

Protest of ) Date: May 20, 1991  
RUBEN LUIS RIVERA GARCIA )  
Solicitation Nos. PR-21-91 ) P.S. Protest No. 91-25  
PR-22-91 )

DECISION

Ruben Luis Rivera Garcia timely protests the terms of two solicitations for the highway transportation of mail between the docks at San Juan, Puerto Rico and the San Juan Parcel Post Annex. Solicitation no. PR-21-91 was issued by the San Juan Transportation Management Service Center (TMSC) on March 4, 1991 after Mr. Rivera and the contracting officer failed to agree on the terms of a renewal for his contract to perform HCR 009AB. The solicitation called for three single-axle tractors capable of draying 20, 35, 40 and 45-foot trailers on an "as-required" basis between the San Juan docks (Sealand and PRMSA Piers) and the Parcel Post Annex. The solicitation estimated that the contractor would provide inbound drayage for thirty five containers per week with an estimated round trip mileage of eight miles and estimated round trip total hours of one hour and thirty minutes.

Solicitation no. PR-22-91 was issued by the TMSC on March 4, 1991 after Mr. Rivera and the contracting officer failed to agree on the terms of renewal for his contract to perform HCR 009BB. The solicitation called for two single-axle tractors capable of draying 20, 35, 40 and 45-foot trailers on an "as-required" basis between the San Juan docks (TMT Pier) and the Parcel Post Annex. The solicitation estimated that the contractor would provide inbound drayage for three containers per week with an estimated round trip mileage of eighteen and six tenth miles and estimated round trip total hours of two hours.

Bid were due 3:00 PM on April 4. Mr. Rivera submitted bids on both solicitations and is seventh low on each. Pursuant to Procurement Manual (PM) 4.5.5 a., contract award has been stayed pending the decision in this protest.

In his protest, dated March 25, Mr. Rivera alleges:

- (1) The solicitations were issued because his offers, which were 50% less than his previous rates, were not accepted for renewal.
- (2) His offers were considered non-competitive but the Postal Service would not commit to what would be competitive. It seemed as if the Postal Service had "pre-planned" that his offers would be turned down.
- (3) He has served the routes for twenty years and the rates of compensation reached their current levels through CPI adjustments and contract requirements changes which were approved by the Postal Service.
- (4) The Public Service Commission of Puerto Rico (Commission) sets rates (tariffs) for the transportation of cargo vans leaving the docks in San Juan for various points on the island. The Commission obliges contractors to comply with the published tariffs whereas TMSC personnel maintain that the tariffs do not apply to the carriage of mail.
- (5) He was obliged to negotiate a rate below the tariff in order to attempt to renew his contracts.
- (6) His final offer was below the rate required by the Commission and half of his previous rate even though the new service would require an additional piece of transportation equipment.

Mr. Rivera states that he also protests the solicitation because the TMSC has not proven that the tariff established by the Commission does not apply to the carriage of mail and that until the inapplicability of the tariff is established it is inappropriate for the TMSC to force bidders to underbid one another.

In her report to this office, the acting contracting officer notes that the Postal Service and its highway contractors may renew their contracts by mutual agreement. When it attempts to renew a contract, the Postal Service first determines whether the price offered is reasonable. In the present cases, after review, the contracting officer determined that Mr. Rivera's prices were excessive and the contracts were not renewed. Instead, the contested solicitations were issued. The acting contracting officer states that it is the Postal Service's position that the tariffs established by the Commission do not apply to the carriage of mail.

In comments on the contracting officer's statement, Mr. Rivera maintains that his contracts would have been renewed if the Postal Service had negotiated in a fair manner. As to the applicability of the tariff, he points out that the Commission maintains that the tariffs apply, the Postal Service maintains the opposite, and this matter should be sorted out in order to allow bidders to bid accordingly.

This office received two comments on the protest in which the commenters maintain that the Commission's tariffs should apply to postal contracts.

## Discussion

There are two issues raised by Mr. Rivera in his protest. First, Mr. Rivera challenges the propriety of the renewal negotiations. Second, he questions the inapplicability of the Commission's tariffs to the movement of mail in Puerto Rico. We treat each issue separately.

Renewal of highway transportation contracts with the incumbent contractor or subcontractor by mutual agreement of the parties is authorized by 39 U.S.C. '5005(b)(2) and PM 12.4.10. Under the terms of postal highway contracts, the decision not to review is subject to review by the next higher level contracting authority pursuant to clause 26 of PS Form 7407, Basic Surface Transportation Contract General Provisions. A decision not to renew is subject to that contractual provision,<sup>1</sup> but because it is a matter arising under the contract, it is not subject to our bid protest jurisdiction. We must, therefore, dismiss this aspect of the protest. Ric Marinkovich, P.S. Protest No. 87-63, August 6, 1987.

We turn, then, to Mr. Rivera's complaint about the Postal Service's refusal to pay the rates established by the Commission. As noted above, the contracting officer asserts that it is the Postal Service's position that the Commission's tariffs are not applicable to the Postal Service's contracts for mail transportation. Mr. Rivera complains that the contracting officer has not adequately demonstrated that this is the case.

It is difficult to understand how the contracting officer could meet whatever burden of proof Mr. Rivera seeks to impose. However, in this instance we know of no basis on which to require the contracting officer to do so.

Postal mail transportation contracting is accomplished pursuant to regulations which implement a specific statutory scheme for the competitive selection of contractors. 39 U.S.C. ' 5005; PM 12.7.1 et seq.<sup>2</sup> Adhering to tariffs established by the Commission, which would preclude any possibility of competition as to price, would be wholly inconsistent with that scheme.<sup>3</sup> Accordingly, while neither the Postal Service nor the Commission can unilaterally establish the inapplicability or applicability of the Commission's procedures to the transportation of mail by contract,<sup>4</sup> the contracting

<sup>1</sup> The file contains no evidence that Mr. Rivera has sought higher level review of the decisions not to renew his contracts.

<sup>2</sup> While another part of the same statute, 39 U.S.C. ' 5203, provides for the authorization of mail transportation services by regulated common carriers subject to the approval of the Interstate Commerce Commission, that procedure is not frequently used, and is not at issue here.

<sup>3</sup> As to one limited class of contracts, those for utility services (defined primarily as "electricity, gas, water, steam, sewerage, and regulated telecommunications services ... performed by ... private companies ordinarily subject to regulation," PM 8.5.1 a.), the Postal Service has agreed, as a matter of comity, rather than law, to abide by "Federal, State, or local governmental agency ... regulations or established procedures affecting ... pricing, rates, and other matters." PM 8.5.2 b. 2. See, e.g., Georgia Power Company, P. S. Protest 90-01, February 14, 1990. Mail transportation contracts are not utility contracts as so defined, and the section is not applicable to mail transportation contracts. PM 12.1.1.

<sup>4</sup> That could be accomplished only by a tribunal having clear jurisdiction over both bodies.

officer has adequately justified the Postal Service's position here. Accordingly, this element of the protest must be denied.

The protest is dismissed in part and denied in part.

**[Signed]**

William J. Jones  
Associate General Counsel  
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**[Compared to original 5/17/95 WJJ]**