



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Humco, Inc.
File: B-244633
Date: November 6, 1991

Robert M. Wright, Esq., Whiteford, Taylor & Preston, for the protester.

Paula J. Barton, Esq., Department of State, for the agency.
Henry J. Gorczycki and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The General Accounting Office has jurisdiction to decide a protest of an award under a tender of service for the transportation of motor vehicles.

2. Where a tender of service for transportation services does not specify whether single or multiple rates can be utilized in tenders, an award to a tenderer who submitted a multiple rate tender will not be disturbed where that tenderer would be in line for award under a worst case evaluation, assuming the highest rates of its tender, since the protester was not prejudiced by the tender of service's lack of specificity as what rates would be acceptable.

DECISION

Humco, Inc. protests an "award" to ABC Auto Transport, Inc. under Tender of Service No. DOS-13, issued by the Department of State, the Despatch Agency of the United States, in connection with its need for transportation services over various routes in the continental United States. The matter under protest is for the transport of vehicles between Washington, D.C., and Miami, Florida.

We deny the protest.

DOS-13, issued on April 15, 1991, requested rate tenders for the movement of privately owned vehicles and official vehicles between various points in the continental United States for the period July 1, 1991, through June 30, 1992. It requested flat rate tenders for the Washington-Miami and Baltimore-Washington routes. All other routes were to be quoted on a mileage basis. The agency

evaluated the respective rates in the tenders and published a rate/route schedule naming the contractor with the lowest and second lowest rates for each route.

The need for transporting individual vehicles arises generally when government employees are relocated. The Despatch Agent does not know at the time of the rate tender solicitation where, when, or even how many vehicles will be transported during the year. As the need for transport arises, the Despatch Agent will issue a Government Bill of Lading (GBL) to the contractor that submitted the lowest rate tender for the route needed. The GBL is the contract for the movement of the vehicle.

Four firms submitted various tenders in response to DOS-13. All of the firms except ABC submitted a single-priced rate for the Washington-Miami route; ABC submitted a multiple-priced rate for this route. ABC's base rate was \$475 with a \$25 additional charge for trucks, vans, and four-wheel-drive vehicles. The Despatch Agency determined that ABC had submitted the lowest tender for that route, and that Humco, which offered a single \$500 rate for all vehicles, had submitted the second lowest tender. Thus, ABC received the "award" for this route.

Humco argues that DOS-13 did not provide that more than one rate could be quoted for this route; that it would have offered better rates if it had known it could submit multiple rates for this route; and that either the award of this route was improper or the solicitation was defective.

The agency first argues that the protest should be dismissed because our Office does not have jurisdiction to consider protests concerning rate tenders. However, the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3552 (1988), authorizes our Office to decide protests concerning alleged violations of procurement statutes or regulations. We view the Transportation Act of 1940, codified as amended at 49 U.S.C. § 10721 (1988), pursuant to which the agency issued DOS-13, as a procurement statute since it authorizes the government to obtain transportation services from common carriers at rates below those in their published tariffs.¹

¹The agency is correct in asserting that such procurements are not governed by the Federal Acquisition Regulation (FAR). See FAR § 47.000(a)(2), which states:

"Even though the FAR does not regulate the acquisition of transportation or transportation-related services when the bill of lading is the contract, this contract method is widely used and, therefore, relevant guidance on the use of the

Federal Transp., Inc.--Recon., 68 Comp. Gen. 451 (1989), 89-1 CPD ¶ 542. We therefore generally review protests of procurements of transportation services under section 10721. See Georgetown R.R., Inc., et al., 70 Comp. Gen. 70 (1990), 90-2 CPD ¶ 383; Federal Transp., Inc.--Recon., supra.

The agency argues that our Office does not have jurisdiction to decide this protest because the selected tenders are not contracts. CICA defines "protests" as including objections to solicitations for bids or proposals for proposed contracts as well as objections to proposed or actual awards of such contracts.² This definition encompasses objections to agency actions that result in the "award" of instruments that are not in themselves contracts (e.g., basic ordering agreements (BOA)),³ but which become contract terms after a final agreement is reached. See, e.g., A&A Realty, Inc., B-222139, June 20, 1986, 86-1 CPD ¶ 575, involving the "award" of a BOA. The "award" of a tender of service, such as DOS-13, is analogous to the "award" of a BOA, since in both cases a contract may arise through the issuance of an order (under a BOA) or a GBL (under the tender) to the "awardee." In short, we consider our protest jurisdiction under CICA as sufficiently broad to include protests involving tenders of service.

bill of lading, particularly the [GBL], is provided in this part."

The applicability of the FAR or the Federal Property and Administrative Services Act of 1949, codified as amended at 40 U.S.C. § 471 et seq. (1988), is not coincidental with whether our Office has jurisdiction over procurement protests. See Computer Support Sys., Inc., 69 Comp. Gen. 644 (1990), 90-2 CPD ¶ 94.

²"' [P]rotest' means a written objection by an interested party to a solicitation by [a] Federal agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or award of such a contract." 31 U.S.C. § 3551.

³A BOA includes a description of the service(s) to be provided, and methods for pricing, issuing, and delivering future orders. BOAs are often used when the specific items and quantities to be covered by a contract are not known at the time the agreement is executed. A BOA is not a contract and does not obligate the government to enter into future contracts with the contractor(s). See FAR § 16.703.

Nonetheless, we have excepted from our review role the issuance of GBLs for spot movements⁴ because spot movement acquisitions fall outside the structure of a formal procurement process and agencies employ their own informal procedures to accomplish such one-time shipments. Noticeably absent from informal agency GBL procedures are formal solicitations and source selections. See Moody Brcs. of Jacksonville, Inc., Troika Int'l Ltd., 69 Comp. Gen. 524 (1990), 90-1 CPD ¶ 550; Stapp Towing Co., Inc., B-240087, July 6, 1990, 90-2 CPD ¶ 19.

The agency claims that this protest involves an excepted spot movement because each vehicle transported will be covered by a separate GBL and because the agency is not required to use the special rate tenders awarded under DOS-13.⁵ We disagree. The vehicular movements covered by DOS-13 tenders are not one-time spot movements. To the contrary, the agency anticipates numerous individual movements will be covered by the special rate tenders obtained through DOS-13.⁶ Although in theory no GBLs need be issued under these special rate tenders, it is apparent that the agency expects the majority of the movements to be made pursuant to GBLs reflecting these special rate tenders, as is evidenced by the effort spent gathering and evaluating the tenders. Moreover, the agency issued a formal solicitation, i.e., DOS-13, and has conducted a formal source selection, i.e., the published rate/route schedule. This clearly goes well beyond a spot movement.

As to the merits of the protest, Humco asserts that since ABC submitted multiple prices, even though DOS-13 did not request multiple prices for individual routes, companies prepared their rate tenders using different business assumptions, so that the agency did not receive the benefit of full and open competition. Humco requests that ABC's tender

⁴Spot movements are one-time shipments of a commodity on one bill of lading and which require special equipment or services not otherwise provided by tariff or special rate tender.

⁵Rule 10 of DOS-13 leaves use of these special rate tenders to the discretion of the Despatch Agent operating in the best interests of the government.

⁶This is evidenced in the agency's determination dated July 11, 1991, to proceed using the protested tenders, notwithstanding the protest. This determination indicated, in pertinent part, that the failure to use the tenders would require individual GBL negotiations for each vehicle to be moved, which would exhaust the Despatch Agency's resources.

be rejected or that DOS-13 be reissued with a clear statement of the pricing scheme sought.

It is true that DOS-13 does not state whether a single price for each rate/route should be given, or indicate that different priced rates for different sized vehicles may be submitted.⁷ Although multiple-priced rate tenders are apparently an acceptable trade practice for this type of transportation service,⁸ this solicitation allows for the possibility that tenderers may not be evaluated on the same basis or that full and open competition will not be achieved. For example, the solicitation does not designate allowable classes of rates or indicate whether multiple awards could be made on the same route based on different vehicle classes.⁹ Also, if several tenderers submitted multiple rates on different classes of vehicles,¹⁰ we are aware of no method by which the rates could be evaluated on a common basis.

Here, however, there is no apparent prejudice to Humco or the competition that would justify soliciting new tenders for the Washington-Miami route. While Humco argues that it might have offered better rates if it had known multiple rates were permitted, it has not described how it would or could have done this. In this regard, it seems logical that Humco's single priced rate of \$500 is a composite rate representing various vehicle class rates it would have charged if it had broken them out separately. That is, this

⁷Thus, we cannot say ABC's tender must be rejected as unacceptable. See I.T.S. Corp., B-190562, Jan. 24, 1978, 78-1 CPD ¶ 64.

⁸For example, ABC submitted a multiple-priced tender in response to DOS-13, which the agency found acceptable. Also, Humco has previously filed such multiple-priced tenders, based on vehicle type, with the Interstate Commerce Commission, and has explained in its protest that different sized vehicles can be transported at different prices and tenderers could provide multiple-priced tenders for this route if specifically requested to do so.


⁹If Humco's flat rate would have been more desirable than the higher of ABC's rates, the agency assertedly would have awarded transportation of trucks, vans, and four-wheel-drive vehicles over the route to Humco, and ABC would have received the award for transporting all other vehicle types.

¹⁰Example: X submits separate prices for compact, mid-size, and full-size vehicles over one route, and Y submits separate prices for cars, mini-vans, and trucks over the same route.

rate represents Humco's exercise of its business judgment that took into account the lower prices it would offer for some vehicle classes, presumably the same type business judgment that was exercised by ABC.

With regard to how ABC's tender was evaluated, we find that if ABC's tender were evaluated under a worst case scenario at its highest possible rate ABC would still be in line for award of this route. As indicated above, while Humco submitted a single price of \$500, ABC tendered rates of \$475 for transporting all types of vehicles over the route except for trucks, vans, and four-wheel-drive vehicles, for which ABC tendered a rate of \$500. The solicitation provided that "[a]wards will be based on the lowest rate. Equally desirable bids will be selected by the chronological order in which they arrive [at the agency]." Here, both tenders are "equally desirable" at \$500 under the worst case evaluation of ABC's tender. The record shows that ABC's tender was received by the agency before Humco's tender. Thus, under this worst case evaluation, ABC would still be in line for award of this route.

The protest is denied.


for James F. Hinchman
General Counsel