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FAX (202) 512-9749
Procurement Control Group
Office of General Counsel
United States General Accountability Office
441 G Street, NW
Washington, DC 20548
Attn: Katherine I. Riback, Esq.

Re: Protest of Abba International, Inc. et al., B-311225.4 –
Protester' Response

Dear Ms. Riback:

On December 1, 2008, we received the Administrative Report in response to the above protest filed on October 27, 2008. Before commenting on the specific responses to the twelve grounds set forth in the protest which, in my opinion, warrant a determination by GAO that SDDC improperly proceeded with its Families First procurement. I would first like to address some general grounds for denial of the protest advanced by counsel for SDDC, namely that the protest lacks a legal or factual basis; that the protest involves a policy decision not within the jurisdiction of GAO; and that the protest was not timely filed.

These contentions are not new. These were the identical grounds relied on by counsel for the government in its request for dismissal, dated November 5, 2008, which allegations were specifically responded to by counsel for protesters on November 7, 2008, with GAO denying the request for dismissal of the protest by Order, dated November 10, 2008.

The government's objections to the protest are no more valid today than they were last month and do not warrant denial of the protest. I have the following specific comments on the government's general contentions:

1. The Government's Allegation that the Protest Lacks a Legal or Factual Basis is Incorrect.

As shown on page 1 of its response, the government's allegation is based solely upon the Settlement Agreement, attached as Tab 2 to its response.

Answer: As set forth in detail in my response, dated November 7, 2008, it is clear that the Families First procurement or DPS involves two roll-outs, the initial roll-out being limited to the movement of military household goods and baggage shipments between 18 specifically named bases, with the second roll-out covering the remaining bases. This is clearly shown in the solicitation itself (AR Tab 2, Protesters' Response, Att. 1). I have underscored the reference in the solicitation which limited the initial roll-out to shipments moving "between the initial 18 sites," which was scheduled to begin on March 31, 2008, with the "ROLL OUT SCHEDULED FOR ALL REMAINING SITES [TO] BEGIN ON MAY 2008 AND BE COMPLETED NO LATER THAN 30 SEPTEMBER 2008..." (Att. 1., p. 3) All TSPs who wanted to participate in the Families First procurement were required to respond by filing rates in the February/March time frame covering Families First shipments moving during the period March 31, 2008 and May 14, 2009, a period of 13½ months. As set forth in the protest, SDDC delayed the Families First procurement until early November and despite the existence of a CICA stay, began to award shipments under the initial roll-out on November 19, 2008. (Att. 2).

As shown in our response to the government's request to dismiss, the protest, dated November 7, 2008 (p. 2), the Settlement Agreement specifically provided: "If the Government rolls-out the remaining sites [beyond the movements covered in the initial roll-out, *viz.* between the 18 identified sites], the Government will allow rates to be re-filed by the TSPs for the remaining sites prior to an expected roll-out [of the remaining bases]". Despite this language of the Settlement Agreement, and the fact that the initial roll-out was limited to shipments moving "between" the 18 specified military bases, the government limited the TSP rate filings to so-called "pure" traffic channels, *i.e.* those covering shipments which do not originate in or terminate at one of the 18 named sites." (Att. 3). As a result, TSPs are presently foreclosed from filing rates covering shipments which originate at a site not contained in the initial roll-out solely because the shipments are destined to points within the 18 named sites. In our response submitted to GAO on November 7, 2008, I gave as an example, a shipment originating in Fort Hood, Texas (which is not

one of the 18 named sites) destined for Spangdahlem, AFB Germany (which is one of the 18 named sites).

Not only is there no limitation in the Settlement Agreement limiting the filing of rates to so-called “pure” traffic channels, so as to preclude TSPs from filing rates covering movements beyond those of the initial roll-out but to read in such a limitation would create an unreasonable and discriminatory restriction on the response to the solicitation in violation of CICA. SDDC, by its further solicitation, which limited the November 11, 2008 rate filing to shipments which did not originate at or terminate at one of the 18 named military bases (Att. 3), precluded TSPs from filing rates covering shipments moving in many traffic channels beyond the initial roll-out. As previously pointed out, not only is such a restriction illogical, but as the signer of the agreement, I was not authorized to make such a commitment on behalf of the protesters.

The bottom line, however, is that it is not the function of GAO to resolve disputes between parties relating to why a protest is withdrawn. GAO considers the merits of pending protests and that is what is here involved.

2. Government’s Allegation that the Protest Involves a Policy Decision Not Within the Jurisdiction of GAO is Incorrect.

This contention is set forth on pages one and two of the Administrative Record where counsel state:

“Its protest also amounts to a mere disagreement with the policy decision of the Government to move from one property movement system to another property movement system [namely from the current system to the Families First procurement.]”

As shown in our protest, the government has precluded protesters from considering in their bids the final Business Rules, which were not published until November 3, 2008, the final decision of the Air Force to move its shipments in the Families First procurement, the elimination from the procurement shipments which have a portion going into non-temporary storage (NTS), changes in costs and currency fluctuations, which influence bids, and the terms, and conditions contained in the Families First Tender of Service, all of which have occurred since the February/March 2008 bid submission. Moreover when protesters submitted their bids in February/March 2008, they were bidding on 13½ months of business, viz.

from March 1, 2008 through May 14, 2009. By its delays SDDC has cut the bid tonnage in half, viz. from November 19, 2008 through May 14, 2009.

When the government changes the requirements or terms and conditions of a solicitation, either before or after responses have been received, bidders are entitled to notification of the changes and an opportunity to submit bids in response to the changes.

“...[W]here the government’s requirements changed after RFP issuance, it must issue an amendment to notify offerors of the changed circumstances and afford them the opportunity to respond... We stated that one circumstance requiring issuance of an amendment is a significant change in the government’s quantity requirements...(Citations omitted).”

Department of Energy – Request for Reconsideration, 92-2 CPD ¶20 (1992); FAR 15.206(a).

Further, as shown in our protest, the agency failed to comply with the terms of its own solicitation by not furnishing TSPs the shipment and tonnage data required for bid as specifically set forth in Business Rule 2.19 and by failing to apply the “best value” standard of the solicitation by not considering the best value rates of a TSP covering shipments moving during the peak season solely because that TSP did not offer best value rates during the off-peak season, or vice versa, by not considering best value line-haul rates solely because that TSP did not offer the best value SIT rates, by not allowing a spread in delivery dates solely because it was found to be beyond the capability of the Families First computer system, by failing to permit corrections in BVS scores solely because of the lack of computer capability, thereby departing from the distribution of shipments on the basis of best value as mandated by the solicitation and by requiring the invoicing and payment for services performed in this procurement by computer modules which have not yet been determined to work.

Government counsel completely misconceive the thrust of the protest. None of the protesters objects to the movement from the current system to the Families First procurement. The protest is limited to showing that SDDC did not follow the requirements of its own solicitation and that by delaying Families First from that initial solicitation issued on December 19, 2007

(Att. 1) until November 19, 2008 they cut the procurement period in half and also precluded bidders from reflecting in their bids changes in costs of providing the procurement services which occurred during this delay.

3. The Government's Allegation that the Protest is Not Timely is Incorrect.

I attach as No. 4 a copy of the request of government counsel for dismissal, dated April 25, 2008, of an earlier protest I filed to the Families First procurement. You will note that Ms. Meza represented to GAO: "At this time there is no certainty of the planned roll-out schedule for implementation of the Families First Program – Phase II." In closing, she stated:

"The testing schedule, demonstration and business rules may or may not result in changes to the transportation program. Nevertheless, based on possible changes to the transportation program, we respectfully request that the protest be dismissed. Any protest decision on the transportation program would be premature and academic..." (Emphasis supplied).

As soon as protesters learned, albeit it informally, that SDDC intended to begin the Families First procurement in the early part of November, they filed a protest on October 27, 2008. Under these circumstances, we respectfully submit that the protest cannot be considered to be untimely.

Although government counsel appear to address the merits of the twelve grounds presented for resolicitation of the Families First procurement, they reassert the contention that some of the matters contained in the protest are time-barred, despite the fact that the protest was filed promptly after protesters learned that the Families First procurement would proceed. As shown below in our discussion of government's counsels' specific responses to the twelve grounds contained in our protest, they have misconceived the nature of protesters' objections and ignore the specific requirements of the Business Rules which are a part of the solicitation. Protesters are not objecting to the use of the Families First procurement. The protest is based on the fact that the Families First procurement has substantially changed since the rate bids were submitted in February/March 2008 and also that SDDC failed to follow the terms of its own solicitation. Accordingly we request that GAO advise SDDC not to distribute any more shipments under the flawed Families First procurement.

In the following paragraphs I have treated each of the grounds relied by protesters, stated the government's position and furnished a direct response on behalf of protesters.

1. THE BUSINESS RULES

In our protest (p. 3), we pointed out that SDDC published a Notice in the Federal Register according TSPs the opportunity to submit comments and furnished a copy of that Notice. We brought to GAO's attention that the Business Rules are incorporated in and form a part of the solicitation and the procurement and further that 700 comments were filed to the proposed Business Rules as of the date of the protest, that the Department of Defense had not, at the time of the protest, published in the Federal Register the required disposition of industry's comments and that the final Business Rules had still not been issued. In fact SDDC's decision on TSPs' comments on the Business Rules was not issued until publication in the Federal Register of November 3, 2008 (Att. 5). It is protesters' claim that the solicitation was clearly incomplete at the time of the required submission of rates, namely in February/March 2008.

Government's Position: In response to protesters' position, the government states: "The TSPs, nevertheless, agreed to tender rates notwithstanding the status of the Business Rules and accepted shipment under the new program beginning in August."

Protesters' Response

TSPs were required by SDDC to file rates in February/March 2008 if they wanted to participate in the Families First procurement – it was not an election. Further, the initial roll-out of Families First began on November 19, 2008. (Att. 2). It is not true, as stated by government counsel (p. 4), that TSPs accepted shipments in Families First beginning in August. The fact is that this was solely a single test shipment and the initial roll-out of Families First did not begin until November 19, 2008. (Att. 6, Declaration of Charles White, para. 2).

Lastly, government counsels' response that the Business Rules were contained in Appendix U to the Defense Transportation Regulation (AR Tab 9) and on the SDDC website is disingenuous to say the least. (Att. 7, Stanley Goldman Decl.). Appendix U shows on its face that it was issued in December 2007 before the final Business Rules were ever published.

2. SHIPMENT AND TONNAGE DATA

Government's Position: Government counsel do not take issue with the fact that Business Rule 2.19 requires that TSPs be provided with shipment information for the "last two completed rate cycles." They further do not dispute the fact at the time it was determined to go forward with Families First and award shipments beginning on November 19, 2008, the IW2007 rate cycle (which ended March 31, 2008) and the IS2008 rate cycle (which ended September 30, 2008) had been completed; nor that in the domestic procurement SDDC had completed, prior to the inception of Families First on November 19, 2008, rate cycle DW07 (which ended on April 30, 2008) and DS2008 rate cycle (which ended on October 31, 2008).

Protesters' Response: The record shows that Business Rule 2.19 has not been complied with because the most current data needed to submit bids on Families First, implementation of which was substantially delayed by SDDC, were not provided to TSPs. The fact that government counsel conclude that earlier shipment and tonnage data was sufficient is immaterial. What is sufficient is to be determined by the terms of the solicitation, viz. Business Rule 2.19.

3. AIR FORCE SHIPMENTS

At the time of the protest no decision had been communicated by either the Air Force or SDDC whether its shipments would move in the Families First procurement.

Government's Position: Government counsel state that protesters' statement "is completely inaccurate, as the U.S. Air Force has officially advised SDDC that it intended to utilize DPS [Families First] for the initial 18 sites."

Protesters' Response: The important thing is that this information as to the Air Force's participation in Families First was not known at the time of the bids back in February/March 2008 or even at the time of the protest on October 27, 2008. Air Force shipments constitute over 35 percent of the total shipments moving in the household goods program. (Original White Decl., para. 2, attached to the protest). It is interesting to note that government counsel do not even attempt to indicate when the Air Force determination was made.

4. NON-TEMPORARY STORAGE

Government's Position: Government counsel state only that whether NTS shipments move in the current program or in Families First is a "management decision."

Protesters' Response: It was not until August 25, 2008, well after the Families First rates were required to be filed by protesters, that they were advised that no shipments which have a portion going into non-temporary storage (NTS) will move in the Families First procurement. (Original White Decl., para 3, attached to the protest). We further pointed out in our protest (p. 4) that this could not be reflected in the TSPs' bids even today since the historical data furnished bidders under the solicitation do not indicate the volume of NTS shipments which will not move in Families First and this lack of information precludes bidders from reflecting this historical data in their bids. We know that the amount of such shipments is substantial. (Original White Decl., para. 3, attached to the protest).

I do not disagree with the contention of government counsel that whether SDDC uses Families First as its procurement or uses the current procurement is a policy matter over which GAO has no jurisdiction (See our earlier discussion). However, this completely misconceives the basis of our protest. It is that whatever decision is made, the historical data required to be furnished TSPs to assist them in formulating their bids need to identify the shipment volume and tonnage which they learned on August 25 will not move in Families First.

5. OFF-PEAK AND NON-PEAK RATES

As pointed out in the protest (p. 4), the solicitation requires distribution of shipments based on best value and the agency requires that the cost portion (rates) of best value be within the “zone of reasonableness”.

Government’s Position: Government counsels’ principal response is that protesters’ objection is not timely. However, as shown above, government counsel has taken the position that, as of April 25, 2008, any protest to the Families First procurement should not be entertained by GAO because no decision had been made as to whether there should be any change in the current procurement in the form of Families First or otherwise. (Att. 4).

Protesters’ Response: As shown above, this protest was immediately filed on learning of SDDC’s intention to proceed with the change from the current procurement to Families First which was to begin in early November and was subsequently delayed until November 19, 2008. Therefore by the government’s own standard, the protest was timely filed. Although government counsel state in opposition to this protest factor that TSPs were permitted to re-file rates which were outside the zone of reasonableness, this misconceives the nature of our contention. Protesters are not arguing that rates which were excluded because they were beyond the zone of reasonableness should have been included. The objection goes to the exclusion of rates which were determined to be within the zone of reasonableness but which were nevertheless eliminated by SDDC from best value consideration solely because other rates covering a different time period were outside the zone of reasonableness. As a result, the government is not applying the best value criterion contained in the Business Rules which are part of the solicitation.

6. STORAGE IN TRANSIT

Government’s Position: Government counsels’ principal contention is that protesters’ objection is not timely. Protesters again claim that it was improper for SDDC under the solicitation to eliminate from its best value consideration line-haul rates which were within the zone of reasonableness solely because SIT rates were not. Many shipments move to destination without incurring SIT and as a result, the government by rejecting line-haul rates, which are admittedly within the zone of reasonableness, has again departed from the best value shipment distribution criterion which is

embedded in the Families First procurement. In response to the government's contention that the protest is untimely we rely on our earlier discussion.

7. INCREASED COSTS

In our protest (p. 4) we pointed out that the fuel costs, ocean rates, currency fluctuations and the CPI, which were in existence in February/March 2008, are no longer applicable to this procurement which was delayed until November 19 and contended that protesters should be given the opportunity to reflect these increased costs in their bid submissions which have occurred after their bids were submitted but prior to the delayed inception of Families First.

Government's Position: Government counsel state that TSPs were fully aware of the period of performance of Families First and further that no credible evidence was presented with regard to fuel cost increases or ocean rates increases, relying on the Baltic Dry Index.

Protesters' Response: This begs the fact that the bids were submitted on a performance period of 13½ months, namely March 31, 2008 through May 14, 2009. The period was changed after bid submission so that Families First now covers performance during the period November 19, 2008 – May 14, 2009, a period of 6 months rather than 13 months. Further, February 1/March 1, 2008 costs did not remain constant so that they are the not same in November 2008. We respectfully submit that the government's delay in the performance of Families First warrants that TSPs be accorded the opportunity to reflect in their bids cost changes which occurred during the delay. For the sake of completeness we point out that the Baltic Dry Index does not apply here since the shipments involved are restricted to carriage in U.S. – flag vessels.

Lastly in response to SDDC's Federal Register publication of April 1, 2008, the Household Goods Forwarders Association of America, Inc., on behalf of its members, which include protesters, filed comments on the proposed Business Rules seeking a pass-through of the increased cost of fuel (50 percent increase overseas – reimbursement of 0 percent, within CONUS an increase of 30-40 percent – reimbursement 17 percent) and request was made for a pass through of increases, since the time of rate submissions in February/March 2008, for fuel, currency and ocean rates. (Att. 8). It was not until November 3, 2008, eight months after the rate bids that the Business

Rules were made final, that TSPs learned that the requested pass-through would not be allowed.

8. COMPETITIVE RANGE

In our protest (p. 5), we pointed out that the zone of reasonableness should be modified to reflect cost increases which have occurred since December 2007 when SDDC first went out with the solicitation on Families First.

Government's Position: Government counsel do not appear to address the merits of this objection to the solicitation but are content to assert that this claim should not be considered because it is untimely as being either late or premature.

Protesters' Response: We rely on our earlier response with regard to lack of timeliness and reassert our contention that TSPs should have the opportunity to reflect costs incurred in performing the services required by the solicitation at least at the beginning of the performance period, here November 19, 2008. We see nothing in the government's response which supports a conclusion that this should not be allowed.

9. DELIVERY SPREAD DATE

As shown in our protest (p. 5), TSPs were advised by SDDC that they could arrange for a spread in delivery dates. However, after the rates were filed, TSPs were advised that the Families First computer system could not properly reflect the delivery spread dates. (Att. 6, Charles White Declaration, para. 3).

Government's Position: Government counsel improperly characterize this contention as one of "contract administration" and therefore beyond the jurisdiction of GAO. As a result they do not treat the merits of this claim.

Protesters' Response: This is not a matter of contract administration. Our point is that the failure of the Families First computer system, learned after bids had been submitted, charged TSPs with delivery on a date certain and deprived them of SIT charges when a shipment delivered within the agreed delivery spread. We point out that the new requirement of delivering a shipment on a date certain, rather than within an agreed spread of delivery dates, increases costs which TSPs should be permitted to reflect in their bids

along with lost SIT revenues. TSPs are paid SIT charges in the event of an early delivery in the current program. As a result, it is our position that TSPs should be permitted to reflect the lack of these SIT revenues in their bids since they did not learn that they would not get the financial benefit of delivery spreads until after their bid submissions were required to be made in February/March 2008.

10. INVOICE AND PAYMENT COMPUTER MODULES

As set forth in our protest (p. 5), we asserted that invoice and payment computer modules used in Families First have not been tested and proven to work. Since payment is an essential element of any solicitation and since invoicing and payment under Families First can be made only by use of computer modules, the Families First procurement should not proceed until the computer modules have been tested and proven to work.

Government's Position: Government counsel appear to state that this decision is solely within SDDC and beyond GAO's jurisdiction and further that both the invoice and payment computer modules have been fully approved.

Protesters' Response: Soliciting services without payment would, in our opinion, completely undermine the competitive bid system, would violate CICA and would be well within the jurisdiction of GAO. Further, the invoice and computer modules have still not been tested and proven to work. (Att. 6, Declaration of Charles White, para. 4).

11. TENDER OF SERVICE

In our protest (p. 5), we pointed out that the Families First Tender of Service, which contains terms and conditions of service applicable to both the domestic and international Families First procurements, was not released until March 18, 2008, after the rates had been filed. Since the Tender of Service is a part of the solicitation, the solicitation was clearly incomplete at the time of the bids.

Government's Position: Again government counsel claim that this protest is untimely and advise that "the release date for the Tender of Service was March 18, 2008 as posted on the SDDC website". Government counsel then states that TSPs did not protest this allegation when the initial rate solicitation was issued and observes that TSPs whose rates were rejected because they were outside the "competitive range" or zone of reasonableness could refile their rates in March and therefore allegedly could have reflected the terms and conditions set forth in the Tender of Service.

Protesters' Response: First, initial rates were required to be filed in February 2008 and only rates which were rejected as being beyond the zone of reasonableness could be filed in March. On this protest ground, we are not talking about rates which were rejected because they were beyond the zone of reasonableness; we are talking about rates which were accepted by SDDC in February and therefore these TSPs could not have reflected in their bids the terms and conditions set forth in the Tender of Service which, according to government counsel, was not released for posting on the SDDC website until March 18, 2008. The March 18 date is confirmed by Charles White (Att. 6, Charles White Decl., para 5). Both government counsel and protesters disagree with Mr. Blackburn's allegation that the Tender of Service "was updated and officially published on the SDDC website on or about 22 October 2007. (Blackburn Dec., fourth para.). Lastly, Mr. Blackburn, who submitted his declaration as "Branch Chief, Personal Property Information and Business Integration for the Surface Deployment and Distribution Command," was not hired by SDDC until August 2008.

12. CORRECTION OF BVS SCORES

In our protest (p. 5), we pointed out that SDDC advised industry they could not correct errors in the CSS scores (Performance Scores which is 70 percent of the best value score (BVS) and therefore SDDC was not applying the best value shipment distribution criterion set forth in the solicitation.

Government's Position: Government counsel state that TSPs were provided with the opportunity to review or challenge their CSS score; they do not deny that when a TSP reviewed and pointed out errors in its CSS scores that SDDC stated it could not make the correction.

Protesters' Response: SDDC did not, and stated it could not, correct errors in the CSS scores and therefore distribution of shipments was not made in accordance with the BVS standard in violation of the terms of the solicitation. (Att. 6, Charles White Decl., para. 5 and attachment to declaration).

CONCLUSION

We respectfully submit that the foregoing establishes that the Families First procurement has substantially changed since the date of the rate bids required to be submitted in February/March 2008 and also that SDDC did not follow the terms of its own procurement. Accordingly we request that GAO advise SDDC not to distribute any further shipments in Families First until these deficiencies have been corrected.

Very cordially yours,

DENNING & WOHLSTETTER

By Alan F. Wohlstetter
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Attachments (8)

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