

October 31, 1994

P.S. Protest No. 94-33

RICHARD C. GENTRY, INC.

Alabama Highway Mail Transportation Solicitations

DIGEST

Protest against failure to solicit incumbent contractor for emergency service following nonrenewal of existing contracts is sustained; Procurement Manual regulation requiring such solicitation is not superseded by Mail Transportation Purchasing Handbook provision relating to emergency contracts.

DECISION

Richard C. Gentry, Inc., protests the contracting officer's failure to solicit it for several highway mail transportation contracts.¹

Gentry, a mail transportation contractor, had several box delivery contracts out of the Gulf Shores, AL, post office, which were administered by a contracting officer at the Southeast Area Distribution Networks Office, Atlanta, GA (the DNO). The contracts expired by their terms on June 30, 1994. Although the contracts contained provisions allowing for their renewal for additional terms by mutual consent, the Postal Service decided not to renew the Gentry contracts.² As allowed by the contracts, Gentry sought review of the decision by the next higher level contracting officer. By letter dated June 30 and addressed to Mr. Gentry, that official, the Manager, National Mail Transportation Purchasing, declined to overturn the contracting officer's decision.³

¹ Richard C. Gentry, Inc., is a corporation whose officers include Richard G. Gentry and Sandra S. Gentry. In this decision, "Gentry" refers to the corporation, while "Mr. Gentry" and "Ms. Gentry" refer to its principals.

² The exact date that Gentry was informed of the nonrenewals is not evident from the protest file.

³ The letter included the following explanation for that decision:

As I have reviewed the file, it has become clear to me that route operations have experienced periodic problems with the quality of service provided by you or your

employees. This includes the incorrect delivery, delay, and destruction of mail. We have received numerous Contract Route Irregularity Reports (PS 5500s) regarding your failure to follow the instructions of the Postmaster.

The file also indicates that you have been confrontational with the Postmaster, causing disruptions at the Gulf Shores Postal Facility. The Postal Service is heading in a new, and hopefully better, direction through teamwork between managers, personnel, and vendors. We simply cannot tolerate confrontational and intimidating behavior in the Postal workplace.

According to the protest, Ms. Gentry was advised by a DNO contract specialist on June 8 that the Gulf Shores routes which had not been renewed would be the subject of emergency solicitations. Ms. Gentry requested copies of those "bid packages . . . plus any other routes in [the] area." According to the protester, although the contract specialist advised Ms. Gentry that Gentry "had the right to bid" and "he would send [Gentry] all [the bid] packets when they were available," he further stated that "'with things here as they are now, I doubt you would be awarded a contract, even if you were low bidder.'" The protest further recites that in response to Ms. Gentry's inquiry why not, the contract specialist stated that he "better not comment on that."

No solicitation packages were furnished to Gentry, and the Gulf Shores contracts were awarded to others. The protester complains of its failure to receive various specific solicitation packages⁴ and of the contract specialist's refusal to explain the basis for his statement.

The contracting officer's statement sets out a different understanding of the June 8 conversation, which it notes was initiated by Ms. Gentry. According to the statement, the contract specialist understood Ms. Gentry to have inquired generally whether Gentry would receive future highway contract solicitations, without identifying any particular routes or solicitations.⁵ The contracting officer asserts that the contracting specialist did not represent that Gentry would be furnished any specific solicitations, but that if, as Ms. Gentry had indicated, Gentry was on the bidder's list for the area, it would receive notice of solicitations in the same manner as others on the list. However, contrary to Ms. Gentry's representation, and unbeknownst to the contract specialist, Gentry was not on the bidder's list for the area, and accordingly, did not receive any solicitations in that fashion.

⁴ The protest identifies three communities in addition to Gulf Shores for which it wished to propose: Lillian, Elberta, and Foley, AL. The contracting officer has identified five solicitations involving those communities; an advertised solicitation for service in Lillian issued April 15 and for which bids were due May 24, and emergency solicitations for service in Gulf Shores issued June 9 and in Foley and Elberta each issued June 7. Written offers on the emergency solicitations were due June 20.

We find no merit in Gentry's protest with respect to the Lillian solicitation, since that solicitation was issued and bids were received well prior to Ms. Gentry's request for solicitations. Accordingly, the remainder of this decision deals only with the emergency solicitations.

⁵ The contract specialist makes a distinction between ordinary solicitations, in which prospective contractors who have indicated an interest in solicitations within a specific area receive notice of the availability of a solicitation and may request it, and emergency solicitations, for which the DNO furnishes copies of the solicitation to specific offerors.

According to the statement, the contract specialist understood Ms. Gentry's inquiry to relate only to the former procedure, and not to the latter. The contract specialist was responsible for establishing a list of prospective offerors for the replacement service in Gulf Shores. It was not his intention to include Gentry among those offerors, and he did not volunteer to furnish Gentry copies of those solicitations.

The contracting officer asserts that the Mail Transportation Procurement Handbook provides for the solicitation of emergency service either orally or in writing from at least three potential contractors, and notes that time is of the essence in such awards. Accordingly, the contracting officer believes it "implicit" in the emergency contracting procedures that he "solicit . . . offers [only] from responsible offerors. . . . In this instance, given Mr. Gentry's unacceptable . . . behavior toward . . . Postal employees, I would not have found Gentry to be a responsible offeror."

The protester has not responded to the contracting officer's statement.

DISCUSSION

Procurement Manual (PM) 12.4.4 and 12.4.5 provide generally for the maintenance of solicitation mailing lists and the publicizing of solicitations by notice to individuals on the mailing lists and by posting. The following portions of those sections are relevant here:

12.4.4 Solicitation Mailing Lists

- a. **Establishing Lists.** The contracting officer must establish a list of potential offerors for each solicitation. . . .

12.4.5 Publicizing and Distribution of Solicitations

- a. **General.** Solicitations for competitive procurements must be distributed and publicized in accordance with the requirements of this part 12.4.5. . . .
- b. **Solicitation Notice.** A solicitation notice must be issued for each solicitation, and must be posted in accordance with paragraph d below. The solicitation notice must describe the service and equipment requirements, summarize applicable qualification requirements, state the date and time set for receipt of bids or proposals, and tell how to obtain the complete solicitation package.

* * *

- d. **Posting.**

1. A solicitation notice must be posted for a minimum of 30 days before the date for receipt of bids or proposals unless precluded by urgency. In case of urgency, the notice must be posted for a minimum of 15 days

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- e. **Distribution.** The contracting officer must mail the solicitation, or a solicitation notice, to all potential bidders or offerors on the solicitation mailing list. . . . The complete solicitation package must be mailed to (1) any incumbent contractor, whether that contractor is performing on a regular, temporary, or emergency contract; . . . (3) those requesting the solicitation in response to a notice of availability. For treatment of concerns that are debarred, suspended, or ineligible, see 3.3.2 d.^[6]

⁶ PM 3.3.2 d.2. provides, in part, that "[c]ontracting officers may not solicit proposals or quotations from

These provisions apply equally to advertised and negotiated contracts as shown by the use of terms such as "bids" and "proposals" in the alternative. They provide for an exception for urgency only with respect to posting, allowing a limitation on posting to fifteen days. Emergency contracts are "awarded through competition and negotiation" or noncompetitive negotiation. PM 12.4.6 b.4. Accordingly, the Procurement Manual requires that competitive emergency contract solicitations be posted, and that copies of the solicitations be furnished to the incumbent contractor and to anyone requesting the solicitation.

The contracting officer's reliance on the Mail Transportation Procurement Handbook to the contrary is misplaced. While MTPH 6.2.1 A. provides for oral or written solicitation and directs contracting personnel to "[c]ontact as many prospective offerors as possible to encourage competition" before it notes that "[c]ircumstances permitting, you should solicit proposals from a *minimum* of three offerors" (emphasis in original), it does not purport to alter or amend the requirements of PM 12.4.5 and 12.4.6.⁷

Kessler, supra, involved the contracting officer's failure to solicit an incumbent contractor with respect to replacement emergency service following the Postal Service's termination of Mr. Kessler's contract for convenience. The Postal Service and Mr. Kessler had failed to reach agreement on the terms of a contract modification which would have reduced both the time of a daily trip and Mr. Kessler's compensation. The contracting officer explained that during the negotiations prior to the termination for convenience, Mr. Kessler had expressed concern that he could not safely perform the proposed reduced schedule; accordingly, the contracting officer concluded that Mr. Kessler could not perform the same schedule set out in the emergency contract and declined to solicit him for the service. The decision noted that the contracting officer's conclusion was a determination that Mr. Kessler was not a responsible offeror for the replacement service, and that "it was premature and prejudicial to Mr. Kessler for the contracting officer to make that determination solely on the basis of the [previous] discussions," since Mr. Kessler might have changed his view once he understood the Postal Service's firm intention to solicit on the basis of the revised schedule.

Kessler distinguished its situation from one in which a defaulted contractor might properly [or] award contracts to" debarred or suspended contractors.

⁷ Nor could it. PM 12.1.1 b. notes that the MTPH provides "[p]rocedural guidance to implement and supplement" PM Chapter 12. And MTPH Transmittal Letter 2, February 1, 1990, notes:

The MTPH is intended as a companion volume to the Procurement Manual (PM). The PM contains policy guidance and a few mandatory procedures; the MTPH translates that guidance into practices applicable to transportation services procurement. . . . [Contracting officers and their staffs] should keep in mind the following points:

The PM and the MTPH go hand in hand. . . Both books must be consulted to fully understand any aspect of the procurement process.

A previous decision of this office, *Melvin R. Kessler*, P.S. Protest No. 90-36, October 23, 1990, reached the different conclusion that PM 12.4.5 e., requiring the solicitation of incumbent contractors for replacement service, applied to solicitations "for permanent highway transportation service," but did not apply to emergency service, citing MTPH 6.2.1. Upon further consideration, we believe this aspect of *Kessler* was decided incorrectly for the reasons set out herein.

be excluded from a reprocurement,⁸ and also noted that a previous decision, *Crist Trucking, Inc.*, P.S. Protest No. 76-12, May 11, 1976, had condoned a contracting officer's failure to solicit, for emergency service, an offeror whose "large number of irregularities on two currently operated routes caused [the contracting officer] to question the offeror's ability to provide the emergency service." *Kessler* described the "evidence before the contracting officer [in *Crist*]" as "far more substantive than the evanescent concerns available here." *Crist*, however, involved a case in which the then applicable procurement regulation, the Postal Contracting Manual (PCM), explicitly excepted solicitations for emergency service from the publicizing requirements applicable to other mail transportation contracts. That decision also noted the contracting officer's representation that the excluded offeror would be allowed to bid on the solicitation for permanent service which would follow the emergency service from which it was excluded. Given these distinctions from this case, *Crist* does not govern its result.

Accordingly, we conclude that the contracting officer erred in failing to solicit Gentry, the incumbent contractor, with respect to the replacement service in Gulf Shores. It is less clear whether Ms. Gentry's general request for other solicitations in the area was specific enough to require Gentry's solicitation for that service. In view of the relief we direct below, however, we need not resolve the matter.

The emergency service which was solicited was of short duration; we can perceive little benefit to the protester and substantial disruption to the Postal Service were we to direct the termination and resolicitation of that service. Instead, the protester may be afforded appropriate relief by our direction to the contracting officer to reinstate Gentry on the solicitation mailing lists maintained pursuant to PM 12.4.4; to solicit Gentry for subsequent emergency service sought within areas for which it expresses interest; and to post solicitation notices for all emergency service solicited within its service area as required by PM 12.4.5 d. or seek an appropriate deviation from the posting requirement in accordance with PM 1.4.

Gentry's eligibility for award with respect to any solicitation on which it otherwise is found to be the low responsive bidder or the most advantageous offeror will, of course, require an appropriate determination of its responsibility in that case. PM 3.3.1 a. Such determinations must be made case-by-case on the facts relevant to the individual solicitation.

The protest is sustained to the extent indicated.

William J. Jones
Senior Counsel
Contract Protests and Policies

⁸ Citing *Jack Yanks Construction Co.*, P.S. Protest No. 75-56. August 13, 1975.