Spangenberg

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dock Express Contractors, Inc.

File: B-227865.2

Date: November 13, 1987

DIGEST

1. A solicitation requirement that ocean contract carriers shall provide a sailing schedule to the government's booking authority 30 days prior to a scheduled sailing is not unreasonable where the protester has not shown the provision does more than impose a discipline comparable to that of common carriers, on the regularity of whose schedules the procuring agency historically has been able to rely for the efficient planning of its cargo transportation needs.

2. Military Sealift Command may require contract carrier to provide in confidence prior to award the essential terms of their contracts with other shippers on the same routes on which they proposed in order to comply with the requirement in the Cargo Preference Act of 1904, 10 U.S.C. § 2631, that Department of Defense shippers not pay higher charges than those paid by private parties for transporting like goods.

3. Protest of solicitation provision that prohibits contract carriers from discriminatory cargo space accommodations, facilities and loading or landing of freight is denied, where the protester concedes that it will comply with the provision which is neither onerous nor prejudicial.

4. Agency can require a contractor to pay for actual damages in the event of contract breach and can define this measure of damages in the contract.

DECISION

Dock Express Contractors, Inc., protests certain provisions in request for proposals N0003387R2200, as amended, issued by the Military Sealift Command (MSC) for less than shipload lots of breakbulk ocean port-to-port transportation services for the period of October 1, 1987, through March 31, 1988.

We deny the protest.

Offerors were requested to submit proposals to ship less than shipload lots of cargo and provide associated services between a wide variety of worldwide ports. Under the RFP, contracts called "shipping agreements" were to be awarded to all responsible United States flag carriers who submit offers responsive to the RFP. The cargo booking procedures in the shipping agreements generally provide that the low cost carrier for each route meeting the storage and delivery requirements would receive the shipment. However, the government makes no commitment under the shipping agreement to ship any cargo on a carrier's vessel(s).

In Dock Express Contractors, Inc., B-223966, Dec. 22, 1986, 86-2 CPD ¶ 695, our Office sustained Dock Express' protest that MSC could not limit competition to ocean common carriers on these procurements for less than shipload lots of ocean transportation services and that qualified contract carriers should be given an opportunity to receive awards. Ocean common carriers are regulated carriers with regular schedules, who hold themselves out the general public to provide transportation by water between the United States and a foreign country for compensation published in tariffs. 46 U.S.C. App. §§ 1702(6), 1702(18) (Supp. III 1985); see generally Dock Express Contractors, Inc., B-223966, supra. Contract carriers do not hold themselves out to the general public to provide regular service but perform services for particular shippers under individual contracts. Id.

On June 15, 1987, Dock Express protested a number of the RFP provisions that placed specific obligations on contract carriers that were not specifically placed on common carriers. In response to the protest, MSC issued amendment No. 4 to the RFP that removed or substantially revised all the protested provisions. Consequently, we dismissed Dock Express' protest as academic because the contracting agency appeared to be granting the requested relief. 4 C.F.R. § 21.3(f) (1987).

Nevertheless, on July 8, 1987, the closing date for receipt of proposals, Dock Express timely protested a number of the provisions in Amendment No. 4 to the RFP, which Dock Express contends are unduly restrictive of competition, place an unfair burden on contract carriers and are in excess of the government's minimum requirements. Dock Express also submitted proposals for nine routes. Four contract carriers and ten common carriers received awards; Dock Express received awards for three routes. On September 1, 1987, Dock Express protested the rejection of its proposal for five of the routes, the conduct of negotiations, and MSC's awarding contracts despite this pending protest. The September 1 protest will be the subject of a future

decision. The Dock Express protest in question here concerns a number of provisions in the amended RFP that are specifically applicable to contract carriers and not to common carriers.

Dock Express first protests the RFP requirement that "contract carriers shall provide a schedule, including sailing dates and ports served, to the booking authority 30 (thirty) days prior to a scheduled sailing" unless MSC interprets this provision as permitting contract carriers complete freedom to revise their schedules. Dock Express concedes that there is nothing objectionable per se to advising the booking authority of when the vessel will sail, since DOD has a requirement to book cargo efficiently on a continuing basis under the shipping agreements, and it would agree to provide notice to the agency of all changes in a schedule as soon as such changes are made. It would wish to be free to revise its schedule, however, at any time its "business judgment" so dictated.

MSC contends that it cannot meet its shippers' needs on erratic notice and sailing schedules. Acknowledging that common carriers may revise their schedules at any time, MSC states that its "long term experience" is that barring unforeseen circumstances common carriers generally regularly maintain the scheduled service which they have published in the trade journals. As a historical matter, MSC advises, it therefore has been able to rely on those schedules. Since contract carriers have no comparable obligation to offer regularly scheduled service and to publish sailing schedules, MSC says that it drafted the RFP provision to which Dock Express objects in order to permit the agency to plan its booking efficiently "and not be subjected to radical changes in schedule by a contract carrier which may have found more lucrative cargo in another trade." MSC states that although it would expect a contract carrier to have the same flexibility as a common carrier to revise its sailing schedules because of "circumstances beyond the carrier's control," it cannot tolerate continual changes in schedules which have the practical effect of establishing no regular schedule at all.

In its comments on the agency report, Dock Express contends that to the extent MSC is suggesting that schedules may be revised only in the event of circumstances which are "unforeseen" or "beyond the carrier's control," the agency is proposing a "test" or "standard" which is too restrictive and to which not even common carriers are held. We do not believe it is necessary or appropriate, however, for us to speculate on precisely how MSC will interpret and apply this provision during administration of the contract. See 4 C.F.R. § 21.3(f)(1) (1987). Dock Express has not rebutted

the agency's assertion that historically it has been able to rely on the scheduled service of which common carriers have provided advance notice, as a result of which cargos can be booked efficiently and the shippers' needs can be met. MSC's desire to impose a comparable discipline on contract carriers who serve its needs does not appear unreasonable.

Dock Express next protests the RFP requirement that contract carriers "submit with their proposals to the contracting officer a concise statement of the essential terms of all other contracts for the transportation of cargo in the foreign commerce of the United States to which they are party for the trade route(s) for which rates are offered under the contract." In the RFP, MSC commits to treating the information as "business sensitive" and to return it to the contract carrier at the conclusion of negotiations prior to award.

The limitation of this requirement to a "concise" statement of the "essential terms" of all other contracts "for the trade route(s) for which rates are offered under the contract," and the commitment by MSC to treat this information as "business sensitive" and to return it to the carrier, all represent changes in the RFP made in response to Dock Express' June 15 protest.1/ In that protest, Dock Express also suggested that MSC had no apparent purpose for requiring the submission of information about other contracts other than the satisfaction of its own "curiousity."

Both in the amended RFP and in its report on the protest, MSC explains that this information is needed to insure compliance with the last sentence in the Cargo Preference Act of 1904, 10 U.S.C. § 2631 (1982), which states:

> "Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contract for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons." (Emphasis supplied.)

1/ The initial RFP required contract carriers to supply MSC with copies of all their contracts.

Now that the agency has identified a statutory basis for this provision, which had been otherwise amended in response to Dock Express' objections, the protester claims that the provision is improper because it cannot insure compliance with the Cargo Preference Act of 1904. As an alternative or fall-back position in the event we uphold the propriety of this provision, Dock Express argues that line-haul rates, ocean rates and accessorial service charges should not be required to be disclosed as essential terms of its other contracts, if the contract prices were not so divided in the contracts.

Dock Express argues that the RFP provision will not ensure compliance with the Cargo Preference Act of 1904 because the provision would involve, so to speak, a comparison of applies and oranges, in that the rates it charges other shippers are based on definite commitments to ship cargo, whereas under this solicitation MSC does not offer any commitment to ship cargo. Dock Express states that "MSC cannot expect its cargo to be carried at rates that are conditioned on a shipment of a large volume of cargo when MSC will not commit to any volume of cargo at all" and asserts that it would be "completely unreasonable" to read the statutory provision which we have underscored above "to require contract carriers to give the Government the same rates as are in contracts with other shippers unless the Government is willing to abide by the same commitments made by such other shippers." Dock Express, therefore, objects to providing MSC with any information concerning its contracts with other shippers. An implication of Dock Express' protest statements quoted immediately above is that Dock Express intends to charge MSC more than it does private persons transporting like goods.

It is clear that DOD shippers are prohibited from paying charges for the transportation of supplies by an American flag or owned vessel that are higher than the charges for transporting like goods paid by private shippers, see United States Lines Co. v. United States, 223 F. Supp. 838 (S.D.N.Y. 1963), aff'd on other grounds, 324 F.2d 97 (2d Cir. 1963), and that MSC has an affirmative duty to assure compliance with this provision of the Cargo Preference Act of 1904. 57 Comp. Gen. 584 (1978). Since contract carriers do not publish their charges, MSC cannot fulfill its statutory responsibilities without obtaining information from those carriers. Consequently, we find reasonably based the MSC requirement that contract carriers supply MSC on a confidential basis the essential terms of their pertinent service contracts.

The fact that this may cause some contract carriers not to submit proposals does not make this provision overly

restrictive of competition, since the government is entitled to impose reasonably based conditions that may cause the competition to be somewhat restricted. See Guildner Pipeline Maintenance, Inc., B-226981, June 12, 1987, 87-1 CPD ¶ 592; T-L-C Systems, B-225496, Mar. 27, 1987, 87-1 CPD ¶ 354. Whether or not a contract carrier elects to submit a proposal in such circumstances is a matter of its business judgment.

With respect to Dock Express' alternative objection to providing MSC with certain categories of charges made of other shippers if those contracts do not themselves contain such a breakdown, we note that the solicitation does not clearly require the disclosure or recalculation of rates that are not in the contract carriers' contracts and that the protester, who received an award under the RFP, does not contend that its service contract rate structures required recalculation to comply with MSC's interpretation of the solicitation. Therefore, this protest basis is denied.

Dock Express next objects to the RFP provision which states:

> "A contract carrier shall not refuse or discriminate in the matter of cargo space accommodations, as provided for herein, or engage in any unfair or unreasonable practice in the matter of cargo space accommodations, facilities, or the loading or landing of freight, due regard being had for the proper loading of the vessel."

Dock Express recognizes that this prohibition of discriminatory practices by contract carriers is based upon the Shipping Act of 1984, 46 U.S.C. App. § 1709(6) (Supp. III 1985), which contains similar prohibitions of discriminatory behavior by common carriers. Since that Act specifically exempts common carrier service contracts from these prohibitions, however, the protester argues that the same exemption should apply to contract carriers such as the protester. In any case, Dock Express argues that this provision is unnecessary since the solicitation otherwise details carrier contractual obligations for cargo space storage, and the loading and landing of freight, which Dock Express does not contend are unreasonable.

MSC states that this provision represents the minimum basic transportation requirements and the expectation of any commercial shipper which transports cargo on a space available basis.

However, since MSC concedes that common carrier service agreements, which are analogous to the contracts that contract carriers have with shippers, are exempted from the

prohibition of these discriminatory practices and provides no specific justification why this additional commitment is required of contract carriers, but not common carriers with service contracts, we are uncertain whether this provision is necessary. Nevertheless, Dock Express concedes that it will comply with this provision, which is neither onerous nor prejudicial. Consequently, we deny the protest. American Maid Maintenance, B-227809, Oct. 2, 1987, 87-2 CPD ¶ ___. However, since the provision is said by MSC to be the minimum basic transportation requirement for shippers on a space available basis, MSC should consider amending future solicitations to make it applicable to common carriers as well as contract carriers.

Dock Express also protests the following RFP provision:

> "A breach of this Article by a contract carrier shall also be subject to actual damages in an amount equal to the difference in total freight paid by the Government for the actual movement of the cargo over that which would have been paid to the subject contract carrier and any other costs incurred by the Government as a result of the breach."

Dock Express that it has no objection to paying "actual damages" but contends that the defined measure of damages might exceed those required of common carriers under the same circumstances and thus this places contract carriers at a competitive disadvantage.

There is no question but that MSC can require a contractor to agree to pay for actual damages in the event of contract breach and that this measure of damages can be defined in the contract. See 5 Corbin on Contracts § 1054 (1964); Calamari & Perillo, The Law of Contracts § 14-31 (2d ed. 1977). MSC contends that potential common carrier liability for breach of contract may exceed that stated for contract carriers. Since Dock Express offers no proof that the measure of damages for contract carriers will exceed those for which common carriers will be liable, we deny this aspect of the protest.

Finally, Dock Express argues this breach damage provision is defective, since it contains no stated duty for MSC to mitigate damages. However, as MSC notes, the government is always required to mitigate damages in the event of breach

action. Astro-Space Laboratories, Inc. v. United States, 470 F. 2d 1003, 1018 (Ct. Cl. 1972); Brookridge Farms, Inc. v. United States, 111 F. 2d 461, 465 (10th Cir. 1940); Calamari & Perillo, The Law of Contracts, supra, sec. 14-15. Therefore, this contention has no merit.

The protest is denied.

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General Counsel