

Review of USPS Mail Transportation Procurement Rules

By David Hendel

The Postal Service's purchasing rules are contained in the 700+ page *Supplying Principles and Practices* manual. Every so often, the Postal Service revises the SPP, which it did most recently on February 28, 2018. While the Postal Service didn't change its mail transportation procurement rules, now is as good a time as any to review what those rules state. The SPP's "Mail Transportation Purchasing" rules only take up 18 pages as they supplement the SPP's general procurement rules.

Authority

The first subject is contracting authority, which comes in three varieties. First, there are "Administrative Officials," who are authorized to supervise and administer your performance, but they have no authority to make contract changes.

Next, there are "Contracting Officer Representatives" (COR), who may be authorized to take actions related to the award and administration of your contract, but their authority is limited to:

- Reviewing and granting price adjustments that will not increase or decrease annual compensation by more than 10 percent;
- Discussing, approving, and signing contract modifications that change service schedules, so long as they do not increase or decrease annual compensation by more than 10 percent; and
- Review and sign contract modifications that have no effect on cost or price.

Since CORs can authorize changes that do not exceed 10 percent of the contract price, they can on their own authorize the smaller changes that occur under your contract.

Finally, there are "Contracting Officers," who do have the authority to make changes to your contract, but only up to their designated level of authority. Thus, even your CO may need to obtain further approval if an action exceeds their delegated authority.

Type of Contract

The SPP defines three types of surface contracts. First, there are "Regular Contracts," which should be used whenever possible. Then there are "Temporary Contracts" which may be used only when: (a) the need for service is expected to be 2 years or less, or (b) the duration, frequency, or volume of mail is not certain. Temporary Contracts must be replaced with Regular Contracts once service requirements are firmly established.

Finally, there are "Emergency Contracts," which may be entered into only when an emergency exists. Examples of emergencies include: a catastrophic event that disrupts normal service, strikes or labor disputes that cause service interruptions, the suspension of a supplier or termination of its contract, the

death of a supplier, and the need for service at unanticipated locations or the unexpected increase in mail volume that exceeds current capacity. Emergency contracts must terminate once the emergency ceases or the Postal Service is otherwise able to obtain service. No emergency contract may remain in place for more than 6 months absent higher level approval.

Renewals

Competitively awarded regular and temporary contracts may be renewed by mutual agreement. Clause B-78, "Renewal," must be included in contracts that are considered for renewal. Contracts that have been wholly subcontracted (a rarity) less than 6 months before their expiration date may not be renewed. Otherwise, wholly subcontracted contracts *may* be renewed with the subcontractor, who would then become the prime contractor. Emergency contracts may not be renewed.

There are two types of renewals: (1) renewals of regular and temporary contracts, and (2) short-term renewals. The length of a renewal term is based on operational requirements, market conditions, and other relevant business factors. Temporary contracts may not be renewed for longer than 2 years.

Before entering into renewal discussions, the Postal Service must first determine that the required service can be met by renewing at a reasonable rate and that the current supplier is providing satisfactory service. Faults in service that do not rise to the level that would justify a default termination may be sufficient to support a decision not to renew.

Having determined renewal is appropriate, the Contracting Officer should hold discussions with the contractor on the terms of the renewal. Before agreeing to final terms, the Purchase Team must determine that renewal provides the best value and most advantageous alternative to the Postal Service, considering both price and other factors. The term "other factors" includes the benefits of continuity of service and the potential costs of disruption arising out of resolicitation. If agreement on renewal terms is reached, the existing contract is modified to reflect any adjustments in service, terms and conditions, and rates. The determinations made throughout the renewal process must be thoroughly documented.

An expiring contract may also be renewed on a short-term basis for up to one year, upon agreement by the parties. The short-term renewal may later be converted into a full-term renewal. Examples of when a short-term renewal may be appropriate include: the Article 32 process (comparison with postal employee service) has not been completed; the expiring contract is under review in the non-renewal appeal process; or the need for the service or definitive service requirements have not been finally determined.

Termination

The SPP contains rules on the Termination for Convenience of mail transportation contracts, but these rules haven't quite caught up with the terms that appear in most HCR contracts. Back in the day, HCR contracts had Termination for Convenience clauses and indemnity provisions that set out the amount a contractor was owed for early termination. Nowadays, those clauses have been replaced by Termination with Notice clauses, which permit termination, by either party, without cost upon a designated period of advance notice.

The SPP's rules on Termination for Convenience are still relevant if you consider the Termination with Notice clause to be a type of Termination for Convenience clause. In this regard, the SPP confirms that a contract may be terminated in whole or in part. The only reason cited by the SPP for terminating service is when that service becomes unnecessary or is superseded by some other service. The SPP also provides that contractors should be provided as much advance notice as possible before their contracts are terminated. To get the word out as soon as possible, the SPP allows the Postal Service to send a "letter of intent" to discontinue service even before it issues a formal notice of termination.

As the Termination with Notice clause became more prevalent on HCR contracts, many have lamented that the base term of their contracts had been reduced from 4 years to 60 days. I'm not so sure that is true. HCR "regular contracts" still contain defined 4-year terms and are priced on an annual basis, all of which is inconsistent with a wholesale right to terminate the contract for any reason or no reason on 60 days' notice. And in a recent case, the Postal Service Board of Contract Appeals has opined that the Postal Service does not have limitless discretion to exercise the Termination with Notice clause (though it upheld the use of the clause in that case).

Service Changes

Service changes are another unique aspect of HCR contracts. The SPP describes three types of service changes. First, there is the "Insignificant Minor Service Change," which may be ordered and priced unilaterally by the CO, but is limited to relatively small dollar amounts. Second, there is the "Significant Minor Service Change," which sounds like an oxymoron – after all, which is it, a *significant* change or a *minor* change? These types of changes require that the contract modification and price adjustment be mutually agreed upon by both parties. Third, there is the "Major Service Change," which further requires the CO to obtain the approval of the Manager of the Transportation Portfolio.

The SPP also contains some guidance on schedule changes. Improvement in mail service must be the primary consideration in ordering a schedule change, so schedules shouldn't be changed for a contractor's or driver's convenience unless the change will in no way be detrimental to the Postal Service. The SPP also sets out three cautions in considering schedule changes: First, changes that create an excessive layover could increase a contractor's operating cost and provide a basis for a pay adjustment. Second, arbitrary action should be avoided, and reasonable efforts made to work out schedule arrangements that are satisfactory to contractors. Third, schedules may not be set that would require running times in violation of speed limits.

Subcontracting

The SPP defines what is meant by "subcontracting" under an HCR contract, and excludes employer-employee agreements from that definition. The SPP also provides that if an owner-operator, due to illness or temporary equipment failure, must obtain labor from another to continue performance, that transaction is not a subcontract.

Subcontracts that require the subcontractor to have access to the mail must be approved by the CO, and failure to do so could result in a default termination. Nonetheless, nothing in the SPP prohibits the CO from waiving this requirement or agreeing in advance to allow the use of subcontractors without prior approval. Moreover, because the requirement to approve subcontractors is linked to the issue of

access to the mail, subcontracting with a company that already has its own HCR contract(s) would seem to be a minor violation that would not justify a default termination.

Death of the Supplier

While I hate to end this article contemplating death, I suppose there is a silver lining. If you have an HCR contract in your own name, or in the name of a corporation in which you own most of the stock, and you pass away or are legally adjudged incompetent, your estate may continue to perform the contract. Don't worry, your estate has no obligation to continue performance, but it's good to know that the work may be retained by your family members even if you pass away. Similarly, if the contract is in the name of a partnership, and one of the partners dies, the surviving partners may continue to operate the route.

When the estate or surviving partners take over the route, the contract rate remains the same. The estate is also entitled to receive the full amount of any pay adjustments that were pending before the supplier passed away. The contract can even be renewed, but only if the estate representative is the surviving spouse or child of the deceased, in which case the contract is renewed in that individual's name.