Postal Regulatory Commission
Submitted 2/13/2009 4:25:28 PM
Filing ID: 62301
Accepted 2/13/2009

ORDER NO. 181

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

Before Commissioners: Dan G. Blair, Chairman;
Nanci E. Langley, Vice Chairman;
Mark Acton;
Ruth Y. Goldway; and
Tony L. Hammond

Competitive Product Prices
International Business Reply Services Contract 1
(MC2009-14)
Negotiated Service Agreement

Docket No. CP2009-22

ORDER CONCERNING ADDITIONAL INTERNATIONAL BUSINESS REPLY SERVICES CONTRACT 1 NEGOTIATED SERVICE AGREEMENT

(Issued February 13, 2009)

In this docket, the Postal Service proposes to add a specific International Business Reply Service Contract 1 (IBRS Contract 1) product established in Docket No. MC2009-14. For the reasons discussed below, the Commission approves the Postal Service's proposal.

I. BACKGROUND

On January 30, 2009, the Postal Service filed a notice announcing that it has entered into an additional International Business Reply Service (IBRS) contract.[1] The Postal Service is using IBRS contracts to provide customers an option for return transportation of used or defective lightweight articles. It has established IBRS contracts with business customers that sell lightweight articles to foreign consumers and desire to offer consumers a way to return those articles for recycling, refurbishing, repair, or other value-added processing. *Id.* at 3-4. The Postal Service represents that prices and classifications "not of general applicability" for IBRS contracts were established by Governors' Decision No. 08-24 filed in Docket No. MC2009-14.[2] It also asserts the instant contract is functionally equivalent to the IBRS Contract 1 submitted in Docket No. CP2009-20. Notice at 1. The Postal Service also asserts that this additional IBRS contract fits within the Mail Classification Schedule language included as Attachment A to Governors' Decision No. 08-24. *Id.* at 2.

The instant contract. The Postal Service filed the instant contract pursuant to 39 CFR 3015.5. The contract is for 1 year from the date the Postal Service notifies the customer that all necessary approvals have been obtained. In addition, the Postal Service contends that the contract shares similar cost and market characteristics with the previous IBRS 1 contract, and thus is functionally equivalent to it. *Id.* at 3. The Postal Service notes that the Governors established a pricing formula and classification designed to satisfy the criteria of 39 U.S.C. 3633. It also represents that the IBRS contracts language proposed for the Mail Classification Schedule requires that each IBRS contract must cover its attributable costs. *Id.* Further, the Postal Service

[1] Notice of United States Postal Service Filing of Functionally Equivalent International Business Reply Service Contracts 1 Negotiated Service Agreement, January 30, 2009 (Notice).

[2] *See* Docket Nos. MC2009-14 and CP2009-20, Request of the United States Postal Service to Add International Business Reply Service Contracts to the Competitive Products List, and Notice of Filing (Under Seal) Contract and Enabling Governors' Decision, December 24, 2008.

observes that this IBRS contract covers the same service from the same foreign origin as the original contract. *Id*. at 3-4.

The Notice addresses reasons why the instant IBRS Contract 1 fits within the Mail Classification Schedule language for the IBRS Contract 1 and explains the Postal Service's interest in confidential treatment for the contract and related material. *Id*. at 2. The Notice also contains a redacted version of the contract and certification of data and compliance with 39 U.S.C. 3633(a). *Id.*

In discussing the functional equivalency of IBRS contracts, the Postal Service notes that the instant contract differs in some respects, including a different maximum weight limit to reflect the mailer's different per-item weight profile, different pricing reflecting a matrix rather than a single flat rate, and different contingency pricing. *Id.* at 4. Additionally, the liquidated damages provisions in the two agreements are different based upon the different wording preferences in negotiations with individual mailers. *Id*. Notwithstanding these differences, the Postal Service contends that the agreement is "functionally equivalent in all pertinent respects" to the initial contract filed in Docket No. CP2009-20. *Id.* at 5 (footnote omitted). The Postal Service requests that this contract be included within the IBRS Contract 1 product.

In Order No. 177, the Commission gave notice of this docket, appointed a Public Representative, and provided the public with an opportunity to comment.[3]

[3] PRC Order 177, Notice and Order Concerning the Filing of Additional International Business Reply Services Contract 1 Negotiated Service Agreement, February 4, 2009 (Order No. 177).

II. COMMENTS

Comments were filed by the Public Representative.[4] No filings were submitted by other interested parties. The Public Representative states that each element of 39 U.S.C. 3633(a) appears to be met by this additional IBRS Contract 1. Public Representative Comments at 2. The Public Representative notes that the contract appears to be functionally equivalent to the other contract within the IBRS Contract 1 (CP2009-20) product classification. *Id*. He also acknowledges that the Postal Service has provided sufficient justification for confidentiality of the matters filed under seal. *Id*. at 2-3. The Public Representative observes the IBRS product improves the efficiency of the mails and serves business mailers and their customers well. *Id.* at 5. He concludes that the agreement comports with all elements of title 39 in that it appears to generate sufficient revenue to cover attributable costs, should not cause market dominant products to subsidize competitive products, and will contribute to the recovery of the Postal Service's total institutional cost. *Id.* at 6.

III. COMMISSION ANALYSIS

The Commission has reviewed the Notice, materials filed in Docket No. MC2009-14 related to this product,[5] the contract, the financial analysis provided under seal that accompanies it, and the comments filed by the Public Representative.

Statutory requirements. First, the Commission reviews the contract to ensure that it is substantially equivalent to the pre-existing contracts classified as part of the IBRS Contract 1 product and thus belongs as part of that product. Second, the

---

[4] Public Representative Comments in Response to United States Postal Service Notice Concerning Filing of Additional International Business Reply Service Contract 1 Negotiated Service Agreement, February 11, 2009 (Public Representative Comments). The Public Representative filed a Motion of the Public Representative for Late Acceptance of Comments on United States Postal Service Notice Concerning Filing of Additional International Business Reply Service Contract 1 Negotiated Service Agreement, February 11, 2009. The motion is granted.

[5] *See* PRC Order No. 178, Order Concerning International Business Reply Service Contract 1 Negotiated Service Agreement, February 5, 2009 (Order No. 178).

Commission must ensure that the contract at issue in this proceeding independently satisfies the requirements of 39 CFR 3015.5 and 3015.7 and 39 U.S.C. 3633.

Functional equivalence. The Postal Service contends that the instant contract is functionally equivalent to the contract submitted in Docket No. CP2009-20 and that, accordingly, it should be grouped under the IBRS Contract 1 product. Notice at 3-5. It argues this contract shares the same cost and market characteristics as the previous IBRS Contract 1. The instant contract and the previous contract concern the return of used or defective lightweight articles. The Postal Service also identifies potential "minor" differences between the new contract and the pre-existing product group, IBRS Contract 1. *Id.* at 4-5. In particular, it points out that the liquidated damages provisions in the two contracts have no substantive differences, the differences reflecting language preferences in negotiations with individual mailers. Additionally, as mentioned previously, the instant contract differs from the first contract in the maximum weight limit because of the current mailer's different per-item weight profile. The Postal Service explains that the mailer's more complex weight profile results in prices being stated in a matrix, rather than as a single, flat rate. In addition, the different weight profile similarly affects the contingency pricing provisions. *Id.* It concludes that in spite of these differences the essential service components being offered and the structure of the contracts are the same and, therefore, the agreements are "functionally equivalent in all pertinent respects." *Id.*

Contingency pricing and cost increase price change provisions. In Order No. 178, the Commission addressed two contract provisions in the IBRS Contract 1 that are also in the instant contract. The first provision provides that if the Postal Service's costs increase above a certain threshold, it may modify the price under the contract. The second is a contingency provision which allows the Postal Service to change rates unilaterally in the event that the agreement is terminated before the "normal" expiration date, or in the event the parties have not executed a new agreement within the 6-month period following the termination date.

As in the first IBRS Contract 1 agreement, these provisions permit the Postal Service the flexibility to change rates without the need to enter into a new agreement. In Order No. 178, the Commission determined that, notwithstanding these provisions, the Postal Service must also comply with the Commission's rules. If either provision is exercised, the Postal Service must file the changed rates with the Commission in conformity with 39 CFR 3015.5. *See* 39 U.S.C. 3632(b)(3); *see also* Order No. 178 at 10. As provided in 39 CFR part 3015, rate changes not of general applicability are subject to a minimum 15-day notice requirement. As stated in Order No. 178, the Commission's conclusion regarding these provisions in this case is applicable to other contracts containing similar provisions.

The Commission has reviewed the contract and finds that it may be appropriately classified within the IBRS Contract 1 product.[6]

Cost considerations. The Commission reviews new competitive products to ensure that they meet the applicable requirements of 39 CFR 3015.5 and 3015.7 and 39 U.S.C. 3633. The Commission has reviewed the financial analysis provided under seal that accompanies the agreement as well as the comments filed in this proceeding. The Commission recommends that the Postal Service use country-specific costs in its financial workpapers, to the extent available, for future contracts for this product.[7]

Based on the information provided, the Commission finds that the contract submitted should cover its attributable costs (39 U.S.C. 3633(a)(2)), should not lead to the subsidization of competitive products by market dominant products (39 U.S.C. 3633(a)(1)), and should have a positive effect on competitive products' contribution to institutional costs (39 U.S.C. 3633(a)(3)). Thus, a preliminary review of the proposed

[6] The differences between the contract at issue in this case and the originally classified IBRS Contract 1 do not appear to be substantial. However, this finding does not preclude the Commission from revisiting this issue at a future date if circumstances warrant.

[7] For this contract, the Postal Service used system-average costs to calculate cost coverage. Through the annual compliance determination process, the Commission is developing costs more specific to industrialized countries and developing countries. The Commission therefore recommends that these costs, once available, be used in future calculations.

contract indicates that it comports with the provisions applicable to rates for competitive products.

Product name. This is the first IBRS contract submitted for review since the filing of the original contract in Docket No. CP2009-20. In Order No. 178, the Commission expressed concern that the name initially proposed by the Postal Service for this competitive product would be confused with a market dominant product of the same name. During the analysis and review of the original contract and prior to a determination by the Commission on the original product and agreement, the Postal Service filed Docket No. CP2009-22 as a functionally equivalent agreement with the same product name as in the previous agreement, IBRS Contract 1. *See* Notice, *supra*. The Commission resolved the potential confusion by adding the term "Competitive" to the product name as follows: "International Business Reply Service Competitive Contract 1." Therefore, the instant contract is approved as an additional contract within the product International Business Reply Service Competitive Contract 1.

Other considerations. The Postal Service shall promptly notify the Commission of the effective dates of the contract. If the agreement terminates earlier than anticipated, the Postal Service shall inform the Commission prior to the new termination date. The Commission will then remove the contract from the Mail Classification Schedule at the earliest opportunity.

It is Ordered:

1. The contract filed in Docket No. CP2009-22 is included within the product category International Business Reply Service Competitive Contract 1 (MC2009-14).

2. The Postal Service shall notify the Commission of the effective dates of the Docket No. CP2009-22 contract, and update the Commission if the termination date changes as discussed in this Order.

By the Commission.

Steven W. Williams
Secretary