**Comptroller General of the United States**

**Washington, D.C. 20548**

# Decision

**Matter of:** Aalco Forwarding, Inc., et al.

**File:** B-277241.16

**Date:** March 11, 1998

Alan F. Wohlstetter, Esq., and Stanley I. Goldman, Esq., Denning & Wohlstetter; James M. McHale, Esq., Seyfarth, Shaw, Fairweather & Geraldson; Thomas M. Auchincloss, Jr., Esq., Leo C. Franey, Esq., and Brian L. Troiano, Esq., Rea, Cross & Auchincloss; Richard L. DeWitt, Approved Forwarders Inc.; and Arthur R. Heath, A&P Shipping Corp., for the protesters.
G. Jerry Shaw, Esq., and Susan E. Shaw, Esq., Shaw, Bransford & O'Rourke, for Cendant Mobility Services Corporation, an intervenor.
Thomas J. Duffy, Esq., Maj. Jonathan C. Guden, and Ramon Morales, Esq., Department of the Army, for the agency.
David R. Kohler, Esq., and Timothy C. Treanor, Esq., for the United States Small Business Administration.
Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

1. Contracting agency reasonably did not set aside for exclusive small business participation a solicitation for a pilot program for the shipment and storage of the personal property of military service members and civilian employees between all the shipping offices in 3 origin states and 18 destination regions in the continental United States and Europe, where the contracting officer had no reasonable expectation that two or more interested small business concerns have the capability to handle all the shipments and perform all the related requirements designated under the pilot program.

2. Contracting agency's partial small business set-aside decision under a solicitation for a pilot program for the shipment and storage of the personal property of military service members and civilian employees is not reasonable, where it does not ensure an economic production run or reasonable lot of shipments for small business concerns, as required by Federal Acquisition Regulation § 19.502-3(b), because it does not meaningfully consider the impact of the relatively small number of shipments available under the set-aside or the significant obligations, such as a

committed daily capacity, imposed on small business contractors by the solicitation.

## DECISION

Aalco Forwarding, Inc. and 96 other self-certified small business concerns protest the terms of request for proposals (RFP) No. DAMT01-97-R-3001, issued by the Military Traffic Management Command (MTMC), Department of the Army, for all personnel, equipment, materials, supervision, and other items necessary to provide transportation and transportation-related services for 50 percent of the eligible Department of Defense (DOD) and U.S. Coast Guard sponsored personal property shipments from North Carolina, South Carolina, and Florida, to any or all of 13 destination regions in the continental United States and/or any or all of 5 destination regions in Europe.[1] The solicitation implements a pilot program to

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[1]The following firms are involved in these protests: Aalco Forwarding, Inc.; AAAA Forwarding, Inc.; Air Van Lines International, Inc.; Allstates Worldwide Movers; Aloha Worldwide Forwarders, Inc.; Alumni International, Inc.; American Heritage International Forwarding, Inc.; American Shipping, Inc.; American World Forwarders, Inc.; Apollo Forwarders, Inc.; Arnold International Movers, Inc.; Astron Forwarding Company; BINL Incorporated; Burnham Service Company, Inc.; Cavalier Forwarding, Inc.; Classic Forwarding, Inc.; Davidson Forwarding Company; Deseret Forwarding International, Inc.; Foremost Forwarders, Inc.; Gateways International, Inc.; Great American Forwarders, Inc.; Hi-Line Forwarders, Inc.; International Services, Inc.; Island Forwarding, Inc.; Katy Van Lines, Inc.; Lincoln Moving & Storage; Miller Forwarding, Inc.; Northwest Consolidators; Ocean Air International, Inc.; Senate Forwarding, Inc.; Shoreline International, Inc.; Stevens Forwarders, Inc.; Von Der Ahe International, Inc.; Wold International, Inc.; Zenith Forwarders, Inc.; Acorn International Forwarding Company; AAA Systems, Inc.; A.C.E. International Forwarders; Apex Forwarding Company, Inc.; Armstrong International, Inc.; Art International Forwarding, Inc.; Coast Transfer Company, Inc.; Crystal Forwarding, Inc.; CTC Forwarding Company, Inc.; Diamond Forwarding, Inc.; Dyer International, Inc.; Harbour Forwarding Company, Inc.; HC&D Forwarders International, Inc.; Jag International, Inc.; The Kenderes Group, Inc.; Pearl Forwarding, Inc.; Rainier Overseas, Inc.; Rivers Forwarding, Inc.; Ryans's World; Sequoia Forwarding Company, Inc.; A-1 Relocation, Inc. d/b/a A-1 Movers of America; A-1 Moving & Storage, Inc.; Able Forwarders, Inc.; Andrews Van Lines, Inc.; A. Arnold & Son Transfer & Storage Company, Inc.; Art and Paul Moving & Storage; Associated Forwarding, Inc.; Associated Storage and Van, Inc.; Carlyle Van Lines, Inc.; Carrier Transport International, Inc.; Coastal Moving Company; Conrad Group, Inc.; Davidson Transfer & Storage Co., Inc.; Denoyer Brothers Moving & Storage Co.; Door To Door Moving & Storage Co.; Exhibit Transport, Inc.; Ferriss Warehouse & Storage Co.; Fogarty Van Lines, Inc.; Horne Storage Company, Inc.; Lynn Moving and Storage, Inc.; A.D. McMullen, Inc.; Mid-State Moving & Storage Inc.; Movers Unlimited, Inc.; Nilson Van & Storage; Northwest Consolidators, Inc.; Ogden

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reengineer DOD's current program for shipping and storing the personal property of its military service members and civilian employees. In these protests, the protesters contend that the RFP is not properly set aside for small business concerns.[2]

The protests that the RFP should be totally set aside for small business concerns are denied and the protests of the reasonableness of the partial set-aside are sustained.

BACKGROUND

This procurement was the subject of prior decisions in Aalco Forwarding, Inc., et al., B-277241.8, B-277241.9, Oct. 21, 1997, 97-2 CPD ¶ 110, which denied various protests primarily against the acquisition of these services under the Federal Acquisition Regulation (FAR) part 12 commercial item procedures, and in Aalco Forwarding, Inc., et al., B-277241.12, B-277241.13, December 29, 1997, 97-2 CPD ¶ 175, which denied protests that the RFP unnecessarily bundled certain contract requirements to the detriment of small business concerns. Those decisions contain much of the background for this procurement, which will not be repeated here.

MTMC's intent to issue a draft solicitation for the reengineering of the personal property program was synopsized in the November 26, 1996, Commerce Business Daily (CBD), which requested that interested small business concerns provide the contracting office a positive statement of small business eligibility, the number of their employees, and evidence of capability to perform (including references) not later than 30 calendar days after release of the draft solicitation. The notice stated that the determination to partially set-aside the solicitation for small business concerns, based upon the responses received, was solely within the discretion of the government.

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[1](...continued)
Transfer & Storage; OK Transfer & Storage, Inc.; Pan American Van Lines, Inc.; Riverbend Moving & Storage; Royal Forwarding, Inc.; Sells Service, Inc.; South Hills Movers, Inc.; Stanley's Transfer Company; Starck Van Lines, Inc.; StarTrans International, Inc.; Stearns Forwarders, Inc.; Stearns Moving & Storage of Kokomo, Inc.; Von Der Ahe Van Lines, Inc.; Wainwright Transfer Co. of Fayetteville, Inc.; Weathers Bros. Transfer Co.-NC.; Approved Forwarders, Inc.; and A&P Shipping Corp.

[2]The protesters have also protested certain provisions contained in a recently issued amendment to the solicitation. These protests are the subject of another decision of today.

MTMC issued the draft solicitation for a proposed pilot program on December 12, 1996, but did not identify the solicitation as a set-aside for small business. MTMC received more than 300 expressions of interest in response to the CBD synopsis from firms that represented themselves as small business concerns.

MTMC later issued notices in the CBD, which provided that the solicitation may be partially set aside for small business concerns and that all responsible small business concerns, including those who responded to the earlier announcement of the draft solicitation, interested in being considered for a potential small business set-aside should submit statements identifying the specific traffic channels, state-to-region, which they would be interested in servicing, as well as evidence of capability to perform if they had not already done so. The agency received about 150 responses from small business concerns to these notices.

MTMC issued the "final" solicitation on March 14, 1997, for services in 53 designated traffic channels (origin state to destination region). In an amendment issued May 14, MTMC replaced the solicitation in its entirety and set aside 12 percent of the traffic volume of 27 designated high traffic volume channels for exclusive small business participation. According to the solicitation, based on historical data, the 27 channels selected for the set-aside represent approximately 85 percent of the total traffic moving under the pilot program, and the 12 percent of traffic volume of the 27 set-aside channels represents approximately 10 percent of the total estimated dollar value of the contracts to be let under the pilot program.

The solicitation requires offerors to list in their proposals for each traffic channel for which they submit offers, the daily capacity (in pounds) that they are committing to each shipping office in an origin state for the base year and each option year. The committed daily capacities will be used by the agency to determine the number of contracts to be awarded for each traffic channel and to obligate the contractors to provide requested services up to their committed daily capacities. Although a minimum committed daily capacity is not specified, the RFP states that committed daily capacities must be reasonable, based on the historical tonnage data. An attachment to the RFP provides historical monthly/yearly tonnage data and numbers of shipments for each traffic channel; the information in the attachment, as amended, covers 100 percent of the eligible traffic for fiscal years 1994, 1995, and 1996 (as stated above, the pilot program will be for 50 percent of the eligible traffic).[3]

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[3]Eligible traffic consists of interstate and international shipments of household goods and unaccompanied baggage. The remaining 50 percent of the eligible traffic not included under the pilot program will be handled under the procedures of the current program. The pilot program does not encompass local, intrastate, and certain other types of moves.

The RFP reserves to the government the right to make multiple awards of firm, fixed-price, indefinite delivery/indefinite quantity contracts, and MTMC anticipates making multiple awards. According to MTMC, the number of awards per channel will depend upon such factors as the daily capacity committed by offerors and whether the channel is partially set-aside for small business concerns. The government will award contracts to the responsible offerors whose offers represent the best overall value under the stated evaluation criteria.[4] The contracting officer will first make awards under the non-set-aside portion of the solicitation to those offerors that represent the best value to the government. After all awards have been made on the non-set-aside portion, the contracting officer will make awards to eligible and responsible small business concerns on the set-aside portion. Consideration for the set-aside portion will be given only to small business offerors who have submitted "responsive offers" on the non-set-aside portion. See FAR § 19.502-3(c)(2)(i).

Once the contracts are awarded, personal property shipments will be ordered through task orders; the orders will be placed on a rotational basis among the awardees for a particular traffic channel until the contract minimums for each awardee ($25,000) are reached. After contract minimums are met, and if multiple awards have been made for a particular traffic channel or set-aside portion of a traffic channel, the awardees will compete for the task orders on a best value basis. For the set-aside portion, if there are multiple small business awardees, they will compete among themselves for subsequent set-aside orders; large businesses will not be able to compete for those orders.

Following the contracting officer's decision to partially set-aside the procurement, the Small Business Administration (SBA) Procurement Center Representative (PCR) recommended to the contracting officer that the solicitation's partial set-aside be increased to 50 percent of the total contract value, given that small business concerns constitute much of the carrier-agent market.[5] The contracting officer rejected the PCR's recommendation. In accordance with FAR § 19.505, the PCR appealed the contracting officer's decision to the head of the contracting activity, MTMC's commander, who upheld the contracting officer's earlier rejection of the

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[4]The RFP provides that the government intends to evaluate offers and award contracts without discussions, although its reserves for the government the right to conduct discussions if necessary.

[5]In maintaining its recommendation during these protests, the SBA points to, among other things, the level of small business participation in the current program, Bureau of the Census data on small business revenues under certain Standard Industrial Classification (SIC) codes that generally encompass the work to be performed under this solicitation, and the amount of small business participation in the relocation program run by the General Services Administration (GSA).

PCR's recommendation.[6] The SBA then appealed to the Secretary of the Army, whose designee, the Director of the Army's Office of Small and Disadvantaged Business Utilization, denied the SBA's appeal. These protests followed.

Two protesters, A&P Shipping and Approved Forwarders, argue that the solicitation should be set-aside in its entirety for exclusive small business participation because small businesses are currently fulfilling the requirements of the current program at reasonable prices and there are more than two small businesses who can fulfill the requirements of the pilot program. The other protesters contend that the partial set-aside is not an economic production run or reasonable lot, as required, and that the solicitation is not properly divided into set-aside and non-set-aside portions and is otherwise ambiguous in this regard.

ANALYSIS

Total Set-Aside

It is the government's policy to place a "fair proportion" of its acquisitions with small businesses. 15 U.S.C. § 631(a) (1994); FAR § 19.201(a). An acquisition over $100,000 must be set aside for exclusive small business participation if the contracting officer determines there is a reasonable expectation that offers will be obtained from at least two responsible small businesses at fair market prices. FAR § 19.502-2(b). We view this determination as a business judgment within the contracting officer's discretion, which we will not disturb absent a clear showing that it has been abused. ACCU-Lab Medical Testing, B-270259, Feb. 20, 1996, 96-1 CPD ¶ 106 at 2; CardioMetrix, B-261327, Aug. 30, 1995, 95-2 CPD ¶ 96 at 2.

The prior procurement history of the current non-FAR-based program, through which many of the self-certified small business protesters participate, is not controlling here, because the current program is not set aside for small business and because participation in the current program does not automatically translate to capability to perform all the different requirements of the pilot program. In contrast to the current program, the solicitation for the pilot program establishes long-term commitments from a relatively small number of prime contractors to replace the current traffic distribution system involving numerous carriers at each shipping

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[6]Under FAR § 19.505, the PCR may appeal the contracting officer's decision not to set aside a procurement for exclusive small business participation to the head of the contracting activity. If the head of the contracting activity agrees with the contracting officer, the SBA may appeal the procuring agency's determination to the head of the agency. The agency head's decision concerning whether the procurement should be restricted to small businesses is final as to the SBA and the contracting officer. See Aspen Sys. Corp., B-272213.2, Oct. 22, 1996, 96-2 CPD ¶ 153 at 2 n.1.

office through which shipments are placed on an order-by-order basis. The prime contractors under the pilot program will be solely responsible for managing most aspects of the movement of the household goods and unaccompanied baggage of service members and employees, including some tasks currently performed by agency personnel. These prime contractors will also be provided potentially greater shipping volumes than under the current program. Moreover, the pilot program significantly expands each individual contractor's obligations, most importantly by requiring each contractor to commit daily capacity at each shipping office in an origin state.[7]

The contracting officer decided--with the concurrence of the agency's small business specialist--not to set aside entire channels because there was insufficient data to ensure that small business concerns could handle all the traffic in any channel, particularly the higher traffic volume channels. The contracting officer considered that the capability of small businesses to perform all the requirements of a traffic channel was not fully known or tested, and that some industry representatives had expressed concern about the ability of small business concerns to handle high traffic volumes. Notwithstanding the considerable interest expressed by small businesses in this solicitation, the contracting officer concluded that the expressions of interest and the responses to the requests for capability and channel information did not warrant a reasonable expectation that two or more interested small business concerns have the capability to service all the traffic in each channel. It follows that, if the contracting officer did not find that small businesses are capable of performing the requirements of any one traffic channel, she could not determine that small businesses are capable of performing all of the solicitation requirements, which encompass all traffic channels.

Because the solicitation is for a pilot program, the SBA does not contest the contracting officer's determination that a total set-aside is inappropriate. Given the lack of directly applicable prior procurement history and reasonable assurances of small business capability to service all of the pilot program's new requirements and traffic channel volumes, we cannot find the contracting officer's determination unreasonable. Accordingly, the protests of A&P Shipping and Approved Forwarders with regard to the decision not to issue the solicitation as a total set-aside are denied.

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[7]The solicitation also imposes other significant obligations on the contractors, such as a requirement to maintain a toll-free telephone line available 24 hours a day for customer inquiries, problem resolution, and intransit visibility service during any phase of a move with a 2-hour response time even during non-business hours, as well as requirements to provide an operations manager, movement counseling to customers, and electronic data interchange with shipping offices.

Partial Set-Aside

As to partial set-asides, FAR § 19.502-3 requires, in relevant part, that:

> (a) The contracting officer shall set aside a portion of an acquisition, except for construction, for exclusive small business participation when--
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> (1) A total set-aside is not appropriate . . . ;
> (2) The requirement is severable into two or more economic production runs or reasonable lots;
> (3) One of more small business concerns are expected to have the technical competence and productive capacity to satisfy the set-aside portion of the requirement at a fair market price;
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> * * * * *
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> (b) When the contracting officer determines that a portion of an acquisition is to be set aside, the requirement shall be divided into a set-aside portion and a non-set-aside portion, each of which shall (1) be an economic production run or reasonable lot and (2) have terms and a delivery schedule comparable to the other. When practicable, the set-aside portion should make maximum use of small business capacity.

In order to constitute an economic production run or reasonable lot, the set-aside portion must be of sufficient quantity as to be economically feasible, such as would result in reasonable prices. See Kurt Mfg. Co., B-236025, Oct. 5, 1989, 89-2 CPD ¶ 318 at 3-4 (decision not to set aside procurement partially for labor surplus area concerns was proper based on determination that severance of acquisition into two or more production lots is not economically feasible because substantial start-up costs would be duplicated and reflected in the prices of two contractors).[8]

As with a total set-aside, the decision whether a particular acquisition should be partially set aside for small business basically involves a business judgment within the discretion of the contracting officer, and our review is limited to ascertaining whether that discretion has been abused; however, the contracting officer's determination whether or not to set aside a portion of a procurement for small

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[8]The Kurt Mfg. decision involved regulations governing partial set-asides for labor surplus area concerns, which used the same language contained in FAR § 19.502-3 requiring the set-aside portion to be an economic production run or reasonable lot. See Department of Defense Federal Acquisition Regulation Supplement § 220.7003(a) (1988 ed.).

business must be one which can reasonably be supported. Digital Sys. Group, Inc., B-258262.2, Jan. 20, 1995, 95-1 CPD ¶ 30 at 7; Atlas Headwear, Inc., B-231488.2, Sept. 14, 1988, 88-2 CPD ¶ 244 at 4.

The record shows that the contracting officer executed a determination on April 15, 1997, that the solicitation will be accomplished as a partial set-aside in accordance with the criteria set forth in FAR § 19.502-3, based on the following findings:

> A 100 [percent] set-aside by channels with limited tonnage (capacity) is unfair to small businesses. It will result in many small businesses competing for channels with limited capacity with a small revenue potential. It is more advantageous to small businesses to set aside ten [10] percent of 27 channels with large capacities which will result in larger revenue potential.
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> The requirement is severable into two or more channels [FAR § 19.502-3(a)(2)]. One or more small business concerns are expected to have the capacity capability to satisfy the set-aside portion of the requirement at a fair market price [FAR § 19.502-3(a)(3)] . . . . The requirement will be divided into a set-aside portion and a non-set aside portion.
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> An analysis was performed which reflects 27 channels be considered for partial set-asides denoting the following.
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> a. the number of small businesses expressing interest in possible set-asides by channel,
> b. the shipment estimate based on historical data of eligible shipments per channel,
> c. the tonnage estimate based on historical data of eligible shipments per channel,
> d. the estimated average weight.
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> Channels selected as candidates for partial set-asides were based on the following criteria: channels must have sufficient interest to small business and, channels must have sufficient volume to provide small business concerns with reasonable revenues.

The analysis referred to by the contracting officer, which used the same fiscal year 1995 shipping data included with the solicitation, proposed that 27 channels be considered as candidates for partial set-asides based on sufficient interest from small businesses and sufficient volume to provide small business with reasonable revenues. The analysis "rationalized that the break-even point" for sufficient volume was any channel with 260 shipments or more, which reflects an average of a shipment a day based on a 5-day workweek. Each channel with a shipment volume of more than 260 shipments was identified by the analysis as a candidate for partial set-aside; the channels that were not selected were deemed not to be economically feasible for small business participation.

According to the contracting officer, the decision regarding the actual size of the partial set-aside for the selected channels was difficult to make because there is no accurate data measuring the percentage of truly independent small businesses in the moving industry and their capacity. MTMC's own data, which indicates that 598 of 717 carriers with at least interstate operating authority approved by the agency to participate in the current program are self-certified small business concerns, was not used as a basis for the set-aside determination. This was because MTMC had serious reservations regarding the small business status of many of the companies approved under its current program due to outdated self-certifications of small business status, common financial and administrative control relationships between companies, affiliations with other moving companies and large van lines, the paper company status of some of the firms,[9] and the ability of some of the firms, particularly freight forwarders, to comply with the solicitation's subcontracting limitation in performing the set-aside portion of the contracts.[10]

To determine what the size of the partial set-aside should be for the selected channels, the contracting officer utilized data compiled by the American Movers Conference (AMC) (an industry trade group) from reports of carrier revenue filed with the Department of Transportation, which the contracting officer asserts was the best available information known to her at the time she made her set-aside determination. The AMC data lists the revenue earned in 1994 by 67 carriers and in 1995 by 61 carriers, including the major van lines. The agency interpreted this data as showing that approximately 90 percent of all the reported revenues in the moving industry are earned by large businesses with the remainder earned by small businesses.

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[9]Under the current program, some firms establish affiliates known as "paper companies" in order to maximize shipments under a traffic distribution system which essentially distributes shipments equally to carriers offering the same rate and to move traffic at higher rates during the peak moving season. While an order may be issued to the paper company, the actual move is performed by the firm behind the paper company, or its agents, with the firm's or agent's equipment and personnel. Thus, paper companies do not actually add to the industry's capacity, but are a result of the current program's traffic distribution system. There may be hundreds of such paper companies participating in the current program, which the pilot program aims to reduce or eliminate.

[10]Because freight forwarders subcontract the actual performance of the transportation services they arrange, the agency had concerns about their eligibility for award under the solicitation's subcontracting limitation.

Based on the AMC data, which the contracting officer viewed as reflecting small business capabilities, the contracting officer determined that 10 percent of the value of the contracts for the pilot program should be set-aside for small business concerns. As described above, the agency views the 10 percent contract value figure as equating to approximately 12 percent of the traffic volume in terms of either shipments or tonnage. It is the agency's position that the amount of the partial set-aside is properly based on the AMC data and since the set-aside represents "enough business to make it worthwhile for a firm to compete for a contract," the set-aside constitutes an economic production run or reasonable lot under the circumstances.

The protesters and the SBA dispute the reasonableness of the agency basing the size of the partial set-aside on the AMC data. They contend that the data is not an accurate reflection of the small business composition of the moving industry because the data does not include revenue generated by numerous small business moving companies and freight forwarders, including many that participate in the current program. They also argue that application of the set-aside based on the AMC data does not result in sufficient shipments to be economically feasible for small business moving companies to compete for the set-aside, considering the obligations imposed by the solicitation.

As confirmed by the agency during these proceedings, application of the set-aside to the historical shipment data used by the agency in making its set-aside determination results in a set-aside ranging from a low of 33 to a high of 165 shipments per year per channel (or an average of less than 1 shipment per week to about 3 shipments per week), depending on the set-aside channel involved.[11] Based on the historical data, small business prime contractors receiving contracts for the set-aside portions of 11 of the 27 set-aside channels would expect an average of 1 shipment or less per week per channel, an average of between 1 and 2 shipments per week per channel on 11 other channels, and an average of 2 or more shipments per week per channel on the 5 remaining set-aside channels.

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[11]The relatively small shipping volumes in the set-aside portions of the partially set-aside channels (33 to 165 shipments per year) are in many cases lower than the number of shipments in the channels not subject to any set-aside (historically ranging from 8 to 254 shipments per year with 19 of the channels having fewer than 165 shipments per year), because the agency determined that the channels not set aside had insufficient volume to provide small businesses with reasonable revenues. We note that some of the protesters and the SBA now suggest that these low volume channels should have been considered for set-asides in their entirety. MTMC responds that under the partial set-aside, small businesses will have greater opportunities in the high volume channels.

Given the relatively small number of potential shipments available under the set-aside portion, there appears to be insufficient traffic volume under the set-aside to make it economically viable for small business to compete for, and commit to, this portion of the work. That is, the contractors are required to contractually bind themselves to be available daily at each shipping office in an origin state, yet will only have a relatively small number of shipments available under the set-aside. In this regard, small business contractors are required to agree to a variety of significant obligations, particularly the requirement that contractors commit to daily capacity at each shipping office in an origin state, but on many of the set-aside channels there may only be an average of one or two shipments per week for all the shipping offices in that channel.

As stated above, in order to constitute an economic production run or reasonable lot, the set-aside portion must be of sufficient quantity as to be economically feasible, such as would result in reasonable prices. See Kurt Mfg. Co., supra. For it to be economically feasible for small business concerns to offer reasonable prices to compete for a partial set-aside, the set-aside amount should have some relationship to the costs associated with the obligations imposed on the contractor by the solicitation. See id. Here, whether or not the AMC data reflects the relative capabilities of small business moving companies on a macro level, we do not find that the record supports the agency's position that the partial set-aside constitutes an economic production run or reasonable lot.

MTMC argues that the amount of the partial set-aside is reasonable, considering that half the outgoing shipments from the origin states remain in the current program (in which many of the self-certified small business protesters participate), and because small businesses will compete for, and have a chance of being awarded, the non-set-aside portion of channels, as well as subcontracts, under the pilot program. However, while small businesses are required by FAR § 19.502-3(c)(2)(i) to first compete for the non-set-aside portion, and may also participate as subcontractors, the regulation requires that the amount of the set-aside standing alone be an economic production run or reasonable lot. See FAR § 19.502-3(b) (each of the set-aside portion and non-set-aside portion shall be an economic production run or reasonable lot); Kurt Mfg. Co., supra, at 3-4.

MTMC also contends that very few shipments are necessary in order for it to be economically feasible for a small business to contract with the government, citing the fact that some moving companies handle only a few shipments per year under the current program and for commercial customers. This argument fails to take into account that, in the cited examples, those firms are not required to commit daily capacity for a 3-year period, as here, and under the current program they are not obligated to accept shipments.

As indicated, this pilot program significantly departs from the current program in a number of significant respects that must be accounted for by prospective contractors in deciding whether to submit, or how to structure, a proposal. In particular, MTMC has established a requirement that all offerors, including small businesses, commit to daily capacities for each origin shipping office in a channel which they will be required to maintain as contractors, as well as to other significant requirements.[12] Even though there are no minimums specified by the RFP, the solicitation requires that offerors propose reasonable committed daily capacities considering the historical tonnage data supplied with the solicitation. That is, in order to be considered for the partial set-aside, a small business offeror must first commit to a daily capacity based on the historical tonnage data for the whole channel (non-set-aside portion and set-aside portion). Thus, the solicitation apparently contemplates that all offerors, including small businesses, commit to a meaningful daily capacity if they want to be considered for an award. As each origin state on which a channel is based has at least several shipping offices for which capacity has to be committed, all offerors must commit sufficient resources to the contract on a daily basis, or at least be able to obtain capacity from other sources on a daily basis, to service orders weighing up to their committed daily capacities.

Although agency contracting officials state that they considered the committed daily capacity requirement in making the set-aside decision and that the need for this requirement predates the set-aside determination, neither the set-aside analysis described above nor the remainder of the record demonstrates that committed daily capacity or the other significant obligations were meaningfully taken into account in establishing the amount of the set-aside. Indeed, the agency asserts in response to the protest that the "committed daily capacity and the set-aside provisions are unrelated," and that "there is no correlation between" the contractors providing committed daily capacities and the number of shipments "when the agency offers no corresponding commitment to tender shipments," even where historical data indicates that shipments for the set-aside portion may be low.

MTMC maintains that the burden of committing daily capacity is mitigated by the concentration of shipping volume during certain months and because contractors can negotiate shipment pick-up dates and utilize delivery spread dates to avoid keeping equipment idle, and build the costs of committing daily capacity into their offers under the solicitation's best value evaluation scheme. Other than in these general terms, the agency has not explained how this suggested flexibility makes the relatively low number of shipments expected to be generated under the

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[12] We previously found the solicitation's requirement for committed daily capacity to be reasonable. Aalco Forwarding, Inc., et al., B-277241.8, B-277241.9, supra, at 20. As noted, the solicitation also imposes other significant requirements, such as a 24 hour a day customer inquiry telephone line with a 2-hour response time, as well as requirements for an operations manager, movement counseling services for customers, and electronic data interchange capability.

set-aside an economic production run or reasonable lot of shipments, given that each small business offeror must commit--at a reasonable price--to meaningful daily capacity at each shipping office in an origin state.[13] See id. The fact that a small business firm, which has only received a set-aside award, can expect a higher concentration of set-aside shipments during the peak summer moving season and has some flexibility in scheduling shipments with customers does not change the overall allocation of shipments under the set-aside in relation to the significant obligations imposed on the contractor by the solicitation. In this regard, the RFP requires the contractor to service, every day, the same capacity it has committed in its offer to each shipping office, and makes no provision for the contractor to adjust its committed daily capacities over the course of the year.

To mitigate this burden, a small business could, in theory, specify very low committed daily capacities, given that the relevant provision in the RFP does not specify a minimum committed daily capacity. However, the RFP would appear to preclude a committed daily capacity at a very low level, since, at such a level, the committed daily capacity might not meet the RFP's standard of "reasonableness" in light of the historical tonnage data. Further, the offer of a minimal committed daily capacity would seem to defeat the purpose of the committed daily capacity requirement, since the contractor can refuse any shipments above this commitment. Thus, we do not think that acceptance of a minimal committed daily capacity is a realistic method of adequately addressing the level of shipments available under the set-aside.

As an illustration (unrebutted by the agency) of the apparent "disconnect" between the level of shipments under the set-aside and the solicitation's requirements for committed daily capacity, one of the protesters states in an affidavit that its overall daily capacity commitment in its offer for one of the channels, North Carolina to Destination Region 6, will exceed 30,000 pounds.[14] Yet, according to this protester, when the set-aside is applied to the historical tonnage data for that channel, less than 30,000 pounds a month will be available under the set-aside. Our review of the historical shipping data provided in the solicitation essentially confirms this assertion and shows that an average of about two shipments per week could be expected under this particular set-aside channel which includes several shipping

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[13]Indeed, the relatively low number of potential shipments under the set-aside in many of the set-aside channels seems inconsistent with the pilot program's goal of consolidating shipments among relatively few prime contractors to take advantage of the economies of scale benefiting each contractor as a result of higher shipment volume. See Aalco Forwarding, Inc., et al., B-277241.12, B-277241.13, supra, at 7.

[14]To put this number in perspective, the typical drop frame trailer used for household goods transportation is reported to have a capacity of about 20,000 pounds.

offices in the origin state, and that the historical average weight per shipment on this channel is 4,407 pounds. Thus, given the relatively small amount available in the set-aside portion, it is not hard to see why a small business offeror would find the set-aside an inadequate basis on which to contractually commit itself to provide the required services (at least at a reasonable price).

The apparent insufficiency of the partial set-aside, for at least of many, if not all, of the set-aside channels, as an economic production run or reasonable lot is exacerbated by the prospect of multiple awards under the set-aside portion which, where made, will reduce even further the number of prospective shipments per small business awardee under the set-aside. That is, where contracts are awarded to two or more small business concerns for the set-aside portion of a channel, the prospective number of shipments per small business contractor will be further reduced. The apparent insufficiency is also exacerbated by the requirement that the contractor provide a committed daily capacity for each shipping office; because each origin state has at least several shipping offices, the already meager numbers of shipments generated under the set-aside on a channel basis per awardee will be scattered among the various shipping offices comprising the channel.

In sum, we find that the contracting agency's partial set-aside decision was unreasonable. The record does not evidence that the agency's decision will assure an economic production run or reasonable lot of shipments for small business concerns.[15]

## RECOMMENDATION

We recommend that the agency reexamine its partial set-aside determination under the criteria of FAR § 19.502-3.[16] In this regard, the agency should first estimate

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[15]As we are recommending that MTMC reevaluate its partial set-aside determination, we will not further address here the protest contentions that the partial set-aside is otherwise improperly divided and ambiguous.

[16]In reexamining its partial set-aside determination, the agency should update its analysis, taking into account information brought to light during these protests, such as the SBA's view that the solicitation's subcontracting limitation does not preclude freight forwarders from eligibility for award under a set-aside, given the applicable SIC code for this procurement. While the SBA's recommendation that the set-aside be increased to 50 percent may result in an economic production run or reasonable lot of shipments, we do not think the agency should necessarily accept this 50 percent figure because the record does not show that it is based upon data that is any more reliable than the data on which MTMC relied. For example, the Bureau of the Census data referred to encompasses a larger segment
(continued...)

what is an economic production run or reasonable lot of shipments, considering the committed daily capacity obligations and the other significant obligations imposed on contractors by the solicitation. The agency should then decide if and how the requirement can reasonably be divided into such economic production runs or reasonable lots; for example, the agency could consider entire channels, or a higher proportion of shipments on set-aside channels, as a basis for the partial set-aside. (It may be that some of the current higher volume set-aside channels could be shown to be an economic production run or reasonable lot.) Assuming the pilot program is apportionable into a set-aside portion and a non-set-aside portion, each of which is an economic production run or reasonable lot, the agency should determine whether one or more small business concerns are expected to have the competence and capacity to satisfy the set-aside portion at a reasonable price.

Because we are sustaining the protests of the partial small business set-aside, we also recommend that the protesters which contested the partial set-aside in their protests (i.e., all protesters other than A&P Shipping and Approved Forwarders) be reimbursed the reasonable costs of filing and pursuing their protests, including reasonable attorneys' fees, allocable to this issue. 4 C.F.R. § 21.8(d)(1); see ViON Corp., B-256363, June 15, 1994, 94-1 CPD ¶ 373 at 13. In accordance with 4 C.F.R. § 21.8(f)(1), their certified claims for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days of this decision.

The protests are denied in part and sustained in part.

Comptroller General
of the United States

[16](...continued)
of the trucking industry overall than just the moving industry and the GSA program referred to is a non-FAR based program more akin to MTMC's current program with a traffic distribution system for numerous carriers maintained by the agency rather than a small number of prime contracts with committed daily capacity.