



## Decision

**Matter of:** Biblia, Inc.

**File:** B-403006

**Date:** September 13, 2010

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William B. VanPuffelen for the protester.  
Brianna L. Elsmore, Esq., Defense Logistics Agency, for the agency.  
Nora K. Adkins, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. The Government Accountability Office has jurisdiction to decide a protest of an award under a solicitation for a tender of service for the one-time transport of a barge, where the transportation service is being obtained based on a “best value” source selection decision made in a procurement conducted using a formal solicitation containing evaluation criteria.
2. An undocumented “best value” award determination to make award to other than the low cost carrier under a solicitation for a tender of service for the one-time transport of a barge does not evidence that the award decision was in accordance with the solicitation or otherwise provide a reasonable basis for the award.

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### DECISION

Biblia, Inc., of Savannah, Georgia, protests an award by the Defense Logistics Agency Norfolk Naval Shipyard (DLA-NNSY) under solicitation No. 1NXX100501N-WEJ to Superior Marine Services, Inc., of Washington, D.C., for a one-time barge movement from Charleston, South Carolina to Little Creek, Virginia.

We sustain the protest.

On May 13, 2010, DLA-NNSY submitted a routing request and order form to the Department of Defense's Surface Deployment and Distribution Command (SDDC)<sup>1</sup> for the one-time movement of a barge from Charleston, South Carolina to Little Creek, Virginia, where the barge was being sent to receive repairs. On May 19, SDDC issued the solicitation for these transportation services to 72 carriers. The solicitation requested that carriers submit a tender for the movement by completing a carrier worksheet and returning it to SDDC. Under the "Selection of Carrier" portion of the solicitation, carriers were informed that tenders "will be evaluated and all responsive responsible tenders will be sent to the Transportation Officer." Solicitation at 7. The solicitation further provided that "[t]he factors to be a responsive, responsible carrier include past performance, ability to meet the RDD's [requested delivery dates] for this movement, ability to provide the necessary equipment for this movement, current eligibility as [a] SDDC approved carrier for the DOD and capability for using PowerTrack." Id.

Seven tenders were received in response to the solicitation. SDDC ranked the seven tenders, according to price, and submitted a consolidated worksheet to the DLA-NNSY's transportation officer for his review and source selection decision. Biblia was ranked first with the lowest tender of \$48,000 and Superior's tender of \$48,999 was ranked second. On May 26, the transportation officer made a best value decision to accept Superior's tender and issued a bill of lading to that firm. On June 3, Biblia protested to our Office.

The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 (2006), which established the bid protest jurisdiction of our Office, defines "protests" as including objections to solicitations for bids or proposals for proposed contracts as well as objections to proposed or actual awards of such contracts. We have found that this definition encompasses objections to agency actions that result in the "award" of instruments that are not in themselves contracts, such as rate tenders, which become binding contracts when a bill of lading is issued. Humco, Inc., B-244633, Nov. 6, 1991, 91-2 CPD ¶ 431 at 3; recon. denied, Department of State--Recon., B-244633.2, Apr. 2, 1992, 92-1 CPD ¶ 339 at 3. Moreover, we have recognized the term "procurement" as used in CICA can include the process of acquiring transportation services by the government, even though the acquisition of such services is generally exempt from the Federal Acquisition Regulation. Federal Transport, Inc.--Recon., B-233393.3, June 1, 1989, 89-1 CPD ¶ 542 at 3. Thus, transportation services procured by and provided to the government are subject to our bid protest jurisdiction, where the agency obtains these services by means of a procurement. Abba Int'l, Inc. et al., B-311225.4, Feb. 2, 2009, 2009 CPD ¶ 28 at 4-5.

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<sup>1</sup> SDDC acts as a liaison between government shippers and commercial carriers. SDDC is responsible for the establishment and maintenance of contracts, solicitations and agreements with the carrier industry to deploy and distribute Department of Defense (DOD) supplies, personal property and personnel worldwide.

DLA-NNSY asserts, however, that this protest is outside of our bid protest jurisdiction because the shipment was a “spot movement,” that is, a one-time shipment of a commodity on one bill of lading that requires special equipment or services not otherwise provided by tariff or special rate tender. The agency references various decisions issued by our Office, in which we declined jurisdiction over protests of such spot movements. See Diplomatic Supply, Ltd., B-249493, Sept. 16, 1992, 92-2 CPD ¶ 182 at 2; Stapp Towing Co., Inc., B-240087, July 6, 1990, 90-2 CPD ¶ 19 at 2; Moody Bros. of Jacksonville, Inc.; Troika Int’l Ltd., B-238844, June 12, 1990, 90-1 CPD ¶ 550 at 2-3. In those cases, we declined jurisdiction over protests of “spot buys” because each involved the issuance of a bill of lading for a one-time shipment using informal procedures without issuing a formal solicitation or making a source selection. Moody Bros. of Jacksonville, Inc.; Troika Int’l Ltd., *supra*; see Abba Int’l, Inc. et al. *supra*, at 5 n.6; Humco, Inc., *supra*, at 4.

Here, the agency issued a formal solicitation to 72 carriers requesting price tenders and other information, and provided the evaluation factors which would be considered in determining which tender would be selected for award. Moreover, the agency made a “best value” source selection decision to award to other than the low-priced carrier. Thus, we think that this spot buy clearly goes beyond the informal spot movement procedures employed by the agency in those cases where we declined jurisdiction. See Abba Int’l, Inc., et al., *supra*; Humco, Inc., *supra*; Georgetown R.R. Inc., Union Pac. R.R., and the Southern Pac. Transp. Co., B-240322, Nov. 9, 1990, 90-2 CPD ¶ 383 at 3. Under the circumstances, we will consider Biblia’s protest.

Biblia’s complains that the agency’s evaluation was flawed because it was the best value carrier with the lowest tender.

An agency’s evaluation and award decision are required to be made in accordance with the terms of the solicitation. Georgetown R.R. Inc., *supra*, at 4. In reviewing protests like the one here, our Office will review the documentation supporting a source selection decision to determine whether that decision was adequately supported and rationally related to the stated evaluation factors. Universal Shipping Co., Inc., B-223905.2, Apr. 20, 1987, 87-1 CPD ¶ 424 at 10.

The solicitation here indicated that award would be made to the low cost carrier, which had been determined responsive and responsible under the factors set forth in the solicitation.<sup>2</sup> It further specified that SDDC would rank carriers for award and

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<sup>2</sup> The Defense Transportation Regulation (DTR) part II, ch. 201, ¶ N.3.a.(1), which is applicable to this spot buy procurement, provides that transportation officers are required to designate “any evaluation factors they will consider in their selection determination” and provide them to SDDC before the solicitation is issued.

provide this ranking to the transportation officer.<sup>3</sup> While the transportation officer, not SDDC, would ultimately make the award selection, nothing in the solicitation suggested that the transportation officer could make award inconsistent with the terms of the solicitation, which indicated that award would be made to the lowest-priced, responsible and responsive carrier.

Moreover, there is nothing in the record that supports the transportation officer's best value decision. In this regard, the record here provides no contemporaneous documentation as to why the low cost carrier was not selected, even though DTR part II, ch. 201, ¶ N.3.b.(1)(d) states that if the transportation officer "selects a carrier other than the low cost carrier, they must document their rationale for their decision in writing and provide a copy to SDDC." The only documentation provided by the agency is an email from the transportation officer sent after the protest was filed in response to a query as to why he considered Superior's tender to represent the best value. This email revealed that the transportation officer called a SDDC representative to explain the urgency for this shipment. The e-mail also stated:

I explained that I had used Superior previously and the[ir] performance was outstanding but Superior was not the low bidder. [The SDDC representative] ask[ed] where Superior was ranked and I replied 2<sup>nd</sup> low bidder for a difference in cost of \$999.00. [The SDDC representative] stated I could award to Superior citing Best Value, and [the SDDC representative] emailed me the definition for Best Value [several hours before award was made].<sup>4</sup>

Agency Report, Tab 9, Email from Transportation Officer (June 10, 2010). Thus, the record does not provide a reasonable basis for the best-value award decision, but only evidences that Superior's tender was selected because the transportation officer was familiar with that firm and its past performance, and that Biblia's tender (including that firm's past performance) was not considered beyond noting its low price.

Because the record does not evidence that the award decision was in accordance with the solicitation or was otherwise reasonably based, we sustain the protest.

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<sup>3</sup> DTR part II, ch. 201, ¶ N.3.a.(2)(b) requires SDDC to "rate tenders according to the evaluation factors provided."

<sup>4</sup> This definition of best value was not included in the record.

The shipment protested here was completed on June 12. Thus, it is impractical to recommend contract termination. Under the circumstances, we recommend that Biblia be reimbursed for its tender preparation costs and its reasonable costs of filing and pursuing this protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1), (2) (2010). The protester's certified claim for costs, detailing the time expended and the costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

Lynn H. Gibson  
Acting General Counsel