



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Federal Transport, Inc.--Request for
Reconsideration

File: B-233393.3

Date: June 1, 1989

DIGEST

On reconsideration, General Accounting Office reverses prior dismissal of protest concerning request for rate tenders from freight carriers issued under the Department of the Army's Military Traffic Management Command's guaranteed traffic program pursuant to the Transportation Act of 1940, and asserts jurisdiction under the Competition in Contracting Act of 1984 over protests concerning such transportation services procured pursuant to the Transportation Act.

DECISION

Federal Transport, Inc., requests reconsideration of our decision, Federal Transport, Inc., B-233393, Nov. 9, 1988, 88-2 CPD ¶ 465, dismissing the firm's protest concerning the decision of the Army's Military Traffic Management Command (MTMC) to allow Shuttle Express, Inc., to correct a mistake in its tender under a request for tenders (RFT) for shipment of certain specified cargos from the Defense Depot at Memphis, Tennessee. We reverse our prior dismissal and assume jurisdiction under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 et seq. (Supp. IV 1986), over protests concerning RFTs issued under MTMC's guaranteed traffic program pursuant to the Transportation Act of 1940, as amended, 49 U.S.C. § 10721 (1982).

Federal Transport argued in its protest that it had been awarded primary or first alternate motor carrier status for certain regions, and that following correction of Shuttle Express' tender, it lost that status. We dismissed the protest as outside our bid protest jurisdiction because the RFT was issued under the authority of the Transportation Act; the negotiations for the rate tender did not result in a contract; and the document used to obtain the actual transportation would be a government bill of lading (GBL). See Petchem, Inc., 65 Comp. Gen. 328 (1986), 86-1 CPD ¶ 179; Sam Trucking, B-229890, Mar. 3, 1988, 88-1 CPD ¶ 425.

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Federal Transport now requests reconsideration of our prior dismissal, arguing that the Transportation Act is a procurement statute, that MTMC's rules governing rate tenders are procurement regulations, and that, consequently, our Office should assert jurisdiction over protests concerning transportation services procured pursuant to the Transportation Act because CICA authorizes our Office to decide protests concerning alleged violations of a procurement statute or regulation.

Under the Interstate Commerce Act, 49 U.S.C. §§ 10101 et seq. (1982), common carriers by motor vehicle must publish and file with the Interstate Commerce Commission tariffs naming rates and charges for the services offered, and are prohibited from charging, demanding, collecting, or receiving a greater, less or different compensation for transportation. However, pursuant to 49 U.S.C. § 10721, a carrier may transport government property free or at reduced rates. The GBL is the document used by the government for acquiring freight transportation services from common carriers.

MTMC is the agency responsible for the direction, control, and supervision of all functions incident to the acquisition and use of freight transportation services for the Department of Defense (DOD) from commercial transportation companies. The acquisition of these services by GBLs where rates have been negotiated under section 10721 of the Transportation Act is accomplished pursuant to MTMC's own regulations, and is expressly exempt from the Federal Acquisition Regulation (FAR) and the DOD FAR Supplement (DFARS). See FAR §§ 47.000(a)(2), 47.200(b)(2), (b)(3) and (e); DFARS § 1.103(b).

MTMC acquires its transportation services pursuant to the Defense Traffic Management Regulation, which provides for MTMC authority over DOD transportation, and the MTMC Inland Freight Traffic Regulation 55-1, which governs negotiations for commercial transportation, tariffs, tenders, rates and routings. Regulation 55-1 provides for carriers' complaints to be handled by the heads of principal staff elements at MTMC headquarters; complaints concerned with policy or those affecting more than one area command are directed to the Commander of MTMC.

MTMC conducts approximately 73 percent of its transportation business, involving 1,346,000 GBLs per year, pursuant to voluntary tenders of one-time routine routings (1986 statistics). The other 27 percent of MTMC's transportation business is acquired through the agency's guaranteed

traffic program and involves repetitive movements. As in this case, the tenders for these routes are solicited through the issuance of an RFT by MTMC. The RFT states that MTMC's actual requirements for transportation services will be allocated for the 24-month period of the RFT to the responsive, responsible carrier whose offer conforms to the RFT and will be most advantageous to the government, cost and other factors considered. Alternate carriers for each route are also selected. Any carrier selected by MTMC may cancel its tender provided it gives written notice of not less than 30 days, or a shorter time period upon mutual agreement between the carrier and the government.

Under CICA, 31 U.S.C. § 3552, our Office is authorized to decide protests concerning alleged violations of a procurement statute or regulation. Section 10721 of the Transportation Act is a procurement statute in the broad sense since it authorizes the government to obtain transportation services from common carriers at rates below those in their published tariffs. Further, unlike the issuance of GBLs, where MTMC merely selects a tender for a one-time routing without issuing any type of solicitation or conducting a formal source selection, all the indicia of a procurement are present in MTMC's guaranteed traffic program. MTMC issues a request for rate tenders which provides for award to the responsive, responsible carrier whose offer is most advantageous to the government, cost and other factors considered, for all the traffic for a particular route for a specific period of time. In response to the solicitation, MTMC receives rate tenders that are offers to perform transportation services at stated prices. After evaluation of offers, MTMC accepts the offer of a primary carrier and awards what is in effect a requirements contract to that carrier.

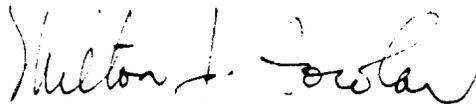
Accordingly, although MTMC does not literally follow the procurement procedures outlined in the FAR and the DFARS, it uses similar provisions in its solicitations for procuring transportation services under the guaranteed traffic program. We conclude, therefore, that the current protest falls within our jurisdiction under CICA and hereby overrule Petchem, Inc., 65 Comp. Gen. 328 supra, and Sam Trucking, B-229890, supra. We find however, that the protest is without merit.

Although the RFT directed that tender rates be expressed in cents per mile without the use of decimals, Shuttle Express' tender was stated in decimals, offering, for example, a rate of 1.24 rather than 124 for a certain route. After MTMC rejected Shuttle Express' and other tenders because of the use of decimals in the rates, Federal Transport was

designated primary carrier on certain routes. Shuttle Express then requested MTMC to allow it to correct the mistake in its rates and to reconsider its low tender. On reviewing Shuttle Express' tender, MTMC allowed correction, waiving the firm's use of decimals as a minor irregularity, and designated Shuttle Express primary carrier on certain routes, displacing Federal Transport.

We do not find MTMC's action to be improper. Although the RFT requested that tender rates be stated in cents per mile and included a cautionary statement to offerors not to use decimals, the RFT reserved to MTMC the right to waive informalities and minor irregularities in tendered charges. The irregularity in Shuttle Express' rate was apparent from the face of the tender, since the firm used decimal points, and its offered rates, for example, 1.24 cents, were clearly in error when compared to all other tenders for the routes in question. Moreover, Shuttle Express' rates would have been low with or without waiver of the irregularity. Accordingly, MTMC correctly waived the irregularity in Shuttle Express' tender.

Our prior dismissal is reversed and the protest is denied.



Acting Comptroller General
of the United States