

**February 24, 1995**

**P.S. Protest No. 94-48**

## **WEM, INC.**

### **Highway Contract Route Service, San Bernardino -- Los Angeles**

#### **DIGEST**

Protest against exclusion of emergency contractor from solicitation of bids from incumbents on existing highway contract routes to provide additional service on their routes is denied where protester does not fit the definition of incumbent and Procurement Manual regulation on limited competitive procedures was followed.

#### **DECISION**

WEM, Inc.,<sup>1</sup> protests its exclusion from competition for the right to provide service on a mail transportation contract operating between the San Bernardino Processing and Distribution Center (PDC) and the Los Angeles Bulk Mail Center (BMC) (hereinafter "the PDC - BMC route").

On June 7, 1994, the Pacific Area Distribution Networks Office (DNO) terminated for default HCR 92314, a contract for the PDC - BMC route held by John Moody. On June 17, the DNO awarded an emergency contract for service to replace the defaulted contract to WEM.

That contract provided that it would end no later than December 2. WEM also held (and continues to operate) a regular (non-emergency) contract on HCR 92355, San Bernardino to La Quinta, CA.

The contracting officer considered alternative ways to obtain permanent service to replace that provided by the defaulted contractor, including issuing a regular transportation solicitation and the use of "limited competitive procedures" to secure the service from

<sup>1</sup> WEM, Inc., is a corporation owned by Mr. Willie E. Magno. Mr. Magno holds the emergency contract which provides the basis for his protest in his own name, not in the name of his corporation. For the purposes of this protest, however, we will consider the corporation and its owner as identical, and will refer to the protester as WEM.

incumbents currently providing service on the PDC-BMC route.<sup>2</sup> The contracting officer chose the second approach. On October 7, he sent letters to Joe Garrett, Inc., and Yung Lee, the holders of regular PDC - BMC contracts HCR 92318 and HCR 90093, respectively, giving each of them the opportunity to submit sealed bids for additional service on their routes. The letters stated that the opportunity to bid on additional service was "[i]n accordance with U.S. Postal Service policy relative to allocation of additional service to incumbent contractors who can provide quality service." WEM was not invited to submit a bid.

Garrett submitted the lower bid for the additional service. The contracting officer agreed to a modification of its contract to include the solicited service effective December 1, but the required higher-level postal approval of the modification had not been received before WEM's protest of November 4 to the contracting officer. The protest complained that only two bids had been sought, "disregarding other contractors who may be interested, particularly [WEM], currently doing the run to the satisfaction of all postal staff concerned." The contracting officer orally advised WEM that no solicitation had been issued on which

<sup>2</sup> Procurement Manual (PM) 12.4.6 d. prescribes three procedures for the acquisition of mail transportation services: competitive procedures, noncompetitive procedures, and limited competitive procedures. PM 12.4.6 d.3. provides as follows:

**Limited Competitive Procedures.** With the approval of the next higher-level of authority, contracting officers may solicit sealed bids for additional service exclusively from contractors currently serving common termini, providing service to the same intermediate points, from contractors affected by Postal Service operational changes, or from transportation companies with special security clearances.

Prior to July 1, 1992, the predecessor to this provision, then at PM 12.4.6 a.4, provided:

**Limited Competitive Procedures.** Contracting officers may solicit sealed bids for additional service exclusively from contractors serving common termini or providing service to the same intermediate points. . . .

On June 3, 1992, the Office of Transportation & International Services issued Special Transportation Bulletin No. 03-92, to which was attached the "Incumbency Policy Statement," see footnote 4, and a deviation to the Procurement Manual authorized by the Assistant Postmaster General, Delivery, Distribution and Transportation Department, replacing the previous text of PM 12.4.6 a.4 with the following, effective July 1, 1992:

**Limited Competitive Procedures.** Contracting [o]fficers may solicit sealed bids for service exclusively from contractors currently serving common termini, providing service to the same intermediate points, or from contractors losing service due to Postal Service operation changes.

That deviation remained in effect until the PM was revised on June 30, 1993, and the current section 12.4.6 d.3. was adopted. The protester contends that the continued vitality of the deviation is of relevance to this protest. We disagree, since each version of the limited competitive procedure, even the original, allowed the restriction of competition to contractors serving common termini, the class of contractors to which the contracting officer limited the competition here.

WEM could bid. Before receiving a written disposition of its protest from the contracting officer, WEM submitted a protest to this office, where it was received on November 10.<sup>3</sup>

WEM protests the "noncompetitive" award of the route previously operated by the defaulted contractor and then by itself as an emergency contractor. The protest states that when WEM learned that the Postal Service solicited bids from the two incumbents, it sought to submit its own bid, but that the contracting officer refused it, citing the "incumbency policy" as applying only to existing non-emergency contracts serving the same termini.<sup>4</sup>

<sup>3</sup> The protester claims that it learned the basis for its protest "[o]n or about November 4." Since the contracting officer has not alleged that the protest is untimely, we consider it timely pursuant to PM 4.5.4 d. and PM 4.5.4 e. Because WEM's protest was filed before Garrett's contract modification was effective, WEM was awarded a new emergency contract for service pending the resolution of its protest.

<sup>4</sup> The July 1, 1992, Incumbency Policy Statement addressed "the allocation of additional service and newly structured service to current Postal Service highway transportation contractors." It was "intended to promote the fair and orderly procurement of newly structured service and confers no legally enforceable rights upon the contractors." The Overview to the policy statement stated, in part, that "[t]his policy statement does not apply to Box Delivery contracts, *emergency contracts* or contracts which have a non-postal facility as a terminus." [Emphasis added.]

The policy statement contained definitions, including:

-- "Additional Service": additional trips of scheduled service or service to additional facilities.

-- "Incumbent Contract":

[A]ny local contract which serves the exact same street addresses as termini with the same equipment type as the additional service being considered or any remote contract which serves the same metro area termini with the same equipment type as the additional service being considered.

The policy statement also contained the following general rules:

-- 2.1 "The holder of [an] incumbent contract **MUST** be offered any additional service which serves the **IDENTICALLY SAME** [sic] . . . **TERMINI** with the **SAME EQUIPMENT TYPE** as [is] currently served by the incumbent contract . . . .

-- 2.4 "If more than one contract can be considered incumbent, the contracting officer must determine which of the contracts best satisfies the requirements of the additional services. . . . If the contracting officer is able to determine that one incumbent contract best satisfies the requirements of the additional service, the contracting officer must add the additional service to that contract, if the negotiated price is competitive."

[Emphases in original.] Further, if two or more incumbent contractors equally satisfy the requirements, "all candidate incumbent contractors will be allowed to submit a sealed bid for the additional service." The service "will be added to the contractor who submits the most competitively priced bid."

The protest argues that fulfilling the requirements through the existing contracts rather than through full competition is improper in this case because:

- "The Route is . . . sufficiently large to support a great deal of contractor interest and to be performed efficiently under a separate contract."
- The route "historically has been procured by the Postal Service as a separate contract rather than a portion of another contract. . . . Simply giving the Route to [another contractor on an existing route] at the expiration of WEM's emergency contract violates USPS's obligation to seek competition for such work."
- Refusing to let WEM submit a bid and giving the route to another incumbent contractor "without competition" violates PM 1.7.1 a., requiring "adequate competition whenever feasible," and 12.1.1, which applies the principle to transportation procurements.
- The Mail Transportation Procurement Handbook (MTPH) requires that a solicitation be issued when emergency contracts are to be replaced by permanent highway contracts. MTPH 2.2.2.A.
- "Noncompetitive awards are not permitted unless justified in writing and approved in accordance with Management Instruction AS-710-92-1, 'Noncompetitive Procurements'," citing PM 12.4.6 d.2. "Upon information and belief, such approval was not obtained. Assuming *arguendo* that such approval was obtained, it could not have been rationally justified under the circumstances of this case."
- Limited competitive procedures "would apply only if USPS were procuring 'additional service,' not re-procuring service [on] an existing route," citing PM 12.4.6 d.3. Even under limited competitive procedures WEM should have been permitted to submit a bid because it was an incumbent under the PM's definition.
- The route is also "beyond the scope of work contemplated under Garrett's contract. Giving the Route to Garrett would thus constitute a cardinal change to Garrett's contract," citing PM 12.4.12 c.2.

In his statement in response to the protest, the contracting officer asserts that the incumbency policy did not apply to WEM in this case because the incumbency policy "explicitly states that [it] does not apply to emergency contracts. That is why the Protestor's emergency contract was not considered as a basis for including the Protestor as a bidder under the policy." See footnote 4. The contracting officer asserts that contrary to the protester's contention, limited competitive procedures were applicable in this case precisely because his intent was to procure additional service on an existing route. He asks that the protest be denied.

In reply to the contracting officer's statement, the protester reiterates its argument that limited competitive procedures under PM 12.4.6 d.3 are inapplicable to the "re-procurement" of this route, but that if they were, the rightful incumbent would be WEM. The

protester argues if the incumbency policy currently is viable,<sup>5</sup> then emergency contractors may be considered incumbents under the policy:

The policy states that *the policy itself* does not apply to "emergency contracts. . . ." Thus, "emergency contracts" cannot be awarded on the basis of this policy. But the policy does not exclude emergency contractors from being considered incumbents for purposes of the policy.

[Emphasis in original.] The protester asserts that it is reversible error for a contracting officer to fail to solicit an incumbent highway contractor, citing *Richard C. Gentry, Inc.*, P.S. Protest No. 94-33, October 31, 1994, which applied to the solicitation of an emergency contract. The protester concludes that "[i]f the procurement of an emergency highway contract requires the incumbent contractor to be included, then certainly the procurement of a less-urgent regular contract requires the incumbent contractor to be included as well." Finally, the protester states that it does not understand why the contracting officer's decision could be in the best interests of the Postal Service when WEM is operating the emergency contract at a lower rate than Garrett would perform the additional service under its existing contract.

In rebuttal, the contracting officer asserts that the protester's emergency contract did not qualify it for the incumbency policy because "one cannot amend a[n] emergency contract to include a service change that does not represent an emergency," citing 12.4.6 b.4.<sup>6</sup> The contracting officer argues that since "no emergency existed" as the protester's emergency contract expiration date neared, "it was determined that it was not necessary to extend the emergency service. Garrett and Lee were the only contractors who had existing non-emergency contracts that met the requirements of 12.4.6 d.3 . . . ."

The contracting officer states that the *Gentry* decision is distinguishable from the present case because *Gentry's* protest was sustained due to the contracting officer's failure to comply with the PM provisions relating to emergency contract solicitations, which are not at issue here.

A protest conference was held on January 12, after which the protester made its final submission, which restates its position as set out above and emphasizes the following points:

-- In an internal memorandum of September 8, WEM had been considered an incumbent along with Garrett and Lee; however, when the October 7 letters went

<sup>5</sup> The protester asserts that the incumbency policy has expired, because the special transportation bulletin transmitting the policy states that it will "remain in effect . . . until the Procurement Manual is permanently revised" on June 30, 1993. The protester misreads the bulletin, which clearly provided that it was the deviation to PM 12.4.6, attached to the bulletin, which would remain in effect until the Procurement Manual was revised, not the incumbency policy, also attached.

<sup>6</sup> Also, PM 12.4.12 f. states: "The service and rate of compensation under emergency contracts may not be changed unless specifically authorized in the contract or by the next-higher level of contracting authority."

out, only Garrett's and Lee's bids were solicited.

-- "Adding the Route to Garrett's contract would increase Garrett's annual mileage from 246,512.16 to 848,250.97--an increase of 344 percent."

The protester asserts that the contracting officer's reliance on the incumbency policy is misplaced because:

-- Since the incumbency policy was "neither a deviation to the Procurement Manual, nor a part of the Procurement Manual, it cannot serve as an exemption to the general policy of adequate competition mandated by PM 1.7.1.a. Only another PM provision can alter the general policies set out in the PM."

-- The "re-procurement" did not supply "additional service" within the meaning of that term because it was in fact "the wholesale re-procurement of a pre-existing, stand-alone Route" -- one that is "more than three times the size of the contract to which the Contracting Officer seeks to add it. The definition of 'additional service' in the Incumbency Policy is not reasonably susceptible of being read as permitting the allocation of a large pre-existing, competitively procured route to a much smaller route."

WEM argues that the contracting officer cannot rely on the limited competitive procedures of PM 12.4.6 d.3 to justify his actions when his statement "makes clear that he relied solely upon the Incumbency Policy. . . ." The protester admits that the incumbency policy "does not confer legally enforceable rights upon contractors," but argues that this office still has jurisdiction to determine whether the policy "has been properly applied" and should be "wary of embracing alternative interpretations of the PM that restrict competition, particularly when no gainful purpose is served thereby."

WEM further contends that an independent justification for full competition in this case is that the procurement "exceeds the scope of Garrett's contract" because of the extent to which it increases it, citing decisions of the Comptroller General<sup>7</sup> for the proposition that a contract modification improperly exceeds the scope of the contract when "the contract as modified is materially different from the original contract for which the competition was held." WEM lists as determinative of material difference "the extent of any changes in the type of work, performance period, and costs between the contract as awarded and as modified, as well as whether the potential bidders reasonably would have anticipated the modification," citing *Neil R. Gross*, footnote 7, *supra*.

Here, WEM asserts that in addition to the increase in mileage and dollar value, Garrett's contract now has additional vehicle requirements and an intermediate terminus. WEM contends that the PM also was violated because the properly authorized individual did not approve a major service change for Garrett's contract.<sup>8</sup>

<sup>7</sup> *Stoehner Security Services, Inc.*, Comp. Gen. Dec. B-248077.3, October 27, 1992, 92-2 CPD 285; and *Neil R. Gross & Company, Inc.*, Comp. Gen. Dec. B-237434, February 23, 1990, 90-1 CPD 212.

<sup>8</sup> WEM contends that the contracting officer never received the proper higher level approval for using

WEM concludes that PM 12.4.12 c.(3) was violated because the contracting officer did not sufficiently consider "factors that would indicate the proper course of action to take in the best interests of the Postal Service," including that the "route historically has been served as a separate contract, and because there was competitive interest in the Route." WEM requests that a regular solicitation be issued, and that it be allowed to compete for this award "along with any other prospective bidders."

## DISCUSSION

The protester argues in the alternative that the contracting officer improperly relied on an expired and inappropriate incumbency policy, but if the policy were held to be applicable, then WEM should have been the rightful incumbent on the PDC - BMC route. WEM also contends that PM 12.4.6 d.3. does not apply to the circumstances of this case and that there should have been a full and open competition. We address these arguments in turn.

The incumbency policy attached to the June 1992 Special Transportation Bulletin did not expire when the PM was revised in June 1993. Footnote 5, *supra*. The incumbency policy was intended to be used together with PM 12.4.6 d.3., and, contrary to the protester's assertion, the contracting officer's reliance on both in this case was proper. The guidance set out in the incumbency policy is supplementary to and consistent with the PM's guidance for limited competitive procedures.<sup>9</sup>

We lack jurisdiction to review the decision made by the contracting officer to use limited competitive procedures involving modifications to existing contracts instead of issuing a regular solicitation. Modification of contracts is a matter of contract administration, which our protest jurisdiction does not cover.<sup>10</sup> See *Sodrel Truck Lines, Inc.; Dennis Truck Line*

limited competitive procedures. It asserts that the national manager of mail transportation purchasing did not sign the approval; rather, a subordinate in his office signed for him. "There is nothing in the record that shows that this authority is delegable, or that it had been delegated."

The record shows that the request to add service and make a major service change to Joe Garrett, Inc.'s contract was dated November 3, and was approved November 7. Although a subordinate to the national manager signed the authorization, she stated that she was signing "for" him. It is routine for a subordinate to sign letters when the principal is unavailable, and there exists no blanket prohibition against it. In any event, we are not persuaded that the lack of the national manager's signature on the approval dated November 7 confers any rights on this protester.

<sup>9</sup> MTPH 2.2.2.A., cited by the protester, also is consistent with the PM and does not negate the incumbency policy. It applies to situations--unlike this case--in which a regular transportation solicitation will be issued.

<sup>10</sup> While there is an exception when a modification is challenged as outside the scope of the existing contract, *M.L. Hatcher Pickup and Delivery Service, Inc.*, P.S. Protest No. 77-25, July 29, 1977, this exception does not apply here because, as discussed *infra*, the PM permits the types of modifications made in this case. See also, *COR, Inc.*, P.S. Protest No. 90-16, June 22, 1990; *Air Transport Association of America*, P.S. Protest No. 90-02, March 23, 1990.

*Co. of Ohio*, P.S. Protest Nos. 92-01; 92-03, February 26, 1992. To the extent that WEM protests the election of those procedures its protest must be dismissed. *Id.* However, the protester is correct that we are authorized to examine the record to determine whether limited competitive procedures (including the incumbency policy) were properly followed in this case. We find that they were.

WEM cannot be an "incumbent" within the meaning of the incumbency policy because its PDC - BMC route existed only as an emergency contract.<sup>11</sup> Since the contracting officer decided to issue contract modifications in this case rather than to award a new contract, and emergency contracts may not be modified, PM 12.4.12 f., WEM could not be considered for those modifications.

The protester's other arguments also fail. The PM does not state that transportation services which previously had been the subject of a regular contract route cannot now be the subject of a modification to another existing contract under PM 12.4.6 d.3. Further, the PM does not limit the amount of additional service to be added to a contract in miles, compensation or equipment; and PM 12.4.12 c.1.(c)(3) specifically authorizes major service changes through contract modification. Although the Comptroller General decisions cited by the protester (footnote 7) involved cases in which contract modifications exceeded the scope of original contracts, and the protesters had standing because the remedy was a new procurement for which they could propose, those decisions are not applicable here because unlike the Postal Service, the agencies involved had neither justification nor applicable procedures for limited competition.<sup>12</sup> The record provides no basis to overrule the use of limited competition or the incumbency policy in this case.

The protest is dismissed in part and denied in part.

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Contract Protests and Policies

<sup>11</sup> The contracting officer's initial mistake in including WEM among the incumbent contractors on the route in a September 8 internal memorandum confers no rights on the protester.

<sup>12</sup> The *Gentry* decision is also inapposite. Its facts did not involve either the incumbency policy or PM 12.4.6 d.3. The decision held, instead, that since emergency contracts are awarded through negotiation, PM 12.4.6 b.4., the PM "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." *Id.*