

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548****FILE:** B-209968**DATE:** June 20, 1983**MATTER OF:** Canadian Commercial Corporation for Hermes
Electronics Ltd.**DIGEST:**

Protest that contracting officer failed to solicit and thus properly consider preferential transportation rates in evaluating the protester's proposal is denied because there was no duty to solicit such rates.

Canadian Commercial Corporation for Hermes Electronics Ltd. (CCC/Hermes) protests the award of a contract to Sippican Ocean Systems under request for proposals (RFP) N00163-82-R-1497 issued by the Naval Avionics Center. The RFP concerned the acquisition of AN/SSQ-36 Bathythermograph Transmitter Sets. The dispute centers on the Navy's evaluation of transportation costs in selecting Sippican on the basis of lowest total cost. We deny the protest.

The solicitation called for delivery f.o.b. origin and for consideration of transportation rates from each vendor's facility to Oakland, California and Norfolk, Virginia. The Navy made award after evaluating transportation rates compiled by the Military Traffic Management Command (MTMC) in Bayonne, New Jersey. Hermes had the highest transportation costs, \$224,178.99, of the three firms that submitted proposals. Sippican had the second highest transportation costs, \$73,072.50. The difference between Hermes' and Sippican's transportation costs was due to three factors:

1. With respect to Hermes, there were no preferential Government rates on file with MTMC on the closing date for receipt of initial proposals. Such rates were available for application to Sippican. As a result, Hermes' proposal was evaluated on the basis of higher commercial tariffs.

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2. Hermes did not indicate a shipping weight; Sippican did. As a result, the Government used an estimated shipping weight for Hermes that was higher than the weight per pallet stated by Sippican.

3. The distances from Hermes' facility in Dartmouth, Nova Scotia, to Oakland and Norfolk are greater than the distances to those points from Sippican's facilities in Marion, Massachusetts.

The issue in dispute is whether the Navy was under a duty to obtain transportation rates more favorable than standard commercial rates in evaluating proposals. CCC/Hermes maintains that preferential rates could have been obtained from Can-Am Freight Services, in which case the protester says Hermes' proposal would have been evaluated as lowest in cost.

On the other hand, the Navy maintains that rates filed after the closing date for receipt of initial proposals cannot be used in evaluating transportation costs. The Navy points out that section M.2 of the solicitation states that, where a shipment is to be made on an f.o.b. origin carload or truckbed basis:

"For proposal evaluation purposes, the agreed weight of a carload or truckload will be the highest applicable minimum weight which will result in the lowest freight rate (or per car charge) on file or published in common carrier tariffs or tendered as of the closing date specified for receipt of proposals."

This language clearly indicates that the applicable rates are to be determined as of the closing date, the Navy states. The agency points out that the rates the protester relies on were not filed with MTMC before the closing date for receipt of proposals. Moreover, the contracting officer states, offerors must bear the responsibility for assuring that the rates they want applied are on file at the time proposals are due, because the Government cannot know in advance who will submit proposals.

The protester concedes that the Can-Am rates were filed with MTMC after award, but explains that this occurred only because it was then that it learned that commercial rates had been used. Moreover, CCC/Hermes argues, the solicitation does not impose an unambiguous obligation on offerors to obtain and file transportation rates. Such an obligation would, the protester believes, force it "to act in effect as the Government's agent to solicit tenders on the Government's behalf for prospective shipments."

Rather, the protester insists, it is the Government's obligation to obtain the best available rates for evaluating transportation costs using the best available rates. According to the protester, this obligation is found in Defense Acquisition Regulation (DAR) § 19-301.1(a) (1976 ed.), which states:

"To afford proper analysis and consideration of transportation factors, the contracting officer shall consider transportation rates and related costs in the evaluation of f.o.b. origin bids and proposals. The best available transportation rates and related costs in effect or to become effective prior to the expected date of initial shipment and on file or published at the date of the bid opening, shall be used in the evaluation. However, when transportation rates and related costs which cover the traffic are filed or published after the bid opening or proposal due date and there were no applicable rates or costs in existence on that date, these rates and costs shall be so identified by the area headquarters of Military Traffic Management Command (MTMC) or the Military Sealift Command (see 19-301.2) and shall be used in the evaluation * * *."

In the protester's view, the phrase "applicable rates or costs" in the third sentence of the material quoted must refer to "best available transportation rates and related costs" in the prior sentence. According to the protester, the sentence imposes an obligation on the Government, through MTMC, to obtain the best available rates from carriers when there is no applicable preferential rate on the date proposals are due.

The plain import of section 19-301.1(a) is contrary to CCC/Hermes' view. The purpose of the third sentence of the regulation is simply to require MTMC to report to the contracting officer when rates are published or filed with it after the proposal due date, if there was no rate in existence before that date, and to provide for consideration of such rates when they are reported. The regulation does not require the Government to solicit preferential transportation rates separately in evaluating proposals, instead of applying the rates in existence when proposals are due. Moreover, in B-163158, April 2, 1968, in considering a somewhat similar question concerning a predecessor to DAR § 19-301.1(a), we found no such duty, but instead pointed out that the Government could not be faulted for its failure to obtain preferential rates where the protester could have timely requested that a carrier tender them.

We disagree with the protester that an undue or improper burden is placed on firms in this type of situation. It is appropriate for the Government to rely on the best rates available by the applicable closing date, which may be published commercial rates. See 53 Comp. Gen. 443 (1973); 39 Comp. Gen. 774 (1960). Here, of course, the lower preferential rates were not filed until after award and therefore could not have been considered in the evaluation. Moreover, the solicitation does not ask an offeror to act as a carrier, and file rates, as CCC/Hermes seems to believe, but simply advises offerors as to how freight rates will be applied in evaluating overall cost. We see nothing unreasonable in leaving to the individual offeror responsibility for taking whatever action he deems appropriate to protect his interests, which may include steps to assure that freight rates of appropriate carriers are on file.

Since the rates on which the protester relies were not tendered until after award, they could not have been used in evaluating Hermes' bid. The protest is denied.

for Milton J. Jordan
Comptroller General
of the United States