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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: ABF Freight System, Inc.; Old Dominion Freight Line, Inc.; Overnite Transportation Co.; Roadway Express, Inc.; and Yellow Freight System, Inc.

File: B-291185

Date: November 8, 2002

John R. Bagileo, Esq., for the protester.

Major Art J. Coulter, and Ramon Morales, Esq., Department of the Army, for the agency.

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

DIGEST

1. Under a solicitation that provides for the award of multiple indefinite-delivery, indefinite-quantity contracts for freight transportation services, protest that the minimum order quantity is inadequate is denied, where the guaranteed minimum amount is sufficient to support a binding contract and reflects the minimum amount the agency is fairly certain to order from each contractor.
 2. Protest that solicitation for an acquisition, conducted under the commercial item provisions of Federal Acquisition Regulation (FAR) Part 12, violates FAR § 47.207-6(b) because the solicitation specifies unit pricing that offerors must use for “accessorial services” is denied, because the agency is not required to apply the requirements in FAR § 47.207-6(b) in a commercial item acquisition.
 3. Protest objecting to solicitation requiring that certain accessorial services be provided at no additional charge and that the costs for these services be factored into offerors’ line-haul rates is denied where the protesters did not show that the solicitation’s allocation of cost risk to the contractors was unreasonable.
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DECISION

ABF Freight System, Inc.; Old Dominion Freight Line, Inc.; Overnite Transportation Co.; Roadway Express, Inc.; and Yellow Freight System, Inc. protest the terms of request for proposals (RFP) No. DAMT01-02-R-0060, issued by the Military Traffic Management Command (MTMC), Department of the Army, for the shipment of

“freight all kinds” (FAK) and other commodities for Department of Defense activities within the continental United States.¹

We deny the protest.

Since 1979, MTMC has acquired FAK shipment services through the agency’s Guaranteed Traffic (GT) program, a Federal Acquisition Regulation (FAR)-exempt, transportation management tool under which MTMC issues requests for rate tenders for traffic for particular routes for a specified period of time, and awards what are, in effect, requirements contracts to the successful carriers. See Agency Legal Memorandum at 1; see also Ready Transportation, Inc., B-285283.3, B-285283.4, May 8, 2001, 2001 CPD ¶ 90 at 1-2. The RFP was issued to implement the agency’s transition from the GT program to a FAR-based procurement system. See 65 Fed. Reg. 45362 (July 21, 2000) (Notice of Proposed Change to MTMC Freight Transportation Procurement Procedures).

MTMC issued the RFP pursuant to the commercial-item provisions of FAR Subpart 12.3 and sought proposals for the award of multiple Tailored Transportation Contracts. These will be indefinite-delivery/indefinite-quantity (ID/IQ) contracts for a 1-year base period with 2 option years.² Unlike the GT program, which was restricted to carriers, the competition under the RFP is open to any responsible contractor capable of providing the transportation services directly or through subcontracts.³

Offerors were informed that the transportation services would be acquired using a regional structure concept developed by MTMC under which there were nine “origin” regions and six “destination” regions.⁴ RFP § C.1.2. As amended, the solicitation schedule identified lanes between eight origin regions and six destination regions, and for each lane identified estimated shipments and average weight and

¹ The RFP stated that the shipments would consist of FAK, aircraft engines, motor vehicles, Direct Procurement Method-crated household goods and unaccompanied baggage, Army Tracked Vehicles (vehicle weight less than 40,000 pounds), and hazardous material. RFP § C.2.1.

² The RFP was issued electronically on the Federal Business Opportunities web site: <www.fedbizops.gov>.

³ This means that firms that do not necessarily own trucks or other transportation assets (such as transportation brokers and third party logistics companies) can compete for awards. Agency Legal Memorandum at 2.

⁴ For example, the RFP identified Defense Depot Puget Sound, Washington to be origin region 1 and the states of Washington, Oregon, Idaho, California, and Nevada to be the Pacific destination region.

mileage for each shipment.⁵ See <www.mtmc.army.mil/parc/attachment_ii.htm>. For each lane, and weight category within each lane, offerors were required to provide a fixed-price rate per hundred weight (CWT) of cargo. *Id.* The services to be provided included both less-than-truckload (LTL) and truckload (TL) shipments. The solicitation also included unit pricing offerors were required to use for “accessorial services,” such as, for example, vehicle detention, extra driver, storage, and surveillance services, which were not included in the fixed transportation rates that offerors were to propose.⁶ See Agency Report, Tab E, Accessorial Services for TL and LTL for Base and Option Years.

The RFP stated that the agency intended to award multiple contracts for each lane. As amended, the solicitation also stated a minimum order quantity for each lane (which was approximately 5 percent of the total estimated shipments per lane) and a maximum order quantity per lane for all contractors. RFP amend. 5. Offerors were informed as follows:

The ordering officer will initially offer shipment to awarded contractors on a rotational basis until all contractors have reached their contract minimum guarantee. After the contract minimum guarantees have been reached, the ordering officer will award shipments to those contractors providing the best overall value to the Government, considering the contractor’s record of quality performance since contract award and total shipment cost.

RFP § C.2.4, amend. 6 at 2.

The protesters, which have identified themselves as LTL motor carriers, protest a number of terms and conditions of the RFP.⁷ First, the protesters complain that the guaranteed minimum quantity to be ordered from each contractor for each lane is no

⁵ Services within the ninth region are currently being provided under a third party logistics contract.

⁶ An “accessorial service” is defined by the RFP to be a “service performed by the contractor in addition to the line-haul,” and “line-haul” is in turn defined to be “[t]ransportation of freight over contractor routes from point of origin to destination, excluding local pickup, delivery, and switching service.” RFP § C.6.1. In essence, an accessorial service is a service other than transportation.

⁷ The protesters initially filed an agency-level protest prior to the closing date for receipt of proposals, challenging the RFP terms and conditions. In response to the protest, MTMC established minimum and maximum quantities for each lane, and agreed to review current industry accessorial rates and refresh the accessorial rates contained in the RFP. MTMC denied the remainder of the agency-level protest allegations, and this protest to our Office followed.

more than a nominal amount that is “inadequate to give bidders an accurate understanding of what [is] required of them.” Protesters’ Comments at 3.

An agency may use an ID/IQ contract where the government cannot predetermine, above a specified minimum, the precise quantity of supplies or services that will be required during the contract period and where it is inadvisable for the government to commit itself for more than a minimum quantity. FAR § 16.504(b); Aalco Forwarding, Inc. et al., B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 at 6. The ID/IQ contract must require the agency to order, and the contractor to furnish, at least a stated minimum amount of supplies or services, and if ordered, the contractor to furnish any additional quantities, not to exceed the stated maximum. FAR § 16.504(a)(1). To ensure that the contract is binding, the minimum quantity must be more than a nominal amount but should not exceed the amount the agency is fairly certain to order. FAR § 16.504(a)(2). The determination of whether a stated minimum quantity is “nominal” must consider the nature of the acquisition as a whole. Sea-Land Serv., Inc., B-278404.2, Feb. 9, 1998, 98-1 CPD ¶ 47 at 12.

Here, like the situation presented in Aalco Forwarding, Inc. et al., *supra*, the solicitation provided for multiple awards to transport cargo for each lane and provided for a best-value basis for selecting among the contractors once all the contractors’ minimum quantities have been ordered. *See also* Sea-Land Serv., Inc., *supra* (award of multiple contracts for same routes or zones affects the amount the government is certain to order from each contractor). Thus, for each lane, the agency may have multiple choices of contractors to perform the transportation services. It is not possible to know, after the minimums are satisfied, whether a given contractor will be used under the best-value scheme for any orders until individual orders arise. For this reason, it is uncertain that a given contractor will carry more than the minimum specified for a lane during the life of the contract. Given this uncertainty and that the minimum quantity on any one contract may not exceed the amount the government is fairly certain to order, *see* FAR § 16.504(a)(2), we find no basis to object to the stated minimum quantities here.

We also find here that the minimum quantity guaranteed for each lane, even if it amounts to only a few hundred dollars, is sufficient consideration to form a binding contract. Although it may be true that the guaranteed minimum quantity for certain lanes appears low (particularly as compared to the minimums guaranteed for other lanes), this does not alone demonstrate that the guaranteed quantity is insufficient to support a contract. *See* Sunbelt Props., Inc., B-249307, Oct. 30, 1992, 92-2 CPD ¶ 309 at 3 n.3.

Furthermore, we do not agree that the RFP is “inadequate to give bidders an accurate understanding of what is required of them,” as claimed by the protesters. As described above, the solicitation states, for each lane between the eight origin regions and the six destination regions, the estimated number of shipments and average weight and mileage for each shipment. We think that this, with the stated

minimum and maximum quantities, is sufficient information to allow offerors to intelligently prepare their proposals.

The protesters also complain that the RFP improperly included unit pricing that offerors were required to use for accessorial services, such as, for example, vehicle detention, extra driver, storage, or surveillance services, which were not included in the offerors' proposed transportation rates. The protesters contend that fixing the accessorial charges that offerors must apply violates FAR § 47.207-6(b), which the protesters assert allows offerors for a transportation contract to specify their own pricing for required services.⁸

The Army responds that FAR § 47.207-6 does not apply to this acquisition because this procurement is being conducted under the commercial item provisions of FAR Part 12. The agency also states that, in any event, the RFP does not deprive the protesters of the ability to price services to be provided; rather, "[t]he solicitation just simplifies and provides a format for the price submission." Agency Legal Memorandum at 9. The agency states that the RFP establishes various rates for different accessorial services (which the agency asserts are at a comparable level "to what many carriers are charging"), and that "[a]ny difference in costs that a contractor wishes to account for can be added to their line[-]haul rates and still be able to submit competitive rates." Contracting Officer's Statement at 6.

We agree with the Army that the agency was not required to apply FAR § 47.207-6(b) to this commercial item acquisition. In this regard, FAR § 12.301(d) provides that "[n]otwithstanding prescriptions contained elsewhere in the FAR, when acquiring commercial items, contracting officer shall be required to use only those provisions and clauses prescribed in this part." There is no requirement in FAR Part 12 to apply the requirements in FAR § 47.207-6(b) in commercial item acquisitions.

Furthermore, we have recognized the wide discretion an agency has to prescribe charges for services ancillary to the transportation of goods. Such prescription of charges, we found, provides the agency with a rational and practical means for selecting the low-priced carriers, without having to account for all the potential variations in charges that may be submitted by the various offerors. See Sea-Land Serv., Inc., supra, at 13-14.

⁸ FAR § 47.207-6(b) states:

The contracting officer shall include in the solicitation a tabulation listing each required service and the basis for the rate (price); e.g., "unit of weight" or "per work-hour," leaving sufficient space for offerors to insert the rates offered for each service.

The protesters also complain that the RFP provides that certain accessorial services, specifically the detention of equipment (that is, for example, where the loading or unloading of a truck is delayed), are to be provided at no additional charge and that the costs for these services must be factored into the offerors' line-haul rate. The protesters assert that this pricing scheme is "at odds with industry practice" and restricts offerors' ability to obtaining "compensation for the delay of the return of their equipment and/or drivers." Protesters' Comments at 22.

The Army states that "[t]he conditions we have established in the solicitation for payment of detention and similar charges are intended to establish uniform procedures across the Department of Defense." Contracting Officer's Statement at 7. In this regard, the agency acknowledges that requiring offerors to recover costs for detention in proposed line-haul rates shifts risk for these services to the contractors but nevertheless is not inconsistent with commercial practices.

The essence of the protesters' complaint is that requiring a contractor to recover costs for certain accessorial services (such as detention of equipment) in the contractor's line-haul rate puts inordinate risk upon the contractor. While the Army acknowledges that its solicitation does in fact shift cost risk for these services to contractors, it is within an agency's discretion to compete a proposed contract that imposes maximum risks upon the selected contractor and minimum administrative burdens upon the agency. See Sea-Land Serv., Inc., *supra*, at 14 (a solicitation for a cargo transportation contract established predetermined pricing or pricing formulas for various specialized services shifted cost risk to the contractor); see also N&N Travel & Tours, Inc., B-283731.2, Dec. 21, 1999, 99-2 CPD ¶ 113 at 5 (contractor's fixed-price commission under a travel management services contract required to cover all required services shifted cost risk to the contractor). Here, the protesters do not show that the solicitation's allocation of cost risk to the contractor is unreasonable or that the solicitation is inconsistent with commercial practices.

The protesters also complain that "bundling" lanes into large geographic regions is restrictive of competition, particularly small business contractors.⁹ The agency responds that it is common industry practice for motor carriers to submit their rates under a region-to-region concept and that MTMC has followed this practice for the last 20 years. Contracting Officer's Statement at 5. The Army states that it decided

⁹ The Competition in Contracting Act of 1984, 10 U.S.C. § 2305(a)(1) (2000), generally requires that solicitations permit full and open competition, and contain restrictive provisions and conditions only to the extent necessary to satisfy the needs of the agency. Since bundled, consolidated, or total-package procurements combine separate, multiple requirements into one contract, they have the potential for restricting competition by excluding firms that can furnish only a portion of the requirement. Aalco Forwarding, Inc. et al., B-277241.12, B-277241.13, Dec. 29, 1997, 97-2 CPD ¶ 175 at 6.

upon this regionalized approach after meeting with industry representatives and considering, among other things, the numerous shipping installations and the agency's desire to simplify the evaluation of offers and the administration of contracts. Agency Report at 8.

The agency also states that, in any event, the protesters (which are all large business concerns) do not show that they are unable to compete under the RFP or will otherwise be prejudiced. *Id.* In response, the protesters contend that they do not need to demonstrate prejudice. Protesters' Comments at 13. Contrary to the protester's arguments, competitive prejudice is an essential element of every viable protest, including protests of consolidated requirements. While the protester asserts that the regionalization of the requirements specified in the RFP may result in higher prices to the government, the protesters have failed to demonstrate that the regionalization significantly inhibits or precludes their ability to compete; thus, there is no indication that the protesters were prejudiced by these requirements. See MCS Mgmt., Inc., B-285813, B-285882, Oct. 11, 2000, 2000 CPD ¶ 187 at 9-10 (SBA bundling). Under the circumstances, we will not consider this protest ground.

The protesters also generally complain that the RFP is "inconsistent with the intent" of the commercial acquisition provisions of FAR Part 12. Protesters' Comments at 19. We do not address this allegation because it was not raised in the protesters' agency-level protest and is thus untimely. Our Bid Protest Regulations require that protests of apparent solicitation improprieties be filed prior to the closing time for receipt of initial proposals be filed before that time. 4 C.F.R. § 21.2(a)(1) (2002). Here, although the protesters filed an agency-level protest prior to the closing date for receipt of proposal, this protest allegation was not raised in the agency-level protest. Our Regulations provide that where, as here, a protest has been filed initially with the contracting agency, we will consider a subsequent protest only if the initial protest to the agency was timely filed. 4 C.F.R. § 21.2(a)(3). Since our Regulations do not contemplate the unwarranted piecemeal presentation of protest issues, where a protester initially files a timely agency-level protest, and subsequently files a protest with our Office that includes additional grounds, the additional grounds must independently satisfy our timeliness requirements.

Research Tech. Int'l, B-243844, Aug. 19, 1991, 91-2 CPD ¶ 165 at 2-3; Armstrong Motorcycles Ltd., B-238436, B-238436.2, June 5, 1990, 90-1 CPD ¶ 531 at 3-4. Thus, we will not consider this issue.¹⁰

The protest is denied.

Anthony H. Gamboa
General Counsel

¹⁰ The protesters also complain in their comments on the report that the Army, after proposals were received, executed a waiver to adopt certain terms and conditions in the RFP “that might be considered inconsistent with customary commercial practices.” Agency Report, Tab H, Waiver (Sept. 13, 2002). FAR § 12.302(c) allows an agency to include terms or conditions in a commercial item acquisition that are inconsistent with customary commercial practices where a waiver is executed by the agency. The fact that such a waiver is executed after the solicitation issued or even during the pendency of a protest is not a sufficient basis to challenge the waiver. See Crescent Helicopters, B-284706 et al., May 30, 2000, 2000 CPD ¶ 90 at 5-6 (FAR § 12.302(c) waiver executed during protest).