Paul Lieberman

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Georgetown Railroad Inc., Union Pacific Railroad, and Southern Pacific Transportation Company

File: B-240322

Date: November 9, 1990

Martin D. Schneiderman, Esq., Steptoe & Johnson, for the protesters.
Daniel L. Rothlisberger, Esq., and William J. Dowell, Esq., Office of the Judge Advocate General, Military Traffic Management Command, and Herbert F. Kelley, Jr., Esq., Department of the Army, for the agency.
Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where solicitation provides that offerors' rates will be adjusted based on mileage determined by the Installation Transportation Officer (ITO) to reflect cost of roadmarch of a large convoy transporting tanks, trucks, and other heavy military equipment between Army base and offeror's railroad terminal, the ITO reasonably determined the protester's mileage on the basis of a four-lane interstate highway route which the ITO selected based on safety considerations. The agency was not required to calculate the mileage based on a shorter state highway route which the ITO considered less safe.

DECISION

Georgetown Railroad Inc., Union Pacific Railroad, and the Southern Pacific Transportation Company (Georgetown) protest an award by the Military Traffic Management Command (MTMC), Department of the Army, for freight transportation services to the Atchison, Topeka and Santa Fe Railway Company (Atchison). The services in question were solicited by MTMC by a letter solicitation of June 4, 1990, as subsequently amended, which requested tenders for the movement of military vehicles and impedimenta between Fort Hood, Texas and the National Training Center, Fort Irwin, California. Georgetown protests that its proposed price should have been evaluated as low, but was miscalculated because MTMC applied an improper disability cost

factor to reflect the mileage between Fort Hood and Georgetown's railroad terminal.

We deny the protest.

The solicitation requested tenders for transportation services for four round-trip movements for the next four scheduled training rotations (military exercises). The solicitation indicated that the government was interested in awarding all such shipments of unit equipment to one carrier, covering training rotations scheduled through the end of 1992, and that if any of the anticipated four rotations were canceled, the next subsequent rotation would be included in the award. The solicitation required that the offeror's terminal be situated within a 75-mile radius of Fort Hood. The items being shipped included M-1 tanks, trucks, and other military impedimenta sufficient to equip a brigade, which MTMC estimated would require 353 railcars to transport.

The solicitation provided that "[t]he government's actual requirements for transportation services under this solicitation will be allocated for the period involved to the responsive carrier whose offer conforms to this solicitation and is most advantageous to the government, cost and other factors considered." The solicitation further provided that "disability" costs would be added to offers which provided for a rail terminal at a site other than Fort Hood. Since only Atchison had a rail terminal at Fort Hood, the option to propose an adequate off-base terminal to which disability costs would be added was intended to encourage competition while taking into account the additional costs which would be incurred by the government in moving equipment to an off-base terminal.

As a threshold matter, MTMC asserts that the matter is outside of our bid protest jurisdiction, citing our decision, Moody Bros. of Jacksonville, Inc.; Troika Int'l Ltd., B-238844, June 12, 1990, 90-1 CPD ¶ 550. MTMC argues that Moody controls because the shipments in question are each denominated as a "spot movement," and are for transportation services which are accomplished by government bill of lading (GBL), under regulations promulgated by MTMC. We determined the question of the extent of our jurisdiction in this area in Federal Transport, Inc.--Recon., 68 Comp. Gen. 451 (1989), 89-1 CPD ¶ 542. In that decision, we reversed previous cases and asserted jurisdiction over protests concerning requests for tenders issued under MTMC's guaranteed traffic program. We did so because we found that all the indicia of procurements were present in the program. In particular, we found that while MTMC does not follow the procurement procedures outlined in the Federal Acquisition Regulation (FAR), and the DOD FAR Supplement, the solicitations contain provisions

similar to those in the FAR and the program involves formal solicitations and a formal source selection. Further, the program gives rise to what is, in effect, a requirements contract for transportation services, which is distinguishable from the majority of the government transportation business, where MTMC merely selects a tender and issues a GBL for one-time routings without any type of formal solicitation or source selection. Accordingly, we concluded that protests against a guaranteed traffic program solicitation fell within our jurisdiction under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3552 (1988).

We have jurisdiction here for the same reasons; the transportation services in question are within the guaranteed traffic program, are being obtained under a formal solicitation, including a source selection formula and language substantially similar to that contained in the FAR, and the award gives rise to what is in effect a requirements contract for at least eight repetitive movements over a 2-year period. The holding in Moody does not control since it simply exempted from our expanded jurisdiction under Federal Transport a spot movement involving only a one-time shipment of a commodity under one GBL which did not involve issuance of a formal solicitation or the conduct of a source selection. Accordingly, we will consider the merits of the protest.

The solicitation provides that total cost will be determined on the basis of a formula which includes calculating the rates quoted for 353 railcars plus listed services and multiplying these rates by four round trips, adding disability costs for four round trips where applicable to reflect mileage traveled to an alternate, off-base terminal. The solicitation contained an appendix which listed disability costs in one-mile intervals for distances ranging from 30 to 80 miles. Only two offers were received, one from Atchison whose terminal is at the base, and one from Georgetown for its terminal at an alternate site. MTMC calculated the disability costs for Georgetown's offer on the basis of the 57-mile distance supplied by the ITO for the anticipated actual road-march route from Fort Hood to Georgetown's terminal over Interstate Highway 35 and U.S. Highway 190. As a result of the application of the disability costs for 57 miles, Atchison's offer was low. Had a slightly lower disability mileage been applied, Georgetown's offer would have been low. Georgetown contends that the proper disability mileage is 46, based on use of State Highway 195, which Georgetown contends should have been used by MTMC for cost calculations since it represents the most direct route between the base and Georgetown's terminal. Georgetown contends that it is entitled to the award because use of the 46-mile disability factor would result in its offer being evaluated as low.

Evaluation and award are required to be made in accordance with the terms of the solicitation. Environmental Technologies Group, Inc., B-235632, Aug. 31, 1989, 89-2 CPD ¶ 202. CICA 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 an allegedly improper evaluation, 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. A protester's disagreement with the agency's judgment is not sufficient to establish that the agency acted arbitrarily. United HealthServ Inc., B-232640 et al., Jan. 18, 1989, 89-1 CPD ¶ 43.

Here, the solicitation provides that for determining disability costs for rail sites other than Fort Hood, "mileage will be determined by ITO, Fort Hood, prior to the evaluation of offerors."1/ The record reflects that the ITO, who is responsible under MTMC regulations for a broad range of transportation matters, including maintaining familiarity with laws and regulations pertaining to vehicle size and weight limitations and the movement of cargoes which subject public highways to unusual hazards, had before him information pertaining to the two alternate routes to the Georgetown terminal site at the time he made his recommendation. In particular, he was aware that the 57-mile route via U.S. Highway 190 and Interstate Highway 135 was a four-lane highway over the entire route and was a proven, safe route which had been successfully used by the Army in 1987 for the deployment of a convoy of over 1800 military vehicles to the ports of Beaumont and Galveston. By contrast, the shorter route over Highway 195 is a two-lane road, including stretches which are heavily traversed by civilian traffic, and includes numerous hills and curves and sections which lack improved shoulders. Because the convoy at issue would consist of hundreds of military vehicles, including heavily laden trucks and other large vehicles, and safety was a primary concern, the ITO

1/ Georgetown initially had protested that the MTMC was required to use the shortest route mileage listed in the Household Goods Carriers Bureau Mileage Guide, rather than the mileage supplied by the ITO. It is clear that the guide is inapplicable by the express terms of the solicitation, and this allegation is untimely under our Bid Protest Regulations because it concerns an alleged apparent solicitation impropriety which was not protested until after the award was made. See 4 C.F.R. § 21.2(a)(1) (1990).

determined that the 57-mile route was the preferred alternative and provided it for calculation of the disability factor.

Georgetown argues that the record shows that other procurement officials within the agency believed that the 46-mile route was feasible and was the route preferred by the Texas state highway department. However, since the route determination is properly within the ITO's responsibilities and the solicitation clearly provides for this determination to be made by the ITO, these opinions do not provide any basis to require the substitution of a different disability mileage. In addition, Georgetown speculates that the ITO simply made a mistake in recommending the 57-mile route, basing the recommendation solely on the fact that the 1987 convoy movement was made over that route, without realizing that the alternate 46-mile route had been substantially improved in the intervening time. Georgetown argues that the ITO simply failed to consider contemporaneously the alternate 46-mile route, which Georgetown contends is now equally safe, and is preferred by the state. In this regard, Georgetown points out that the agency initially requested our Office to dismiss the protest on jurisdictional grounds and did not include any reference to the ITO's consideration of safety factors which the subsequent full agency report indicated formed the basis for the ITO's determination. Georgetown argues that this evidences that the ITO's safety rationale was a pretext which was not supplied until after the protest was filed.

We find that none of the Georgetown's allegations establish that the ITO's determination was unreasonable or otherwise improper. The summary dismissal request was merely intended by the agency to support its position, discussed above, that our Office does not have jurisdiction to consider the merits of the protest. The fact that this request did not reference the ITO's safety rationale does not call into question the explanation for the ITO's determination which was provided in the full report since the two reports are not inconsistent--the second merely provides amplification on the merits. The specific objections raised by Georgetown amount to nothing more than an attempt to substitute the protester's assessment of the agency's minimum safety needs for the determination made by the ITO, and do not provide a basis to overturn the agency's determination. Xerox Corp., B-236072.2 et al., Nov. 29, 1989, 89-2 CPD ¶ 502. Moreover, where a solicitation requirement relates to human safety or national defense, an agency has the discretion to set its minimum needs so as to achieve not just reasonable results, but the most reliable and effective results. Marine Transport Lines, Inc., B-224480.5, July 27, 1987, 87-2 CPD ¶ 91. Under this solicitation, the route safety considerations were properly within the ITO's discretion, and Georgetown's disagreement with the

significance or implications of the safety factors which were considered by the ITO does not establish that the ITO's determination was unreasonable. On the contrary, we find that under the circumstances, the factors considered by the ITO reasonably established that the four-lane route was warranted for safety reasons, and MTMC's application of this 57-mile disability factor constituted a proper application of the evaluation criteria under the solicitation.

We also note that while Georgetown has suggested that the safety rationale is a pretext and that the 57-mile route is not that which the Army would actually use, the Army points out that it is presently routing military equipment convoys for the Desert Shield deployment over this four-lane 57-mile route as part of its movement of troops to the Mideast via Texas Gulf ports. The Army states that this use of the 57-mile route was based on a determination that it was a proven route and the safest route.

The protest is denied.

James F. Hinchman
General Counsel