



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Crowley Caribbean Transport

File: B-246784

Date: March 31, 1992

Thomas J. Touhey, Esq., and Donald A. Tobin, Esq., Bastianelli, Brown & Touhey, for the protester, Richard S. Haynes, Esq., Chara J. Swedarsky, Esq., and John M. Binetti, Esq., Department of the Navy, for the agency.

Aldo A. Benejam, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that by informing offerors of the agency's determinations regarding various transportation rates based upon the evaluation of initial proposals, and before best and final offers, agency created an improper auction or conferred an unfair competitive advantage on a competitor, is dismissed as untimely, where protest was filed more than 10 working days after protester knew or should have known of basis for protest.

DECISION

Crowley Caribbean Transport (CCT) protests the agency's acceptance of certain transportation rates offered by Sea Barge, Inc., under request for proposals (RFP) No. N00033-91-R-2400, issued by the Military Sealift Command (MSC).¹ CCT contends that the agency improperly disclosed to Sea Barge MSC's determinations regarding CCT's rates based upon the evaluation of initial proposals, and that as a result, Sea Barge gained an unfair competitive advantage over CCT in preparing its best and final offer (BAFO).

We dismiss the protest.

BACKGROUND

MSC issued the RFP on June 21, 1991, seeking prices from United States flag ocean carriers for ocean cargo transportation services for the period December 1, 1991, to

¹Each procurement period is termed a "cycle" and covers a 6-month period.

July 31, 1992. The required transportation services were divided geographically by trade route and subdivided, in some cases, into zones. For example, route 39 zone A (39A) and route 43 zone A (43A), the only routes at issue here, designated services between ports in Panama and ports on the East Coast--39A--and the Gulf Coast--43A--of the United States. The RFP stated that offerors could submit rates for breakbulk or container service, or for both, for various categories of cargo, and further provided that rates for any particular category were independent of rates for other cargo categories. Section M of the RFP stated that MSC would accept the lowest inbound and outbound, technically acceptable rates offered for each category on an individual route or zone, unless it was not fair and reasonable. The RFP also advised that, in addition to the lowest rates, MSC would accept higher priced rate or rates, if necessary to meet the government's minimum needs (e.g., considering capacity, schedule, etc.), making multiple awards possible under the RFP.

Four offerors, including the protester and Sea Barge, submitted initial offers in response to the RFP by the August 7, 1991, extended closing date for receipt of proposals. Initial outbound breakbulk and container rates for light vehicles on routes 39A and 43A were as follows:

Outbound Breakbulk Rates

Route	CCT	Sea Barge	Marine Car	Lykes Bros.
39A	\$62.00	\$66.18	\$ 75.85	\$155.00
43A	66.00	66.18	no bid	86.75

Outbound Container Rates

39A	\$114.00	\$119.27	no bid	\$144.25
43A	116.00	121.27	no bid	149.00

In separate letters dated October 16, the contracting officer informed each of the four offerors that their initial rates had been evaluated and either accepted, not accepted, or designated for discussions.² That letter notified CCT that MSC had accepted CCT's light vehicle outbound breakbulk rates on routes 39A and 43A. MSC's

²That is, each offeror received only information about the status of its own offered rates. In addition to indicating whether each rate was accepted, not accepted, or designated for discussions, the letter indicated whether each initial rate submitted was conditionally accepted; accepted foreign flag; rejected; no bid; no MSC need; accepted late; or not applicable.

letter to Sea Barge and the other two offerors notified the firms that their outbound breakbulk rates were not accepted. MSC's letters to CCT, Sea Barge, and Lykes designated for discussions the outbound container rates submitted by these firms. The agency received BAFOs on October 25; in its BAFO, Sea Barge substantially reduced its outbound container rates for light vehicles, thereby underpricing CCT on that cargo category. On November 8, MSC awarded the primary contract to Sea Barge based on its lower outbound container rates.

In a letter to MSC dated November 14, CCT alleged that the agency's October 16 letter improperly disclosed information about CCT's initial rates to Sea Barge. On November 25, before the agency responded to CCT's November 14 letter, CCT filed this protest with our Office challenging MSC's acceptance of Sea Barge's outbound container vehicle rates.

PROTESTER'S CONTENTIONS

CCT asserts that it is protesting the agency's October 16 letter, which allegedly improperly disclosed to Sea Barge the results of MSC's determinations regarding CCT's initial rates, creating an imbalance or information "gap" between CCT and Sea Barge. According to CCT, by MSC informing Sea Barge that MSC had not accepted Sea Barge's initial outbound breakbulk prices for light vehicles, the agency improperly disclosed to Sea Barge that MSC had accepted CCT's lower prices for that cargo category. On the other hand, CCT argues that since MSC could accept rates offered by more than one carrier on the same routes, by informing CCT that MSC accepted its outbound breakbulk prices for light vehicles, CCT gained no information about the status of Sea Barge's initial rates.

According to CCT, MSC improperly conferred an unfair competitive advantage on Sea Barge because, having been provided with the October 16 letter, Sea Barge knew that: 1) CCT must have submitted a lower price than Sea Barge for outbound light vehicles on both routes; and 2) Sea Barge had to substantially reduce its outbound container light vehicle rates in its BAFO, in order to successfully book any light vehicle cargo on those routes. In summary, CCT argues that MSC should not have provided Sea Barge with the results of the breakbulk rates competition in the October 16 letter before BAFOs were submitted for container rates.

DISCUSSION

Under our Bid Protest Regulations, protests not based upon alleged improprieties in a solicitation must be filed no later than 10 working days after the protester knew or should have known of the basis for protest, whichever is

earlier. See 4 C.F.R. § 21.2(a)(2) (1991). Our Regulations also provide that a matter initially protested to an agency will be considered only if the initial protest to the agency was filed within the time limits for filing a protest with our Office, 4 C.F.R. § 21.2(a)(3). To be timely under our Regulations, therefore, CCT's agency-level protest would have to have been filed within 10 working days after CCT knew or should have known of the basis for protest. In the absence of evidence to the contrary, we assume that mail is received within 1 calendar week from the date it was sent. See Barrett and Blandford Assocs., Inc., B-240723, Sept. 12, 1990, 90-2 CPD ¶ 204. We thus assume that CCT received MSC's October 16 letter by October 23.

The RFP generally informed offerors that the agency intended to accept some or all initial rates submitted without discussions, and that negotiations would be limited to only those rates identified in writing by the agency. MSC's October 16 letter clearly referenced the RFP, stated that initial offers had been evaluated, and explained each of the 10 determinations the agency could have made with respect to each rate offered, including accepted, not accepted, or designated for discussions. Thus, having been informed of the agency's intentions in the RFP, and upon receipt of MSC's October 16 letter, CCT either knew or should have known that MSC had also informed other offerors about the status of their initial rates, including whether MSC had accepted, rejected, or designated any rates for discussion. Instead of protesting then, however, CCT chose to continue participating in the procurement, submitting its BAFO prices on those rates the agency had designated for discussion.

Since CCT knew or should have known by October 23 that MSC had provided other offerors with virtually identical letters with similar information about their initial rates, if CCT had any objections to the agency's method of informing offerors of MSC's determinations regarding their initial rates, CCT was required to protest by November 6, 10 working days later. CCT did not protest to the agency until November 14, more than 10 days after October 23, after the conclusion of the competition and after all rates for this cycle had been published in the agency's master shipping and container agreements. Since CCT's November 14 letter to the agency was untimely filed, CCT's subsequent protest to our Office is also untimely and will not be considered. See Hatch & Fortwangler, Inc., B-244752, July 17, 1991, 91-2 CPD ¶ 71.

In any case, CCT's objections do not provide a valid basis of protest. CCT essentially alleges that by informing Sea Barge that MSC did not accept Sea Barge's initial outbound breakbulk prices of light vehicles, the agency created an impermissible auction. In this regard, Federal Acquisition:

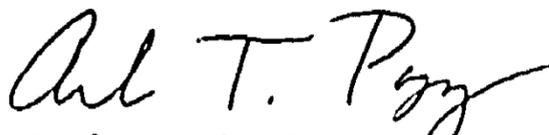
Regulation § 15.610(e)(2) prohibits the use of auction techniques such as:

"(i) Indicating to an offeror a cost or price that it must meet to obtain further consideration;
(ii) advising an offeror of its price standing relative to another offeror (however, it is permissible to inform an offeror that its cost or price is considered by the government to be too high or unrealistic); and
(iii) Otherwise furnishing information about other offerors' prices." [Emphasis added.]

MSC's October 16 letter to all offerors merely indicated that each rate submitted had been evaluated and had been assigned one of the several designations listed in the letter. The letter did not indicate any cost or price that offerors had to meet to be considered further nor advise any offeror of its price standing vis-a-vis another offeror nor furnish information about any offeror's prices. By informing offerors that certain rates had not been accepted, the letter merely indicated that MSC had determined that the rates of other than the lowest priced carrier or carriers for that route or zone were too high or were otherwise not required.

Additionally, contrary to CCT's assertions, four offerors, not two, submitted initial outbound breakbulk prices for light vehicles on route 39A, and three of those offerors also submitted prices for that cargo category on route 43A. Further, MSC's October 16 letter uniformly informed all offerors that MSC could have made 1 of 10 different determinations with respect to each of the rates offered. Accordingly, CCT's contention that MSC's October 16 provided specific information to Sea Barge from which that firm could conclude with certainty that MSC had definitely accepted only CCT's initial outbound breakbulk prices of light vehicles, or that MSC revealed to Sea Barge the amount of those prices, is illogical, not supported by the facts, and is legally insufficient to provide a basis for protest. See 4 C.F.R. § 21.3(m); see also CWM Indus., Inc., B-246350, Nov. 26, 1991, 91-2 CPD ¶ 505.

The protest is dismissed.



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