



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Stapp Towing Company, Inc.

File: B-266275

Date: December 4, 1995

Jon N. Kulish, Esq., Haas & Najarian, for the protester.

Robert A. Burgoyne, Esq., Fulbright & Jaworski, for Texas Eastern Products Pipeline Company, an interested party.

Bryant S. Baner, Esq., and Nicholas P. Retson, Esq., Department of the Army, for the agency.

Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A rate tender that alters the government's liability for demurrage fees under a guaranteed traffic solicitation is noncompliant with the material terms of the solicitation and must be rejected; carrier whose rate tender is noncompliant is not eligible for award and therefore not interested for purposes of filing a protest.

DECISION

Stapp Towing Company, Inc. protests the award of a contract by the Military Traffic Management Command (MTMC) to Texas Eastern Products Pipeline Company (TEPP) under Guaranteed Traffic Solicitation (GTS) No. GT-NIP-95-001. Stapp alleges that the agency's evaluation of rate tenders was inconsistent with the provisions of the GTS.

We dismiss the protest because we find that Stapp's tender was noncompliant with the solicitation terms; since the protester would not be eligible for award, it lacks the requisite interest for filing a protest.

The GTS solicited rate tenders for the transportation of jet fuel to Little Rock Air Force Base under government bills of lading pursuant to specified requirements and contemplated the award of a requirements contract for 1 base year with 4 option years. The GTS stated that the contract would be awarded "to the responsible carrier bidding the lowest cost." The solicitation provided that all rate tenders submitted in response to the solicitation would be subject to the terms and conditions contained in Guaranteed Traffic Rules Publication GT-NIP-95-001 (GT Rules). Among other things, the GT Rules established a demurrage rate of \$250 per hour. In this context, demurrage refers to charges that the contractor may impose

on the government to compensate for any undue detention of the contractor's barges.

Prior to submission of offers, carriers were permitted to submit any questions concerning the solicitation. Stapp submitted the following question:

"According to Rules Item 30, breakdown of pumping equipment during loading results in the carrier accessing demurrage at one-half the established rate. Can this be changed so that the full rate applies"?

The agency provided the following response in an amendment to the GTS:

"No, but the second sentence in Item 30 ["However, the demurrage rate at the loading port shall be reduced 1/2 (one half) if demurrage is incurred due to breakdown of pumping machinery or other causes beyond the control and without the fault and negligence of the Government."] is changed as follows: "However, the demurrage rate at the loading port shall be reduced 1/2 (one half) if pumping is interrupted due to causes beyond the control of the shipper, the carrier, or the Government, such as interruptions due to weather or closing of the port."

Stapp submitted a "proposal" in response to the GTS which included both cost data (on the requisite rate tender form) and technical data. In its cover letter, Stapp stated that the firm "takes no exception to the requirements of the solicitation." However, in a section entitled "Government Agreements," Stapp included a discussion of demurrage charges. This section included the following provision:

"The demurrage rate at the loading port shall not be reduced if demurrage is incurred due to breakdown of pumping machinery or other causes beyond the control and without the fault and negligence of the Government or Stapp."

Stapp and TEPP submitted the only two rate tenders in response to the GTS. When these were evaluated, MTMS determined that TEPP's rate was low, and awarded the contract to this firm.

The agency notified Stapp of its award decision, including in its letter that it considered Stapp's submission nonresponsive because it took exception to the demurrage provision in GT Rule 30. After Stapp filed its protest in our Office, alleging improprieties in the evaluation of costs, MTMS requested that we dismiss the protest summarily. The agency argues that Stapp rendered its rate tender nonresponsive when it substituted its own demurrage language for the language in

the GTS. Since Stapp would be ineligible for award under this theory, Stapp would lack the requisite interest for filing a protest.

We are persuaded that Stapp's rate tender took exception to a material term of the GTS. If in its offer a firm attempts to impose conditions that would modify material requirements of the solicitation, limit its liability to the government, or limit rights of the government under any contract clause, then the offer is noncompliant with the solicitation and an award cannot be made to that firm. See Hewlett-Packard Co., B-216530, Feb. 13, 1985, 85-1 CPD ¶ 193.

Stapp concedes that the qualifying language concerning the demurrage rule (GT Rule 30) took exception to that rule, but argues that "the facially nonconforming language did not make Stapp's proposal noncompliant because the monetary effect upon the actual and evaluated costs of performance under the solicitation were only trivially affected thereby and that the exception was therefore not material." Stapp contends that it is able to estimate, based on past years of experience transporting fuel by barge, the approximate costs that could be incurred under the demurrage clause in Stapp's tender. Using calculations based on this estimate, Stapp argues that any demurrage that would be billed under the language in Stapp's tender would be de minimus.

We do not agree with Stapp's premise that the monetary impact of the exception can be estimated with any certainty. Demurrage can be caused by a number of unforeseeable events; for example, a port may be closed because of a fuel or oil spill, a strike, or bad weather. Any attempt to estimate the demurrage fees that might be incurred under a particular contract would necessarily be based on speculation and assumptions about future events outside the control of the parties. The level of disagreement between the protester and the agency on this point--the former arguing that the particular type of demurrage at issue here would only result in minor amounts, and the latter asserting that Stapp itself has in the past sometimes collected demurrage payments that were greater than the total contract amount, and both parties basing their arguments on past experience--further demonstrates that the impact of the clause cannot be accurately foreseen.¹

Further, even if the potential liability at issue could be estimated with greater certainty, we disagree with Stapp's premise that the monetary impact of the clause would be dispositive here. The effect of the exception was to alter the obligations

¹Although Stapp argues now that the impact of this provision is minimal, it apparently was important enough for the firm to raise it as an issue during the pre-bid period and for Stapp to include it in its tender, notwithstanding the agency's express refusal to accept it. When the agency refused to accept this change, Stapp was on notice that the agency considered this clause material.

of the parties, shifting certain risks of performance from the contractor to the government. A deviation to a solicitation provision which has the effect of changing the legal relationship between the parties is material and cannot be waived, even if the impact on price is trivial. Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555. Here, in addition to the most obvious effect of the exception (i.e., doubling the government's potential liability for demurrage), the language that Stapp substituted introduced ambiguity concerning the events that would trigger the government's potential liability. For example, while the relevant language in the amended GTS did not address the effect of a pumping machinery breakdown as a basis for demurrage payments, Stapp's clause stated that "the demurrage rate at the port shall not be reduced if demurrage is incurred due to breakdown of pumping machinery"; arguably, under the wording of the clause, the government would be liable for full demurrage charges even if the contractor's machinery failed due to the contractor's own negligence. Thus, Stapp's clause not only doubled the government's potential liability for demurrage, it also introduced an element of ambiguity into the contract that could require litigation to resolve, exposing the government to additional risks and expenses.²

We conclude that Stapp's tender took exception to the terms of the GTS, and therefore was properly rejected. Since Stapp would not be eligible for award if its protest challenging the evaluation of costs were sustained, it is not an interested party for purposes of pursuing this protest. 4 C.F.R. § 21.0(a) (1995).

The protest is dismissed.

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²The agency points out that at present, under other contracts, the protester has approximately 43 active Armed Services Board of Contract Appeals pending regarding demurrage charges.