

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter MV Public)	APPLICATION NO. B-1843
Transportation, Dallas, Texas,)	
seeking authority as a contract)	
carrier of passengers by bus)	
between points in Lancaster)	DENIED
County. The transportation of)	
railroad train crews and their)	
baggage is not authorized. HHS)	
Designation: Yes.)	ENTERED: NOVEMBER 5, 2013

APPEARANCES

For the Applicant:

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For the Protestant:

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BY THE COMMISSION:

On June 17, 2013, an application was filed by MV Public Transportation, Dallas, Texas, seeking authority as a contract carrier of passengers by bus between points in Lancaster County. The transportation of railroad train crews and their baggage is not authorized and the HHS Designation is Yes. This application was Published in the Daily Record, Omaha, Nebraska, on June 26, 2013.

Protests were timely filed by Transport Plus of Lincoln, Inc., and by Servant Cab Company, LLC, Lincoln. On September 30, 2013, the protest of Servant Cab Company, Lincoln, was withdrawn.

The Commission entered a Planning Conference Order on September 4, 2013, establishing various progression deadlines and setting

the hearing for October 23, 2013.

Notice of this hearing was sent to all interested parties on September 5, 2013. A hearing on the application was held October 23, 2013, in the Commission Hearing Room with appearances as shown above.

APPLICANT'S EVIDENCE

In support of its application, Applicant produced three witnesses: Robert Walla, Matthew Veach and Patricia McArdle.

Robert Walla is the Purchasing agent for the City of Lincoln. He has held the position for 7 ½ years. His duties include procuring bids and contracts for Lincoln, including for StarTran.

Mr. Walla has worked on contracts involving StarTran in the past. He is knowledgeable about projects that involve the Federal Transit Administration ("FTA") and the hundreds of pages of requirements that are involved with such contracts such as the one involved in this matter. Mr. Walla stated that the current provider for this contract is the protestant, Transport Plus.

Mr. Walla said that this particular contract proposal is the first one he has been involved with in his current position that has used a Request for Qualification ("RFQ") in the process. This was done on the basis of an FTA audit that indicated there needed to be more competition in the bidding process.

The details of the contract up for bids were reviewed by Mr. Walla. Some of the details included that the vehicles to be used were either four door enclosed sedans or multi-passenger minivans. The vehicles were to be equipped with two-way radios, be maintained in the safest possible condition, and be clean and comfortable for the passengers. The trips were to all take place within the city limits of Lincoln.

Mr. Walla said that among the factors his office was interested in were the ability to perform around 21,878 rides annually, the experience of the applicant. Mr. Walla did note that this was the first time that the RFQ process was used, that his office received three bidders for the contract, and that all three were qualified. The next step in the process is the issuance of the Request for Proposal "RFP").

On cross-examination by Mr. Mossman, Mr. Walla stated that Transport Plus was qualified, along with MV Public Transportation and Yellow Cab from Omaha.

Matthew Veach testified next for the Applicant. He is the Vice President of Business Development. He works on RFQs and RFPS and works to maintain existing contracts as well as develop new business for MV.

Mr. Veach testified that the Applicant was formed in 1975 to provide transportation in the disabled community as well as for the elderly. Their services include fixed route buses, campus shuttles, paratransit, school busing and special needs contracts units. The Applicant has 17,000 employees, 10,000 vehicles with 217 contracts in 146 locations in twenty-seven states, two provinces in Canada and in Saudi Arabia. Over half of their contracts are in the provision of transportation in the disabled community. He believes that the Applicant is the best in the business in this area.

The Applicant has extensive experience in contracts involving the FTA and its requirements, and that its services meet these requirements. The company has compliance officers as well as other divisions to maintain compliance with the requirements.

Mr. Veach said he did not have enough information at this time to determine how many vehicles would be necessary to fulfill this contract if it was awarded to them. They would need the information in the RFQ to make that determination. He does believe that five vehicles may be an appropriate number based on their experience with contracts of a similar trip volume. The Applicant would purchase the vehicles outright through a number of national vendors, and could probably have the vehicles on site within a "couple of days." He has proposed that Starlite buses be used. These are 14 passenger vehicles, or could transport two wheelchair passenger and eight ambulatory passengers at one time.

Mr. Veach is not certain how many drivers would be needed for the service, but did state that they would look to hire drivers that are currently providing the service if they were available. The Applicant uses a selection process for its employees that includes a Motor Vehicle Report, a background check, and extensive interviewing.

The training process includes 20 hours of classroom training, and then programs such as driving skills, customer service skills, vehicle training and a cadet training program

where they follow a current driver to be instructed hands-on regarding the service.

The Applicant says they have a safety program that includes an on-board Drive cam, monthly safety meetings and special events called "Safety Blitzes". The Applicant also has a regular maintenance program for its vehicles.

Mr. Veach said that the Applicant has a drug screening plan that was drawn up in compliance with FTA requirements. This program includes pre-employment testing, random testing and testing immediately after an accident.

Mr. Veach said that the managers and the drivers would be residents of the community, and that it involves itself with activities in the community.

The rate to be charged for the service is still to be determined, according to Mr. Veach. They do not have enough information available to determine that rate, although they will use a bid model based on anticipated costs and the location that the service is being provided.

Mr. Veach said that he believes that the Applicant is best qualified to provide the services required for StarTran. He said that they have extensive experience in the provision of this type of service. He also said that the company will comply with all rules and regulations of the Commission.

On examination by Commissioner Schram, Mr. Veach said he does not know whether this contract would be an exclusive one or whether more than one company could be retained by StarTran for the service. Mr. Veach said that determination is made by the authority.

On examination by Commission Vap, Mr. Veach said that the Applicant would pursue any types of business that the permit would qualify them for if they were to be awarded a permit from the Commission but not awarded the contract by StarTran.

On examination by Commissioner Landis, Mr. Veach noted that they can take a number of people on their vehicle and that no one would have exclusive use of the vehicle. He noted that there were limits as to how long a person could be on the vehicle before being dropped off at their location, but that this time period varied for contract to contract.

On cross-examination by Mr. Mossman, Mr. Veach said that the Applicant does look to retain drivers that are currently

driving under this contract, but that these drivers would not be available if they were able to be retained by the current company. Mr. Veach also said that the terms "bus" and "van" were interchangeable.

Mr. Veach was asked if they had identified any special needs that StarTran has in this matter. He stated that there were none other than those listed in the RFQ.

On redirect, Mr. Veach noted that the terms bus and van were interchangeable, and that the special needs in this matter would be the transportation needs of the disabled community.

Ms. Patricia McArdle was called next by the Applicant. She is an Assistant General Counsel for the Applicant. She stated that the Applicant would put the permit in a "file" and not do anything with it if they were awarded the permit but were not awarded the contract. When informed by Commissioner Vap that the permit either has to be active, in suspension or revoked, Ms. McArdle said that they would follow Commission rules and regulations regarding either revoking or suspending the permit, whichever is appropriate.

On cross-examination by Mr. Mossman, Ms. McArdle did state that there are no requirements that the employees live in the community where they work. She cited a contact that the Applicant has in Elkhorn, Iowa, where many of the employees live in Omaha, about an hour's drive from Elkhorn.

PROTESTANT'S EVIDENCE

The Protestant called nine witnesses: Doug Tenney, John Davis, Michael Davis, Steve Walling, Melody Gagner, Joe Bolubasz, Larry Worth and Vicki Harding.

Doug Tenney is the owner of Rent-a-Van in Lincoln. He testified that he has sold between 15 and 25 vans to the protestant since 1997. His transactions have always been very good, and he anticipates that he will sell more to them in the future.

John Davis testified next. Mr. Davis is the Operations Manager for Happy, Yellow and Checker Cabs Companies. He stated that he had not heard any comments that were negative about Transport Plus when he was doing research and having meetings with different groups in his determinations as to whether his companies should enter the Lincoln market. He believes that there is a need for the service that Transport Plus provides in Lincoln. The companies he manages have a formal working

arrangement with the Protestant to provide wheelchair service when his companies are not able to do so. He said that he has never received a call from any of the referrals reporting poor service or other complaints.

On cross-examination by Ms. Tricker, Mr. Davis did note that they have a formal agreement with Transport Plus that includes a covenant not to compete. He said that this agreement was entered into in response to a protest that Transport Plus filed in their application to enter the Lincoln market.

Michael Davis testified next. He is the Transit Manager for StarTran, and has held the position for five months. He noted that the Protestant has been under contract with StarTran since 1999, and that they have provided 2050 trips per month. He further noted that there have been no complaints for at least the last three years regarding the service provided by the Protestant.

Steve Walling testified on behalf of the Protestant. Mr. Walling has resided in Lincoln for the past 26 years, and has used the services of the Protestant during the last 15 years. He states that they provide excellent service, with clean vans, a set-up where he is comfortable riding, and that the service is courteous and timely. He also said that the Protestant offers services that are after the hours provided by StarTran.

Melody Gagner from Madonna Rehabilitation Hospital testified for the Protestant. She said that she is an administrator at Madonna, and that Madonna has partnered with the protestant to provide services for the disabled community.

Joe Bolubasz testified for the Protestant. He is a commercial banker at Great Western Bank. For over 28 years he was at Wells Fargo, where he met and worked with the Protestant on its accounts. He said that he first met Vicki Harding six years ago when the local branch that she had been working with believed that she needed the services of a commercial banker. He stated that the Protestant handled their accounts well, and that he would extend credit to her if she applied for it.

On cross-examination by Ms. Tricker, Mr. Bolubasz said that the Protestant had not moved her accounts over to his bank at this time.

Larry Worth testified for the Protestant. Mr. Worth is a retired employee who worked for the City of Lincoln for over forty years, the last twenty of which were as the Manager of StarTran. He was responsible for the operation of a "medium-

sized" transit system, with 112 employees. He became aware of the Protest approximately 15 years ago when they became contracted with StarTran. StarTran needed to provide paratransit services for the Americans with Disabilities Act and started the Handi-Vans service. The Protestant was retained to handle the increases in services that the Handi-Van service could not meet. It saved the system money when they could use the services of the Protestant rather than commit to a permanent resource that would not be efficiently used.

Mr. Worth agreed with the statement that the Protestant adequately met the needs of StarTran during his time as the manager. He said that he knows that he could call on the Protestant on short notice and that they would accommodate these requests. He also said that the Protestant was able to adjust to a decrease in such requests.

Vicki Haring is the president and an owner of the Protestant, Transport Plus. They began business in 1997 and have Commission authority. They currently have 15 drivers plus 3 office staff. The Protestant transports the physically disabled as well as ambulatory individuals. Ms. Harding noted that her company provided trips for StarTran, the Nebraska Department of Health and Human Services, and the general public.

Ms. Harding stated that the company currently has 13 vehicles in tis fleet, including 9 wheelchair minivans. She said that the minivans were more comfortable for the clients as well as more energy efficient. All of her vehicles are equipped with two-way phone.

Ms. Harding said that the company provides a one-week classroom type training for its new employees, then an additional week in the vehicle and subsequent on-going training. They conduct background checks and potential employees must undergo a physical examination. The Protestant has a drug screening program that is FTA complaint, and includes pre-employment, random, reasonable suspicion and testing in the case of an accident.

The vehicles undergo routine maintenance during the year. The vehicles are also inspected annually by the Commission and by StarTran.

The Protestant currently hold four contracts, including the StarTran contract. Ms. Harding stated that have fulfilled the terms and conditions of all of their contracts, and have not lost a contract. She noted that her company recently received a progress report from Access2Care in which the goal is a score of

68. The Protestant received a rating in excess of 98 for the last three months.

Ms. Harding indicated that they have been a contractor with StarTran for over 14 years. She said that there were times they were the only bidder, and other times there were others. She did not have information available to her as to these past bids processes.

Ms. Harding noted that her company has met StarTran's stated needs. She said the number of trips that the Protestant have provided for StarTran have generally been increasing, and this number has always been met by Transport Plus. She said that approximately 21,000 of the nearly 39,000 trips that Transport Plus performed in 2012 were under the StarTran contract.

Ms. Harding stated that the number of trips that her company is providing for StarTran has increased in 2013, for about fifty-six percent of the total for nearly sixty-six percent in 2012. She said that if the Protestant lost the contract it would be out of business.

On examination by Commissioner Schram, Ms. Harding said that the Protestant provides wheelchair service, as does Madonna and Servant Cab in Lincoln.

On examination by Commissioner Landis, Ms. Harding said that it was very rare that more than one wheelchair was in a vehicle at any given time. On examination by Commissioner Vap, Ms. Harding noted that there were sometimes other bidders on the StarTran contract, including two other bidders on this RFQ.

On cross-examination by Ms. Tricker, Ms. Harding stated that she has protested other applications such as Prince of the Road and the cab companies entering into Lincoln. She said that she protested these companies because Lincoln is not a very large city and that it would be hard to exist if there were too many providers in the area. She said that she would protest other applications if she believed that these companies would be a detriment to her business.

Janet Coleman testified on behalf of the Protestant. She has been a resident of Lincoln since 1963. She is heavily involved in the community, serving on several boards and committees and volunteering for numerous entities. She said that the Protestant has been very helpful for her, and that without their service she would not be able to do what she does. She said they were very courteous and on-time.

On cross-examination by Ms. Tricker, Ms. Coleman said that she was not a client of StarTran, and that she doesn't know about MV Public Transportation or what kind of service that it may provide.

OPINION AND FINDINGS

Applications for contract carrier authority are governed by Neb. Rev. Stat. § 75-311(2), which provides:

"(2) A permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application if it appears after notice and hearing from the application or from any hearing held on the application that (a) the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle and to conform to the provisions of such sections and the lawful requirements, rules, and regulations of the commission under such sections and (b) the proposed operation, to the extent authorized by the permit, will be consistent with the public interest by providing services designed to meet the distinct needs of each individual customer or a specifically designated class of customers as defined in subdivision (6) of section 75-302. Otherwise the application shall be denied."

The Commission's consideration of an applicant's fitness is comprised of two tests. The first part of the test is whether the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle and to conform to the provisions of such sections and the lawful requirements, rules and regulations of the Commission under such sections.

Applicant is an experienced passenger transporter with operations in twenty-seven states and two foreign countries. It appears that it can be properly equipped and would have the financial capability to perform services as a contract carrier. The Commission declines to address the specifics of fitness in the first part of the test in this application due to other factors considered.

The second part of the first test of fitness is whether the applicant can provide the service in conformity with the statutory requirements and Commission rules and regulations. The Commission notes that the Applicant has not performed any services in Nebraska and has applied for authority as a contract carrier with the Commission. The Commission again declines to

address the specifics of fitness in this second part of the test due to other factors considered.

The second part of the two-part test is whether the proposed operation, to the extent authorized by the permit, will be consistent with the public interest. In Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp., 188 Neb. 584, 198 N.W. 2nd 195 (1972) the Court established the following criteria to be considered in determining whether a proposed contract carrier operation will be consistent with the public interest:

"In considering an application for a permit to operate as a contract carrier, the burden is upon the applicant to show that the proposed service is specialized and fits the need of the proposed contracting shippers, that the applicant is fit, willing, and able to perform the service, and that the proposed operation will be consistent with the public interest. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., 183 Neb. 229, 159 N.W.2d 310. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., *supra*. If competent proof is made by the applicant showing the proposed service to be specialized and needed, and is protested by common carriers showing a willingness and ability to perform it, the applicant must then establish that he is better equipped and qualified to meet the special needs of the proposed contracting shippers than the protesting common carriers. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., *supra*. The adequacy of existing services to perform the normal needs of proposed contracting shippers is not conclusive where the new service is better designed to fit the special requirements of the proposed contracting shippers. Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., *supra*.

In the application before us, StarTran's requirements for passenger transportation demands appear to require a specialized service. It is not clear that the Applicant has made a sufficient showing that the proposed service is designed to meet the need of StarTran.

The evidence before the Commission is that the Applicant believes that it would place into service five buses to provide transportation under the contract. This number of vehicles is

based upon the experience that the Applicant has with contracts involving a similar number of trips and not on the specifics of the StarTran contract. There was no testimony as to whether the number of vehicles contemplated being placed into service will be adequate to fulfill the requirements of the contract. There further was no testimony as to whether these types of buses proposed to be placed into service are of the type that will fit the needs of StarTran for the service to be provided.

Regarding whether the transportation of specified commodities can be performed as well by common carriers as by contract carriers (see Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp., supra.), an examination of the evidence shows that there was no evidence offered that common carriers are unable to perform the transportation for StarTran as well as the contract carriers. There was no evidence put forward by the Applicant regarding insufficiencies of the service provided by the common carrier that has been providing the service for the last few years. Mr. Walla stated that the RFQ process was put in place due to FTA requirements regarding competitive bidding and not to seek additional applicants due to inadequate services available to it.

Evidence was adduced by the Protestant that it has been and is meeting the needs of StarTran. Mr. Michael Davis, the current Transit Manager for StarTran, testified that the Protestant has been under contract since 1999. Mr. Davis noted that Transport Plus provides more than 2,000 trips per month. This number shows that Transport Plus has the capacity to perform the necessary trips under the proposed RFQ. He further testified that he has received no complaints regarding their service and that they are always available to accommodate all of StarTran's ADA requirements.

Mr. Larry Worth, the manager of StarTran for twenty years prior to Mr. Davis, stated that he could depend on Transport Plus to meet StarTran's needs. He said that the Protestant was reliable and had no complaints regarding its service. He stated that the Protestant was always able to provide more service when requested. They showed the ability to adjust to the demands that were asked of them by StarTran. He stated that during his tenure at StarTran that the Protestant met the needs of StarTran.

Ms. Harding testified that her company has held a contract with StarTran for over fourteen years, and further that it stands prepared to fulfill any future contracts for StarTran. She noted that her company has always met the requested needs from StarTran, and that they are able to expand their fleet as necessary to continue to meet these requests in the future. Mr.

Bolubasz testified that Transport Plus handled their accounts well and believed he would be able to offer them credit for their business should the need arise. She further testified that the loss of the StarTran contract would likely put her company out of business as it accounts for approximately sixty percent of her business.

The evidence before the Commission is that the proposed service is specialized. The Protestant made a showing that it is willing and able to perform the service. The Commission must also look at a third area of consideration regarding the public interest.

The Wells Court set forth a third area of consideration as to whether the proposed service is in the public interest. Where competent proof is made by the Applicant showing the proposed service to be specialized and needed, and the application is protested by common carriers showing a willingness and ability to perform it, the Applicant must then establish that it is **better equipped and qualified** (emphasis ours) to meet the special needs of the proposed contracting shippers than the protesting common carriers. Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp, 188 Neb. 584, 198 N.W. 2d 195 (1972); see also In re Application of Northland Transportation, Inc., Northland Transportation v. Herman Brothers, Inc., et. al. 239 Neb. 918, 470 N.W. 2d 764 (1992).

In this case, the Commission finds that the Applicant has failed to establish that it is better equipped and qualified to meet the special needs of the shipper than the Protestant. While there was some evidence put forth that the Applicant can be equipped to properly perform the service and would have the requisite qualifications to perform the service, the evidence does not show that they are better equipped or better qualified than the Protestant. The Applicant did not make a showing that the equipment that the Applicant would provide would offer advantages over the equipment used by the protestant. They did not show that their proposed plan had improved quality factors or features than that currently being used by the Protestant. They also did not set forth any evidence that they have better qualifications than that of the protestant.

The Commission finds that the evidence shows that the transportation in this matter can be performed as well by common carriers as by contract carriers, thus not establishing a need for contract carriers. The Commission further finds that the Applicant is not better equipped and qualified to perform the service than the Protestant. The Applicant also failed to show that it provides better service than the Protestant.

After due consideration of the evidence and being fully advised in the premises, the Commission is of the opinion and finds:

1. The proposed contract carrier operation will not be consistent with the public interest.
2. The application should be denied.

ORDER

IT IS THEREFORE THE ORDERED by the Nebraska Public Service Commission that Application B-1843 be, and it is hereby denied.

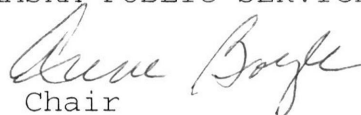
MADE AND ENTERED at Lincoln, Nebraska, this 5th day of November, 2013.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:



//s//Anne C. Boyle
//s//Frank E. Landis


Chair

ATTEST:


Executive Director

