

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Competitive Product Prices
Priority Mail
Priority Mail Contract 17

Docket No. MC2009-37

Competitive Product Prices
Priority Mail Contract 17 (MC2009-37)
Negotiated Service Agreement

Docket No. CP2009-56

PUBLIC REPRESENTATIVE COMMENTS IN RESPONSE
TO UNITED STATES POSTAL SERVICE REQUEST TO ADD
PRIORITY MAIL CONTRACT 17 TO COMPETITIVE PRODUCT LIST

(August 7, 2009)

In response to Order No. 261,¹ the Public Representative hereby comments on the July 24 Request of the United States Postal Service to add Express Mail & Priority Mail Contract 17 to the Competitive Product List (Request).

The instant Request comports with title 39 stipulations and the relevant Commission Rules of Practice and Procedure. It appears, therefore to be beneficial to the general public. (*But see infra*, 5-6)

Discussion

The Public Representative has accessed and reviewed all materials the United States Postal Service submitted under seal in this matter, documentation in its original

¹ Notice and Order Concerning Priority Mail Contract 17 Negotiated Service Agreement, July 29, 2009.

(not redacted) version. The Request (and its accompanying documentation) is persuasive. Each element of 39 USC 3633(a) appears to be met by Priority Contract 17 and its Request. The Postal Service's justification of this contract under the umbrella of Governors' Decision 09-6 (filed in Docket No. MC2009-25) comports with the requirements of 39 USC 3632(b)(3).

For a competitive products pricing schedule *not of general applicability*,² the Postal Service must demonstrate that the contract will comply with 39 USC 3633(a): It will not allow market dominant products to subsidize competitive products, it will ensure that each competitive product covers its attributable costs; and enable competitive products as a whole to cover their costs (contributing a minimum of 5.5 percent to the Postal Service's total institutional costs). In the Governors' April 27, 2009 Decision 09-6 (a redacted copy, and certification of the vote, was supplied in Docket No. MC29009-25, as Attachment A, on May 19 with the Request of the United States Postal Service to Add Priority Mail Contract Group to Competitive Product List) (at 2), the Governors assert that these conditions are met. Furthermore, the Governors' approval of the pricing shell outlined in that Decision, while arguable broad, does comport with section 3642 stipulations regarding new products. Features such as packaging supplies for the contract partner and/or postage payments tailored for the most efficient transactions between the Postal Service and the contract partner arguably militate for consideration as a "new" product, as much as negotiated pricing that, while falling within the rubric of Governors' Decision 09-6 and Docket No. MC2009-25, is distinguishable from other,

² See 39 CFR 3015.5-7.

previously-approved, Priority Mail contracts which have been enabled by Governors' Decision 09-6.

Accountability and Confidentiality

The Postal Service Request contains a rationale for maintaining confidentiality concerning pricing, processes which enable discounted pricing, the attendant formulae and other contractual terms which are matters of commercial sensitivity.³ Here, it would appear that the Postal Service has concisely justified the extent of confidentiality appropriate in this matter, providing a brief explanation for maintaining the confidentiality of each aspect of the matters remaining under seal. It appears that the Postal Service has made a good faith effort to supply enough pertinent details to demonstrate the need for material under seal to be protected.

However, with the confidentiality afforded the Postal Service Requests filed under seal, it is important to provide the general public with the courtesy of transparency to the greatest extent possible. To comply with Order No. 247 in Docket[s] MC2009-30 and CP2009-40,⁴ the Postal Service should include with its filing a redacted copy of the Governors' Decision and certification. Locating the redacted version in another docket may raise an unnecessary hurdle for the layperson. This need not be an onerous task for the Postal Service; when filing multiple sequential negotiated service agreement (NSA) notices, each relying on the same Governors' Decision for ratemaking authority,

³ Postal Service Request, at 2-3.

⁴ Order Concerning Priority Mail Contract 14 Negotiated Service Agreement, July 14, 2009, at 6.

inclusion of the Governors' Decision in the first, and clear reference to the recent "lead" Notice, in each subsequent filing might meet the spirit of the Commission's instruction that each docket should be self-contained. The instant NSA appears to be the third of three filed July 24, 2009 – all relying on Governors' Decision 09-6 for support. The Postal Service's legitimate commercial interests in keeping contract data confidential can thereby be balanced with the general public's right to review rates, classifications and operating practices of the Postal Service.

The Public Representative respectfully notes that in Attachment C, Statement of Supporting Justification, the Postal Service official sponsors the Request referring to "Priority Mail Contract 14". No doubt this was merely a typographical or filing error, but this discrepancy should be explained or corrected before the Commission accepts the Statement of Supporting Justification.

The Agreement

The agreement features a number of provisions that are mutually beneficial to the parties, and beneficial to the general public. Components of this three-year contract which suggest positive results:

- Prices are set to increase for the second and third years of the contract, based on the increases of prices of general applicability.
- The contract partner is a high- volume mailer entering mailpieces provided for the customer by the Postal Service.
- The contract partner agrees to manifest eligible pieces under separate permit number and use the Electronic Verification System.

The pricing formula approved in Governors' Decision 09-6 should assure that there is no subsidization of this Priority Mail negotiated service agreement by market dominant products.

While this is a three-year contract, with prices established for the first year and pricing formulae for the next two years, Term III, "Expiration Date," provides that either party may terminate the contract "with 30 days notice to the other Party in writing". Although that term is present in a number of already-approved NSAs, It would seem that such a loose escape clause renders the duration term of such contracts ineffective. When contemplating changes to the Mail Classification Schedule, 30 days certitude is such a tenuous gauge to justify classification of any individual product. While both parties have agreed to this term, it is not clear that such an agreement – or term for an agreement – is in the best interests of the general public. It is true that, for any competitive products pricing schedule *not of general applicability*, pricing data would not be available to the general public. However, this Public Representative has noted in many reviews that increased volumes, or standardized packaging (frequently noted in NSA considerations) provide a benefit for the general public because these factors increase the efficiency of the Postal Service. Similarly, inefficiencies hurt the Postal Service, and thereby the general public. The imprecision of contracts which appear to have substantial duration, but at any given point in their lifetime only afford a 30-day-certain period for reliance, performance and enforcement, call in question their utility. Absent further information, the Public Representative must ask whether such NSAs are efficient. If not, the agreements are not in the public interest. If the Postal Service and its mailing partners would enter agreements with indeterminate terms, the Postal

Service must justify to the Commission and educate the public why 30-day escape clauses are a component in any of their NSAs. If this is an “industry practice,” how does it serve the general public’s interest in efficiency, and affordable and predictable rates? Despite any reservations about Priority Mail Contract 17’s terms, it does appear lawful.

Conclusion

The Public Representative submits that the present Priority Mail Contract 17 agreement complies with title 39. The costing data submitted by the Postal Service indicates that it will not allow market dominant products to subsidize competitive products; it will ensure that each competitive product covers its attributable costs; and enable competitive products as a whole to cover their costs (contributing a minimum of 5.5 percent to the Postal Service’s total institutional costs). The Postal Service request also fulfills all relevant requirements for Commission Rules of Practice and Procedure.

The Public Representative respectfully offers the preceding Comments for the Commission’s consideration.

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