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DECISION

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

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FILE: B-212279

DATE: November 13, 1984

MATTER OF: Starflight, Inc.

DIGEST:

1. Where Military Traffic Management Command returns carrier's rate tenders as insufficient, the tenders have been rejected and may not later be used as a basis on which to bill for transportation charges.

2. Where carrier cancels tender in accordance with tender provision, cancellation takes effect even though the replacement tender has been rejected.

3. Where a carrier transports goods without an effective tender on which to base its charges, the carrier may be paid quantum meruit on the basis of the usual or going rates for the same services.

Starflight, Inc. (Starflight), requests that we review the General Services Administration's (GSA) determination that Starflight improperly billed and collected transportation charges for weapons shipments Starflight transported for the Department of the Army (Army) under government bill of lading (GBL) Nos. S-2,795,345, S-2,795,373, M-5,277,407, S-2,795,373, M-5,282,121 and M-2,086,120. We conclude that the tenders referenced in the record as governing these shipments were not in effect and, therefore, Starflight is entitled to payment on a quantum meruit basis, unless it is determined by GSA that there were other applicable tenders.

Tenders were submitted by Starflight to the Military Traffic Management Command (MTMC), Department of the Army. By letter dated June 16, 1981, MTMC informed Starflight that tender Nos. 6, 7 and 8 were insufficient and were being returned for amendments. By letter dated July 31, 1981, MTMC informed Starflight that tender Nos. 2, 3, 4, 6 and 9

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(app. 1) would have to be canceled. MTMC requested Starflight to submit a notice canceling these tenders.

The Army shipments involved were weapons shipments and were transported prior to August 11, 1981. Starflight billed the Army for these shipments on the basis of its regular air service tender Nos. 8 and 14, because Starflight believed that MTMC's June 16 letter rejected weapons tender Nos. 6 and 7. The regular air service rates are higher than the weapons tender rates.

GSA conducted an audit and determined that Starflight overcharged the Army because the lower rates in weapons tender Nos. 6 and 7 were in effect and applied to the shipments. GSA reached this conclusion because it believed that MTMC was precluded from canceling the tenders pursuant to tender provision 20e, which reserved to Starflight the sole right to cancel or amend the tenders upon 30 days written notice. GSA states that MTMC would not have requested Starflight to cancel any tenders if MTMC could have canceled the tenders. In addition, GSA states that Starflight orally agreed with MTMC that tender Nos. 6 through 10 were in effect until August 11. Starflight denies that it entered into such an agreement. Finally, GSA notes that since tender No. 14 became effective on August 11 and the shipments moved prior to that date, Starflight could not use the rates in tender No. 14 to bill the Army for these shipments.

We agree with GSA that Starflight could not use tender No. 14 to bill the Army for shipments which moved before this tender became effective. We further agree that since Starflight, in its tenders, reserved the sole right to cancel or amend the tenders, any attempt by MTMC to cancel the tenders would be ineffective. See National Van Lines, B-180699, Oct. 2, 1974. This conclusion, however, is not dispositive of whether tender Nos. 6, 7 and 8 were in effect and applicable to the involved shipments.

Rate tenders are considered to be continuing offers to perform transportation services for stated prices. As such, they are the same as any other offer made by a party seeking to form a contract and their interpretation is subject to the traditional rules governing contract law. Coast Counties Express, Inc., B-194951, Nov. 23, 1979.

Pursuant to traditional contract law an offer is terminated if it is rejected by the person to whom it is made (the offeree). Williston on Contracts § 50A (3rd ed. 1957). In this regard, any words or acts of the offeree which indicate that he declines the offer or which justify the offeror in inferring that the offeree does not intend to accept the offer or give it further consideration amounts to a rejection of the offer. Williston, id. § 51. A counter-offer or conditional acceptance which amounts to a counter-offer operates as a rejection of the offer and terminates the offer and, therefore, the offeree's power to accept the offer. Id.

MTMC's June 16, 1981, letter to Starflight states that Starflight tender Nos. 6, 7 and 8 were being returned for amendments because several provisions in the tenders were not sufficiently specific and did not meet the requirements of a military shipper. We find that under the standard noted above, this letter operated as a rejection of tender Nos. 6, 7 and 8. Since a rejected offer may not later be accepted, GSA improperly concluded that tender Nos. 6 and 7 should have been used to bill the Army for the shipments in issue.

We note that our conclusion is also supported by MTMC's records and procedures and instructions for filing tenders which define an officially recognized tender as one which has been time/date stamped approved and has been assigned an official distribution date and number by MTMC headquarters. See Transportation and Travel Military Traffic Management Regulation ¶ 104001(J), Jan. 1, 1984; Department of the Army Headquarters, Military Traffic Management Command, Memo 59-1 ¶ 5(1), June 1, 1977. In this respect, MTMC headquarters has informed this Office that it did not have tenders Nos. 6, 7 and 8 on file and that it has no record indicating that these tenders were ever approved.

Because of the result we reach we must address the issue of the basis on which Starflight should be paid for the shipments it delivered for the Army. Starflight charged the Army for these shipments on the basis of Starflight tender Nos. 8 and 14. As noted above tender No. 14 did not become effective until after the shipments moved and tender No. 8 was rejected by MTMC's June 16 letter. Thus, the shipment charges could not be based on these tenders.

Further, tender Nos. 6 and 7, issued on April 13, gave MTMC 30 days written notice in accordance with tender provision 20e that tender Nos. 3 and 4 were being canceled on May 15. The fact that tender Nos. 6 and 7 did not become effective because MTMC rejected them does not change the fact that this written notice canceled tender Nos. 3 and 4. See Mercury Van Lines--Reconsideration, B-193964, June 27, 1980. Thus, on the present record, it appears that there were no tenders in effect on which to base the billing rates.

In such circumstances, unless GSA determines that other applicable tenders were in effect, the carrier may be paid on the basis of *quantum meruit* because the shipper has received the benefit of the carrier's service. See District Containerized Express, B-188229, May 4, 1977, and B-190061-O.M., Dec. 22, 1977. This *quantum meruit* payment should be based on the usual or going rate of authorized carriers, that is, the lowest rates available to the government for the same or similar services. General Services Administration, Request for Advance Decision; JAMAR Trucking, B-212991, Nov. 28, 1983. Thus, GSA should determine the lowest available government rate and amend its proof of claim to reflect this as the amount owed to Starflight for transportation services.

for Milton J. Socolar
Comptroller General
of the United States