

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 1997

Docket No. R97-1

OPPOSITION OF UNITED STATES POSTAL SERVICE
TO UPS MOTION TO COMPEL PRODUCTION OF INFORMATION AND MATERIALS
REQUESTED IN INTERROGATORIES UPS/USPS-T33-1(c) and 2(a)-(c)
TO WITNESS SHARKEY
(August 22, 1997)

On August 15, 1997, the United Parcel Service, filed a motion to compel production of information and materials requested in interrogatories UPS/USPS-T33-1(c) and 2(a)-(c) to witness Sharkey. The material whose production is sought to be compelled is a copy of the complete PMPC network contract between the Postal Service and Emery Worldwide Airlines, as well as "all agreements, memoranda of understanding, correspondence, and other arrangements between the Postal Service and [Emery] specifying or establishing service to be performed by either party for the other, or the costs of such services," and "all documents which establish, set, state, or form the basis for determining the costs, both in the test year and, by year, in total, to the Postal Service of any of the services performed for or on behalf of the Postal Service under the [PMPC] contracts"

The Postal Service objected to these interrogatories on August 4, 1997 and August 7, 1997, on the grounds that the information requested contains confidential business information containing trade secrets of the Postal Service, and of its contractor, Emery Worldwide Airlines, that the procurement process could be compromised in the future if

confidential business information submitted in response to a request for proposals were subjected to disclosure in discovery, that the interrogatories were overbroad, that under the terms of the interrogatories a large number of documents which would need to be reviewed and copied or otherwise produced, and that the burden of producing all affected documents is not justified given the tangential relevance of some of the requested information to issues in this case.

Although UPS has somewhat narrowed its request in the Motion To Compel, the Postal Service maintains its objections to the remaining requests. The remaining requests are still broad, covering "all agreements, memoranda of understanding, correspondence, and other arrangements between the Postal Service and [Emery] specifying or establishing service to be performed by either party for the other, or the costs of such services," and "all documents which establish, set, state, or form the basis for determining the costs, both in the test year and, by year, in total, to the Postal Service of any of the services performed for or on behalf of the Postal Service under the [PMPC] contracts" To literally comply with this request, which goes far beyond the actual contract between the Postal Service and Emery, would require a time-consuming review of files containing a large number of documents related to the PMPC procurement, which are not at this point centrally located and easily accessible. It is estimated that to complete this review will take several days.

The primary concern of the Postal Service and its contractor, however, remains the commercial sensitivity of information sought to be produced pursuant to these interrogatories. Among other things, the requested material contains facility-specific information such as anticipated volume flows between origin and destination PMPCs, which could be used by competitors such as UPS to target its marketing efforts in competing with Priority Mail, and thus undermine the commercial interests of both the Postal Service

and its contractor. The material would also disclose information relating to Emery's internal air transportation and other costs, its overhead and profit rate, and Emery's proprietary methods of pricing, billing and responding to government solicitations. This clearly is information which no rational business entity would disclose to the public, let alone to competitors. To require the disclosure of such information would also have a chilling effect upon future outsourcing procurement efforts, should the Postal Service again seek to conduct similar procurements. Harm to the procurement process has been considered by the Commission to be a factor supporting non-disclosure of contractor proprietary information. See Docket No. MC83-2, Presiding Officer's Ruling on Postal Service's Objections to Interrogatories File by OOC (June 29, 1983).

Whether the burden of production and the risk of commercial harm is justified also involves an assessment of the relevance of the requested information in the context of the specific contract at hand.^{1/} The PMPC contract is a novel one, and presents unprecedented issues of relevance before the Commission. Since the PMPC portion of the Priority Mail network is outsourced, and the cost to the Postal Service under the contract relates solely to a limited number of distinct variables, such as service performance measures, and volume of mail handled, many aspects of the contract, and documents related to it, are not relevant to the Commission's inquiry, and should not be produced in any form when such production could risk damage to the legitimate commercial interests of the Postal Service and its contractor. For example, to the extent that the materials requested by UPS contain information regarding Emery's overhead, profit margins and overall profitability, such information may have been pertinent to Emery's

¹ UPS incorrectly asserts that the Postal Service did not address relevance in its objections. UPS Motion at 3. As noted above, however, the Postal Service did raise relevance concerns in the context of its objection to the burden of production.

bid for the PMPC contract, but such data clearly have no bearing on any issue before the Commission, because the risk of unprofitability is solely that of the contractor, and does not implicate the Postal Service or its ratepayers.

Similarly, any information in the requested documents pertaining to the costs incurred solely and directly by Emery under the contract, and not pertinent to the charges paid by the Postal Service, are also irrelevant, and the potential damage of disclosing Emery's cost structure is not justified by any compelling need on the part of the Postal Service's chief competitor in the parcel market. Furthermore, information relating to specific methods which Emery might choose to use to accomplish the end-to-end performance targets set out in its agreement with the Postal Service are of questionable relevance at this juncture.

In its Motion, UPS makes the bald assertion that Sections 5005(b)(3) and 410(b)(5)(B) of the Postal Reorganization Act require the production of the requested contractual material, and that the existence of these statutory provisions completely undermines the Postal Service's claims of confidentiality. UPS Motion at 6-7. To the contrary, the applicable federal law is not so sweeping, and does provide significant protection of proprietary, trade secret information such as that contained in the PMPC contract and related documents requested by UPS. For example, Postal Service employees can be exposed to criminal liability for failure to protect the confidentiality of commercial trade secrets under the Trade Secrets Act, 18 U.S.C. § 1905^{2/} Contractors have been able to block release of trade secrets by the Government when they are

² The Congress recently supplemented the criminal prohibitions against disclosure of trade secrets in the Economic Espionage Act of 1996, P.L. 104-294, which added a new Chapter 90 - Protection of Trade Secrets - to Title 18. Section 1832 of Title 18 now prohibits the unauthorized copying or communication of trade secrets, and provides for multiple sanctions, including fines of up to \$5,000,000.

requested under the Freedom of Information Act (FOIA) on the theory that the release of a trade secret would be an abuse of administrative discretion because such release is a crime under 18 U.S.C. § 1905. See, e.g., *Orion Research Inc. v. EPA*, 615 F.2d 551 (1st Cir. 1980) (barring release of winning technical proposal), and *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280 (D.C. Cir. 1983)(barring release of technical information submitted to the agency).

Consistent with such concerns regarding protection of trade secrets, Section (b)(4) of the FOIA exempts from mandatory disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). Likewise, the Postal Service’s FOIA regulations, at 39 CFR § 265.6(b)(2),(3) and (9), explicitly provide for nondisclosure of “trade secrets, or privileged or confidential commercial or financial information,” “[i]nformation of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed,” and “[o]ther matter specifically exempted from disclosure by statute.”⁹

The cursory appeals to the Postal Reorganization Act and to the “public interest” made by UPS clearly fail to adequately address the serious issues involved in protection of proprietary, trade secret information, both of the Postal Service and of its contractor, and the Motion to Compel should be denied. Notwithstanding its strong objections to these interrogatories, however, the Postal Service has collected and initially reviewed

³ Section 821 of the recently-enacted National Defense Authorization Act for Fiscal Year 1997, P.L. 104-201 (September 23, 1996), contains a new prohibition against disclosure by federal agencies of contractor proposals under FOIA, including technical, management or cost proposals, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal. The Postal Service expects to conform to the federal policy.

much information potentially falling within the scope of the remaining UPS interrogatories, and has attempted to determine which portions of that information, if any, can be produced without compromising the commercial interests of the Postal Service and its contractor, and which do not involve an undue burden of production. In this spirit of cooperation, the Postal Service shortly will file, as Library Reference H-235, a redacted version of the PMPC contract with Emery. It is hoped that this material will be sufficient to serve the purposes of the requesting party. The Postal Service therefore requests that any ruling on the motion to compel be deferred until such time as counsel for UPS has reviewed this library reference, made a determination regarding its adequacy, and consulted informally with undersigned counsel regarding any request for further disclosure.

In the event that UPS were to seek production of material beyond that produced in Library Reference H-235, the Postal Service maintains its objections, and insists that

any further information, if compelled to be produced, be produced only under rigid protective conditions designed to ensure its confidentiality^{4/}

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking



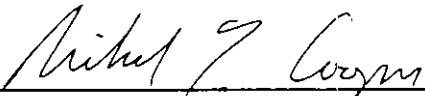
Richard T. Cooper

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2993; Fax -5402
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⁴ The specific conditions suggested by UPS in its Motion, while similar to protective conditions used previously in Commission proceedings, would not appear to offer sufficient safeguards in the unusual circumstances of the Emery contract. Should such protective conditions come into play in this dispute, the Postal Service would insist upon stronger conditions. For example, each person given access, including attorneys, should be required to swear under oath that he/she is not involved, and will not become involved, in competitive decision making as discussed in *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984), for or on behalf of any party to this proceeding or any entity which could gain a competitive advantage for access to the disclosed material. Furthermore, disclosure of certain information, such as Emery's profitability data, would not be appropriate even under such conditions. Finally, although the Postal Service recently has consulted with representatives of the contractor with respect to the substance of this dispute, it is possible that Emery may seek to intervene and raise additional arguments against disclosure beyond those stated by the Postal Service.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.



Richard T. Cooper

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Washington, D.C. 20260-1137
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