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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Crowley Caribbean Transport

File: B-246784.3

Date: September 25, 1992

Thomas J. Touhey, Esq., and Donald A. Tobin, Esq., Bastianelli, Brown & Touhey, for the protester.
Richard S. Haynes, Esq., Charna J. Swedarsky, Esq., and David A. Townsend, Esq., Department of the Navy, for the agency.
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DIGEST

Protest that proposed negotiation strategy announced in solicitation for contract seeking ocean and intermodal rates for transporting breakbulk and container cargo is defective and constitutes an impermissible auction because it provides that agency may accept some or all rates initially offered, without discussions, but reserves to the government the right to hold discussions on rates not initially accepted, is denied where (1) negotiation strategy is not prejudicial to any offeror, (2) the solicitation does not contemplate disclosing the rates that offerors must meet to be considered acceptable, and (3) agency will not disclose any offeror's rates or relative standing in the procurement.

DECISION

Crowley Caribbean Transport (CCT) protests the terms of request for proposals (RFP) No. N00033-91-R-2400 (Second Cycle), issued by the Military Sealift Command (MSC) for ocean and intermodal transportation of Department of Defense (DOD) cargo.[1] CCT argues that the agency's proposed method for disseminating information to offerors concerning the status of certain rates submitted in initial proposals, which is then followed by a request for best and final offers (BAFO), is improper.

We deny the protest.

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[1]This is the second cycle of the procurement, covering the period October 1, 1992, through March 31, 1993. Each procurement is termed a "cycle" and covers a 6-month period.

BACKGROUND

MSC issued the RFP on April 15, 1992, seeking rates for ocean and intermodal transportation (ocean transport in combination with motor/rail transport) for DOD cargo using United States-flag commercial carriers. As relevant here, offerors are required to submit rates based on individual ocean route (port to port)--further delineated as to the direction (outbound or inbound) in which cargo will move--and by cargo category, breakbulk (non-containerized bulk cargo) or container cargo (20-foot or 40-foot containers). The services are further divided geographically by trade route and subdivided, in some cases, into zones. For example, route 43 zone A (43A) designates services between Panama and the Gulf Coast of the United States.

The RFP permits offerors to submit rates for either breakbulk or container service, or for both, and further provides that a rate for any particular category is independent of rates for other categories. Section M of the RFP states that MSC will accept the lowest, technically acceptable rates offered for each category on an individual route or zone, unless that rate is not fair and reasonable. The RFP advises that, in addition to the lowest rate, MSC will accept a higher priced rate or rates offered on a route if necessary to meet DOD's minimum needs (e.g., considering capacity and delivery schedule), making multiple awards possible between the same transportation points. The solicitation's "Cargo Booking Policy" explains that where cargo may be transported under either breakbulk or container service rates, MSC will give preference to that method representing the lowest overall cost to the government.

Section M-5 of the RFP advises offerors that the government intends to make award based on initial proposals, but reserves the right to conduct discussions if necessary. That section further provides:

"In particular, offerors are advised that the [g]overnment may accept some or all rates or services initially offered, without discussions of those rates. If negotiations are conducted, they may be limited to certain rates or services specifically identified in writing by the contracting officer . . . Thereafter . . . offerors will be notified of the close of negotiations and the opportunity to submit a [BAFO]." (Emphasis added.)

Under this method, the contracting officer informs each offeror, prior to requesting BAFOs, whether its initial rates have been accepted, not accepted, or designated for discussions.[2] CCT objects to the agency's proposed method of conducting discussions in accordance with this provision.

PROTESTER'S POSITION

According to CCT, much of DOD cargo can be transported as either breakbulk or containerized cargo. CCT states that a carrier's objective in submitting rates is not to propose the lowest container rate, standing alone, or the lowest breakbulk rate. Rather, a carrier's objective is to submit the lowest rate (breakbulk or container) which allows the carrier to "capture" the cargo in a specific route. In this context, the protester argues that MSC's negotiation strategy essentially has the effect of an impermissible auction.

In support of its contention, CCT provides the results of the first cycle competition where several carriers, including CCT and Sea Barge, submitted initial offers on route 43A. CCT's and Sea Barge's initial outbound breakbulk and container rates (per measurement ton) for light vehicles on route 43A were as follows:

	CCT	Sea Barge
Outbound Breakbulk Rates	$ 66	$ 66.18
Outbound Container Rates	$116	$121.27

Using the same negotiation strategy CCT complains of here, the contracting officer informed each of the offerors that their initial rates had been evaluated and either accepted, not accepted, or designated for discussions, among other things. In particular, the letter to CCT notified that firm that MSC had accepted CCT's route 43A light vehicle breakbulk rate ($66.00). MSC's letter to Sea Barge and the other offerors informed those carriers that MSC had not accepted their light vehicle breakbulk rates. MSC's letters to CCT, Sea Barge, and a third offeror requested BAFOs on the container rates submitted by these firms.

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[2]Each offeror receives information only about the status of its own offered rate. In addition to stating whether each rate was accepted, not accepted, or designated for discussions, the agency in practice informs offerors whether each rate submitted was conditionally accepted, accepted for foreign flag, rejected, no bid, no MSC need, accepted late, or not applicable.

In its BAFO, Sea Barge substantially reduced its outbound container rates for light vehicles from $121.27 to $60.27, thereby underpricing CCT's initial container rate of $116, which remained unchanged. Since Sea Barge's revised container rate ($60.27) represented the lowest overall cost to the government for light vehicles (i.e., below CCT's $66 breakbulk vehicle rate), CCT asserts that all of DOD's light vehicle cargo moved under Sea Barge's lower container rate, rather than CCT's higher breakbulk rate, which MSC had "accepted" for that cargo category during the procurement cycle.

Based on these results, CCT argues that by MSC informing one offeror (e.g., Sea Barge) that MSC had not accepted its initial outbound breakbulk prices for light vehicles, MSC improperly disclosed to that offeror that MSC had accepted a competitor's (e.g., CCT) lower price for that cargo category, thereby allegedly disclosing information about a competitor's price and its relative standing in the competition. Conversely, CCT argues, since MSC could accept rates offered by more than one carrier on the same routes, by informing CCT, for example, that MSC had accepted CCT's outbound breakbulk rates for light vehicles, CCT gained no information about the status of any competitor's initial rates for that cargo category, thus giving rise to an "information gap" between offerors in preparing BAFOs for the unrequested items only since BAFOs are not requested or permitted for previously accepted items.

AGENCY'S POSITION

MSC denies that its negotiation procedures result in improperly disclosing any information to any offeror concerning rates initially offered. The agency explains that its system of independently competing each type of service (breakbulk or container), and cargo category, is designed to result in the most economical rate for each discrete cargo movement on each route. MSC states that its proposed method for conducting negotiations simply does not disclose any offeror's price or relative standing in the competition, or afford any offeror an unfair competitive advantage. The agency concludes that any inference that offerors may make from MSC's negotiation letter calling for BAFOs is not the direct result of any improper disclosure of information, but from common business knowledge.

DISCUSSION

We find that the record here does not support CCT's position that the agency's proposed negotiation strategy constitutes a prohibited auction. Federal Acquisition Regulation (FAR) § 15.610(e)(2) prohibits the use of auction techniques such as:

> "(i) Indicating to an offeror a cost or price that it must meet to obtain further consideration;
> (ii) Advising an offeror of its price standing relative to another offeror (however, it is permissible to inform an offeror that its cost or price is considered by the [g]overnment to be too high or unrealistic); and
> (iii) Otherwise furnishing information about other offerors' prices."

Prohibited auction techniques essentially consist of indicating one offeror's price to another during negotiations, thereby promoting direct price bidding between offerors. See FAR § 15.610(e)(2)(i); Youth Dev. Assocs., B-216801, Feb. 1, 1985, 85-1 CPD ¶ 126.

Here, the protester argues that by informing a competitor (e.g. Sea Barge) that its initial breakbulk rate was not accepted, MSC conferred a competitive advantage on that firm. We disagree with the protester's contention because we find that MSC's negotiation letter does not in itself confer a competitive advantage or contain sufficient information to constitute a prohibited auction.

In practice, offerors receive virtually identical letters with information about the status of each of their initial rates. That is, MSC's standard negotiation letter merely states that each rate submitted has been evaluated and has been assigned one of several designations listed in the letter (i.e. accepted, rejected, designated for discussions, etc.). In learning from MSC that a particular rate was not accepted, Sea Barge knows only that it was not the lowest for that cargo category on that route, because if the firm's rate had been low, the rate would have been accepted or subject to discussions. Sea Barge does not know how many offerors participated in the competition; it does not know whether any rates, in fact, were accepted or the amount of the accepted rate(s); and it does not know its rank order or standing relative to other offerors. What it does know for certain is that its rate was not the lowest for the category for which its rate was not accepted.

In the case presented by CCT, it is true that Sea Barge knew that, since it had not offered the lowest rate for outbound breakbulk shipments, if it did not offer a lower BAFO rate for containerized cargo over the same route, cargo that could be shipped breakbulk would go to the previously successful offeror for that category. In other words, even if Sea Barge's BAFO rate were accepted for containerized cargo, it would not carry the cargo that could be transported either breakbulk or containerized unless its BAFO rate was lower than the breakbulk rate. Consequently, Sea Barge had some motivation to offer a BAFO rate lower

than $66.18 for containerized cargo in CCT's example. It is not clear how this provided a competitive advantage. If Sea Barge's offer for breakbulk had been accepted, the firm would have made virtually the same business analysis in preparing its BAFO for containerized cargo that it did after MSC stated that the breakbulk rate was not accepted.

While Sea Barge might find MSC's negotiation letter instrumental in preparing its BAFO for other cargo categories, any conclusions it might reach are based upon a combination of supposition, general business knowledge about market conditions,[3] and the results of the competition on previous cycles, not as the result of advantages extended by MSC or improper government auction. The protester has simply not shown, and we fail to see, how providing information to competing firms about the status of their initial rates results in prejudicial or irregular treatment of CCT.[4]

The protest is denied.

James F. Hinchman
General Counsel

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[3]At the conclusion of negotiations for each cycle, MSC publishes the carriers' names and their accepted rates for containerized cargo in the Worldwide Container Agreement and Rate Guide and in the Worldwide Shipping Agreement and Rate Guide for breakbulk cargo.

[4]CCT further argues that the agency should request BAFOs even for previously accepted items (such as breakbulk rates) where BAFOs will be requested for unaccepted items (such as container rates) because they both represent transport services for the same cargo. Since we find that offerors do not receive a competitive advantage and that the agency's procedures do not constitute an auction, we have no basis to recommend a revision to those procedures.