



GAO

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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Abba International, Inc. et al.

File: B-311225.4

Date: February 2, 2009

Alan F. Wohlstetter, Esq., Denning & Wohlstetter, for the protester.
Vera Meza, Esq., and Bruce D. Ensor, Esq., Department of the Army, for the agency.
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DIGEST

1. Pursuant to the bid protest authority granted GAO under the Competition in Contracting Act of 1984, GAO will consider a protest of the terms of a request for competitive rate tenders for transportation services, even though they are not subject to the Federal Acquisition Regulations, where the responses will form the basis for placement of government bills of lading for the services; however, GAO will not consider issues relating to the agency's decision not to include certain traffic channels in the request for rate tenders since this involves the exercise of the agency's business judgment and executive branch policy.

2. As a general rule, solicitations must contain sufficient information to allow offerors to compete intelligently and on a relatively equal basis, although there is no requirement that a solicitation contain such detail as to completely eliminate all risk or remove all uncertainty from the mind of every prospective offeror.

DECISION

Abba International, Inc. and 14 other firms protest the terms of a solicitation issued by the Department of the Army, United States Transportation Command, soliciting rate tenders from eligible Department of Defense (DoD) approved transportation service providers (TSP) to transport household goods, unaccompanied baggage and boat shipments between designated rate areas (traffic channels) through government

bills of lading (GBL) under the Defense Personal Property System (DPS).¹

We deny the protest in part and dismiss it in part.

The DPS is the computerized web-based system that supports the Surface Deployment and Distribution Command (SDDC) household goods transportation program called the Families First Program, which seeks to automate and simplify the personal property moves, in particular permanent change of station (PCS), for applicable personnel. The DPS was developed to improve the competitive nature of the DoD household goods program, and is a computerized system with the ability to accept rates filed by TSPs, award shipments to TSPs through the issuance of GBLs, provide counseling to military service members and employees relating to their PCS, and verify invoices. This new transportation system involves the receipt of rate tenders where no level of traffic, number of shipments, or level of tonnage is guaranteed to any carrier for any specific traffic channel. Agency Report (AR) at 2.

Under the DPS, qualified TSPs are solicited to tender rates for each traffic channel, and the TSPs are evaluated for each traffic channel on the basis of their rates submitted for that traffic channel and their past performance quality score as determined by the agency, both of which are used to calculate a best value score (BVS) for each TSP for each traffic channel. The TSPs' BVSs are then ranked from highest to lowest for each traffic channel, and placed in quartiles. The TSPs whose BVSs place in the highest quartile (the highest 25 percent) are placed into the first quartile, and are distributed shipments prior to any TSP whose BVS places in the second quartile (the next 25 percent) in that traffic channel, and so on. The TSPs are then provided an opportunity to view their BVSs and quartile placement in the DPS. The TSPs who believe that their BVS are in error are then permitted to contact the agency at the close of rate filing, discuss their concerns, and, in instances where mistakes are discovered, have them corrected. Once the BVSs are calculated and those scores are ranked both by quartiles as well as within a specific quartile, the competitive rate filing process is considered final and complete for that rate cycle. AR at 2-3.

¹ The firms protesting this solicitation are: Abba International Inc. of Everett Washington; Arpin International Group of East Greenwich, Rhode Island; Approved Forwarders, Inc. of San Diego, California; BINL, Inc. of Long Beach, California; Cartwright International, Inc. of Grandview, Missouri; Covan International, Inc. of Midland City, Alabama; Crystal Forwarding, Inc. of Carlsbad, California; Genesis Van Lines, LLC of Memphis, Tennessee; Hetco Van Lines, Inc. of Springfield, Virginia; Jet Forwarding, Inc. of Torrance, California; Old Glory Van Lines, LLC of Memphis, Tennessee; Silver Ridge Forwarding, Inc. of San Diego, California; Stevens Van Lines, Inc. d/b/a Stevens Worldwide Van Lines of Saginaw, Michigan; Suddah Van Lines, Inc. of Jacksonville, Florida; and Volunteer Van Lines, LLC of Memphis, Tennessee.

The agency has been attempting to implement this program for some years. Ultimately, on March 14, 2008, the agency issued a revised request for rate tenders from the TSPs that were to be submitted from March 17 through March 25.² This request, which for purposes of clarity we will call the initial request, advised that TSPs were required to submit tenders for any channels that the TSP wished to service. These rates were applicable for shipments from March 31, 2008 through May 14, 2009. However, the initial request also advised that agency shipments involving (or between) 18 identified transportation offices would be initially rolled out, with the remainder of the sites to be rolled out at a later date during the solicited rate period.³

The terms of the initial request for “round two” rates were protested on March 25 by a number of TSPs on a number of grounds, including that the agency had not provided sufficient or required information to allow them to submit the rate tenders.⁴

Rate tenders from the TSPs in response to the initial request were received and evaluated according to the evaluation scheme and a BVS for each traffic channel was calculated for each TSP. On or about April 2, the TSPs were provided with the opportunity to question or challenge any of the BVSs received.⁵ The agency then ranked the BVSs for all TSPs who submitted rates within a given traffic channel, and placed the ranked scores into quartiles, which determined the prospective awardees.

On May 5, the parties entered into a settlement agreement wherein certain TSPs agreed to the initial rollout of the DPS at the 18 identified sites. The parties also agreed that “[i]f the Government rolls-out the remaining sites, the Government will allow rates to be re-filed by TSPs for the remaining sites prior to an expected roll-out.” AR, exh. 2, Settlement Agreement (May 5, 2008), at 1. The settlement agreement also noted that “TSPs shall not be permitted to refresh their rates for the initial 18 roll-out sites.” *Id.* Based on this settlement agreement, the protesting TSPs withdrew their protests.

² This request was for “round two” rates; the “round one” rates were solicited and submitted from February 11 through February 22, 2008. Rates could be submitted by the TSPs during either round.

³ The initial request indicates that roll out of the remaining sites would begin in May 2008 and be completed no later September 30, following successful implementation of the initial 18 sites.

⁴ The initial request for “round one” rates was also protested on February 7, 2008.

⁵ The agency noted that no TSP who submitted rates in response to the initial request challenged or protested any calculated BVS for any traffic channel relating to the 18 initial sites. AR at 3.

There were delays in implementing the DPS. On August 19, the first GBL was issued to move household goods under this DPS between 2 of the 18 identified sites. AR, exh. 7, Declaration of Branch Chief, Personal Property Information and Business Integration of SDDC (Nov. 26, 2008). The complete roll-out of the DPS for shipments involving the 18 identified sites did not occur until November 19. www.move.mil. The agency states that it is “on track to roll-out DPS world-wide in early 2009.” *Id.*

On October 20, the agency issued a “second” request for rate tenders from the TSPs for certain “pure traffic channels,” that is, channels that neither originated from nor terminated at the 18 initial roll-out sites. This second request required TSPs to submit rates for the “pure traffic channels” from November 11 to November 22 for round one and from December 4 to December 12 for round two. These rates would be effective for these channels until May 14, 2009. The second request further stated that “channels covered by the initial 18 sites roll-out will not re-file rates until the annual rate cycle” (that is, effective May 15, 2009).

The protesters filed this protest on October 27 arguing that the second request for revised rates was “arbitrarily severely limited to a small number of traffic channels” because it did not allow for revised rate tenders involving the 18 initially rolled-out sites, Protest at 2, and that the second request was otherwise improper because it did not provide sufficient or required information to allow the TSPs to submit revised rate tenders on any of the channels encompassed by the DPS.

The Army initially argues that our Office does not have jurisdiction to decide this protest because the DPS is a technology computer system that accepts and processes government rate tenders from qualified TSPs, and the acquisitions are exempt from the Federal Acquisition Regulation (FAR).

The Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 (2000), 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 basic order agreements, which become binding when an order is issued, or a rate tender, which becomes binding when a GBL 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 FAR. *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.⁶ Humco, Inc., supra, at 2-4; recon. denied, Department of State--Recon., supra, at 2; Federal Transport, Inc.--Recon., supra. Because the request for competitive rate tenders under protest here will form the basis for the placement of GBLs for transportation services, our Office will consider the protests of the terms of this request, except as explained below. Humco, Inc., supra, at 2-4; recon. denied, Department of State--Recon., supra, at 2.

The protesters argue that the agency improperly did not allow the TSPs to submit revised rate tenders for the channels involving the 18 initially rolled-out sites. For example, the protesters contend that, due to the substantial delay in making awards under the first request, the rates are “no longer relevant due to changes in the procurement [e.g., the tender of service containing terms and conditions of the services that was part of the solicitation was not issued until the rates in response to the initial request for rate tenders were submitted, the agency removed the provision for a date range for delivery⁷], increases in the cost of fuel and ocean transportation and unfavorable dollar fluctuations, as well as increases in the [Consumer Price Index] which have occurred since that time and since the date the Settlement Agreement was entered into.” Protesters’ Response to Agency Summary Dismissal Request (Nov. 7, 2008), at 4; Protesters’ Comments at 10-13. In addition, the protesters assert that they were apprised by the Army that the Air Force, which provided a significant volume of shipments under the previous transportation program, would not participate in the roll-out involving the 18 initial sites, and that the agency has now announced that the Air Force will participate in this roll-out. The protesters argue that the TSPs for the channels involving the 18 initially rolled-out sites should be given an opportunity to refresh their rates for the initial solicitation because of “the government’s delay in the performance of the Families First warrants that TSPs be accorded the opportunity to reflect in their bids cost changes which occurred during the delay.” Protesters’ Comments at 10. The protesters also assert that the agency had not published in the Federal Register the Business Rules applicable to the DPS when the initially requested rate tenders were

⁶ This is in contrast to the issuance of a GBL for “spot movements,” where the agency elects to issue a GBL under a tender for a one-time routing under informal procedures without issuing any type of solicitation or conducting a formal source selection; these orders are not reviewed by our Office. See Humco, Inc., supra, at 4; Federal Transport, Inc.--Recon., supra; Moody Bros. of Jacksonville, Inc.; Troika Int’l Ltd., B-238844, June 12, 1990, 90-1 CPD ¶ 550 at 3.

⁷ The protesters state that they were advised, prior to the closing date for receipt of the round one offers under the initial solicitation, that deliveries could be made within a delivery window, but the DPS could not accommodate this feature and now requires that delivery be accomplished by a specified date.

submitted, and that the TSPs should be permitted to revise their rates based upon the finally published Business Rules.⁸ Protest at 3; Protesters' Comments at 6.

These complaints all concern the agency's decision as to what services should be acquired under the procurement at issue and what services will not be included. We will not consider these complaints because we view the agency's decision as one involving the exercise of the agency's business judgment and executive branch policy in determining what transportation services should be acquired through this procurement. Cf. Firetech Automatic Sprinkler, B-295882, May 4, 2005, 2005 CPD ¶ 146 at 2 (GAO will generally not consider agency decisions to obtain services in-house instead of under a procurement because this involves a matter of executive branch policy, except in limited cases where the agency uses the procurement system to determine to obtain the services in-house or through contracting). In this case, the agency had already obtained rate tenders for the traffic channels involving the 18 indicated sites that are effective through May 14, 2009, and we find no legal requirement for the agency through the procurement in question here to allow TSPs to update these rate tenders that are in effect, even though this procurement provided for TSPs to update their rates for other traffic channels.⁹

The protesters nevertheless argue that the Army breached the settlement agreement entered into between the parties at the time of the earlier protests. The protesters maintain that they are only prohibited by the settlement agreement from re-filing rates for moves between the 18 identified sites and that under the settlement agreement they should be allowed to re-file rates for traffic channels that originate at or terminate at one of the 18 initial sites and involve a new site. Protesters' Comments at 2-3. In contrast, the agency argues that its actions during this procurement have been consistent with the settlement agreement and that the

⁸ The Business Rules were published in the Federal Register on November 3, before the rates for the second solicitation were required to be filed, from November 11 to November 22 for round one, and December 4 to December 12 for round two. 73 Fed. Reg. 65,297 (Nov. 3, 2008). The agency notes that, prior to its publication in the Federal Register, the Business Rules were the Operational Business Rules and in Appendix U in the Defense Transportation Regulations. AR, exh. 8, SDDC Website-DPS Business Rules; exh. 9, DTR Appendix U.

⁹ While the protesters assert that the duty to update the rate tenders for the traffic channels involving the 18 indicated sites exists because no contracts came into existence through the issuance of GBLs until November 19 (after this protest was filed), it has provided no persuasive legal authority that supports this proposition. The case cited by the protesters, Department of Energy--Recon., et al., B-246977.2 et al., July 14, 1992, 92-2 CPD ¶ 20 at 4 (agency required to amend a solicitation where the requirements materially changed after receipt of proposals), involved the application of FAR § 15.206(a), which does not apply to the acquisition of transportation services.

protesters in its request for relief in this protest are simply asking that the GAO permit them to breach the settlement agreement. Agency Summary Dismissal Request (Nov. 5, 2008), at 3.

The agency's alleged violation of the settlement agreement is not a valid basis of protest. Our bid protest jurisdiction as established by CICA is limited to deciding protests "concerning an alleged violation of a procurement statute or regulation." 31 U.S.C. § 3552. Thus, in cases such as this, we will not consider an argument concerning compliance with a settlement agreement except to the extent the protest asserts that an alleged breach resulted in a prejudicial violation of procurement laws or regulations. American Mktg. Assocs., Inc.–Recon., B-274454.4, May 14, 1997, 97-1 CPD ¶ 183 at 2-3. The protesters here have not shown that the agency's alleged breach of the settlement agreement resulted in a violation of procurement laws or regulations. Therefore, to the extent that the protesters' arguments are based on an alleged violation of the settlement agreement, they will not be considered by our Office.¹⁰

The protesters also raise a variety of issues that concern the terms of the solicitation of revised rates for the "pure traffic channels" that are within our Office's jurisdiction. As a general rule, solicitations must contain sufficient information to allow offerors to compete intelligently and on an equal basis. However, there is no legal requirement that a solicitation contain such detail as to completely eliminate all risk or remove all uncertainty from the mind of every prospective offeror. Braswell Servs. Group, B-276694, July 15, 1997, 97-2 CPD ¶ 18 at 2-3.

Specifically, the protesters argue that Business Rule 2.19 which governs this program requires that the agency furnish the TSPs with shipment and tonnage data for the "last two completed rate cycles using the new domestic and international channels" and that this information has not been provided. AR, exh. 8, SDDC Website-DPS Business Rules, at 12 (emphasis added); Protest at 3; Protesters' Comments at 7. The agency responds that this historical data was already available to TSPs on the SDDC website for the last two full cycles under the previous computer program for both the Domestic GBL Records and International GBL Records. Regarding future cycles under the DPS, which the agency contends is the subject of Business Rule 2.19, the agency states that the shipments under the DPS have only just begun, so there is no data. The Army maintains that it will provide a report to all qualified TSPs

¹⁰ To the extent that these protest grounds regarding the traffic channels involving the 18 indicated sites concern apparent solicitation improprieties of the initial solicitation, they were required to be protested before rates were due under the initial solicitation in order to be considered timely under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(1) (2008). The fact that the protesters elected to withdraw those protest grounds based on the settlement agreement provides no basis for waiver of our timeliness requirements.

concerning tonnage data, once shipments are awarded under DPS. AR at 5. Since the data requested is not available because the DPS has only begun to be implemented, we find no obligation to provide data that does not exist.¹¹

The protesters also complain that the invoice and payment computer modules have not been tested and proven to work. The agency reports that both modules have been fully approved for implementation and the DPS is already awarding shipments. This is essentially a contention that the assertedly unproven modules somehow place undue risk on the TSPs in preparing their rate tenders. On this record, we have no basis to find that the agency has imposed an undue risk on the TSPs. See AirTrak Travel et al., B-292101 et al., June 30, 2003, 2003 CPD ¶117 at 12-16.

The protesters finally claim that under the first solicitation certain TSPs were rejected under the initial solicitation for their “off-peak” rates solely because the peak rates submitted were beyond a competitive range of prices, and that storage in transit rates were improperly used as a factor to calculate the BVS of TSPs. Protest at 4. As indicated above, on or about April 2, the TSPs were provided the opportunity to question or challenge any of the BVSs received. Thus, these protest challenges are untimely under our Bid Protest Regulations because they were not filed within 10 days after the basis of protest were known or should have been known.¹² 4 C.F.R. § 21.2(a)(2).

The protest is denied in part and dismissed in part.

Gary L. Kepplinger
General Counsel

¹¹ The protesters make a similar argument that the agency has not provided historical data regarding the volume of shipments which had a portion going into non-temporary storage, which the agency can acquire either under the older acquisition system for the movement of household goods or the DPS. Here too, the agency does not have to provide data that does not exist.

¹² To the extent that these protesters anticipate that allegedly improper action may be taken in evaluating and ranking the rates tenders under the second solicitation, this protest is speculative and premature, and therefore not for our consideration at this time. See Sun Chem. Corp., B-288466 et al., Oct. 17, 2001, 2001 CPD ¶ 185 at 13. To the extent that the protesters contend that the “competitive range” may not be properly determined under the second solicitation, such protest ground would be similarly premature.