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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: 2B Brokers et al.

File: B-298651

Date: November 27, 2006

Richard D. Gluck, Esq., Benjamin J. Lambiotte, Esq., Robert A. Boraks, Esq., Harold G. Bailey, Jr., Esq., and Amy Morton, Esq., Garvey Schubert Barer, for the protesters.

Lary W. Mohl, Esq., and Peter Ries, Esq., U.S. Transportation Command, Department of Defense, and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitation for the Defense Transportation Coordination Initiative that consolidated transportation coordination and freight transportation services was unduly restrictive of competition and was an impermissible bundling of requirements under the Small Business Act is denied, where the agency reasonably determined that consolidation would result in substantial cost savings and efficiencies and was necessary to meet the agency's needs.

DECISION

2B Brokers and 89 other firms¹ protest the terms of request for proposals (RFP) No. HTC711-06-R-0001, issued by the United States Transportation Command,

¹ The other protesters are A&A Transportation; ACE Transportation; Acme Trucklines; Alan Farmer; American Freight; American Road Lines; American World Forwarders, Inc.; Anita Howard; America Trans-Freight; Available Shippers; Big Rock Transportation; Blackhawk Transport, Inc.; Britton Transportation; C2 Freight Resources, Inc.; Callie Transport; Cargo Master; Carr Trucking; Cheetah Transportation; CL Services; Combined Transportation; Cowboy Trucking; CrossRoad Carriers; D and H Trucking; Daily Express; Dallas Mavis; Dalton Trucking; Daystar Transportation; Diamond Transportation System, Inc.; Diedes Transport; Dispatch Services; DTS Logistics; Durrett Trucking Inc.; Dynasty Transportation; E9 Logistics; Easton Transportation; Economy Transport; Encore

(continued...)

Department of Defense (DoD), for freight transportation and transportation coordination services within the continental United States (CONUS) in support of the agency's Defense Transportation Coordination Initiative (DTCI).² The agency describes DTCI as

a CONUS freight initiative aimed at increasing operational effectiveness and at the same time obtaining efficiencies. The premise is that DoD will increase operational effectiveness by reducing cycle times and improving predictability through the use of more dedicated truck schedules and cross docking operations. This premise also includes obtaining efficiencies through best business practices such as increased consolidations and mode conversions. The DTCI coordinator would have the visibility of freight movement requirements across the CONUS and access to a network of transportation providers to schedule and fulfil[l] those requirements.

Agency Report (AR), Tab 44, DTCI Information Paper, May 3, 2004, at 1.

The protesters complain that the RFP improperly bundles requirements, is unduly restrictive of competition, and provides for the performance of services that are inherently governmental in nature.

We deny the protest.

(...continued)

Forwarding; Family Affair Trucking; Federal Freight Systems; Frontline; General Freight; GMR Logistics; Great American; Green Valley; Hi-Ball Trucking; International CC; J.H. Rose Logistics; Jameson Enterprises, Inc.; Kansa Transport, Inc.; Kenneth Clark; Keystone Lines; KL Logistics; L&M Transportation; Louisiana Transportation, Inc.; Maverick Transport; McClellan Trucklines; Meadowlark; MEGATRUX; Midwest Specialized Transportation, Inc.; Norseman Transportation; Northern Dispatch; NorWest Express, Inc.; NYP & Associates; Overdrive Transportation; Owen Kennedy; P. Carter Trucking; Packard; Parker Trucking; Picks Logistics; Prompt Shippers, Inc.; R.K. Jackson; Ready Transportation; Rockhill Transport; Sheridan Transportation; Southern Ag Carriers; Speed Logistics; Sunteck Transport; Teresi Trucking; Trans Tech; Trinity Transport; TTI, Inc.; Tucker Company; Universal Am-Can; US Transport; Utley, Inc.; Virginia Highway; Watson Trucking; Wilson Transfer; and Wiedmeyer Express.

² The mission of the Transportation Command is to provide air, land and sea transportation for the DoD. GAO/NSIAD-98-99, "Defense Transportation: Status of U.S. Transportation Command Savings Initiatives, May 1998, at 2.

BACKGROUND

Currently, DoD transports freight from more than 600 sites using hundreds of commercial freight transportation providers to move the freight to thousands of destinations within CONUS. AR, Tab 25, Acquisition Plan, at 2; Contracting Officer's Statement of Facts (COSF) at 1. This freight transportation is managed by more than 600 transportation officers, who are assigned to various components of DoD, such as the Defense Logistics Agency, the Army, the Navy, and the Air Force, and accorded the authority to place orders under the Tailored Transportation Contract (TTC) or to issue tenders for freight shipment. Hearing Transcript (Tr.), day 1, at 21-22, 40; Agency's Post-Hearing Comments at 2.³ According to the agency, "[m]ultiple information systems are employed to execute and manage this shipment activity; but there is no centralized planning, coordination, or control. DoD shippers act unilaterally by independently selecting the mode, level of service, and transportation provider." AR, Tab 10, DTCI Market Research, July 2005, at 1-1. In this regard, transportation officers act in a decentralized fashion focusing on satisfying local shipper requirements rather than DoD-wide efficiency or expense. Tr., day 1, at 40. The agency states that, as a result of this lack of planning, coordination, and control, shipment predicability is inconsistent and transportation costs are higher because enterprise-wide efficiencies are not employed. COSF at 2.

In 1997, the agency initiated a review of its transportation documentation and financial processes to explore "reengineering" its freight shipment system; as part of this effort, DoD studied logistics processes used by the commercial sector and discovered that some commercial companies were using third-party logistics (3PL) firms to manage their transportation needs.⁴ See AR, Tab 5, 3PL Prototype Test, Management Reform Memorandum #15 Final Report, Aug. 15, 2002, at 2. In 2001, DoD conducted a prototype test with a 3PL firm, Eagle Global Logistics (EGL), to manage transportation of selected commodities outbound from the southeast region

³ The TTC is an indefinite-delivery, indefinite-quantity contract awarded and subject to the Federal Acquisition Regulation (FAR). According to the agency, a tender is an unsolicited rate provided by a carrier that an agency can use to offer freight shipment services to carriers; a contract based upon a tender is created only when the agency and carrier agree to the shipment of services and a bill of lading has been issued. Tr., day 1, at 26-27. DoD moves far more freight, both by volume and value, using tenders rather than by issuing orders under the TTC. Tr., day 1, at 28-31.

⁴ A 3PL firm is one that provides outsourced or "third party" logistics services to companies for part or all of a company's supply chain management functions, such as transportation or warehousing. See AR, Tab 7, University of Tennessee 3PL Prototype Test Report, Sept. 15, 2002, at 2.

of the United States.⁵ The agency tasked the University of Tennessee's National Transportation Research Center to "act as an independent observer and provide comments and analysis during the Prototype Test of the 3PL concept." AR, Tab 7, University of Tennessee 3PL Prototype Test Report, Sept. 15, 2002, at 2. From this test, DoD concluded that a 3PL firm could successfully integrate with DoD shipping processes:

The prototype did highlight a number of valuable lessons for DoD. The most notable was the fact the concept could work if designed and implemented correctly. The 3PL prototype was not without its problems and challenges. Some glitches overshadowed the success of the test. For example, the implemented concept of operation relegated the 3PL provider to a transportation brokerage relationship rather than a fully integrated supply chain business partner. Another lesson was learned that the 90 days (from the date of the award) allotted for implementation was not sufficient to accomplish the automated system interfaces, training, and change management tasks commonly required in such startups.

AR, Tab 10, DTCI Market Research, July 2005, at 1-1. Although the prototype test did not show any cost savings, the University of Tennessee found that the prototype contract "was not structured to allow the 3PL to optimize shipment consolidations and therefore reduce DoD's transportation costs," and recommended the integration of coordination services with freight transportation to achieve cost savings. AR, Tab 7, University of Tennessee 3PL Prototype Test Report, Sept. 15, 2002, at 3.

In addition, the agency performed market research with the assistance of Logistics Management Institute (LMI), a nonprofit government consulting group, and GENCO, a 3PL firm that provides, among other things, transportation services.

The primary objective of the DTCI market research was to gain a general understanding of commercial logistics business practices in which a third-party service provider performs at least some of a client's logistics management services. The research also was to determine if there are providers in the commercial marketplace that can meet or exceed the quantitative and qualitative requirements of the DTCI initiative.

⁵ EGL was awarded a fixed-price contract for a base year with 2 option years to manage transportation at 28 shipping or transportation offices located within Alabama, Florida and Georgia. After the base year, EGL continued to perform at four Defense Logistics Agency depots. AR, Tab 7, University of Tennessee 3PL Prototype Test Report, Sept. 15, 2002, at 2.

AR, Tab 10, DTCI Market Research, July 2005, at 1-2. This research included a review of trade journals and academic studies and interviews and surveys of industry and academia. Based upon this research, DoD concluded that there were several companies that could “address the specific concerns and requirements of DoD.” Id. at 1-3.

A business case analysis (BCA) was performed to “determine whether a world-class 3PL [firm] could increase operational effectiveness and improve shipment efficiency by lowering costs and improving predictability through better utilization of available rates and increased shipment consolidations through cross docking,⁶ mode shifting, and scheduling.”⁷ COSF at 4. Based on this analysis, the agency concluded that selection of a 3PL firm to centrally manage DoD’s freight transportation within the CONUS “would improve effectiveness, gain efficiencies, and achieve cost savings.” Id.; AR, Tab 8, BCA, Apr. 2006. In this regard, the agency estimated that such an approach would realize estimated net savings of approximately \$[Deleted] million, which was about [Deleted] percent of the agency’s historical operation and maintenance costs, after considering “the phased in/safe start approach and implementation/life-cycle costs (to include management services costs, award fee costs, and Program Management Office (PMO) costs).” AR, Tab 8, BCA, Apr. 2006, at 4-18; Agency Memorandum of Law at 4. The cost savings were calculated using a cost model, under which the agency’s historic transportation costs were compared to optimized, weighted average rates the government could hope to achieve by leveraging volume and optimizing freight movements to obtain the lower rates.⁸ See AR, Tab 8, BCA, Apr. 2006, app. A, Savings Analysis Method, at A-1-4.

DoD also analyzed whether the DTCI requirement represented a “bundled acquisition and, if so, whether sufficient justification exists to proceed with the project” under the Small Business Act. AR, Tab 9, DTCI Bundling Analysis, Apr. 12, 2006, at 1. The Small Business Act states that “to the maximum extent practicable” agencies “avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors.” 15 U.S.C. § 631(j)(3) (2000). The Small Business Act defines bundling as

⁶ “Cross-dock” is defined as a “distribution system in which merchandise received at the warehouse or distribution center is not put away, but instead is readied for shipment,” which the BCA states “can significantly reduce distribution costs.” AR, Tab 8, BCA, Apr. 2006, app. D, Glossary, at D-1.

⁷ The BCA was prepared by LMI and GENCO.

⁸ The cost model used was GENCO’s proprietary ShipIO™ modeling software, a linear programming-based freight optimization tool that uses the well-accepted “Farthest First” algorithm. Agency’s Reply to Protesters’ Comments at 13; AR, Tab 8, BCA, Apr. 2006, app. A, Savings Analysis Method, at A-1.

consolidating two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern due to (a) the diversity, size, or specialized nature of the elements of the performance specified; (b) the aggregate dollar value of the anticipated award; (c) the geographical dispersion of the contract performance sites; or (d) any combination of the factors described in subparagraphs (a), (b), and (c). 15 U.S.C. § 632(o)(2). The Act also provides that an agency may determine that consolidation of requirements is “necessary and justified if, as compared to the benefits that would be derived from contracting to meet those requirements if not consolidated, the Federal Government would derive from the consolidation measurably substantial benefits,” including such benefits as cost savings, quality improvements, reductions in acquisition cycle times, and/or better terms and conditions. 15 U.S.C. § 644(e)(2)(B); see 13 C.F.R. § 125.2(d) (2006).

The agency concluded that because the transportation coordination function was a new requirement, rather than one previously provided, the DTCI solicitation did not result in a bundled requirement, as defined by the Small Business Act. See COSF at 11. Nevertheless, because the transportation services had previously been acquired from both small and large businesses, DoD analyzed whether bundling the transportation coordination and transportation services was justified under the Small Business Act. DoD concluded that, even if the DTCI acquisition was considered to be a bundled requirement under the Act, it would save more than 5 percent of the new contract’s estimated 7-year value of approximately \$1.5 billion-- “which meets the [Act’s] ‘measurably substantial benefits test’” that would justify bundling.⁹ AR, Tab 9, DTCI Bundling Analysis, Apr. 12, 2006, at 18. DoD also concluded that there would be a number of non-monetary benefits, such as improved delivery times, increased on-time delivery, and improved in-transit visibility (ITV).¹⁰ See COSF at 12.

DoD coordinated its planning for this procurement with the Small Business Administration (SBA), transmitting copies of DoD’s Bundling Analysis and BCA to

⁹ SBA’s regulations implementing the Small Business Act define “measurably substantial benefits” to include “[b]enefits equivalent to 5 percent of the contract or order value (including options) or \$7.5 million, whichever is greater, where the contract or order value exceeds \$75 million.” 13 C.F.R. § 125.2(d)(5)(i)(B); see FAR § 7.107(b)(2).

¹⁰ ITV refers to the “ability to track the identity, status, and location of DoD unit and nonunit cargo . . . from origin to consignee or destination established by the combatant commanders, the Services, or DoD agencies during peace, contingencies, and war.” Understanding the Defense Transportation System, USTRANSCOM Handbook 24-2, 4th ed., Sept. 1, 2004, at GL-7.

SBA, see, e.g., AR, Tab 23, Transportation Command Letter to SBA, Apr. 12, 2006, and published a notice on the Federal Business Opportunities website, notifying small businesses of the agency's intent to bundle its requirements under the RFP. See AR, Tab 29, Notice to Small Business. DoD states that SBA concurred with DoD's acquisition approach, and the record shows that SBA did not contemporaneously object to the agency's bundling of the requirements.¹¹

SOLICITATION

The RFP, issued June 22, 2006, provides for the award of an indefinite-delivery, requirements contract with fixed-price, cost reimbursable, and award fee items, and includes an award term option provision for a 3-year base period and up to 4 option years.¹² For the base period, offerors were requested to provide a fixed-price for transportation coordination services and to propose estimated costs with a "not-to-exceed" (NTE) ceiling rate for the transportation services.¹³ With respect to the proposed NTE costs for transportation services, the RFP provides for adjustments in the NTE rates for the option years based upon a "pre-priced methodology" to be proposed by the offerors and evaluated in making award,¹⁴ see RFP § H, at 94, and for interim adjustments of the NTE costs for orders placed within sites designated by the Transportation Command as an "exigency area." See id. at 94-96.

The RFP includes a detailed performance work statement (PWS) that informed offerors that the DTCI would be "implemented through a spiral phased approach"

¹¹ In response to our request, SBA provided a report in which it states, contrary to DoD's views, that the RFP reflects a bundled requirement under the Small Business Act, and that this bundled requirement "will not be good for small business." SBA Report, Sept. 18, 2006, at 2. SBA also states, however, that DoD, as required, properly coordinated this acquisition with SBA and that, given the substantial cost savings reflected in the agency's analysis, the bundled requirement does not violate the Small Business Act. Id.

¹² As indicated above, the estimated value of the contract, including all option and award terms, is approximately \$1.5 billion. AR, Tab 9, Bundling Analysis, Apr. 12, 2006, at 18.

¹³ The RFP excludes accessorial and fuel surcharge costs from the NTE costs to be proposed by offerors. RFP § M, at 170. Accessorial Service is defined by the Defense Transportation Regulation (DTR) as a "service performed by a carrier in addition to the [transportation of cargo over carrier routes from point of origin to destination]." DTR, DoD 4500.9-R, Part II, Cargo Movement, Definitions, at xxiv.

¹⁴ The successful offeror's pre-priced methodology for option-year NTE rate adjustments will be incorporated into the contract. RFP § H, at 94.

and that “Spiral I, the only spiral to be implemented under this contract” would include three phases. Phase I includes 18 identified Defense Distribution Centers, phase II includes another 33 identified DoD shippers and aerial ports, and phase III includes 16 additional, identified shipper locations. RFP § C, at 23. The RFP also informs offerors that the government may add, and the contractor would be required to implement, additional sites, to a maximum number of 260 sites, during contract performance.¹⁵ *Id.* at 30. Even if all 260 sites were added under the DTCI contract, the DTCI acquisition represents only slightly more than a third of all DoD’s shipping locations, although the DTCI contract will include the larger shipping sites. *Tr.*, day 1, at 65-66, 162-63.

Under the contract, the DTCI contractor would be responsible for handling all aspects of freight shipment from receiving notification from DoD shippers that shipments are ready for transportation to selecting and subcontracting with carriers for the transportation of freight. The RFP provides that requests for transportation would be electronically submitted to the contractor and the contractor would be required to electronically respond to the request. RFP § G, at 77. The contractor will be required to provide tracking and tracing capabilities and electronic recordkeeping, and to handle and facilitate the resolution of claims for loss or damage. In this regard, the contractor is required to provide a central information technology system meeting certain requirements. *Id.* § C, at 46-55.

With respect to the transportation services, the RFP requires the contractor to “establish, maintain, and manage all necessary subcontracts with carriers that move freight under this contract.” *Id.* § C, at 33. Among the contract requirements is that the contractor support “surge” requirements, that is, that the contractor support transportation needs associated with mobilization, wartime, natural disaster, humanitarian assistance, or other contingencies. *Id.* § C, at 45. In addition, the contractor is required to report its actual cost savings on a semi-annual basis, and offerors were informed that the agency expected cost savings of 19.1 percent by the end of the base contract term from an historical baseline to be established at award and cost savings of 23.2 percent by the end of the first option year. *Id.*, § C, at 32.

The RFP identifies a number of performance thresholds, such as the requirements for on-time pickup, on-time delivery, and loss and damage free shipments in 98 percent of the contract shipments; for resolution of loss and damage claims within 120 days for 99 percent of the claims; for an information technology system that was available for use 99 percent of the time; and for meeting or exceeding various small business, HUBZone business, service-disabled-veteran-owned business, small disadvantaged business, and women-owned small business

¹⁵ To the extent that additional sites are added to the DTCI contract, the contractor may be entitled to an equitable adjustment under the contract’s changes clauses. RFP § C, at 30.

subcontracting goals. See RFP § C, Table 7, at 57-58. The solicitation provides for reductions in the contractor's fixed price for services that fail to satisfy the performance thresholds identified in the RFP. Id. § G, at 81-90.

DISCUSSION

Consolidation of Requirements

The protesters complain that, by consolidating the transportation coordination services and freight transportation services, the RFP unduly restricts competition under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2305(a)(1) (2000), and is an unnecessary and unjustified bundling of requirements in violation of the Small Business Act, 15 U.S.C. § 631(j)(3).

The applicable Small Business Act requirements are set out above. In addition, CICA requires that solicitations generally permit full and open competition and contain restrictive provisions only to the extent necessary to satisfy the needs of the agency. 10 U.S.C. § 2305(a)(1). Because bundled or consolidated procurements combine separate and multiple requirements into one contract, they have the potential for restricting competition by excluding firms that furnish only a portion of the requirement; we therefore review challenges to such solicitations to determine whether the approach is reasonably required to satisfy the agency's needs. Aalco Forwarding, Inc. et al., B-277241.12, B-277241.13, Dec. 29, 1997, 97-2 CPD ¶ 175 at 6. We have recognized that bundling may serve to meet an agency's needs where the agency reasonably determines that consolidation will result in significant cost savings or operational efficiencies. See B.H. Aircraft Co., Inc., B-295399.2, July 25, 2005, 2005 CPD ¶ 138 at 7; Teximara, Inc., B-293221.2, July 9, 2004, 2004 CPD ¶ 151 at 6. Administrative convenience, however, does not in and of itself provide a reasonable basis for an agency's consolidating or bundling of requirements. See Vantex Serv. Corp., B-290415, Aug. 8, 2002, 2002 CPD ¶ 131 at 4.

DoD disagrees that the RFP reflects either bundling or a restriction upon competition; rather, the agency argues that the solicitation does not preclude any offeror from competing and therefore provides for full and open competition.¹⁶ See COSF at 7-8. This argument, however, is inconsistent with the agency's own

¹⁶ Also, as noted above, DoD believes that, because the transportation coordination services are a new requirement, combining this function with the transportation services in the RFP did not constitute bundling, as defined by the Small Business Act. The protesters and SBA disagree with DoD's belief. We do not address this issue because we find that, even assuming this is a bundled requirement under the Small Business Act, the record shows that the consolidation of the coordination and transportation functions will result in a substantial monetary benefit as defined by SBA's regulations. See 13 C.F.R. § 125.2(d)(5)(i)(B).

recognition that the “overall management of a CONUS-wide domestic freight operation [under the DTCI contract] is beyond a small business’s capabilities.” See AR, Tab 9, Bundling Analysis, at 7-8. It is thus apparent that the agency’s consolidation/bundling of its coordination and freight transportation requirements restricts competition to some degree. The fact that the agency expects to receive some competition under the RFP does not relieve an agency of the burden under CICA of justifying restrictions to full and open competition. See National Customer Eng’g, B-251135, Mar. 11, 1993, 93-1 CPD ¶ 225 at 6.

DoD argues nevertheless that the RFP, as structured, is the least restrictive means to obtain the substantial cost savings estimated by its cost model and to satisfy its other legitimate needs. See Agency Legal Memorandum at 2. As noted above, DoD determined that the decentralized and disorganized manner in which its freight transportation is managed and shipped does not satisfy the government’s requirements for shipment reliability, predictability and efficiency; for reduced cycle times (time from request for shipment to freight delivery); for visibility over movements across the DoD enterprise; and for cost savings. See id. at 3-4; COSF at 1-5. In addition, under its current system, the agency’s freight volume is not leveraged to enable it to get the best possible rates, and that even when the agency obtains fixed rates for a specific lane or point-to-point movement there is no practical guarantee by a carrier that its capacity will be available at that rate when DoD needs it. Agency Legal Memorandum at 5-6. In contrast to DoD’s current system, the agency points to the commercial marketplace, in which, DoD states, the “current commercial trend is to leverage the services of a [3PL firm] to collect transportation requirements, perform shipment planning and optimization, and gain efficiencies through consolidation and mode shift.” Id. at 6. Commercial 3PL firms, DoD notes, use their aggregate volume to reduce transportation costs and, unlike DoD’s current system, contract for guaranteed capacity at set rates. Id. In short, the agency believes that it is necessary to consolidate the coordination services and transportation services in the DTCI solicitation to fix or reengineer the agency’s current decentralized and disorganized freight transportation system.

The protesters agree with the agency that DoD’s freight shipment system needs to be reengineered. See Supplemental Protest at 6 (“We agree that the nation’s warfighters and taxpayers would benefit from centralization and improvement of those [management, coordination, and information technology] functions, as opposed to having them performed by hundreds of DoD shippers [that is, transportation officers] that are now performing them”). In this regard, the protesters describe the agency’s current freight shipment system as having a

core dysfunctionality resulting in the inefficiency and less than optimal costs that define DTCI’s stated goals. . . . [The transportation officers] are a decentralized corps, disbursed across many different shipping locations. They make traffic management and load planning decisions, including carrier and mode selection decisions, on an independent,

uncoordinated, and localized basis, without regard to the needs and activities of other, even nearby shipping locations within the DoD enterprise, with the sole focus of “getting their freight off the dock,” without regard to overall cycle time from pickup to delivery.

Protesters’ Post-Hearing Comments at 6 (Tr. citations omitted). The protesters also agree that the RFP, as structured, will provide the cost savings and non-monetary benefits ascribed to it by the agency.¹⁷ Tr., day 2, at 7-9.

The protesters now primarily argue that the agency could receive the same cost savings and non-monetary benefits under a less restrictive approach that does not consolidate the coordination/management services with the transportation services. See Protester’s Comments at 4-5; Protester’s Post-Hearing Comments at 9. In this regard, the protesters contend that the problems associated with the decentralized nature of DoD’s freight transportation could be resolved by awarding a contract for a coordinator that would provide centralized traffic management, freight optimization recommendations, and an information technology system. Protester’s Comments at 4-5. The agency responds that it determined that it could only achieve the cost savings and non-monetary benefits, such as more reliable, efficient, and timely

¹⁷ The protesters initially challenged the agency’s cost analysis and methodology as incorrect, incomplete, and unsupported. See, e.g., Supplemental Protest at 13. The protesters, however, had the opportunity for a full review of the record supporting the agency’s cost model and analysis, and had the support of an expert consultant, who received access to protected material under the protective order issued in connection with this protest. See Protesters’ Consultant’s Final Report. Following this review, the protesters’ view of the cost model and its estimated cost savings changed. Although the protesters agree that the model’s estimated cost savings can be achieved, see Tr., day 2, at 7-8, they continue to complain that the model looked at all of DoD’s shipping locations within CONUS without regard to whether the locations would ultimately be part of the DTIC acquisition. As noted in testimony, however, at the time of the cost analysis, the agency had not determined what shipping locations would become part of the DTIC acquisition and, in fact, the cost analysis was used to make that determination. See Tr., day 1, 263-65. In any event, the protesters fail to show what difference this would make in the agency’s analysis. The protesters also complain that the agency’s cost analysis used rates from the TTC I contracts, which were awarded based upon a cost/technical tradeoff, and did not consider the rates from the newer TTC II contracts, which were awarded based upon low price and technical acceptability. However, the performance of the TTC II contracts did not begin until after the agency had completed the business case analysis, which as noted above, was based upon the agency’s historical data. Agency’s Response to Protesters’ Comments at 14. Under such circumstances, the agency was not required to account for the rates included in the TTC II contracts. See American Artisan Prods., Inc., B-292380, July 30, 2003, 2003 CPD ¶ 132 at 6.

transportation, by consolidating the coordination and transportation functions. Agency's Post-Hearing Comments at 2.

The protesters complain, however, that the agency failed to contemporaneously perform an analysis of whether such an "unbundled" approach, which did consolidate the coordination and transportation functions, would provide cost savings and other benefits. Protester's Supplemental Response (Oct. 19, 2006) at 2. While it is true that the record does not contain a detailed analysis of an "unbundled" approach, as discussed below, the record confirms that the agency in fact considered whether its needs could be satisfied by an approach that did not consolidate the coordination function with the actual provision of the transportation services, and concluded that this approach would not satisfy all of its needs. See Tr., day 2, at 58, 78-80, 134-35, 142-44; AR, Tab 25, Acquisition Plan, at 5; Agency's Post-Hearing Comments at 12-14.

As indicated, the protest now focuses on the reasonableness of the agency's determination that it can only achieve the cost savings estimated in its cost model, if the DTCI coordinator performs both the coordination and transportation functions under which it would provide a centralized structure, information technology system, management, and shipping volume to allow for the optimization of freight shipments (that is, consolidation of loads, better mode and carrier selection, and avoidance of "empty miles"¹⁸) that results in lower shipping rates. In questioning this determination, the protesters assert that, because the cost model was based only upon DoD's own shipping volume (and did not include any estimate of commercial volume that a 3PL could bring to the contract) and rates, see Tr., day 1, at 235-36, the reported cost savings indicated by the model are only a reflection of obtaining optimized shipments, which could also be achieved if the DTCI coordinator was merely a consultant providing management and optimization advice to the agency's transportation officers.¹⁹ See Protester's Post-Hearing Comments at 22-23.

¹⁸ "Empty miles," also known as "deadhead miles," refers to the situation where a carrier after delivering a freight shipment does not have cargo to return and is thus traveling empty. In this situation the costs associated with the empty miles must be borne by the first shipment, and thus the shipping rates are higher. See Tr., day 2, at 35-37.

¹⁹ In its pre-hearing statement, the protesters stated that the DTCI coordinator, in the protesters' unbundled alternative, "would determine and select the optimum route, mode, and carrier rate, and order the transportation from the Government-contracted carrier." Protesters' Submission (Oct. 31, 2006) at 5 (emphasis added). The agency contends that allowing a contractor to place orders against other government prime contracts, and thus obligate government funds, would appear to provide for the DTCI coordinator to perform inherently governmental functions contrary to FAR Part 7.5. In their post-hearing comments, the protesters no longer assert that the DTCI coordinator, under their proposed unbundled approach, would
(continued...)

We find that both the contemporaneous record and the testimony received at the hearing supports the agency's conclusion that the estimated savings to be derived from optimizing freight shipments can only be achieved from an approach that provides for consolidating the coordination and transportation functions, including a centralized information technology and freight management system.²⁰ We first note in this regard that the record supports the agency's judgment that a 3PL firm brings to the contract an existing carrier network and information technology system that allows the 3PL the ability to optimize DoD freight movements both before and after the pickup of freight.²¹ See Tr., day 2, at 26, 38, 40; AR, Tab 7, University of Tennessee 3PL Prototype Test Report, Sept. 15, 2002, at 17. Although the protesters argue that the coordinator could perform the same services while the government continued to award and administer the transportation contracts, they have not provided a persuasive basis to challenge the agency's belief that such an unbundled approach would be operationally inefficient, given that the coordinator would be supporting the more than 600 transportation officers located throughout the agency's various components. In this regard, the agency was reasonably concerned that using the coordinator as a consultant to the agency's scattered transportation officer corps

(...continued)

place orders; rather, the coordinator would serve as a consultant to the transportation officers, who would be placing orders for transportation services. See, e.g., Protesters' Post-Hearing Comments at 10-12.

²⁰ In fact, as discussed above, the protesters do not dispute that DoD needs to reengineer its freight transportation system, and the protesters' consultant testified that, despite having access to all of the protest record and having heard all of the hearing testimony, he could not conclusively say whether DoD would achieve the same monetary and non-monetary benefits if the coordination and transportation services were not bundled. Tr., day 2, at 185-87. The protesters argue, however, that it should not be their obligation in these protests to perform the analysis that they assert the agency did not perform to demonstrate that an unconsolidated acquisition approach would provide the monetary and non-monetary benefits that DoD hopes to obtain in this procurement. Although we agree with the protesters that they need not perform such an analysis nor conclusively demonstrate what benefits, if any, the agency would achieve from the protesters' argued-for approach, the protester has the burden of showing that the agency's analysis and explanation supporting the bundling of the requirements are unreasonable. See Phoenix Scientific Corp., B-286817, Feb. 22, 2001, 2001 CPD ¶ 24 at 12. As explained in this decision, the protesters have failed to satisfy this burden.

²¹ 3PL firms also employ volume purchasing of fuel, maintenance, parts and equipment for their carrier network, which reduces its carriers' costs for these items; this aids small business carriers and tends to improve the carriers' rates. See Tr., day 2, at 34.

would bifurcate responsibility and contribute to operational inefficiency. Finally, contrary to the protesters' assertions, the agency had reasonable concerns that if the coordination and transportation functions are not consolidated the agency would be required to bear greater time, expense and risk to obtain and/or develop a central information technology capability that the agency currently does not have and which the coordinator would be expected to provide as part of its carrier network.²² See Tr., day 2, at 99-100.

In addition, the record supports the agency's judgment that obtaining optimization of freight shipments after pickup and a means to share in subsequent rate savings are important agency needs. Although it is true that the agency's cost model did not specifically address when freight optimization would occur and that commercial freight volumes were not included in the model's analysis, the agency believed that having a mechanism, such as DTCI's use of cost-reimbursable NTE rates, would allow the agency to share in cost savings generated by after pickup optimization.²³ That is, this approach would enable the DTCI contractor to leverage both government and commercial volume and consolidate freight after pickup to achieve additional cost savings.²⁴ This is one of the reasons that the agency believed that the

²² While it is true that the agency can contract for the provision of a new information technology system by a transportation coordinator/consultant, the protesters' arguments ignore the agency's and its 3PL consultant's arguments that 3PL firms would not simply provide the agency with access to its existing information technology system that was expensive to create and is intertwined with its commercial carrier network. The agency's 3PL consultant basically questioned the feasibility of a 3PL firm providing access to its information technology system to carriers with which it was not in a contractual relationship. The reliability of the information technology system is dependent upon carriers being trained to use the system, investing in the "hookup," and complying with contract requirements to provide information to the system, all of which the agency believed would be difficult, if not impossible, to achieve where the government continued to award and administer its own transportation service contracts. See Tr., day 2, at 52-55; see also Tr., day 1, at 171-74.

²³ The agency found that cost savings were not achieved under its 3PL prototype test in 2001, where, among other things, a 3PL firm was awarded a fixed-price service contract and there were no incentives for the firm to generate cost savings. See COSF at 3; AR, Tab 7, University of Tennessee 3PL Prototype Test Report, Sept. 15, 2002, at 44-45.

²⁴ While the protesters contend that the DTCI will not have sufficient incentive to ensure cost savings for the government will be obtained, the proposed contract includes a variety of terms, for example, award fees, award term option, and provisions providing for reductions in contract price if the performance thresholds are not satisfied.

model's estimated cost savings represented a "conservative" estimate that could be realized by the agency and that therefore its need for cost savings would be satisfied by the RFP, whereas an unbundled approach posed risks that costs savings would not be achieved. See Tr., day 1, 94-95, 236-38; day 2, at 42-43. Although the protesters suggest that the agency's expressed need to share in cost savings after freight pickup could be satisfied by "the transportation provider . . . agreeing, in advance as a part of its contract, that its initial task order and rate is subject to change after issuance in the event the Coordinator can find additional optimization/coordination opportunities after pickup," see Protesters' Post-Hearing Comments at 16, the protesters have failed to explain this proposed approach or show it would be practical and/or feasible.

Moreover, the record supports the reasonableness of the agency's conclusions that contracting with a 3PL firm for coordination and transportation services would satisfy other core agency needs, such as reducing cycle times, improving the reliability and predictability of freight shipments, and increasing the agency's capacity guarantees to address daily and surge requirements. Testimony at the hearing explained how a 3PL firm's larger carrier and customer network and freight volume provided greater shipping capacity than that available to the agency under its contracts and that it was this greater capacity that allows 3PL firms to meet the agency's shipping needs generally and surge requirements. See e.g., Tr., day 1, at 179-80; day 2, at 23-26, 28. Other testimony explained the agency's view that an unconsolidated approach would not satisfy the agency's needs for improved reliability, predictability and cycle times, given that such an approach would, among other things, not result in a centralized transportation management system supported by an information technology system. See, e.g., Tr., day 2, at 100-04. Again, although the protesters argue that all of the agency's needs would be met in some fashion by an unconsolidated approach, they have failed to show that the agency's judgments to the contrary are unreasonable.

In sum, the agency reasonably concluded that consolidating the coordination function and transportation services extends beyond mere administrative convenience and would provide the agency with substantial monetary benefits and increased operational efficiency, as well as a number of other non-monetary benefits. Further, DoD reasonably decided that an approach that did not consolidate these functions would likely not satisfy the agency's needs for cost savings and reengineering its transportation system to obtain operational efficiency and other benefits. Here, the record reasonably supports DOD's judgments.

Inherently Governmental Functions

The protesters also complain that the RFP provides for the performance of a number of inherently governmental functions in violation of 10 U.S.C. § 2383 (Supp. IV 2004) and FAR Part 7.5. Specifically, the protesters argue the DTCI contractor will be required to select carriers; negotiate, execute, and manage subcontracts; ensure

subcontractor compliance with federal regulations regarding public liability and cargo liability insurance; facilitate the resolution of government claims for loss or damage to cargo; and “[i]nterpreting and enforcing cargo liability terms.” Protesters’ Comments at 14.

Implementing Office of Federal Procurement Policy Letter 92-1, Sept. 23, 1992, the FAR provides that agencies will not award contracts for the performance of inherently governmental functions, and includes as examples of inherently governmental functions in federal procurement activities “with respect to prime contracts” the awarding, administering and/or terminating contracts. FAR § 7.503(a), (c)(12). In this regard, the FAR defines an “inherently governmental function” as one that is so intimately related to the public interest as to mandate performance by government employees, and notes that governmental functions fall into two categories: the act of governing (that is, the discretionary exercise of government authority), and monetary transactions and entitlements. FAR § 2.101. Section 2383 of Title 10 of the United States Code further provides that an agency may award a contract “for the performance of acquisition functions closely associated with inherently governmental functions” only where there are no appropriate DoD personnel available to perform the functions; that the contractor will be supervised by DoD personnel who will perform “all inherently governmental functions associated with the functions to be performed under the contract”; and any potential organizational conflict of interest of the contractor in the performance of the functions under the contract has been addressed.

We find from our review of the solicitation here that the RFP does not provide for either the “performance of acquisition functions closely associated with inherently governmental functions” or for the performance of “inherently governmental functions” themselves. The RFP’s coordination, management, and transportation requirements are all services that are routinely performed in the commercial sector by 3PL firms, such as GENCO. See AR, Tab 7, University of Tennessee 3PL Prototype Test Report, Sept. 15, 2002, at 16-17. In addition, the DTICI contract requirements do not provide for the performance of inherently governmental functions involving the inherent exercise of government discretionary authority or directly obligating government funds. Instead, the contract tasks of selecting, awarding, and managing subcontracts reflect routine subcontract administration requirements. While the contract requires the DTICI contractor to facilitate the resolution of government claims for loss or damage to cargo and requires the contractor to include in its subcontracts terms that “name the government as a third party beneficiary” and “authorize[s] the government to enforce cargo liability terms,” see RFP § C, at 41-43, these provisions do not require the contractor to perform any tasks that are inherently governmental in nature because it remains the government’s responsibility to “determine the final resolution of government claims [for loss or

damage to cargo],” see id. at 44, and, in this regard, the DTCI contractor remains liable to the government for the actions of its subcontractors. See id. at 43.

The protest is denied.

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General Counsel