C. Evans

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: PHH Homequity Corporation

File: B-240145.3; B-241988

Date: February 1, 1991

John J. Duffy, Esq., Piper & Marbury, for the protester.
Joy Strickland, Esq., Farm Credit Administration, and Michelle Harrell, Esq., General Services Administration, for the agencies.
James A. Calderwood, Esq., Zuckert, Scoutt & Rasenberger, for American Movers Conference; Leo C. Franey, Esq., Rea, Cross & Auchincloss, for Household Goods Carrier Bureau, Inc.; and Harry Kurtz, Esq. and George Leddicotte, for Mobility Resource Associates, Inc., interested parties.
Catherine M. Evans and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that solicitation improperly prohibits relocation services contractor from receiving commission payments from household goods carrier is denied where agencies reasonably determined that commission payments are prohibited by the Anti-Kickback Act of 1986.

2. Agency reasonably concluded that commission payments from household goods carrier to relocation services contractor are prohibited by Anti-Kickback Act of 1986 where contractor under solicitation will not be providing compensable services to carriers; commission payments therefore would serve only to improperly influence carrier selection.

DECISION

PHH Homequity Corporation protests the terms of request for proposals (RFP) No. 90-FCA-RFP-002, issued by the Farm Credit Administration (FCA), and RFP No. 6FBG-90-B527-N, issued by the General Services Administration (GSA), for employee relocation services. PHH alleges that the RFPs unduly restrict competition because they do not allow the relocation services contractor to accept commissions from the household goods carrier selected by the contractor to perform individual employee moves.

We deny the protests.

Transportation of household goods of employees of federal civilian executive agencies who are relocated within the United States is regulated by GSA's Centralized Household Goods Traffic Management (CHGTM) Program, 41 C.F.R. § 101-40.200 et seq. (1990). Under the program, there are two methods by which an employee move may be effected. Under the commuted rate system, employees make their own arrangements for shipping their goods and are reimbursed in accordance with the GSA Commuted Rate Schedule. Under the government bill of lading (GBL) method, the government selects and pays the household goods carrier, with the GBL operating as the contract governing the transaction. The agency determines which method to use based on a cost comparison furnished by GSA; the GBL method can be chosen only if it is determined to be more economical than the commuted rate system, and only where it will result in a savings of at least $100 over the commuted rate system cost. 5 U.S.C. § 5724(c) (1988); 41 C.F.R. § 101-40.203-4(a). Where an agency chooses the GBL method for a particular relocation, the CHGTM regulations require it to select the carrier that provides the lowest price consistent with the required service. 41 C.F.R. § 101-40.204. The carrier is selected from a list of household goods carriers that have rate tender agreements with GSA. These "tender of service" (TOS) agreements set forth the rates to be charged by carriers and standards of performance for federal employee relocations.

Both RFPs in issue here contemplate the award of a contract for employee relocation services which are currently being performed in-house. Under the RFPs, the contractor will be responsible for administering employee relocations in accordance with the CHGTM regulations, including those governing selection of carriers for individual moves, and the agency will pay the contractor a fee for its services. Carriers selected for relocations under the GBL method are paid directly by the agency according to the rates specified in their TOS agreements. The RFPs prohibit the contractor from receiving commission payments from the carriers it selects, and express the agencies' view that receipt of such commissions are prohibited by the Anti-Kickback Act of 1986, 41 U.S.C. §§ 51-58 (1988).

In its protest, PHH contends that the provision in both RFPs prohibiting commission payments is unreasonable because commissions from household goods carriers are not kickbacks, but rather are compensation to the contractor for brokerage services provided to the carrier. PHH argues that commissions from carriers therefore do not fall within the Act's definition of a "kickback," and notes that the Interstate Commerce Commission (ICC) regulations authorize the use of licensed brokers to arrange for transportation of household

goods, and permit such brokers to accept compensation from carriers. 49 C.F.R. § 1045.2 (1989). In addition, PHH argues, the provision is unduly restrictive of competition because it is not necessary to satisfy the agencies' minimum needs, and because it does not allow PHH to take advantage of preexisting commission arrangements it has with a number of household goods carriers, thereby preventing PHH from offering its most favorable price.

The agencies respond that, under the terms of the RFPs, the contractor is not a broker, but instead performs certain services for the government in return for a fixed fee, and therefore is not entitled to compensation from the carriers. Thus, the agencies argue, any payment from a carrier to the contractor would serve no other purpose than to influence the contractor's selection of a carrier, a practice proscribed by the Anti-Kickback Act. Beyond the potential legal impropriety of such payments, the agencies assert, the provision prohibiting commissions also serves to assure that the contractor will impartially represent the government's interests when it selects a carrier, a benefit the agencies consider well worth what likely will be higher fixed fees. Further, the agencies maintain that any cost saving a contractor might pass on to the government were commission payments from carriers permitted undoubtedly would be offset by a resultant increase in the carriers' TOS rates; that is, carriers could be expected to pass on to the government the commission costs when TOS rates are renegotiated in the future. In addition, the agencies note that the prohibition against commissions assures that all offerors--those that have prior commission arrangements with carriers and those that do not--will be able to compete on an equal basis.

Where a protester alleges that a requirement is unduly restrictive, we review the record to determine whether the requirement has been justified as necessary to satisfy the agency's minimum needs. See, e.g., Embraer Aircraft Corp., B-240602; B-240602.2, Nov. 28, 1990, 90-2 CPD ¶ 438.

We find that the prohibition is unobjectionable because it addresses legitimate concerns of both agencies.1/ First, in

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1/ Although we need not resolve the question in this case, it is not clear that the prohibition even constitutes a restriction on competition. We agree with the agencies that the prohibition likely will expand competition by placing all interested firms on an equal footing. ICC-licensed brokers will not enjoy a competitive advantage over non-ICC-licensed firms by virtue of existing commission arrangements with carriers, and, as discussed below, this is not likely to increase the government's costs to relocate its employees.

addition to the benefit to the competition discussed above, we think the agencies reasonably concluded that commission payments from carriers to the contractor are proscribed by the Anti-Kickback Act. The Act defines a kickback as anything of value provided to a prime contractor, subcontractor, or their employees for the purpose of improperly obtaining or rewarding favorable treatment in connection with a government prime contract or subcontract. 41 U.S.C. § 52(2). PHH argues that commissions from carriers do not fall within the definition because the payments are legitimate compensation for brokerage services rendered by the contractor. However, we do not agree that the contractor here will be performing brokerage services for carriers. Rather, it will select carriers on behalf of the agencies as prescribed by the CHGTM regulations, and will be paid by the agencies for rendering this service to them. As the contractor thus will be impartially administering the established selection procedures rather than acting on behalf of any specific carriers, the agencies are correct that commissions paid by carriers would serve no legitimate compensatory purpose. This being the case, we think the agencies reasonably concluded that such payments could serve only to improperly influence carrier selection (notwithstanding CHGTM carrier selection procedures), or, absent any actual impropriety, create an appearance of impropriety. The prohibition against commissions is an unobjectionable method of avoiding these results.

In addition, we find legitimate the agencies' concern that commission arrangements probably will lead to an increase in carriers' TOS rates when TOS agreements are renegotiated in the future; if carriers are required to pay commissions to the contractor, the carriers reasonably can be expected to pass this cost on to the government in the form of higher TOS rates. In fact, the record contains a number of statements from carriers asserting that their current TOS rates do not allow for commission payments, and that having to pay commissions on a regular basis would force them to raise their rates to include the amount of those commissions. Such a rate increase would affect the cost to the government not only under the solicitations at issue here but for all federal civilian executive agencies, as the TOS rates apply to movements of household goods for all such agencies.

We conclude that the prohibition on the contractor receiving commissions from carriers is unobjectionable.

The protests are denied.

for James F. Hinchman
General Counsel