McAuliffe

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: STC Submarine Systems, Inc.

File: B-237782

Date: March 21, 1990

Gerald B. Greenwald, Esq., Arent, Fox, Kintner, Plotkin & Kahn, for the protester.
Roger A. Briney, Esq., for AT&T Communications, Inc., an interested party.
Vasio Gianulias Esq., Office of the General Counsel, Department of the Navy, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The requirement that only United States-flag vessels may be used in the transportation by sea of military supplies to be furnished in the performance of a contract does not apply to a contract for cable-laying services which will involve use of a specialized cable-laying vessel and incidental carriage of the cable to be laid by that vessel at sea without delivery to any port.

DECISION

STC Submarine Systems, Inc., protests request for proposals (RFP) No. N62477-89-R-0039, issued by the Department of the Navy for the installation of an undersea fiber optic cable system between Sasebo, Japan, and Gesashi, Okinawa. STC claims that the requirement that firms use United States-flag vessels under Defense Federal Acquisition Regulation Supplement (DFARS) § 252.247-7203 (DAC 88-8), which implements 10 U.S.C. § 2631 (1988), the Cargo Preference Act of 1904 (the Act), as amended, does not apply to the laying of cable by a specialized cable-laying vessel.

We sustain the protest.

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The solicitation was issued on March 23, 1989, and contemplated the award of a fixed-price contract for services and materials necessary for the cable system, including installation of termination and interface equipment, undersea fiber optic cable and ancillary devices, cable system engineering and design, quality assurance tests, training, 1 year of engineering field support, spare parts, and documentation. Amendment No. 5 to the RFP extended the closing date for receipt of initial proposals until July 14, and incorporated DFARS § 252.247-7203, entitled "Transportation of Supplies by Sea." This DFARS provision states that "[t]he Contractor shall employ United States-flag vessels, and no others, in the transportation by sea of any supplies to be furnished in the performance of its contractual obligations."

In its initial offer, STC proposed to use a British cable-laying ship loaded with cable in Portland, Oregon, with the cable to be directly discharged into the sea between Okinawa and Japan, without first travelling to another port. By letter of July 12 to the Navy, STC first expressed its opinion that the movement of cable during the installation of an undersea cable system was not transportation by sea of supplies (i.e., cargo), and thus did not require a United States-flag vessel. On September 7, STC informed the Navy that although it was still trying to secure the use of a United States cable-laying vessel, its attempts were not yet successful. At that time, STC had evidently learned that the only suitable United States-flag vessels consisted of those owned by the Military Sealift Command, which were not available to STC, and one owned by AT&T, a potential competitor for this contract, which would not unconditionally guarantee the use of its vessel to STC.

By letter of October 17, the contracting officer confirmed his statement made, during October 6 negotiations held with STC, that DFARS § 252.247-7203 was "not applicable to this acquisition, given the nature of the services being acquired." He also indicated he had requested legal review of his position. As a result of the legal review, the contracting officer reversed his position and STC was advised by letter of November 3 that the DFARS clause did apply to this acquisition. All offerors, including STC, were directed to revise their proposals to reflect the use of United States-flag vessels for the transportation of all supplies, including the cable to be laid under this contract.

STC filed its protest with our Office on November 15 challenging the Navy's definition of transportation as being broader than that contemplated by the Act. Specifically,

STC challenged the Navy's position that STC's proposed use of a specialized foreign flag cable-laying vessel that will travel to and lay the cable at the designated location in the sea without "landing" the cable, at another port, was precluded by the DFARS.

The United States-flag vessel requirement imposed by DFARS § 252.247-7203 is adopted from the language of the Act, which provides that:

> "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, contracts 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."

STC essentially argues that the Act's explicit reference to freight charges, indicating application of the Act to port-to-port transportation of landed cargo, together with its legislative history and related statutes, shows that the United States-flag vessel restriction should not apply to this procurement for the installation of an undersea cable system since the acquisition is not a contract for the transportation of supplies as cargo or freight for delivery. STC argues that this RFP is for a service--cable laying and installation of a fiber optic cable communication system--which necessarily involves the movement of cable supplies incidental to the rendering of the service. STC relies upon an earlier decision of our Office, 52 Comp. Gen. 327 (1972), in which we found that the Act's restrictions applied only to the transportation of military supplies by sea under contracts of affreightment and, thus, did not apply to a contract for towage services. To support its contention, STC also cites Navy Acquisition Procedures Supplement (NAPS) § 8.9000, which lists the types of vessels that are procured by the Navy for purposes other than transportation. The NAPS which, STC states, considers the overall purpose of the voyage, lists cable-laying vessels as vessels procured for other than transportation purposes. Further, STC points out that with regard to the Jones Act, 46 U.S.C. § 883, which provides that "no merchandise shall be transported by water . . . between points in the United States" by other than United States-built, United States-flag vessels, the Customs Service, which enforces the Jones Act, has concluded that a

vessel involved in pipe or cable laying is not subject to its restriction.

The Navy, on the other hand, relies on the statutory language as supporting its view that any military supplies moved by sea must be moved on United States-flag vessels under any circumstance, including the incidental movement of supplies to be used in performing a service during that voyage.1/ The Navy also states that the legislative intent behind the Act was to nurture the American maritime industry and increase the merchant marine fleet by conferring a monopoly on United States-flag ships over transportation of military cargo. See S. Rep. No. 182, 58th Cong., 2d Sess. at 3 (1904). The Navy reasons that this policy of increasing our merchant marine justifies any restriction imposed upon competition by the United States-flag ship requirement.

As to STC's reliance upon our decision in 52 Comp. Gen. 327, supra, the Navy states that the decision is not controlling here since that case involved a contract to tow an empty barge from one port to another and there is no towage service involved under the present RFP. To the extent that STC argues a contract of affreightment must be present, the Navy states that a contract for the transportation of the cable impliedly exists since transportation of the cable includes "all at-sea movement of the cable except the actual act of cable-laying itself." Thus, the Navy's position is that any movement of the cable, albeit incidental to the cable-laying services at hand, to the precise location in the sea where the discharge of the cable begins, must be on a United States-flag vessel. We disagree and find that the Navy has improperly failed to recognize the distinction between a contract for the delivery of landed cargo from one port to another (i.e., a "contract of affreightment") and the necessary, incidental movement of supplies used by a vessel during the performance of services required under a contract.

1/ As a threshold matter, the Navy argues that the protester essentially challenges the cargo preference clause in the solicitation and, as such, its protest concerns an impropriety apparent from the solicitation which was not timely protested prior to initial closing. See 4 C.F.R. § 21.2(a)(1) (1989). In our view, STC is protesting the agency's interpretation of the cargo preference requirement which precluded its proposed approach. The protester was advised of this interpretation on or about November 3. Since STC filed its protest with our Office on November 15, we consider it timely. 4 C.F.R. § 21.2(a)(2).

The first sentence of the Act, as amended, provides that only vessels of the United States or belonging to the United States may be used in the transportation of military supplies. Under the contract in question, the cable to be laid under the RFP could be considered an incidental "supply" for the use of the Navy. However, in our view, the remainder of the statute's language concerning the United States-flag restriction indicates that the reference in the first sentence to transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps is to transportation by sea under "contracts of affreightment" and not to transportation by sea under contracts for particular services which necessarily involve the use of certain supplies. See 52 Comp. Gen. 327, at 329, supra. Our position is supported by the language in the second and third sentences of the Act regarding freight charges. Freight charged under contracts of affreightment is usually computed on some weight or measurement rate basis related to the amount of cargo carried or the amount of space occupied by the cargo. Under such transportation contracts it would be a relatively simple matter to determine whether the freight charged was excessive or unreasonable. Here, as in the case of a contract for towage services, there is no separate charge for the at-sea transportation of the cable, but rather, a lump-sum charge for the procurement, which includes any transportation charges. Although the lack of any bills of lading documenting transportation and freight charges, as here, may not be conclusive, we believe the service oriented mission of the voyage, along with the lack of any established freight charge, supports a determination that this contract is not a contract to transport supplies as contemplated by the Act.

Further, support against an application of the Act's restriction here can be found in the language of DFARS § 252.247-7203 concerning request for waivers from the United States-flag vessel restriction. Under the DFARS provision, a waiver request must include detailed information concerning freight charges and an ultimate destination port, neither of which are necessarily present or identifiable here.

We also find persuasive STC's analogy to the Jones Act, which restricts coastal trade to United States-flag vessels, since it contains similar language and was passed for a similar purpose. See 38 Cong. Rec. 2409 (1904) (statement of Senator Hale); 38 Cong. Rec. 2472 (1904) (statement of Senator Bacon). The Customs Service, in interpreting the Jones Act, has held that a vessel involved in pipe or cable laying is not considered in use in coastal United States

trade and is thus exempt from the Jones Act's United States-flag vessel restriction since the pipe or cable it carries "is not loaded as cargo but is only paid out in the course of the laying operation." Customs Service Decision 79-321; Customs Service Decision 89-40. We see no compelling reason, nor has the Navy provided any, to take a position inconsistent with the Customs Service's reasoning with regard to the performance of cable-laying services in international waters.

Finally, it is also clear from NAPS § 8.9000 that a cable-laying ship is considered by the Navy to be a service type vessel, not a cargo ship. The Navy asserts, without any support, that the NAPS' exclusion applies only when the cable-laying vessel is actually discharging and laying the cable from the ship. We think, however, that the NAPS' provision reasonably recognizes that the type of service the vessel will be performing is the critical factor in determining whether the vessel is transporting supplies or performing a service. Here, the vessel proposed by STC clearly is principally performing a service.

Accordingly, we find that the restriction does not apply to the movement of cable upon a specialized cable-laying vessel engaged in cable-laying services while travelling by sea from its loading port to the location in the sea where the cable is to be laid, since the cable at that time is a necessary, incidental aspect of the installation services being provided and is not being transported for the purpose of delivery or shipment as cargo.

We sustain the protest. By separate letter of today to the Secretary of the Navy, we are recommending that another round of revised proposals be solicited from each offeror consistent with this decision. Further, we award STC the cost of pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1).

Milton J. Gordon

Acting Comptroller General
of the United States