

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

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**FILE:** B-212302

**DATE:** September 4, 1984

**MATTER OF:** Port Arthur Towing Company

**DIGEST:**

1. Procurement for transportation services which could have been negotiated under applicable regulations, but which was conducted by procuring activity as a formally advertised procurement, must meet the standards and requirements applicable to formal advertising.
2. Bid which is nonresponsive by virtue of listing items with less than required holding capacity may not be corrected after bid opening on the basis of clarification from bidder in order to make bid responsive.

Port Arthur Towing Company (Patco) protests the award of affreightment agreement (lease of a vessel under which the owner remains in charge) No. 1BW06677SS to Ingram Barge Company (Ingram), under a solicitation issued by the Department of the Army (Army), Military Traffic Management Command Eastern Area (MTMC). Patco alleges that Ingram's bid was nonresponsive and should have been rejected and that award should have been made to Patco, the next low bidder.

For the reasons which follow, we sustain the protest.

The solicitation called for quotations on the furnishing of towboat and barge equipment for the transportation and storage of aviation fuel between various points of origin and destination on the Western Inland Waterway System, including the Gulf Intracoastal Waterway System, based on a monthly rate per vessel supplied, for a period of 1 year, with a 1-year renewal option. Specifically, three towboats were required, meeting two different moving capacities for different barge configurations, and "approximately" nine barges meeting an approximate capacity and suitable for three towing configurations were required. Seven quotations were received. Six quotations specifically identified three towboats and from nine to 12 barges. Ingram's quotation identified 10 barges and listed an unrestricted choice of seven towboats with varying horsepower ratings and monthly charge rates. Ingram's three lowest priced towboats were in the 1,000- to 1,600-horsepower range with monthly rates varying from

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\$39,704 to \$46,420; Ingram's four higher priced towboats were in the 3,200- to 4,200-horsepower range with monthly rates from \$70,437 to \$80,800.

Upon receipt of the quotations, MTMC evaluated Ingram's price on the basis of the three lowest price towboats which, when added to the rates for the 10 barges, resulted in a total monthly rate of \$212,225. This was the low quote with Patco's monthly quote of \$240,000 for the specified vessels being next low. Award was made to Ingram as the low bidder, after clarification with respect to listed barge capacity. Subsequent to the award of the contract, both Ingram and the Army questioned whether any of the towboats selected could meet the specification for one towboat for the larger capacity barge configuration contained in the solicitation. Subsequently, one of the higher horsepower towboats listed was substituted, with a monthly rate increase which resulted in a total monthly rate of \$236,242. Thereupon, Patco protested to our Office.

Patco has raised a number of specific allegations, in particular that Ingram did not offer to provide two-thirds of the barges as end piece (single rake) barges, which was required under the solicitation; that Ingram's barges did not fulfill the solicitation requirement for a capacity of 215,000 to 220,000 barrels of fuel at the required draft, nor could they be configured to meet the capacities for each of the required tow groups; that Ingram's towboats were underpowered and insufficient to handle the transportation of the required fuel in the area in question; and several allegations about the inadequacy of Ingram's fleet vessels and the inadequate proof of ownership or lease control by Ingram of the vessels as required under the solicitation. Patco also asserts that Ingram improperly offered seven towboats on an alternative basis when the solicitation called for three such boats, and that there was an improper substitution of these vessels after award when the agency realized that it had selected an inadequate vessel. Finally, Patco alleges that fuel costs were not calculated in determining cost, and that if such calculations had been made properly, it would have been determined the low offeror.

There is an initial question about the type of procurement method, that is, advertised or negotiated, employed in the solicitation in question. The solicitation

called for "bids" by "offerors" and indicates that award will be made to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the government. Offers were required to be made on the basis of monthly rates or prices for supplying approximately nine barges which under normal waterway conditions of 9'6" draft will have a cargo capacity to permit loading of approximately 215,000 barrels of fuel oil. Elsewhere in the solicitation, this capacity is stated as 215,000 to 220,000 barrels. Under the solicitation, three towboats are required, two of which are to be of sufficient horsepower and adequate design to handle the number of barges to transport up to 68,000 barrels in each tow, and one of which must be capable of handling the barges required to transport up to 83,000 barrels in each tow. Offerors were permitted to substitute equivalent equipment, at no additional cost, subject to government approval.

While there is no indication in the record of any agency determination to conduct a negotiated procurement, it appears that MTMC could have made such a determination. Under Defense Acquisition Regulation (DAR), § 3-210.2(xi), reprinted in 32 C.F.R. pts. 1-39 (1983), procurement for commercial transportation, including time, space, trip and voyage charters are specifically listed as examples of services which may be negotiated under 10 U.S.C. § 2304(a)(10) (1982), as impracticable to obtain competition. Further, we note that other transportation services which are furnished by common carriers are statutorily exempted from the requirement for formal advertising. The services provided under this affreightment agreement are for the kind of commercial transportation services which are listed in the above DAR examples.

In addition, MTMC has promulgated specific regulations under DIN Standard Operating Procedure No. 55-45 (April 16, 1982), for the procurement of the routing of bulk petroleum products by tank vessel, not covered by published tariffs or tenders. This regulation applies to the procurement in question. The procedures outlined therein by MTMC call for the evaluation of proposals for such services under six listed criteria to determine which proposal is most advantageous to the government. The first criterion is rate or charge, and the regulation provides that the first alternative is to accept the low-cost carrier, but that a carrier other than the low-cost carrier may be selected if complete justification for such selection is provided.

Thus, it appears that the services in question could have been acquired by a negotiated procurement. However, as noted above, no determination to negotiate was made by MTMC. The solicitation, in conjunction with the MTMC regulations, appears to indicate that cost is the expected selection criterion. The contracting officials conducted the procurement without any negotiation discussions, using a solicitation with no indication of any scheme for technical evaluation, with no evidence of technical evaluations, and in a manner which suggests that it was their intention to determine award solely on the basis of the low responsive bid by a responsible bidder. In our view, since the record shows that the agency intended to and did conduct the procurement as if it were formally advertised, it must be held to the standards of such a procurement.

With respect to the barge capacity, the solicitation alternately requires "approximately 215,000 barrel" capacity and capacity of "215,000 to 220,000 barrels," both at a 9'6" draft. Read together, this constitutes a requirement of an approximate capacity which falls within the range of 215,000 to 220,000 barrels. Ingram listed 10 barges with specified capacity totaling 214,000 barrels. In our view, while the range constitutes an approximation, it is clear that the lower threshold is 215,000 barrels. Accordingly, on its face, Ingram's quotation offered barges with specifications which were nonresponsive to the solicitation requirements. MTMC contends that the figures were erroneously low because of downward rounding, and that recalculations based on clarification supplied by Ingram after the due date disclosed that the total capacity was greater than 215,00 barrels. However, this was an improper correction. A bid which is nonresponsive on its face may not be converted into a responsive bid by use of clarification and the correction procedures. Bayshore Systems Corp., 56 Comp. Gen. 83 (1976), 76-2 C.P.D. ¶ 395. Therefore, Ingram's bid was nonresponsive and should have been rejected. The protest is sustained.

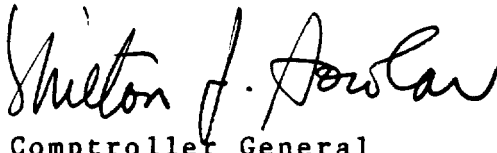
In view of the above holding, it is not necessary to address the other bases of protest.

The initial 1-year contract period has been performed and the 1-year renewal option is being exercised on a month-to-month basis. It is our understanding that the Army is in the process of drafting a new solicitation. The

Army conceded in its report that the solicitation in question was poorly drafted and it has directed MTMC that future solicitations will require the inclusion of fuel costs in the monthly rate. It has also directed MTMC to clarify whether the solicitation is advertised or negotiated and, if negotiated, it has advised MTMC to specify the relative importance of factors other than cost or price and their relationship to cost or price.

We recommend that the monthly option exercise be discontinued at the earliest possible date, which will permit substitution of a new contract awarded under a solicitation which takes into account the changes which the Army has conceded are appropriate.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982) (formerly 31 U.S.C. § 1176 (1976)), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

*for*   
Comptroller General  
of the United States