



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Lykes Bros. Steamship Co., Inc.

File: B-236834.4

Date: July 23, 1990

Christopher K. Tankersley, Esq., Nemirow, Hu, Kurt & Tankersley, for the protester.

William Coffey, Esq., for Sea-Land Service, Inc., an interested party.

Richard S. Haynes, Esq., and Charna Swedarsky, Esq., Office of the General Counsel, Department of the Navy, for the agency.

Richard P. Burkard, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency's determination that rates offered by protester were not fair and reasonable is unsupported by record and where evaluation criteria was misapplied or applied to offerors inconsistently.

DECISION

Lykes Bros. Steamship Co., Inc. protests the rejection of various transportation rates it offered in response to request for proposals (RFP) No. N00033-89-R-2300, issued by the Military Sealift Command (MSC). Lykes argues that MSC failed to offer a rational explanation for rejecting certain rates offered by the company.

We sustain the protest.

The RFP, which was issued December 5, 1989, sought prices from U.S.-flag ocean carriers for ocean transportation and intermodal transportation services for the period from April 1, 1990, to September 30, 1990, and was considered the second cycle of the RFP. (Each 6-month period is termed a "cycle.") The RFP requested rates for transportation of containerized and breakbulk (non-containerized) cargo. MSC states that container rates include "port-to-port" rates for the ocean transportation portion as well as hundreds of rates for line-haul (overland) transportation in both the

United States and overseas. Breakbulk transportation includes rates for a port-to-port service which may include rates solicited on a "free-in-and-out" basis (government loads and discharges cargo), "liner term" basis (carrier loads and discharges cargo), or a combination basis.

For the ocean rates, the transportation services were divided geographically by trade route and subdivided, in certain instances, into zones. The RFP solicited inbound and outbound rates for transporting containers carrying three types of cargo: vehicles, refrigerated cargo, and cargo NOS (Not Otherwise Specified). With respect to breakbulk cargo, the RFP listed 10 categories, including cargo NOS, refrigerated cargo, wheeled or tracked vehicles, and hazardous cargo.

The RFP provided that container and shipping agreements would be awarded to all technically acceptable, responsible carriers who submitted offers which are fair and reasonable; thus, multiple awards were possible. The protester states that it submitted approximately 3,400 rates for virtually every category under the RFP and that MSC rejected more than 900.

The RFP also contained a "Cargo Booking Policy" provision which explained that cargo would be booked by individual rate category for each lot of cargo to the low-cost carrier. In the event the low-cost carrier could not provide acceptable space and an acceptable delivery schedule, then cargo would be booked to the next low-cost carrier and so on, until a carrier could be found who could provide acceptable space and an acceptable delivery schedule.

On January 8, 1990, Lykes submitted its initial offer in response to the RFP. By letter dated February 1, 1990, the contracting officer notified Lykes that none of its rates had been accepted based on its initial offer. The letter also notified Lykes that certain line-haul/drayage rates offered were considered so high as to be outside the competitive range and were, therefore, rejected on the basis of its initial offer.^{1/} The agency states that negotiations

^{1/} We will not consider the propriety of the rejection of the rates identified in MSC's February 1 letter. In order to be considered timely under our Bid Protest Regulations, Lykes was required to file its protest against the rejection of those rates within 10 working days of when it received notice of the February 1 rejection. Since it did not file this protest until March 19, more than a month after

(continued...)

took place on February 5, and on February 14 MSC issued a request for BAFOs. On February 24, MSC requested a second BAFO from carriers offering service on route 5. Discussions were held on February 24 and 25 and Lykes subsequently submitted its BAFO concerning route 5 service.

By letter dated March 5, the contracting officer informed Lykes of the BAFO rates which were accepted, conditionally accepted, and rejected. On March 19, Lykes filed its protest with our Office against the rejection of its rates.

THE EVALUATION METHOD

Section M set forth the evaluation factors for award. As stated, award would be made to all carriers who submitted rates which were fair and reasonable. The RFP stated that the contracting officer is required to make an affirmative determination that all prices (rates) are fair and reasonable and that each rate would be evaluated on its own merit. The RFP provided further that in determining whether carriers' rates are fair and reasonable, the contracting officer would conduct an analysis in which one or more of the following criteria will be used:

"1. A determination of adequate price competition resulting from a comparison of a carrier's offered rates with the offers of its competitors.

"2. A comparison of the offered rates with all applicable commercial tariff rates for the same or similar services, including . . . service contract rates. . . . This may involve a comparison with commercial tariff rates for a representative market basket of commodities historically shipped by the Department of Defense and the contracting officer's assessment as to whether the commercial rate represents a competitive market rate.

"3. A comparison of proposed rates with prior proposed and contract rates for the same or similar service.

1/(...continued)
negotiations and submission of best and final offers (BAFO), its protest against the rejection of those rates is untimely. See 4 C.F.R. § 21.2 (1990).

"4. For container cargo only, a comparison of rates offered for containers under 32 feet with rates offered for containers over 32 feet.

"5. A comparison of rates offered, where appropriate, with the level of market rates overseas for the same or similar services."2/

The RFP also contained a statement that the contracting officer will make an assessment of market conditions, including consideration of trade route serviced, supply and demand, the rate of foreign exchange, balance of trade, and the general international economic environment. The agency states that an assessment of market conditions was used as supporting data for the determinations of rate fairness and reasonableness made on other bases and was not used independently to reject a rate.

DISCUSSION

Lykes argues that MSC has failed to articulate any reasoned explanation for its rejection of its rates despite its many opportunities to do so. It also asserts that MSC misapplied the evaluation criteria. We agree that the record does not support the agency's evaluation decisions.3/

Evaluation and award are required to be made in accordance with the terms of the solicitation. Environmental Technologies Group, Inc., B-235623, Aug. 31, 1989, 89-2 CPD ¶ 202. The Competition in Contracting Act of 1984 provides that the head of any agency shall evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation. 10 U.S.C. § 2305(b)(1) (1988). In reviewing protests like the one here, against allegedly improper evaluations, our Office will examine the record to determine whether the agency's judgment was reasonable and in accord with the evaluation criteria listed in the solicitation. Space Applications Corp., B-233143.3, Sept. 21, 1989, 89-2 CPD ¶ 255.

2/ The parties apparently agree that "overseas" was a typographical error; the contracting officer stated at a pre-proposal conference that the RFP should have read "overland."

3/ We sustained American President Lines, Ltd.'s protest against the rejection of its rates under the same solicitation. American President Lines, Ltd., B-236834.3, July 20, 1990, 90-2 CPD ¶ ____.

We have recognized that such judgments by their nature are often subjective; nonetheless, the exercise of these judgments in the evaluation of proposals must be reasonable and bear a rational relationship to the announced evaluation criteria upon which competing offers are to be selected. See Wadell Eng'g Corp., 60 Comp. Gen. 11 (1980), 80-2 CPD ¶ 269. Implicit in the foregoing is that these judgments must be documented in sufficient detail to show that they are not arbitrary.

With the exception of certain rates discussed below, we cannot conclude, based on the record before us, that MSC's rejection of Lykes' rates was reasonable.^{4/} The agency's report and comments fail to address with any specificity valid reasons for rejecting Lykes' rates.^{5/} MSC defended its position with generalities and conclusory statements. Where the record does provide information concerning the agency's decision-making process, it shows that the agency misapplied the evaluation criteria or applied them inconsistently.

^{4/} The protester has withdrawn its protest for those rates for which there is no longer a requirement for service. These include rates offered for 20-foot containers on routes 19A through 19E, routes 7, 13, 14, 27, 49, 50, as well as breakbulk rates under route 44A. Also, line-haul rates outside the continental United States for mileage above 375. will not be acquired under the container agreement and thus we are not considering the rejection of Lykes' rates for this service.

^{5/} MSC's initial report on this protest contained the contracting officer's hand-written workpapers which allegedly support the determination to reject the Lykes' rates at issue. These workpapers contained notations, references to tariffs, and many calculations, which, for the most part, were indecipherable and not identified to particular rates. We requested that the agency organize these notes and provide some explanation as to how these calculations supported the rate rejection. The workpapers were reorganized with a cover sheet explaining the notations. However, since it was still difficult to review the analysis, we asked the agency to provide examples, using the worksheets, to show why the contracting officer rejected these rates. For the reasons discussed in the decision, the explanations offered by counsel did not show that the agency acted reasonably.

The majority of the rates which were rejected were determined by the agency not to be fair and reasonable based on a comparison of Lykes' rates to those of its competitors. We have reviewed the contracting officer's workpapers and worksheets which purport to justify those decisions. Those documents reveal that the only explanation for the rejection of Lykes' rates is the hand-written comment, "comparison to competitors." While we recognize that this comparison is a stated evaluation criterion, we find that this factor was not reasonably and consistently applied.

With respect to the containerized rates, the record shows that MSC accepted rates which exceeded the low rate for a particular rate and zone by 34, 41, and 53 percent.^{6/} The record also shows that MSC rejected rates on the sole basis of comparison to competitors' rates, where Lykes' rates exceeded the low rate for a particular route or zone by substantially smaller percentages. For example, on route 43, United States Gulf Coast to Panama, inbound cargo in containers under 32 feet, Lykes submitted a price of \$96.02, an increase of \$5 from its previously accepted rate. The low rate for this requirement was \$85.29. Based on this 13 percent disparity, MSC rejected the rate. The record shows that the agency frequently accepted rates which exceeded the low rate by greater margins and, as noted above, in one instance accepted a rate which was 53 percent higher than the low rate. Ordinarily, there would be nothing improper with the rejection of a proposed rate because it is too high compared to a competitor's rate. However, where as here, based on the virtually identical percentage difference, the agency accepts some rates, and rejects others, it must justify this inconsistent action based on one of the other RFP rate evaluation criteria.

Another example of MSC's inconsistent application of the RFP evaluation factors, which was discussed by MSC counsel, was Lykes' rate for outbound cargo on route 43 for 20-foot containers carrying cargo NOS. The primary reason given by the agency for the rejection was comparison to competitors' rates. The record shows that Lykes' rate was approximately 16 percent higher than the low rate, a price difference that MSC had elsewhere found to be acceptable. Thus, we conclude that the agency could not reasonably reject container rates which exceeded the rate by less than 53 percent, since rates 53 percent higher were accepted elsewhere and there is no

^{6/} Route 5, inbound vehicles, route 43, outbound vehicles, route 39, inbound vehicles, respectively.

explanation for the different treatment.^{7/} Here, too, the inconsistent rejections were not supported by reference to another RFP rate evaluation criteria.

With respect to the breakbulk cargo, the record shows that MSC accepted rates which exceeded the low rate on a particular rate or zone by as much as 64, 92, or 100 percent.^{8/} Thus, where the agency rejected breakbulk rates which were less than double the low breakbulk rate, we are unable to conclude that such a rejection was reasonable. While there may appear to be significant price disparities between certain Lykes rates and the low-priced rates, the agency has failed to explain why price differences of 90 or 100 percent are acceptable in some instances, but not in others. Since the evaluation factor was applied inconsistently, we find that these rates were improperly rejected on this basis.

Many of the rates which fall into the categories described above also are rates that were in the same range as those accepted in the prior cycle. The agency fails to provide a rational explanation as to why those rates were unreasonable 6 months later. We find that MSC improperly rejected rates submitted by Lykes which were approximately the same as, identical to, or lower than previously accepted rates.

The agency argues that the prior acceptance of a rate does not bar rejection of such rates under the current procurement since "each procurement stands alone." Here, however, the RFP specifically defined price reasonableness by reference to previous rates. Therefore, under the terms of the solicitation, the agency was obligated to consider, as an evaluation factor, prior proposed and prior contract prices and, in our view, at least explain why these rates are no longer reasonable after only 6 months.

For example, on route 20B, interport carrying vehicles, Lykes' offered the same rate that was accepted in the previous cycle, \$117.60 per ton. The rate was 27 percent higher than the current low-priced rate offered by a carrier for this requirement. As discussed, a difference of 27 percent or more was not considered by the agency to be great enough to warrant rejection in evaluating other rates. In addition, however, the rate compares favorably to Lykes'

^{7/} This includes, among others, rates on routes 10, 32, and 43.

^{8/} Route 6 inbound, route 6 outbound, and route 39, outbound, respectively.

previously accepted rate, which was a stated basis for evaluating whether a rate is fair and reasonable. The record also shows that for many rates which were rejected in this cycle, Lykes offered prices which were even lower than rates which were previously accepted. For two rates, MSC rejected a Lykes' rate where Lykes was the only carrier who submitted a rate for the requirement and Lykes offered a rate which was 16 percent lower than its previously accepted rate.^{9/}

Another example of an unreasonable rejection of rates is the evaluation of Lykes' breakbulk hazardous cargo rate on route 24, interarea. The only explanation provided for the rejection of this rate is comparison to competitors. The record shows, however, that there was no other competitor who submitted a rate on that route. Moreover, the record shows that Lykes lowered its price 33 percent from its rate which was accepted in the previous cycle. The rate rejected was also 25 percent lower than the low-priced rate accepted in the previous cycle. On another route, the agency rejected rates based on a comparison to competitors where there were no competitors.^{10/} Thus, the stated reason simply does not apply, and we therefore find the rejections to be patently unreasonable.

MSC rejected a group of breakbulk rates based on a comparison of breakbulk rates with container rates for the same route and zone. The contracting officer made hand-written notations indicating that the agency should not pay more for breakbulk cargo than for containerized cargo since breakbulk cargo is unprotected. This reason served as the basis for rejection of Lykes' breakbulk rates on routes including 10A, 10C, 10D, 11, 19A through 19E, 24A, 24C, and 32A. Lykes contends that there are very good commercial and operational reasons why breakbulk rates would be higher than container rates on a per ton basis, such as the lack of uniformity of breakbulk cargo and the fact that breakbulk rates are calculated on the presumption that the cargo is less than a full container load. While MSC states that it believes it should not have to pay more for breakbulk than containerized cargo, this does not establish that Lykes' breakbulk rate was unreasonable. Further, the solicitation did not specifically provide that price reasonableness of breakbulk cargo would be determined by comparison to containerized cargo.

^{9/} Route 10A, inbound and outbound, HVEH.

^{10/} Route 19, hazardous breakbulk cargo, interport rates.

With regard to the line-haul/drayage rates for point to point in the United States and overseas, the contracting officer's workpapers merely assigned an "X" next to the numerous Lykes' rates rejected. The workpapers do not state the reason for the rejections. The agency's report, prepared by counsel, does not specifically address the rejection of line-haul rates, but states that the rejection resulted from an unfavorable comparison to competitor's rates and/or the commercially available market. We do not accept this representation as to the reason for rejection as stated in the counsel's report. First, there are no commercial rates cited and thus no basis to review the reasonableness of the rejection on that ground. Second, while Lykes' rates are generally higher than competitors' rates, the percentage difference for each route varies significantly, and the record shows that some of the rates are the same or in line with rates previously accepted. Therefore, we find no basis on this record to support MSC's rejection of these rates.

With respect to shipment on flat racks, we also sustain the protest on the basis that the record does not support the agency's decision to reject the rates. While conclusory statements by the agency appear in the record concerning various rates, we are unable to find a reasonable basis in the record for the rejections.

We find, however, that in certain instances, rates were properly rejected, and therefore we decline to disturb the agency's decision with respect to those rates. MSC adequately explained its rejection of Lykes' rate on route 32A outbound breakbulk cargo for wheeled or tracked vehicles (unboxed) exceeding 10,000 pounds per unit (FIO). The record shows that Lykes' rate of \$295 per ton was the only one submitted for this requirement, which involved shipment from the United States East Coast to Norway. The contracting officer, who was unable to make a direct comparison of competitors for the exact requirement, stated that a competitor submitted a rate of \$60 per ton for the same requirement from the United States East Coast to Sweden. Since the routes are virtually identical, we find that this was a sufficient reason to reject the rate under the evaluation factor, comparison to competitors.

In contrast to those breakbulk rates which were rejected because they were less than 100 percent higher than competitor's rates, we find MSC's rejection of Lykes' breakbulk rates to be supported by the record where Lykes' rates were more than 100 percent higher than the low rate

accepted for the requirement.^{11/} Similarly, we have no basis to object to MSC's rejection, based on a comparison to competitors, of Lykes' container rates which were more than 53 percent higher than the low rate accepted for the requirement.^{12/} In addition, we also find that the agency reasonably rejected Lykes' rates where Lykes submitted the only rate for a particular requirement and Lykes' price is more than 100 percent higher than its previously offered price.^{13/}

CONCLUSION

In the absence of any reasonable explanation for the rejection of the Lykes' rates protested, we find that the agency should have accepted Lykes' rates. Except for the rates indicated above, we sustain the protest with respect to the rejected rates which were timely protested for which there is a requirement. We recommend that the agency take corrective action consistent with this decision and include those Lykes' rates which we found were improperly rejected in its container agreement for the remainder of the cycle. We also recommend that if the agency intends to use the stated evaluation criteria for evaluation of rates in future cycles, that it document its reasons for rejection of the rates and apply the criteria consistently to all offerors. Further, we find that Lykes is entitled to the costs of pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1).

for 
Comptroller General
of the United States

^{11/} Route 20B, interport, HZD, route 24B, interarea, HVEH, LVEH, route 32B, outbound and inbound, HVEH, LVEH, HZD.

^{12/} Route 10C inbound and outbound containers carrying vehicles and NOS, route 32B, inbound 40-foot container carrying vehicles, and route 32C, inbound and outbound containers carrying vehicles and cargo NOS.

^{13/} Route 10C, inbound and outbound LVEH, routes 10A through 10D, hazardous breakbulk cargo, inbound, route 32C, inbound and outbound, LVEH.