



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Dock Express Contractors, Inc.  
File: B-223966  
Date: December 22, 1986

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### DIGEST

Provision restricting solicitation for ocean transportation to only common carriers, where a contract carrier asserts that it can meet government requirements, violates the Competition in Contracting Act requirement for full and open competition, since the procuring agency has not reasonably established that the requirement is necessary to meet the government's needs or is otherwise authorized by law.

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### DECISION

Dock Express Contractors, Inc. (DECI), protests the restriction limiting competition to ocean common carriers as that term is defined in the Shipping Act of 1984, 46 U.S.C. App. § 1701 et seq. (Supp. II 1984), in request for proposals (RFP) No. N00033-86-R-2100, issued by the United States Navy, Military Sealift Command (MSC), for ocean and intermodal transportation services. DECI, a "contract carrier," contends that limiting the solicitation to common carriers unduly restricts competition under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C § 2301 et seq. (Supp. III 1985).

We sustain the protest.

The RFP solicited ocean transportation services for less than shipload lots of containerized and breakbulk cargo for various trade routes listed in the RFP for a 1-year period divided into two six-month cycles. The first cycle extends from October 1, 1986, to March 31, 1987, and the second cycle extends from April 1, 1987, to September 30, 1987. Written offers for the first cycle were required to be submitted by July 9, 1986. Offers for the second cycle are due by January 7, 1987. Contracts -- called "container agreements" and "shipping agreements" -- were to be awarded to all responsible United States flag ocean common carriers, which submitted offers responsive to the RFP.

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The Shipping Act of 1984 defines an "ocean common carrier" as a "vessel-operating common carrier," but not "ocean tramps," i.e., contract carriers. 46 U.S.C. App. § 1702(18). The Act defines a common carrier as a person "holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that assumes responsibility for the transportation from the point of receipt to the point of destination and utilizes, for all or part of the transportation, a vessel operating on the high seas or the great lakes between a port in the United States and a port in a foreign country." 46 U.S.C. App. § 1702(6).

On July 8, 1986, DECI protested to MSC the specification restricting the RFP to common carriers. MSC denied the protest on August 12, 1986, after opening proposals as originally scheduled on July 9, 1986. Notwithstanding the restriction, DECI submitted a timely proposal. DECI's protest filed at our Office more than 10 working days after the closing date for receipt of proposals could be considered untimely with respect to the RFP's first cycle because opening proposals on the scheduled closing date without taking any corrective action in response to the protest constitutes initial adverse agency action under our Bid Protest Regulations. 4 C.F.R. §§ 21.0 and 21.2 (1986); see Shaw Aero Development, Inc., B-221980, Apr. 11, 1986, 86-1 C.P.D. ¶ 357 and Sunrise Associates--Request for Reconsideration, B-219356.2, June 27, 1985, 85-1 C.P.D. ¶ 738. However, since DECI's protest was received before the closing date for receipt of proposals for the second cycle, its protest will be considered as it concerns that cycle.

DECI operates a United States-flag vessel, the Dock Express Texas, as a contract carrier, which it contends is capable of transporting breakbulk cargo. DECI contends that common carrier status is not required to perform ocean and inter-modal transportation, and that restricting the RFP to common carriers violates the procurement standard of full and open competition mandated by CICA. 10 U.S.C. §§ 2304(a)(1)(A) and 2305(a)(1).

MSC advises that regular, dependable United States-flag ocean transportation service is required to effect the total movement of Department of Defense (DOD) cargo and that one of the traditional characteristics of a common carrier by water is a regular schedule. MSC also points to certain prohibited acts of common carrier activities which require them to treat the shipping public, e.g., MSC, in a fair and nondiscriminatory manner. 46 U.S.C. App. § 1709. MSC further advises that requiring all offerors to propose service on a common carrier basis encourages regularly scheduled ocean common carriers to

offer MSC the most favorable rates. MSC states that soliciting rates on this basis assures that cargo will not be "skimmed" by contract or "tramp" operators, which would likely offer low rates on certain routes, such as to be in a position to demand all available cargo on those routes. MSC believes that allowing tramp operators to compete prevents DOD cargo booking activities from orderly planning and shipment of cargo. MSC also contends that allowing contract carriers to compete would be contrary to the policy of the Shipping Act of 1984, "to encourage the development of an economically sound and efficient United States-flag liner fleet capable of meeting national security needs." 46 U.S.C. App. § 1701(3). MSC finally contends that the common carrier requirement is not onerous, since DECI could easily become a common carrier by filing an appropriate tariff with the Federal Maritime Commission.

Under CICA, the procuring agency must "specify its needs and solicit bids or offers in a manner designed to achieve full and open competition for the procurement," 10 U.S.C. § 2305(a)(1)(A)(i), and "include specifications which . . . permit full and open competition and include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency." 10 U.S.C. §§ 2305(a)(1)(B)(i) and (ii); see Military Services, Inc. of Georgia, B-221384, Apr. 30, 1986, 86-1 C.P.D. ¶ 423 and Malco Plastics, B-219886, Dec. 23, 1985, 85-2 C.P.D. ¶ 701. Where a solicitation provision is challenged as restrictive, the initial burden is on the procuring agency to establish prima facie support for its belief that the challenged provision is necessary to satisfy its needs. Military Services, Inc. of Georgia, B-221384, supra. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. Id. Once and if this prima facie support is established, the burden shifts to the protester to rebut the agency's position and show that the allegedly restrictive provision is unreasonable. Id.

MSC has not shown that "contract carriers" by water or "tramp operators" cannot satisfy its needs to the same extent as "ocean common carriers." Therefore, MSC has not established prima facie support for the protested requirement.

The primary and most pertinent "common carrier" attribute referenced by MSC to support this limitation on competition is its need for carriers with regular schedules. (Contract carriers are not required to have regular schedules.) DECI seems to no longer contest MSC's legitimate requirement for regular scheduled service. Indeed, it is clear that MSC

can require carriers to commit to provide regular predictable service so DOD can provide for the orderly planning and booking of cargo.

DECI states that it has a private affreightment agreement to ship less than shipload lots on its vessel, the Dock Express Texas, on two routes encompassed by the solicitation during the two 6-month periods covered by this solicitation. DECI's proposal, which was rejected as unacceptable because it was not a common carrier proposed to sail once every 60 days commencing October 1, 1986. However, in its initial protest to MSC, DECI contested MSC's requirement that carriers provide regular service for the contract's designated routes. Therefore, we are not certain that DECI is willing to commit to provide MSC the kind of regular predictable service as provided by common carriers for the contract period.

The appropriate method for MSC to obtain a commitment to the desired service predictability is to structure the solicitation to accomplish this purpose, not to simply eliminate all offerors but common carriers from the competition. MSC has not stated that contract carrier's cannot contractually bind themselves to give MSC a sufficient commitment to provide predictable service.

Moreover, MSC has not shown how the other traditional common carrier attributes referenced as necessary to protect the shipping public, including itself, from discriminatory shipping practices with regard to rates, cargo classifications, and similar cargo restrictions relate to the performance of this contract. Moreover, these restrictions were modified in the Shipping Act of 1984. That Act prohibits these particular discriminatory practices only where the common carriers have not entered into service agreements with particular shippers giving preferential treatment. 46 U.S.C. §§ 1709(b)(6); 1702(21); and 1707(c). Consequently, to the extent that MSC actually requires these protections from discriminatory practices by either common carriers or contract carriers, it should deal with these concerns in the solicitation. Therefore, MSC has not shown that common carriers have any inherent attributes which form a basis for limiting the competition on this solicitation.

MSC offers no explanation or factual support for its contention that eliminating contract carriers from the competition will encourage all ocean common carriers to offer MSC their most favorable rates or that "skimming" by contract carriers would adversely affect competition. Since this RFP

is for less than shipload lots, "skimming" would seem to be discouraged, since carriers need full ships to maximize their profits. Moreover, it would appear that low rates are more the function of legitimate business considerations, which necessarily would include the competitive nature of the marketplace, than common carrier status.

In any case, under CICA, MSC was bound to follow the procurement policy of using "full and open competitive procedures." See 10 U.S.C. §§ 2301(a)(1), 2302(2), 2304(a)(1)(A), and 2305(a)(1)(A)(1). "Full and open competition" is defined as meaning "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement." 10 U.S.C. § 2302(3); 41 U.S.C. § 403(7). CICA's legislative history reveals that Congress established the "full and open competition" standard as the new standard for awarding contracts because of its strong belief that the procurement process should be open to all capable contractors who want to do business with the government. See House Conference Report No. 98-861, 98th Cong., 2d Sess. 1422 (June 23, 1984). Consequently, the unsubstantiated MSC concern that allowing full and open competition with contract carrier participation may cause ocean common carriers to not compete cannot be a legitimate excuse under CICA to eliminate contract carriers from the competition. See Trans World Maintenance, Inc., B-220947, Mar. 11, 1986, 65 Comp. Gen. \_\_\_\_ , 86-1 C.P.D. ¶ 239.

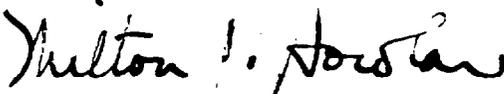
Furthermore, we find nothing in the Shipping Act of 1984 or the legislative history that supports MSC's conclusion that permitting United States-flag contract and tramp carriers to compete for DOD contracts would be inimical to the development of a United States-flag liner fleet capable of meeting national security needs. The legislative history of that Act reveals that the United States-flag liner fleet was primarily threatened by foreign competition and over-regulation, and that the development of an economically sound United States-flag liner fleet was to have been accomplished by the legislative changes contained in the Act itself. See House Committee on Merchant Marine and Fisheries, H.R. Rep. No. 98-53, Part I, 98th Cong., 1st Sess. 237, reprinted in 1984 U.S. Code Cong. & Ad. News 167, 173 (1983). That Act did not provide for limiting competition for government ocean transportation to ocean common carriers. Indeed, Congress continued to be concerned about preserving the competitive balance of the marketplace created by the participation of independent carriers and tramp operators. See 46 U.S.C. § 1709(c)(3). Moreover, Congress has recognized that all American flag vessels, both common carrier and contract carriers, are essential to the national security. See e.g.,

Merchant Marine Act of 1936, 46 U.S.C. § 1101 (1982); Cargo Preference Act, 46 U.S.C. § 1241 et seq. (Supp. II 1984). Therefore, while we recognize that MSC may have a legitimate concern about the continuing economic viability of the ocean common carrier industry, there is no statute that conflicts with or modifies CICA's requirement for full and open competition for government ocean transportation that would permit the general elimination of contract carriers from competition.

Finally, since American flag contract carriers are generally eligible for government contracts and Congress has recognized that the American-flag fleet includes both common carriers and contract carriers, MSC's argument that DECI should become a common carrier to become eligible has no merit. See Federal Acquisition Regulations (FAR), 48 C.F.R. §§ 47.001; 47.101 (1985); 46 U.S.C. § 1101; 46 U.S.C. App. § 1709(c)(3).

DECI's protest is sustained.

We recommend that MSC eliminate the RFP provision limiting competition to common carriers for the second cycle of the contract. To the extent MSC requires other information or assurances from contract carriers or common carriers, e.g., schedule information or commitments, the solicitation should be appropriately modified. Since the protester will be afforded the opportunity to compete for the second cycle of the contract, it is not entitled to recover proposal preparation or protest prosecution costs. See 4 C.F.R. § 21.6(e); The Hamilton Tool Co., B-218260.4, Aug. 6, 1985, 85-2 C.P.D. ¶ 132.

  
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