personnel told it that its proposal had been rejected because it required the transfer of 270,000 pounds of mail within 65 minutes. TPI states that this calculation was based on an erroneous analysis of its initial hub schedule.^{5/} Rather than calculating the time between the first aircraft into the hub and the last aircraft to leave, the Postal Service mistakenly used the time between the first scheduled arrival and the first scheduled departure. Therefore, TPI allowed two hours and thirty-five minutes to transfer the required mail, not 65 minutes. TPI also alleges that, if the postal negotiators were misinformed about its proposal, they should have either analyzed the proposal more carefully or requested further clarification. Since its proposal was at least technically equal to that of Evergreen and TPI's cost was considerably lower, TPI states that it should have received award.

^{5/}TPI explains that its original proposal did not contain a hub schedule, and that, when a postal negotiator requested during negotiations that a schedule be furnished, it was separately mailed. A revised hub schedule accompanied its best and final offer.

Contracting Officer's Position

While acknowledging that TPI's proposal was considerably less expensive than that of Evergreen, the contracting officer states that "TPI's offer ranked significantly lower than the other offerors' with respect to the first evaluation factor, efficiency." Her two reasons for this conclusion were that TPI had proposed "extremely tight transfer times" at its hub,^{6/} which she was skeptical that TPI could successfully perform. Second, she states that TPI failed to provide an operating plan for its hub. She notes that the postal negotiators specifically requested detailed descriptions in their negotiations with TPI, but that TPI refused to provide anything more than a listing of the scheduled departure and arrival times. The contracting officer states that she was unable to conclude, based on the information provided by TPI, that its hub operation would be efficient enough to perform successfully the tight schedule which it had proposed.

Rebuttal Comments

Several rounds of rebuttal comments have been received from both TPI and the contracting officer. TPI alleges that the contracting officer's rejection of its proposal because of reduced efficiency is illogical and does not take into account the later tender times and earlier delivery times which had been specifically requested by the Postal Service. It thinks that, by having the best schedule, it must have also had the most efficient proposed system. TPI states that the solicitation required only a detailed description of the operation of the network, as opposed to a detailed description of the hub, and that, when postal negotiators requested the hub schedules, TPI provided it. TPI strongly disputes the contracting officer's assertion that additional information regarding its hub operation was requested by postal negotiators, stating that such information would have been given to them if requested. TPI further notes that the contracting officer's conclusion that TPI's hub operation would be unlikely to perform successfully is based on an inaccurate analysis of the functioning of the hub.^{7/} TPI also proffers Evergreen's accepted schedule, which has only a 35 minute interval between the last arriving flight and the first departing flight. In summary, TPI asserts that the contracting officer's rejection of its proposal was based only on a subjective feeling that TPI would not be able to perform the contract successfully rather than on any hard evidence.

^{6/}As noted above, TPI proposed that it would transfer the mail in a total time of two hours and 10 minutes, with 30 minutes between the last arriving flight and the first departing flight.

^{7/}For example, TPI notes that the total elapsed time between the last scheduled arrival and first scheduled departure is 25 minutes, but that, at maximum, only 1,150 pounds of mail would have to be transferred between these two planes. It asserts that its staggered flight arrival and departure times and the fact that each flight would have its own loading and handling crew greatly minimizes that amount of mail which would have to be transferred within a very short time frame. TPI also alleges that the total time for the transfer of all the mail was two hours and 35 minutes, and that the contracting officer's use of two hours and 10 minutes is due to her review of a hub schedule other than the hub schedule which TPI included in its best and final offer.

The contracting officer responds that TPI was downgraded mainly for its perceived inability to process the entire 274,000 pounds of mail within the time set out in its proposal rather than the interim period between the scheduled arrivals and departures. She alleges that TPI only submitted one hub schedule to the Postal Service, and that the inconsistent schedules now being put forth by TPI were never evaluated because they were never submitted for evaluation. The contracting officer reiterates that TPI's inability to answer questions proposed to it by postal negotiators caused negative inferences to be drawn concerning TPI's ability to perform the contract successfully. She also states, for the first time, that TPI's proposal was inadequate as to evaluation criteria number four, "the length of time between required tender and delivery (with tighter time frames preferred)," although she does not explain how or why TPI's proposal failed to meet the requirements of this criterion. Overall, she notes again that it was the combination of the deficient hub transfer operations and the short hub transfer times which led to her conclusion that TPI's system would not be able to operate successfully.

Discussion

TPI's protest alleges, in essence, that its proposal was not evaluated in accordance with the solicitation's stated evaluation criteria. When evaluation factors are set out in a solicitation, they must be followed. PCM 19-807.2 (c); cf. POVECO, Inc., P.S. Protest No. 85-9, May 21, 1985; RMI, Inc., Comp. Gen. Dec. B-203652, April 20, 1983, 83-1 CPD & 423. "The Postal Service may make award on the basis of any factors it chooses, consistent with applicable regulations, so long as the evaluation and award factors in the solicitation fairly advise prospective offerors of the basis on which their offer[s] will be considered for award." Sea-Land Service, Inc., P.S. Protest No. 80-18, June 30, 1980; Sea-Land Service, Inc., P.S. Protest No. 77-28, August 18, 1977. If the Postal Service wishes to change or modify the evaluation criteria it has enunciated, it must cancel the solicitation and issue a new solicitation incorporating the necessary changes. PCM 19-131.74 (c). Thus, since the stated evaluation factors were never changed, the narrow question is whether TPI's proposal was evaluated in conformance with the solicitation's requirements.

We conclude that it was not. It is undisputed that TPI's proposal was substantially lower in cost than Evergreen's. The solicitation also clearly required that if Evergreen's and TPI's proposals were closely ranked, award should have been made to TPI, the lower cost proposal. Therefore, under the solicitation's evaluation criteria, the contracting officer would have had to find that TPI's proposal was "not closely ranked" technically for award to have been properly made to Evergreen.

There were five areas in which the proposals would be reviewed. Setting aside, for the moment, the first evaluation criteria (on which the contracting officer has based her justification of award to Evergreen), it is clear that both Evergreen and

TPI were equal on evaluation criteria two (total volume of mail), three (number of points served) and five (use of dedicated aircraft); as both offered to transport the same volume of mail and to serve all 21 points by dedicated aircraft. As to evaluation criteria four, the length of time between required tender and delivery (with tighter time frames preferred), TPI's proposal was clearly more advantageous than Evergreen's, as it had shorter times between tender and delivery and tighter time frames.

The contracting officer hinges her determination that TPI's proposal was not closely ranked with Evergreen's on the first, and most important evaluation criteria: "the degree to which an Offeror's proposed network would speed delivery of the mail and enhance the efficiency of postal operations." The reason for her determination was that she believed TPI could not meet the extremely tightly scheduled transfer times, given the information she possessed concerning TPI's hub operations. This determination is flawed in two respects. First, it confuses the criteria to be used in the evaluation of proposals under the solicitation with factors to be taken into account in determining a prospective contractor's responsibility. The evaluation criteria go only to the essence of the proposed system. Whether an offeror has the capacity and capability to perform a contract is usually reviewed in the determination of an offeror's responsibility. See PCM 19-122 et seq.; 1-900 et seq. An otherwise low, technically acceptable offeror may be determined to be nonresponsible by the contracting officer. Therefore, the types of concerns expressed by the contracting officer should have been a part of her determination of the responsibility of TPI. It stretches the wording used in the first criterion beyond reasonable limits to interpret those terms to include an almost unlimited review of an offeror's capability.¹⁷ Therefore, the contracting officer was mistaken in downgrading TPI as to the first criterion for its perceived capability shortfalls.

Even assuming that the contracting officer's concerns were properly located in the first evaluation criterion, we cannot concur with her determination that the deficiencies were serious enough to result in a determination that TPI's proposal was not closely ranked with Evergreen's, given that TPI was equal to Evergreen in three of the other criteria and superior in the fourth. The inconsistencies and inaccuracies in TPI's proposal are, we think, insufficient to result in a reasonable conclusion that the two proposals were not closely ranked.¹⁷ Since these two

^{8/}We note that the contracting officer's interpretation of the first criterion, when coupled with the plain meaning of the fourth criterion, placed offerors in a potential "catch-22" situation. If the offeror relaxed the tender and delivery times to meet the first criterion, it lost points on the fourth; conversely, tighter time schedule to meet the fourth criterion lost points on the first criterion. That the contracting officer's interpretation of these criteria leads to inconsistency in their results further detracts from the logical coherence of her position.

^{9/}We are dissatisfied with the record of negotiations evidenced in this procurement. It is difficult to conclude, on the record before us, that the contracting officer's concerns were effectively communicated to TPI during the course of negotiations. Given the contracting officer's duty "not [to] make award without exploration and discussion prior to award" when there is "uncertainty as to the rate or service aspects of any proposals," PCM 19-131.74 (a)(ii), the failure to obtain such necessary clarifications is her

proposals should have been determined to be closely ranked, award would have been made to TPI, as the lower cost offeror, if TPI was a responsible offeror. Therefore, TPI's proposal was improperly evaluated and its protest must be sustained.

Relief

Since we have determined that TPI's protest should be sustained, we are faced with a serious question of what remedy this office can order. Where award has not been made, reevaluation under correct guidelines can be ordered with a minimum of cost to all parties. See POVECO, Inc., supra; Sea-Land Services, Inc., P.S. Protest No. 77-47, November 21, 1977. Even where award has been made, this office has, in the past, ordered reevaluation by the contracting officer. See Copico, P.S. Protest No. 77-37, September 16, 1977; Riteway Leasing, Inc., P.S. Protest No. 76-61, December 13, 1976. Where the passage of time since award makes reevaluation impossible, the requirement may need to be resolicited. See John Schomaker, P.S. Protest No. 75-49, January 20, 1976. The cases in which relief has been ordered after award was improperly made recognize, however, that the relief also requires the termination for the convenience of the Postal Service of the improperly awarded contracts. The test for whether termination for convenience of the Postal Service is an appropriate remedy is the best interests of the Postal Service. See Dwight Foote, Inc., P.S. Protest No. 87-80, September 28, 1987; Rentco Division, Freuhauf Rental Equipment, Inc., P.S. Protest No. 75-74, December 19, 1975; Hydralifts, Inc., P.S. Protest No. 75-41, November 3, 1975. As we stated in Inforex Corporation, et. al., P.S. Protest No. 78-12, June 26, 1978:

Whether to require termination action in a given case depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the Government, the urgency of the requirement, and the impact of termination on the accomplishment of the agency's mission. Honeywell Information Systems, Inc., Comp. Gen. Dec. B-186313 (April 13, 1977), 77-1 CPD & 256, p. 7.

These factors have been regularly used in determining whether to order termination. Where the cost of terminating the awarded contract is great, we have generally declined to award such relief. See, e.g., FWH Motor Transit, Inc., P.S. Protest No. 84-30, May 21, 1984; (\$524,221 makes termination not in the best interest of the Postal Service); General Telephone Corporation of Indiana, P.S. Protest No. 79-55, February 4, 1980; Acco Industries, Inc., P.S. Protest No. 79-49, January 30, 1980; Rentco Division, Freuhauf Rental Equipment, Inc., supra (\$850,000); Autoquip Corporation, P.S. Protest No. 74-27, September 10, 1974.

responsibility.

Likewise, when the contract has been substantially completed, termination is usually not ordered. See General Telephone Corporation of Indiana, supra; Acco Industries, Inc., supra; Hydralifts, Inc., supra. The urgency of the requirement, the lack of prejudice to other offerors or to the competitive bidding process, and the impact of any termination on mail delivery have also been cited in appropriate cases as rationale justifying the refusal to terminate an improperly awarded contract. See, e.g., Ramsay Products, Inc., P.S. Protest No. 80-78, March 16, 1981 (urgency); Acco Industries, Inc., supra, (urgency); Inforex Corporation, supra (lack of prejudice); Rentco Division, Freuhauf Rental Equipment, Inc., supra (impact on mail delivery).

In light of the factors enunciated in Inforex Corporation, we must decline to order termination of Evergreen's contract. It is true that the procurement deficiency which we have identified is serious, and that TPI has been prejudiced thereby. Other factors, however, argue against ordering termination of the contract. The cost to the Postal Service of terminating Evergreen's contract would be over \$6 million, the amount of the liquidated damages to be provided pursuant to General Provision 24C of the contract. The requirement's urgency is shown by the short time frames within which the service was procured. Evergreen has performed for almost 5 months, which is approximately 20% of the total contract period. There has been no allegation that postal employees have acted in bad faith in this procurement. Finally, there is no certainty that TPI is a responsible offeror and would have received award even if its proposal had been properly evaluated. Therefore, we are unable to order any relief under the particular facts of this case, but we note that "the degree of prejudice to the interests of the competitive procurement system will prove to have not been great provided that the lessons of this procurement are observed in future procurements" Dwight Foote, Inc. supra, quoting Inforex Corporation, supra.

The protest is sustained to the extent indicated.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[Compared to original 3/3/93 WJJ]