

ORDER NO. 6401

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Michael Kubayanda, Chairman;
Mark Acton, Vice Chairman;
Ann C. Fisher;
Ashley E. Poling; and
Robert G. Taub

Competitive Product Prices
Parcel Select Contracts
Parcel Select Contract 56

Docket No. MC2023-93

Competitive Product Prices
Parcel Select Contract 56 (MC2023-93)
Negotiated Service Agreements

Docket No. CP2023-94

ORDER ADDING PARCEL SELECT CONTRACT 56
TO THE COMPETITIVE PRODUCT LIST AND PROVIDING GUIDANCE

(Issued January 11, 2023)

I. INTRODUCTION

The Postal Service seeks to add a new product identified as Parcel Select Contract 56 to the competitive product list.¹ For the reasons discussed below, the Commission approves the Request, and provides guidance on the narrow scope of contract language permitting future operational changes.

¹ USPS Request to Add Parcel Select Contract 56 to Competitive Product List and Notice of Filing Materials Under Seal, December 14, 2022 (Request).

II. BACKGROUND

On December 14, 2022, in accordance with 39 U.S.C. § 3642 and 39 C.F.R. §§ 3020.30-.35,² the Postal Service filed the Request, along with supporting documents. In the Request, the Postal Service asserts that Parcel Select Contract 56 is a competitive product that establishes rates “not of general applicability” within the meaning of 39 U.S.C. § 3632(b)(3). Request at 1. Among the supporting documents, the Postal Service included a copy of the Governors’ Decision authorizing the product, a contract related to the proposed new product, requested changes to the competitive product list, a statement supporting the Request, a certification of compliance with 39 U.S.C. § 3633(a), and financial workpapers. In addition, the Postal Service submitted an application for non-public treatment of materials requesting that unredacted portions of the Governors’ Decision and the contract, customer-identifying information, and related financial information remain under seal. *Id.* Attachment F.

The contract is intended to take effect three business days after the date that the Commission issues all necessary regulatory approval. Request, Attachment B at 11. It is set to expire March 31, 2026. *Id.* at 11-12.

On December 15, 2022, the Commission issued a notice establishing the two dockets, appointing a Public Representative, and providing interested persons with an opportunity to comment.³

On December 23, 2022, Chairman’s Information Request No. 1 was issued.⁴ CHIR No. 1 asked the Postal Service to address the cost and revenue implications of a contract provision that states that the parties will mutually agree on operational

² The regulations cited by the Postal Service have been reorganized, and are now found at 39 C.F.R. §§ 3040.130-135. See Docket No. RM2019-13, Order Reorganizing Commission Regulations and Amending Rules of Practice, January 16, 2020 (Order No. 5407) (effective April 20, 2020). The Postal Service should cite to the reorganized regulations in future filings before the Commission.

³ See Docket No. MC2023-90, *et al.*, Notice Initiating Docket(s) for Recent Postal Service Negotiated Service Agreement Filings, December 15, 2022.

⁴ Chairman’s Information Request No. 1 and Notice of Filing Under Seal, December 23, 2022 (CHIR No. 1).

procedures and service level commitments. CHIR No. 1, question 1. CHIR No. 1 also asked the Postal Service to describe the source of certain data used in the financial workpapers. CHIR No. 1, question 2. The Postal Service filed its response on January 3, 2023.⁵ The Postal Service stated that many of the operational procedures referred to by the identified contract provision are consistent with existing product standards and that it expects no material impact on costs, and that there will be no impact on revenue. Response to CHIR No. 1, question 1. The Postal Service also described the source of the indicated data in the financial workpapers. *Id.* question 2.

III. COMMENTS

The Public Representative filed comments on December 21, 2022.⁶ No other interested person filed comments. The Public Representative concludes that the contract meets the requirements to be classified as a new competitive product, and that the contract should generate sufficient revenues to cover costs during its first year. PR Comments at 2. He notes that the contract has a mechanism for the adjustment of contract prices in the second and third year. *Id.* at 3. He also notes that the Commission will have an opportunity to annually review the financial results of the contract for compliance with 39 U.S.C. § 3633(a). *Id.*

IV. COMMISSION ANALYSIS

The Commission has reviewed the Request, the contract, the supporting data filed under seal, the response to the request for supplemental information in CHIR No. 1, and the Public Representative's comments.

⁵ USPS Response to Chairman's Information Request No. 1 with Portions Filed Under Seal, January 3, 2023 (Response to CHIR No. 1).

⁶ Public Representative Comments on Postal Service Request to Add Parcel Select Contract 56 to the Competitive Product List, December 21, 2022 (PR Comments).

Product list requirements. The Commission's statutory responsibilities when evaluating the Request include assigning Parcel Select Contract 56 to either the market dominant or competitive product list. See 39 U.S.C. § 3642(b)(1); 39 C.F.R. § 3040.134. Before adding a product to the competitive product list, the Commission must determine that the Postal Service does not exercise sufficient market power that it can effectively set the price of the product substantially above costs, raise prices significantly, decrease quality, or decrease output, without the risk of losing a significant level of business to other firms offering similar products. See 39 U.S.C. § 3642(b)(1). In addition, the Commission must consider the availability and nature of private sector enterprises engaged in delivering the product, the views of those who use the product, and the likely impact on small business concerns. See 39 U.S.C. § 3642(b)(3); 39 C.F.R. §§ 3040.132(f), (g), and (h).

The Postal Service asserts that it provides postal services of the kind provided under the contract in a highly competitive market, that other shippers who provide similar services constrain its bargaining position, and that it can therefore neither raise prices nor decrease service, quality, or output without risking the loss of business to competitors. Request, Attachment D at 2. The Postal Service states that the contract partner supports the Request, that expedited shipping is widely available from private firms, and that the Postal Service is unaware of any small business concerns that could offer comparable services to the contract partner. *Id.* at 3.

The Commission finds that the Postal Service does not exercise sufficient market power that it can effectively set the price of the proposed product substantially above costs, raise prices significantly, decrease quality, or decrease output, without the risk of losing a significant level of business to other firms offering similar products. The availability of other private sector providers supports this conclusion. The contract partner and the Public Representative support the addition of the Parcel Select Contract 56 product to the competitive product list. Further, there is no evidence of an adverse impact on small businesses. For these reasons, having considered the relevant

statutory and regulatory requirements,⁷ the comments filed, and the Postal Service's supporting justification, the Commission finds that Parcel Select Contract 56 is appropriately classified as competitive and is added to the competitive product list.

Cost considerations. Because the Commission finds Parcel Select Contract 56 is a competitive product, the Postal Service must also show that the contract covers its attributable costs, does not cause market dominant products to subsidize competitive products as a whole, and contributes to the Postal Service's institutional costs. 39 U.S.C. § 3633(a); 39 C.F.R. §§ 3035.105 and 3035.107. As long as the revenue generated by the contract exceeds its attributable costs, the contract is unlikely to reduce the contribution of competitive products as a whole or to adversely affect the ability of competitive products as a whole to contribute an appropriate share of institutional costs. In other words, if the contract covers its attributable costs, it is likely to comply with 39 U.S.C. § 3633(a).

Based on a review of the record, the Commission finds that the rates during the first year of the contract should cover the contract's attributable costs. 39 U.S.C. § 3633(a)(2). The contract contains a price adjustment provision that adjusts contract rates during subsequent contract years. Request, Attachment B at 8. Combined with sufficiently high first-year cost coverage, the contract's price adjustments will help ensure that the contract will cover attributable costs in subsequent contract years. For these reasons, the Commission also finds that the contract should not result in competitive products as a whole being subsidized by market dominant products, in accordance with 39 U.S.C. § 3633(a)(1). Similarly, the Commission finds the contract is unlikely to prevent competitive products as a whole from contributing an appropriate

⁷ 39 C.F.R. § 3040.132(a) requires the Postal Service to "[e]xplain the reason for initiating the docket and explain why the change is not inconsistent with the applicable requirements of this part and any applicable Commission directives and orders[.]" 39 C.F.R. § 3040.132(a). The Postal Service incorrectly recites the applicable requirements (as reorganized) by asserting that the Postal Service is required to "[d]emonstrate why the change is in accordance with the policies and applicable criteria of the Act." Request, Attachment D at 1. Nevertheless, the Commission finds that the information provided by the Postal Service contains the information required by 39 C.F.R. § 3040.132(a).

share of institutional costs, consistent with 39 U.S.C. § 3633(a)(3). See also 39 C.F.R. § 3035.107(c). Accordingly, a preliminary review of the contract indicates it is consistent with section 3633(a).

The Commission will review the contract's cost coverage and the contribution of competitive products as a whole to the Postal Service's institutional costs in the Commission's Annual Compliance Determination (ACD) to ensure that they continue to comply with 39 U.S.C. § 3633(a).

Commission guidance. Although the Commission has determined above that the contract, as filed, should cover its attributable costs, the Commission is concerned that new, open-ended contract language ostensibly permits the Postal Service and the contract partner to subsequently agree to different operational procedures that could potentially have different costs. See Request, Attachment B at 11; CHIR No. 1, question 1. That language states:

The Parties will endeavor to mutually agree to operational procedures and service level commitments as it pertains to Parcel Select packages. Such procedures are intended to be documented in an agreement between the Parties.

Request, Attachment B at 11.

The Postal Service explained that subsequent agreements under this provision “are intended to promote an efficient partnership by clearly defining operational expectations....” Response to CHIR No. 1, question 1.b. The Postal Service further explained that no material deviations from the national average costs for Parcel Select should be expected. *Id.* From this explanation, the Commission infers that the contract language in question is intended to commit the Postal Service and the contract partner to memorializing changes to operational procedures consistent with other Parcel Select negotiated service agreements.

Therefore, the Commission will construe this contract language—and similar contract language in other contracts—as narrow in scope. In keeping with its

representations to the Commission, the Postal Service shall not interpret such language as permitting any departures from the product standards for referenced products that would cause material deviations from the national average cost. Any changes to operational procedures that may cause such material deviations must be specified explicitly in negotiated service agreements and accounted for in the accompanying financial workpapers.

The Commission will, as necessary, review the operational changes made under such language in future ACDs to ensure that the scope of such changes conforms to the Postal Service's representations.

Other considerations. By its terms, the contract becomes effective three business days after the date that the Commission issues all necessary regulatory approval. Request, Attachment B at 11. The contract is scheduled to expire March 31, 2026, unless, among other things, either party terminates the contract with 30 days' written notice to the other party or it is renewed by mutual agreement.⁸

The contract also contains a provision that allows the parties to extend the contract for two 90-day periods if a successor agreement is being prepared and the Commission is notified at least seven days prior to the contract's expiration date. *Id.* at 12. During the extension periods, prices will be adjusted as described in the contract. *Id.* The Commission finds the two potential 90-day extension periods are reasonable because: (1) prices are automatically adjusted in the extension period and (2) the extension(s) should assist the Postal Service's contract negotiations by providing additional flexibility.

If the instant contract is terminated prior to the scheduled expiration date, the Postal Service shall promptly file notice of such termination with the Commission in these dockets.

⁸ *Id.* at 11-12. Should both parties agree to renew the contract, any such renewal is required to follow the requirements of 39 U.S.C. § 3633 and the Commission's implementing regulations of 39 C.F.R. part 3035.

In conclusion, the Commission approves Parcel Select Contract 56 as a new product. Revisions to the competitive product list and the Mail Classification Schedule appear below the signature of this Order and are effective immediately.

V. ORDERING PARAGRAPHS

It is ordered:

1. Parcel Select Contract 56 (MC2023-93 and CP2023-94) is added to the competitive product list as a new product under Negotiated Service Agreements, Domestic. Revisions to the competitive product list and the Mail Classification Schedule appear below the signature of this Order and are effective immediately.
2. The Postal Service shall promptly file notice of the instant contract's termination with the Commission in these dockets if the instant contract terminates prior to the scheduled expiration date.
3. The Secretary shall arrange for publication in the *Federal Register* of an updated product list reflecting the change made in this Order.

By the Commission.

Erica A. Barker
Secretary

CHANGE IN PRODUCT LIST

The following material represents changes to the product list codified in Appendix B to 39 C.F.R. part 3040, subpart A—Competitive Product List. These changes reflect the Commission’s order in Docket Nos. MC2023-93 and CP2023-94. The Commission uses two main conventions when making changes to the product list. New text is underlined. Deleted text is struck through.

Appendix B to Subpart A of Part 3040—Competitive Product List

Negotiated Service Agreements*

Domestic*

Parcel Select Contract 56

CHANGES TO THE MAIL CLASSIFICATION SCHEDULE

The following material represents a change to the Mail Classification Schedule. The Commission uses two main conventions when making changes to the Mail Classification Schedule. New text is underlined. Deleted text is struck through.

Part B—Competitive Products **2000 Competitive Product List**

Negotiated Service Agreements*

Domestic*

Parcel Select Contract 56

2500 **Negotiated Service Agreements**

2505 **Domestic**

2505.8 **Parcel Select Contracts**

- Parcel Select Contract 56

Baseline Reference

Docket Nos. MC2023-93 and CP2023-94

PRC Order No. 6401, January 11, 2023

Included Agreements

CP2023-94, expires March 31, 2026
