



DEPARTMENT OF THE ARMY
HEADQUARTERS, U.S. ARMY MATERIEL COMMAND
9301 CHAPEK ROAD
FORT BELVOIR, VA 22060-5527

Nov. 28, 2008

Office of Command Counsel

_____)	
In the Matter of)	
)	
Abba International, Inc., et. al.)	
)	B-311225.4
Defense Property System)	
Administrative Report)	
_____)	

Katherine Riback, Esq.
Government Accountability Office
441 G. Street, N.W.
Washington, DC 20548

Dear Ms. Riback,

Abba International, Inc, et. al. (Abba)¹ ostensibly filed a protest at your Office on Oct. 27, 2008 objecting to an announcement by the Government on Oct. 20, 2008, that it intended to solicit rates for the pure traffic channels beyond the 18 sites listed in a Settlement Agreement of prior protests. AR, Tab 1. On Nov. 7, 2008 in response to our dismissal request, Abba clarified its protest to be one against both the initial roll-out and world-wide expansion of the new property movement system.

The Oct announcement requested rates from Department of Defense (DOD) approved TSPs² eligible to transport household goods, unaccompanied baggage and boat shipments between designated rate areas through Government bills of lading (GBLs) under the Defense Property System (DPS).³ Based on the Settlement Agreement reached in the prior protests, we believe that this protest lacks a legal or factual basis. In addition, we believe that the protest is untimely filed in regard to the rates already filed on 18 sites.⁴ Its protest also amounts to a mere

¹ The protest letter claims to be filed by 15 protestors which are various transportation service providers (TSPs).
² A transportation service provider is any party, person, agent or carrier that provides freight and/or personal property transportation and related services to an agency, including Motor Carrier, Freight Forwarder and Broker. DOD 4500.9-R, Part IV at IV-xii.
³ DPS is the standard information technology system, a worldwide web-based solution that supports the new SDDC household goods transportation program
⁴ The 18 sites are the sites listed on the Settlement Agreement entered into between the Government and TSPs, including Abba. AR, Tab 2. We also include the protestors that were parties to the earlier filed protests in AR, Tab 3.

disagreement with the policy decision of the Government to move from one property movement system to another property movement system.⁵

Under prior protests concerning the DPS Program, Abba⁶ agreed to and specifically authorized the initial rollout of DPS to the 18 initial sites under the Settlement Agreement. Abba also agreed that if the Government were to roll out the remaining sites that TSPs would be allowed to re-file rates for the remaining sites only. AR, Tab 2. at paras 2, 3. The Government has fully complied with the terms of that settlement agreement.

We have not stayed issuance of GBLs under the new property system during the pendency of this protest.⁷ In fact, some of the named protestors have received GBLs.

BACKGROUND

In response to prior GAO reports that recommended that DoD improve the competitive nature of the DoD household goods program, SDDC initiated a major effort to construct a state of the art computer system with the ability to accept rates filed by TSPs, award shipments, provide counseling to military service members and employees, and verify invoices. This newly developed program is commonly known as the Defense Property System (DPS). This major initiative became a critical necessity due to the deteriorating condition of the legacy computer program (TOPS), which is completely outdated.

Rate Tender Procurement. The new transportation system involves rate tenders, that do not fall within the application of the Federal Acquisition Regulation (FAR). Under a rate tender process, no level of traffic, number of shipments, or level of tonnage is ever guaranteed to any carrier for any specific traffic channel. AR, Tabs 4 and 5.

Under DPS, qualified TSPs are evaluated for each traffic channel on the basis of the rates submitted for that traffic channel and their past performance quality score, both of which are used to calculate a Best Value Score (BVS). A BVS for each traffic channel upon which TSPs provided rates is calculated. TSPs are then provided an opportunity to view their BVS and quartile placement in DPS. At the close of the 2008 rate filing, TSPs who believed they had identified an error in the calculation of their BVS were permitted to contact SDDC, and if the score was incorrect, the error was subsequently corrected. TSPs were also able to receive their specific ranking with all traffic channels from SDDC upon request before any shipments were awarded under DPS. The current protestors actually did request those specific rankings by e-mail correspondence. A concise listing of the rankings of the current protestors is provided at AR, Tab 6.

⁵ The old property movement system is akin to an invitation for bids because it issued GBLs on the basis of low price only. The new property movement system takes into account performance in determining a best value score for each TSP. It is more akin to a negotiated solicitation when it issues GBLs.

⁶ Abba was a named protestor on Attachment 1 of B-311225.

⁷ The Court of Federal Claims denied a motion for a preliminary injunction on Nov. 21, 2008. The plaintiffs in the court case were three protestors in this protest: Cartwright International Van Lines, Covan International, Inc. and Crystal Forwarding, Inc. The fourth plaintiff, Foremost Forwarders, Inc., was not a party to this protest. Nevertheless, all four companies have been involved in protests that were included in the Settlement Agreement at issue.

Under the ranking process, the BVS are ranked from highest to lowest, and placed in quartiles. TSPs who place in the highest twenty-five percent of all TSPs who file a responsive bid are placed into the first quartile, and are distributed shipments prior to any TSP who places in the second quartile in that traffic channel. Once BVS are calculated and those scores are ranked both by quartiles as well as within a specific quartile, the competitive rate filing process is considered final and complete. All of this information was clearly known by industry prior to the initial bid protest.

The rate filing and BVS determinations occurred prior to the Settlement Agreement of May 5, 2008.

The period of performance for the rate solicitation at issue is for the period of March 31, 2008 to May 14, 2009. The terms and conditions of the rate solicitation indicated that all rates tendered to the government by TSPs to bid for household goods shipments were to be effective and valid for that entire period of performance.

The actual period for TSPs to file rates for the initial round of 18 sites was from Feb. 11 to Feb. 22, 2008 for round one and Mar. 17 to Mar. 25, 2008 for round 2. While the Tender of Service was officially published on the SDDC website on Mar. 18, 2008, SDDC ensured that the Rate Tender was available to all interested TSPs prior to the initial rate filing to assist them with filing rates. AR, Tab 7. SDDC determined that it was in the best interest of the government to roll out a limited number of sites to ensure that DPS was operational, and that TSPs would be fairly treated under this new system, including invoice payment, shipment offers, BVS calculations, and similar such issues.

Initial rate filing participation by qualified TSPs for the initial 18 sites was relatively large. Upon SDDC's receipt of those timely-filed rates, each TSP was evaluated according to the evaluation criteria and a BVS for each traffic channel was calculated. Subject to the second round of rate filing under the solicitation, BVS were provided to all TSPs who filed responsive bids on or about Mar. 31, 2008. On or about April 2, 2008, TSPs were officially advised of their BVS for each traffic channel in which they submitted a bid, and TSPs were provided the opportunity to question or challenge any of the scores received. No TSP who submitted rates filed a bid protest challenging any BVS for any traffic channel relating to the 18 initial sites that was calculated by DPS. After TSPs had the opportunity to contest any BVS they received, SDDC ranked the best value scores for all TSPs who submitted bids within a given traffic channel, and placed the ranked scores into quartiles, which determines the number of shipments to be awarded.

Subsequent to the settlement agreement of May 5, 2008, even though the initial intent was to begin awarding shipments under DPS on or around June, 2008, some system problems arose indicating that additional work was required to ensure that the DPS could meet the expectations of both the military services and TSPs who submitted competitive bids for the initial 18 sites. A portion of the delayed implementation of DPS involved the previous bid protests that culminated in the Settlement Agreement of May 5, 2008 on behalf of each of the

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protestors in Protest of A&P Shipping Corp., et al., B-311082, Protest of AA Sound Forwarders, Inc., et al., B-311225, Protest of A&P Shipping Corp., et al., B-311225.2.

RESPONSE TO PROTEST ALLEGATIONS

The paragraphs below respond to the allegations of the protest. Overall, the allegations are untimely filed because these business issues existed at the time of the settlement agreement and were considered in reaching a full accord and satisfaction of all claims in the prior protests. See AR, Tab 2 at paragraph 6.

BUSINESS RULES

1. The Protestor believes that because the Business Rules were not finalized at the time of filing the protest that the procurement is not yet complete.⁸

The Operational Business Rules for DPS appear on the SDDC website (AR, Tab 8) and the Procedural Business Rules appear in Appendix U in the Defense Transportation Regulations. AR, TAB 9. At the time of the Settlement Agreement, the protestors were aware of the pending final actions in the Business Rules. The TSPs, nevertheless, agreed to tender rates notwithstanding the status of the Business Rules and accepted shipments under the new program beginning in August. AR, Tab 7

SHIPMENT AND TONNAGE DATA

2. The protestors specifically claim as a valid protest ground that they do not have the current tonnage data, in violation of the proposed business rule 2.19 which states:

DPS will provide a report to all DoD qualified TSPs listing the number of shipments moved for the last two completed rate cycles using the new domestic and international channels. This data will be used for tonnage estimates for future cycles. Historical peak and non-peak tonnage data per channel will be provided by SDDC to help TSPs estimate their rates.

The fact is that all TSPs do have current tonnage data, as current tonnage data was provided to TSPs under the TOPS program. DPS at initial rollout would have virtually no tonnage data entered into the system as it is an entirely new program. The tonnage information provided by SDDC is the latest available and was posted on the SDDC website. The historical tonnage data is readily available from the prior performance periods that utilized TOPS. Tonnage data entered under the TOPS system was provided to industry prior to the rate filing process. SDDC submits no credible evidence exists that TSPs do not have sufficient tonnage data estimates to consider prior to filing rates. Since the DPS was delayed until August/September for the test shipment, historical data was already provided for the last two full cycles for both the Domestic GBL Records (November 1, 2005 - October 31, 2007) and International GBL Records (October 1, 2005 - September 30, 2007). That information was

⁸ The Business Rules have now been published.

readily available on the SDDC website under the Families First/ Phase II link on the left menu bar.

The fact is that DPS will provide a report to all DoD qualified TSPs concerning tonnage data, once shipments are awarded under DPS. Ironically protestors request to stay all shipments under DPS, which prevents tonnage data from being entered into DPS. It is plainly obvious that the proposed business rule is intended to be applied for tonnage data entered under DPS for future cycles.

AIRFORCE SHIPMENTS

3. Protestors specifically allege that the United States Air will not move any of their shipments in Families First but this decision may change. Until this decision has been made, TSPs cannot reasonably submit their bids since Air Force shipments constitute a significant portion of the entire business covered in the Families First procurement. (See, White Declaration, para. 2).

This underlying factual assertion claimed by Protestors is completely inaccurate, as the US Air Force has officially advised SDDC that it intended to utilize DPS for the initial 18 sites. Secondly, a rate tender procurement does not in any way guarantee any level of traffic, tonnage or number of shipments for any specific traffic channel. TSPs are fully aware of their competitive status under TOPS concerning the potential to receive shipment offers, TSPs are fully aware of their BVS for the original 18 sites, as they received their quartile rankings and well as their ranking within that quartile. A government agency's management decision to allocate DoD's household goods shipments from a legacy system to a new computerized operating system is an inherently governmental decision that is entirely one of contract administration, particularly where the protestors agreed to that roll-out decision in the Settlement Agreement of May 5, 2008.

NON-TEMPORARY STORAGE

4. Protestors claim that the notice that no shipments which have a portion going into non-temporary storage would move under the new transportation systems affects the level of bids.

This allegation is without legal basis. The management decision to use either the legacy transportation system or the new transportation system for shipments going into non-temporary storage is allowed pursuant to the Settlement Agreement. SDDC has not experienced any decrease in the rates filed.

OFF-PEAK AND NON-PEAK RATES

5. The protestors claim that both "peak" and "non-peak" rates were considered to determine whether any bid fell within a competitive range.

This allegation is untimely, as any rates filed by protestors that were rejected were rejected in March, 2008. In addition, those TSPs who experienced a rejected rate for any traffic channel were provided a second opportunity to increase the competitiveness of their bid. Once

again, TSPs failed to timely file any protest after the BVS were determined, and in fact, entered into a Settlement Agreement that permitted SDDC to run DPS and TOPS concurrently.

Protestors claim that certain TSPs were rejected for their “off peak” rates solely because the peak rates submitted were beyond a competitive range of prices. The period of performance under the solicitation clearly indicates that the period of performance involves both peak and off-peak seasons. An overall evaluation as to the competitiveness of any portion of a TSP’s overall applicable rate factually involves both “off peak” and “peak” traffic. Protestors did not file a bid protest at the time these rates were submitted, and therefore not only does it lack legal merit, the claim is also untimely. Industry was well aware of that both off-peak rates and peak rates would be considered when considering the BVS, and each TSP was specifically advised if the initial rates was rejected for one or a number of specific traffic channels. Those notices were distributed to TSPs on or about March 14, 2008. TSPs were permitted an opportunity to re-submit their bids to “cure” any bid determined to be outside of a competitive range.

STORAGE IN TRANSIT

6. The protestor’s claims that their rates were improperly rejected because SIT rates fell outside of the competitive range are untimely filed.

Notices of rejection were distributed to TSPs on or about March 14, 2008. SIT remains a significant cost of the Department of Defense, and was properly considered as a major indicator of total cost to properly evaluate the true “total cost” of every TSP for each traffic channel.

Transportation of household goods historically involves not only the line-haul service for transportation of household goods from point of origin to point of destination, but SIT as well. The term “storage-in-transit” under transportation law necessarily means that the goods remain “in transit”, even though they have temporarily come to rest at a location pending delivery to final destination. Household goods therefore remain in an active transportation status under a GBL.

SDDC properly considered all relevant and significant cost factors relating to a TSPs filed rate in order to properly compute a TSP’s Best Value Scores. In addition, even if SIT played some role in the initial determination that a certain rate filed by a TSP fell outside of the competitive range, TSPs were provided the opportunity to resubmit their rates. Given that the notices of these rate rejections occurred in March, 2008, this claim is also untimely.

INCREASED COSTS

7. The protestors claim that since the rate filing in February/March 2008 there have been increased fuel costs, increased ocean rates, a devaluation of the U.S. currency and a rise in the Consumer Price Index. Consequently, protestors argue that they should be given an opportunity to reflect the costs in being at the time they submit their rates (bids). Further, the charges for accessorial established by SDDC in December 2007, and contained in the Families First International Rate Tender which are binding on all bidders, need to be updated to reflect cost increases occurring since that date.

TSPs filed rates fully aware of the period of performance of the DPS rate solicitation. The mere fact that certain TSPs do not like the terms and conditions of a solicitation does not provide any legal or factual basis to sustain a bid protest.

Protestors also fail to provide any credible evidence that fuel costs are up and ocean rates have increased. In fact, the Baltic Dry Index, a leading economic indicator of ocean shipping costs, indicates that international shipping rates have decreased almost 90 percent since June, 2008.⁹ The price of oil/fuel has also decreased significantly. In addition, TSPs fail to note to the GAO that Bunker Surcharges apply to international shipments where such surcharges are actually incurred and applicable to the specific shipment involved.

This claim is entirely inapplicable to the new rate solicitation for traffic channels outside the initial 18 sites. Nothing prevents TSPs from considering the current cost data prior to submission of their rates. In fact, it appears from current transportation industry statistics that shipping costs have dramatically declined since June, 2008. SDDC expects that TSPs will utilize current information on the status of the world economy, and related cost factors, when filing their rates for rollout to all sites outside the original 18 sites. If TSP's elect to make a unilateral business decision to not file rates for these traffic channels, that is entirely a unilateral corporate business decision.

COMPETITIVE RANGE

8. The protestors claim that after TSPs filed rates in February 2008, the zone of reasonableness was changed, and Families First should not proceed until SDDC establishes a zone of reasonableness which reflects the cost increases that have occurred since December 2007 and said zone of reasonableness should remain constant during the course of the procurement. Further, we submit that the zone of reasonableness should be modified to reflect increased costs of the nature set forth in paragraph 7, above. Failure to do this will arbitrarily restrict the number of participants in violation of the Competition in Contracting Act (CICA).

Competitive ranges were administratively determined and uniformly applied to all TSPs who submitted bids within a specific traffic channel. Initial recalculation of the competitive ranges within each traffic channel actually increased the number of qualifying TSPs. Protestors request that the competitive range should remain constant during the course of the procurement, while at the same time the competitive range should be increased is entirely inconsistent. Once again, this claim is untimely, as TSPs received BVS back in March 2008.

To the extent this argument is intended by protestors concerning the rate solicitation for traffic channels beyond the original 18 sites, this claim is premature. The competitive range of prices is determined from the overall distribution of bids that are actually received. Protestors seek a stay of the re-solicitation of rates outside the initial 18 sites to protest a competitive range that cannot factually exist at this time. Use of a competitive range does not in any way

⁹ On 21 May 2008 the index reached its record high level since its introduction in 1998, reaching 11793 points. Less than half a year later, on 4 November 2008, the index had dropped by 93%, to 815 points, the lowest since 1999.

constitute a violation of the Competition in Contracting Act, as competitive ranges are regularly used in government contracts.

DELIVERY SPREAD DATE

9. The protestors seeks a stay of a solicitation of rates based upon the premise that SDDC advised TSPs that under this procurement TSPs would have a certain spread in the date range to effectuate final delivery, and that DPS cannot accommodate this delivery spread date.

This matter is solely a matter of contract administration. TSPs complain that DPS cannot accommodate a delivery spread date, although this issue only arises in limited circumstances where the TSP and the consignee cannot obtain an agreement as to a specified delivery date. Secondly, this issue is administrative in nature, as invoice disputes must clearly be reviewed by individuals entrusted with pre-audit responsibilities prior to submission of the invoice for payment processing. Whether a certain shipment is required to even be entered as SIT during the shipment period is also a mere matter of contract administration.

INVOICE AND PAYMENT COMPUTER MODULES

10. Protestors assert next that the invoice and payment computer modules to be used in DPS have not been tested and approved.

Protestors fail to provide any evidence to support this allegation. Government contractors do not have authority to veto inherently government decisions, including matters of contract administration. The decision to implement DPS is entirely an inherently governmental function. As of the filing date of this reply, both the invoice and payment computer modules have been fully approved for implementation, and DPS is already awarding shipment offers. In fact, some of the protestors in this proceeding have actually been offered, and have accepted shipments under DPS.

TENDER OF SERVICE

11. Protestors have alleged that the Families First Tender of Service, which sets forth the obligations of TSPs under this procurement, was not released until after the rates had been filed.

The release date for the Tender of Service was Mar. 18, 2008 as posted on the SDDC website. Once again, protestors raise issues that are completely untimely. Protestors did not protest this allegation when the initial rate solicitation was issued, or when TSPs filed rates. TSPs who are the parties to this proceeding apparently for certain traffic channels were afforded the opportunity to file rates not only once, but twice if the rates were outside of the competitive range determination. TSPs were afforded the opportunity to resubmit rates for any rejected rate in March 2008.

PERFORMANCE SCORES

12. Protestors have alleged that SDDC advised industry that they could not, for several months, correct errors in CSS scores (performance scores). Protestors also assert that this necessarily means that SDDC is not applying the best value standard required by the procurement since the CSS is 70 percent of the best value score (BVS).

SDDC advised industry that for several months the program prevented correction of errors in CSS scores. However, all of those errors occurred prior to the initial rate filing of DPS in February/March 2008. In fact, every TSP was provided the opportunity to review or challenge their CSS score prior to the initial rate filing period of the solicitation at issue. TSPs at this late date cannot complain about a CSS score that they failed to challenge, or a CSS Score that was administratively determined to be correct over 6 months ago. In August 2008, TSPs were once again allowed the opportunity to validate or contest their most recent calculated performance scores that were earned for the past 12 months. Consequently, all TSPs at this time who wish to file rates in the impending rate filing period for sites outside the original 18 sites have current and valid CSS scores. This issue was not only filed late, but is factually and legally moot. In addition, SDDC does in fact review all of the current customer satisfaction surveys, and ensures the statistical validity of those surveys by directly communicating with all TSPs. In addition, SDDC currently maintains a webpage where TSPs have the ability on a 24-hour basis to log in to review, validate, or challenge any customer satisfaction survey.

CONCLUSION

We believe that this protest filing fails to meet the time filing requirements of a bid protest. It seeks relief from the GAO that would require SDDC to breach the settlement agreement reached in the previous bid protests, and/or subject SDDC itself to bid protests from TSPs who received high BVS during the competitive rate filing in March 2008;

Based on the above and the enclosed Administrative Report, we respectfully request that the protests be dismissed or denied, as appropriate.

Sincerely,



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