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IN THE
UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST

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U.S. COURT OF FEDERAL CLAIMS

BINL, INC.,
CAISSON FORWARDING CO.,
CLASSIC FORWARDING, INC.
CRYSTAL FORWARDING, INC.,
GREAT AMERICAN
FORWARDERS, INC.,
SILVER RIDGE
FORWARDING, INC., and
U.S. VAN LINES, INC.

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Case No. _____

12 - 71 C

**PRE-AWARD PROTEST
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

COMES NOW, the Plaintiffs BINL, Inc., Caisson Forwarding Company, Classic Forwarding, Inc., Crystal Forwarding, Inc., Great American Forwarders, Inc., Silver Ridge Forwarding, Inc. and U.S. Van Lines, Inc. (individually, "BINL," "Caisson," "Classic," "Crystal," "Great American," "Silver Ridge," and "U.S. Van," respectively, and, collectively, "Plaintiffs") by and through their undersigned counsel, and pursuant to Rules 3, 7, 8 and Appendix C of the Rules of the United States Court of Federal Claims, as and for their Complaint against the United States Department of Defense, United States Transportation

Command, Military Surface Deployment and Distribution Command (“SDDC” or “the Agency”), respectfully state to this Honorable Court as follows:

I. Nature of the Action and Statement of the Case

1. This is an action for declaratory and injunctive relief pursuant to the Tucker Act, 28 U.S.C. § 1491(b)(1) & (2).

2. By this action, Plaintiffs seek review, prior to award of contracts for the movement of household goods of members of the armed forces and civilian Department of Defense employees for the period May 2012 through May 2013, of “unearned freight” terms of the Agency’s Defense Personal Property System (“DPS”) rate solicitations under Military Surface Deployment and Distribution Command, International Tender 2012 (“IT-2012”) and Domestic 400-NG-2012 Tariff (“400-NG-2012”).

3. Qualified bidders who submit rates during the 2012 bidding period, if successful, will be bound contractually by the terms, conditions and rules set forth, for international movements, in IT-2012 and, for domestic movements, in 400-NG-2012. Accordingly, those terms, conditions and rules are a material part of the rate solicitations challenged here.

4. Specifically, both the DPS IT-2012 and 400-NG-2012 rate solicitations incorporate “unearned freight” terms purporting: to prohibit Transportation Service Providers (“TSPs”) who transport household goods and unaccompanied baggage (“HHG”) under those Agency contracts from collecting freight charges on lost or damaged shipments; to require refunds of freight charges on such shipments; and to permit the Agency to offset freight charges on such shipments against amounts otherwise due the TSP for other movements completed successfully, when the TSP delivers a new item to the servicemember at destination to replace the lost or damaged item,

or the full value thereof, including costs of shipping. IT-2012 Item 402(a) & (b); 400-NG-2012 Item 46A(1) & (2).

5. Since 2007, the Agency has been under a Congressional mandate, set forth in 10 U.S.C. § 2636a(a), to include in contracts for the transportation at Government expense of HHG for members of the armed forces or civilian employees of DoD provisions requiring the TSP to pay the **full replacement value** for loss or damage to the HHG transported under the contract, as opposed to the **depreciated value** which formerly applied. The Agency carried out this requirement in 2007 by changing the old depreciated value contract terms to a requirement that the carrier must settle loss or damage claims by **replacing the goods at destination**, or by paying the full replacement cost to the owner, defined as **“the replacement cost at destination. It includes any shipping charges and sales tax.”** This obligation is now incorporated into the terms of both the IT-2012 and 400-NG-2012 solicitations.

6. Congress further specified the Agency’s remedy, in the event that the TSP failed to fulfill its obligations to settle loss or damage claims by giving the servicemember full replacement value at destination. If the TSP does not pay the claim at full replacement value, “the amount equal to the full replacement value for the baggage or household effect shall be deducted from the amount owed by the United States to the carrier under the contract **upon a failure of the carrier to settle a claim for such loss or total damage within a reasonable time.**” 10 U.S.C. § 2636a(b) (emphasis added). The law also requires the amount so deducted to be paid to the claimant (and not retained by the Government), presumably so that the claimant would have the funds needed to replace the lost or damaged item at the place where he or she is stationed. *Id.* However, Congress gave the Agency **no** authority to make deductions from or to offset amounts otherwise due the TSP under the contract in cases when the TSP timely and fully

performs its “full replacement value” obligations. Recently, the Agency has given notice that it intends to do exactly that in loss or damage cases, relying on the authority of the “unearned freight” refund provisions of the solicitations.

7. Under the current Congressionally-mandated “full replacement value” regime, the TSP is now obliged to provide the full benefit of the transportation contract to the person whose goods are shipped, by paying the full replacement costs of lost or damaged items to the destination -- the place where it was contractually obligated to deliver the items -- or to actually cause replacement items to be delivered to that location. Having fully performed the transportation required under the contract, the TSP has rightfully earned, and is entitled to, its compensation under the contract – all transportation charges applicable to the shipment.

8. The solicitations’ “unearned freight” and offset provisions, as the Agency interprets them, compel a directly contrary result. They confer an unreasonable benefit on the Government, and impose a non-compensatory penalty on a TSP who fulfills in every respect its obligations to provide “full replacement value” on loss or damage claims. Accordingly, they violate settled principles and practices of commercial transportation law, which Congress expressly intended the Agency to follow in implementing its “full replacement value” mandate.

9. In light of Congress’ clear intention, reflected in 10 U.S.C § 2636a(a), its legislative history, and current solicitation terms providing that, in the event of a lost or damaged shipment, the TSP is obliged to make the HHG recipient whole by paying the full replacement value of the lost or damaged item at the specified destination, including the cost of shipping the item there, or delivering a replacement item to the destination, the additional solicitation terms challenged hereby, which also purport to empower the Agency to force the TSP to forfeit its freight charges, and to offset those forfeited freights against other amounts due the TSP under the contract, are

arbitrary, capricious, irrational, an abuse of discretion, and contrary to law and Congressional intent.

10. Accordingly, as set forth in detail in the prayer for relief hereto, Plaintiffs seek, among other relief, the Court's declaration that the inclusion of those provisions in the solicitations are arbitrary, capricious, without a rational basis, an abuse of discretion, and contrary to law and Congressional intent, and an injunction directing the Agency to delete the "unearned freight" provisions -- at IT-2012 Item 402(a) & (b) and 400-NG-2012 Item 46A(1) & (2) -- from the IT-2012 and 400-NG-2012 and subsequent rate solicitations, so that they do not become part of the contracts of successful TSP bidders during the 2012 cycle or thereafter.

II. Jurisdiction, Venue and Timeliness

11. This Court has original jurisdiction over this pre-award bid protest, and venue lies here, pursuant to 28 U.S.C. § 1491(b)(1).

12. This pre-award protest is timely filed. The first round of DPS IT-2012 and 400-NG-2012 rate solicitation bids are due no earlier than February 5, 2012, and the deadline for submission of first round rate bids is February 10, 2012. This protest is filed before the bid opening date, and well before the bidding deadline.

III. Parties

13. Plaintiff BINL is a corporation, an incumbent DP3 TSP, holds all the qualifications, approvals and certifications, and meets all the Tender of Service requirements, necessary to submit rate bids in response to the Agency's DP3 IT-2012 and 400-NG-2012 rate solicitations, and has a *bona fide* intention to timely submit rate bids in response to both solicitations at issue.

14. Plaintiff Caisson is a corporation, an incumbent DPS TSP, holds all the necessary qualifications, approvals and certifications and meets all the Tender of Service requirements

necessary to submit rate bids on lanes in response to the Agency's DPS IT-2012 and 400-NG-2012 rate solicitations, and has a *bona fide* intention to timely submit rate bids in response to the 400-NG-2012 domestic rate solicitation.

15. Plaintiff Classic is a corporation, an incumbent DPS TSP, holds all the necessary qualifications, approvals and certifications and meets all the Tender of Service requirements necessary to submit rate bids on lanes in response to the Agency's DPS IT-2012 and 400-NG-2012 rate solicitations, and has a *bona fide* intention to timely submit rate bids in response to both solicitations at issue.

16. Plaintiff Crystal is a corporation, an incumbent DPS TSP, holds all the necessary qualifications, approvals and certifications and meets all the Tender of Service requirements necessary to submit rate bids on lanes in response to the Agency's DPS IT-2012 and 400-NG-2012 rate solicitations, and has a *bona fide* intention to timely submit rate bids in response to both solicitations at issue.

17. Plaintiff Great American is a corporation, an incumbent DPS TSP, holds all the necessary qualifications, approvals and certifications and meets all the Tender of Service requirements necessary to submit rate bids on lanes in response to the Agency's DPS IT-2012 and 400-NG-2012 rate solicitations, and has a *bona fide* intention to timely submit rate bids in response to both solicitations at issue.

18. Plaintiff Silver Ridge is a corporation, an incumbent DPS TSP, holds all the necessary qualifications, approvals and certifications and meets all the Tender of Service requirements necessary to submit rate bids on lanes in response to the Agency's DPS IT-2012 and 400-NG-2012 rate solicitations, and has a *bona fide* intention to timely submit rate bids in response to the IT-2012 international rate solicitation.

19. Plaintiff U.S. Van is a corporation, an incumbent DPS TSP, holds all the necessary qualifications, approvals and certifications and meets all the Tender of Service requirements necessary to submit rate bids on lanes in response to the Agency's DPS IT-2012 and 400-NG-2012 rate solicitations, and has a *bona fide* intention to timely submit rate bids in response to the 400-NG-2012 domestic rate solicitation.

20. Each of the Plaintiffs is an "interested party," for purposes of 28 U.S.C. § 1491(b)(1), in that each has a direct economic interest in the outcome of this protest, and/or absent the relief requested, would suffer prejudice and a non-trivial competitive injury, including, without limitation any or all of the following:

(a) The solicitation's "unearned freight" provisions would force forfeiture of freight charges for lost or damaged shipments, even if Plaintiff satisfies in full its obligations to settle loss or damage claims by providing to the recipient "full replacement value" of such items at the specified destination, including shipping charges. Such forfeitures would substantially increase the Plaintiffs' costs and economic risk of performing DPS HHG contracts;

(b) the Agency's exercise of its purported power under the solicitation terms to unilaterally offset against freight charges due for shipments not lost or damaged, freight charges on other lost or damaged shipments, even if Plaintiffs satisfy their obligations to settle the loss or damage claims by providing to the servicemember "full replacement value at destination," including shipping costs, will likely impede and disrupt Plaintiffs' revenues and cash flow, and reduce its profit margins;

(c) Plaintiffs are relatively small businesses, and each derives nearly all of its operating revenues from the DPS program. Relative to other larger and more diversified prospective DP3 bidders, each Plaintiff lacks the capacity to bear the costs of insuring against, or otherwise to

absorb, the increased economic risk, and the revenue, cash flow, and profit margin impacts caused by the defective solicitation; and

(d) In order to compensate for the economic risks and impacts caused by the defective solicitation, Plaintiffs may be forced to decline to bid or to submit increased rate bids on certain lanes and channels. Declining to bid on certain rates and channels would place Plaintiffs at a competitive disadvantage relative to other bidders better able to absorb such risks who submit bids, and who are awarded contracts, on such lanes and channels. On DPS rate bids, the Agency applies a target range of reasonableness to determine whether to accept or reject such bids, and that target range is unknown to the bidders. If the Plaintiffs must increase rate bids to address the economic risks and impacts of the defective solicitation, they also will bear an increased the risk that the rate will be rejected as outside the competitive range, placing them at a competitive disadvantage.

21. Defendant is United States, through the Department of Defense, United States Transportation Command, Military Surface Deployment and Distribution Command (“Agency”), the contracting authority for the DPS program, and the issuer of the DPS IT-2012 and 400-NG-2012 rate solicitations challenged here.

IV. Factual Allegations

A. Transition from “Depreciated” to “Full Replacement” Value For Lost or Damaged HHG Claims

22. Members of the armed services and civilian DoD employees are subject to frequent relocation throughout their careers. The movement of armed service members’ and their families’ personal effects is generally paid for by the U.S. military, under programs administered by the Agency in what is known as the Defense Personal Property System. The Agency spends approximately \$2.3 billion on approximately 600,000 movements of household goods, per year.

23. Qualified carriers and forwarders known as Transportation Service Providers (“TSPs”) bid on these moves by submitting rates to the Agency in response to periodic, published DPS solicitations that contain the terms and conditions to which TSPs agree when they submit their rates.

24. Among other things, the Agency’s solicitations specify the liability of TSPs for loss of, or damage to, the service members’ shipments of household goods carried under the resulting contracts.

25. Historically, these solicitations originally limited the liability of TSPs to a depreciated value of 60 cents per the weight of an item, later increased to \$1.25 multiplied by the weight of an item, unless the shipper paid an additional fee, called a “valuation charge,” to declare a higher value.

26. These former solicitations also contained terms specifying that TSPs will not collect, or require a shipper to pay, any published freight charges (including any charges for accessorial or terminal services) when that shipment is totally lost or destroyed in transit, and required the TSP to refund the portion of its freight charges corresponding to the portion of the shipment lost or destroyed. This was reasonable, because under the depreciated value liability limits, and the fact that household goods were generally used and worth relatively little on a depreciated basis, the servicemember had not received substantially the benefit of the transportation contract.

27. In 2002, concerned about widespread problems within the existing system for moving the possessions of service members and their families, the DoD submitted a report to Congress outlining proposals for improving the system. This report led to the development of the DoD “Families First” program, intended to improve the quality of household goods moves.

Among the problems to be addressed was the fact that, under the existing “depreciated value” system, service members were not fully compensated for lost or damaged goods.

28. In support of this initiative, in November 2003, Congress included a provision in the National Defense Authorization Act for Fiscal Year 2004 (the “2004 Act”) permitting the Secretary of Defense to include a term in contracts for the transport of armed services members’ household goods that would require the TSP “to pay the full replacement value for loss or damage to the baggage or household effects transported under the contract.” Pub. L. No. 108-136, § 634 (codified as amended at 10 U.S.C. § 2636a). The same section of the 2004 Act authorized the DoD to deduct the full replacement value (“FRV”) for lost or damaged items from the amount owed by the Government to the TSP under the transportation contract if the TSP failed to settle the claim within a reasonable period of time. *Id.*

29. The Conference Report that accompanied the final version of the 2004 Act described the underlying rationale as follows:

The conferees understand that the Department of Defense intends to implement changes to claims procedures, including use of the full replacement value standard, as part of more comprehensive changes under the “Families First” Program. The conferees fully support implementation of the various aspects of the “Families First” program, including use of customer surveys, increased direct deliveries through customer to carrier contact, and the on-line claims filing processing. Additionally, the conferees expect that the full replacement value standard for loss or damage will be implemented in a manner that is consistent with commercial practices and that is fully explained to military members who should benefit from this new approach.

H.R. Rep. No. 108-354, at 709 (2003) (emphasis added).

30. Subsequently, the “Families First” program encountered delays in its implementation. These delays prompted Congress in 2006 to include a provision in the John Warner National Defense Authorization Act for 2007, requiring the Secretary of Defense to begin including FRV liability in all contracts for movements of service members’ and civilian

military employees' household goods. Pub. L. No. 109-364, § 363 (codified as an amendment to 10 U.S.C. § 2636a). Explaining the need for this provision, the Senate Armed Services Committee stated:

The committee believes that the time is past due for implementing the contractual authority requested by the Department in 2003 and included in section 634 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136). Military personnel and their families have waited long enough for realization of the Families First promise of full replacement value for household goods lost and damaged by movers in connection with permanent changes of station.

The committee has concluded that implementation of the full replacement standard for both military members and civilian employees by means of contractual changes with carriers must precede implementation of the Defense Personal Property System (DPS) under the Families First program.

S. Rep. No. 109-254, at 335 (2006).

31. Pursuant to this statutory requirement, beginning in the Fall of 2007 SDDC changed the terms of its solicitations. Under the revised terms, if a shipper files a loss or damage claim with the TSP within nine months of the delivery date, the TSP is made liable for the full replacement value of the lost or damaged goods, subject to certain maximum liability limits. Within these limits, the TSP must replace the lost or damaged item with a new one at destination or pay the shipper its cash equivalent. Under the explicit terms of these revised solicitations and resulting contracts, this liability includes costs required to ship the replacement goods to the specified destination.

32. These "full replacement value at destination" ("FRV") terms effectively require the TSP to remedy loss or damage claims such that the claimant is restored to the position it would have been in had the loss or damage not occurred: *i.e.*, full replacement, delivered to the destination originally specified, at the TSP's expense.

33. Beginning in 2009, the SDDC began to phase in the “Families First” program, with the new name of DP3. During this phase-in period, SDDC issued two solicitations, one as DP3 and the second under the old system known as TOPS. While the rate solicitations issued under the old system consistently contained provisions requiring refunds of transportation charges, the International DPS rate solicitations issued by the Agency for the 2009 and 2010 rate bidding cycles deleted transportation charge refund provisions.

34. The Agency’s deletion of solicitation provisions requiring refunds of freight charges was consistent with the principle that, under FRV liability, once claims have been settled, and the claimant has obtained the full benefit of the transportation services bargained for—full replacement of lost or damaged items, delivered to the specified destination, or the monetary equivalent—the TSP has substantially fulfilled its obligations and is entitled to retain its freight charges.

B. Defective “Unearned Freight” Provisions of the Solicitations

35. The DPS IT-2012 and 400-NG-2012 rate solicitations each contain detailed FRV HHG loss and damage claim liability provisions that implement Congress’ statutory mandate. Those provisions supplant pre-FRV loss and damage claim liability provisions that were predicated on depreciated value and/or valuation charges. Specifically, the 2012 solicitations’ FRV liability provisions provide:

A. When the owner files a claim with the TSP within nine months of delivery, the TSP is liable for the Full Replacement Value of any lost or destroyed items. IT-2012 Item 400(f)(2)(b); 400-NG-2012 Item 2(2)(b);

B. For items damaged but not destroyed, the TSP must either repair the items, or pay the costs of repair, and for items destroyed or lost, the TSP must either replace the lost or destroyed

item with a new item, or pay the un-depreciated replacement cost of a new item, with replacement cost based on the replacement cost *at destination, including the costs of shipping the item there*. IT-2012 Item 400(f)(2)(f); 400-NG-2012 Item 2(2)(f).

36. These requirements ensure the result that Congress intended: at the end of the claims process, the claimant receives at its destination the HHG entrusted to the TSP, either repaired or replaced with a new item, or has been compensated in full for the cost of a new, un-depreciated, replacement delivered to the destination. When the claim has been fully settled, the consignee will have received the full benefit of the transportation services for which the Government contracted—*i.e.* having all goods delivered to the designated destination—despite the initial loss or destruction.

37. The current terms of the solicitations, however, impose burdens on the TSP far beyond merely making the Government and shipper whole. They contain “unearned freight” abatement terms which would restore the pre-FRV “depreciated value”-era requirement that the TSP refund freight charges for transportation of lost or destroyed items.

38. The DPS IT-2012 and 400-NG-2012 rate solicitations each contain terms prohibiting the TSP from collecting or requiring a shipper to pay freight charges when a shipment is totally lost or destroyed; and, for shipments partially lost or destroyed, to refund that portion of the freight charges corresponding to the lost or damaged items. IT-2012 Item 402(a) & (b); 400-NG-2012 Item 46A(1) & (2).

39. From the face of the “unearned freight” abatement provisions, it is clear that they are artifacts of pre-FRV “depreciated value” or “valuation charge” liability standards which Congress specifically directed the Agency to abrogate. They refer expressly to liability limits and commercial-sector regulations predicated on a depreciated value methodology. Also, the

liability standards and regulations referenced in the “unearned freight” provisions are either wholly inapplicable to movements of Government HHG or simply do not address abatement of freight charges at all. Thus, much of the “unearned freight” provisions’ language conflicts with, and bears no relationship to, the Congressionally-mandated FRV liability standards in the solicitations. Their inclusion in the solicitation was irrational and contrary to law.

40. Specifically:

A. (i) The “unearned freight” clause of the current IT-2012 International Tender solicitation (Item 402) refers to a “valuation charge” the shipper is responsible to pay in the event of a total loss. This language relates solely to the pre-FRV liability limit regime, when a shipper had the option to pay a fee for a valuation higher than the normally-prevailing depreciated value liability base. *See* Para. 25, *supra*. The current loss and damage liability provision of the Tender (Item 400) make no reference to liability limits based on “valuation charges.”

(ii) The International Tender solicitation “unearned freight” clause also says that, in the event of partial loss or destruction, the TSP will dispose of claims “as provided in 49 CFR Part 1005.” (Item 402). 49 C.F.R. § 1005.5, entitled “Disposition of Claims,” provides that, when settling a claim for loss or damage, a household goods carrier “shall use the replacement costs of an item ***as a base to apply a depreciation factor to arrive at the current actual value of the lost or damaged item.***” This regulatory reference may make sense in the context of a provision regarding disposition of loss or damage claims based on depreciated value, but it has no rational application to a provision purporting to require freight charge refunds when claims are settled according to the FRV liability provisions of the Tender.

B. (i) The “unearned freight” clause of the current 400-NG-2012 Domestic Tariff also refers to a “valuation charge” the shipper is responsible to pay in the event of a total loss. (Item

46A). Like the International Tender, the current Tariff's loss and damage liability provision (Item 2) makes no reference whatsoever to liability limits based on "valuation charges."

(ii) The Tariff's "unearned freight" clause also says that, in the event of partial loss or destruction, the TSP will dispose of claims "as provided in 49 CFR 375.1(b)(1)."

(a) First, Part 375 of Title 49, CFR applies only to "individual shippers" as defined in the regulation, and neither the Government nor a servicemember consignee. Persons whose property is transported under the solicitations at issue here are defined in the regulation as "Government bill of lading shipper[s]," and they are excluded from the scope of Part 375. The regulation is, on its face, inapplicable to the types of shippers who move HHG under the Tariff.

(b) Second, there is no Section 375.1(b)(1) in the current version of Title 49, C.F.R. In any event, when that section was in effect, it was merely a definition of "household goods." It did not address disposition of HHG loss and damage claims, or freight charge refunds, at all. A regulation that only provides a definition of "household goods" cannot rationally be applied to authorize a freight charge refund, or to govern how a TSP must dispose of a loss or damage claim.

(c) Moreover, the section of the regulations that does govern settlement of HHG loss or damage claims is in 49 C.F.R. § 370.9(b), and it says: "***when settling a claim for loss or damage, a common carrier by motor vehicle of household goods as defined in § 375.1(b)(1) shall use the replacement costs of the lost or damaged item as base to apply a depreciation factor to arrive at the current actual value of the lost or damaged item.***" Like the regulation cited in the International Tender, this regulation has no rational application to a provision purporting to require freight charge refunds when claims are settled according to the FRV liability provisions of the Tariff.

C. Unlawful Effects of “Unearned Freight” Solicitation Provisions

41. Both DP3 IT-2012 and 400-NG-2012 rate solicitations indicate that loss and damage liability of TSPs is to be determined in accordance with the Carmack Amendment to the Interstate Commerce Act (title 49, United States Code, Section 14706), except as otherwise provided in the solicitations. This echoes Congress’ intent, expressed in the Conference Report that accompanied the final version of the 2004 Act, that “the full replacement value standard for loss or damage will be implemented in a manner that is consistent with commercial practices . . .” Para. 29, *supra*.

42. Carmack Amendment decisions and settled transportation law regarding recovery of freight charges follows classic “benefit of the contract” principles: if the shipper has been placed in the same position as if the contract of carriage had been successfully performed, then it is not entitled to recover freight charges. In Carmack cases where specific performance of the transportation contract is ordered, no damages are available.

43. Applying those principles in this situation, if the TSP fulfills its obligations under the solicitations’ FRV provisions, and makes the servicemember whole for any lost or damaged property, by providing claimant the full value of a new replacement for a loss or damaged item, including shipping costs to the destination, or delivering a new replacement to the destination, then the TSP has earned its freight charges, and is entitled to payment of them in full.

44. The solicitations’ provisions requiring forfeiture of freight charges in such situations results in a penalty to the TSP, and a double benefit to the Government. The servicemember gets new goods shipped to his destination, and the TSP gets nothing.

45. The Agency’s requirement that TSPs contractually agree to forfeit payment for freight charges, despite providing the full benefit of the transportation contract by settling claims

according to the FRV standard, is inconsistent with Congress' intent in authorizing, and subsequently requiring, DoD to adopt a FRV liability scheme. As noted above, the primary intent of Congress in mandating FRV liability was to ensure that service members' families are made whole for lost or damaged HHG shipments. There is no evidence of an ancillary intent to penalize TSPs by depriving them of the consideration earned in making good a FRV claim.

46. Under Carmack precedent and settled principles of transportation law, the obligation of a carrier to a shipper whose goods are lost or damaged is to place the shipper in the position he would have been in had the contract been performed, not to subject the carrier to a penalty, or to confer benefits on the shipper greater than the benefit of the contract.

47. This basic inequity was recognized initially by the Agency when it published its first two rounds of rate solicitations under the new DP3 system without the "unearned freight" provisions forfeiture of freight charges. For reasons that are not clear, however, the Agency elected to return to this unjust arrangement in its recent solicitations.

48. In addition to mandating FRV liability, in the applicable statute, Congress also prescribed a corresponding "setoff" remedy to be exercised by the Agency. If the TSP fails to timely settle loss and damage claims in accordance with the solicitations' FRV provisions, then "the amount equal to the full replacement value for the baggage or household effect shall be deducted from the amount owed by the United States to the carrier under the contract" 10 U.S.C. § 2363a(b). As noted previously, the term "full replacement value," includes shipping costs to destination. Thus, only when the TSP fails to timely settle a claim at full replacement value did Congress authorize the Agency to offset amounts including shipping charges against amounts otherwise due.

49. Congress *did not* give the Agency authority to require forfeiture of freight charges on lost or damaged shipments on claims where the TSP fulfills its FRV obligations, nor did it authorize the Agency to enforce such a forfeiture by offsetting those charges against other amounts for other shipments owed to the TSP under the contract. Where the TSP fulfills its FRV obligations, the Agency's offset authority is limited to that prescribed by the statute.

50. The Agency, in connection with certain HHG losses incurred in a warehouse fire in Germany, is attempting to apply "unearned freight" offsets, notwithstanding the fact that applicable tender terms did not include "unearned freight" provisions. Such action, and the Agency's interpretation of the current "unearned freight" solicitation provisions as giving it such offset authority, are arbitrary, capricious, irrational, *ultra vires* and contrary to law.

51. The presence in the solicitations of the "unearned freight" provisions described above, their inclusion in transportation contracts resulting from the 2012 rate bidding cycle, and enforcement of the provisions through offsets, will have a very real, prejudicial, and punitive economic impact on TSPs, far beyond the traditional compensatory function of transportation contract remedies for loss or damaged goods claims.

52. To meet its obligations under contracts resulting from the solicitations in their present form, the TSP will be required to incur or bear the costs of new replacement items, and the freight costs of transporting the items to the destination, but will receive no contract compensation whatsoever. Many movements involve the use of carriers other than the TSP. In addition to those FRV claim settlement costs, the TSP must also pay freight and accessorial charges of those underlying carriers, regardless of whether the Government pays the TSP's freight charges for the movement. In many situations, the liability of the underlying carrier to the TSP on a loss or damage claim is strictly limited, for example, to \$500 in the case of an

ocean carrier. In such situations, the solicitation, as presently configured, would require the TSP to pay not only the cost or value of new replacement items and the costs of shipping the new item to the destination, *but also* any underlying carrier's freight and accessorial charges on the original movement, all without receiving any revenue from the Government.

53. Such a result is not only contrary to law, it is unfair, unworkable, and commercially unreasonable. It violates Congress' intention that the Agency act in a manner consistent with commercial practice in implementing its FRV mandate. It goes far beyond making the Government whole for any damage arising from the TSP's failure to perform under the contract, and amounts to imposition of an unreasonable and unlawful penalty on the TSP.

IV. Claims for Relief

54. Plaintiffs repeat and re-allege here Paragraphs 1 through 53, as if set forth herein in their entirety.

55. For the reasons stated above, the Agency's inclusion in the rate solicitations "unearned freight" terms, at IT-2012 Item 402(a) & (b) and 400-NG-2012 Item 46A(1) & (2), purporting: to prohibit the TSP from collecting or requiring a shipper to pay freight charges when a shipment is totally lost or destroyed; for shipments partially lost or destroyed, to refund that portion of the freight charges corresponding to the lost or damaged items; and to permit the Government to offset those forfeited freights against other amounts due the TSP under the contract, in situations where the TSP performs fully its obligations to settle loss or damage claims at "full replacement value," as prescribed by 10 U.S.C. § 2363a, and the FRV liability provisions of the solicitations, is arbitrary, capricious, irrational, an abuse of discretion, and contrary to law and Congressional intent.

56. The rate solicitations’ “unearned freight” terms, at IT-2012 Item 402(a) & (b) and 400-NG-2012 Item 46A(1) & (2), referencing pre-FRV “depreciated value” or “valuation charge” liability standards and limits, and commercial-sector regulations governing disposition of claims using depreciated value methodology (which are either wholly inapplicable to movements of HHG by the Government, or which simply do not address abatement of freight charges at all), are in conflict with, and bear no rational relationship to, the Congressionally-mandated FRV liability standards in the solicitations, or to abatement of freight charges. For the reasons stated above, the inclusion in the solicitation of such terms and references is arbitrary, capricious, irrational, an abuse of discretion, and contrary to law and Congressional intent.

V. Prayer for Relief

WHEREFORE, the Plaintiffs respectfully request this Honorable Court to enter judgment in its favor, and an Order:

A. Declaring and decreeing that the SDDC’s inclusion of the current “unearned freight” provisions in the DPS IT-2012 and 400-NG-2012 rate solicitations, at IT-2012 Item 402(a) & (b) and 400-NG-2012 Item 46A(1) & (2), was arbitrary, capricious, irrational, an abuse of discretion, and contrary to law and Congressional intent.

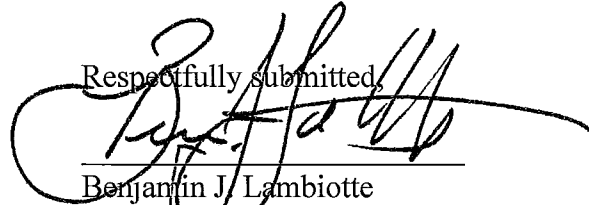
B. Enjoining and directing SDDC to issue amended DPS IT-2012 and 400-NG-2012 solicitations deleting the “unearned freight” provisions at IT-2012 Item 402(a) & (b) and 400-NG-2012 Item 46A(1) & (2);

C. Enjoining permanently SDDC from awarding contracts to bidders who submit rate bids in response to the DPS IT-2012 and 400-NG-2012 rate solicitations in their present form; and

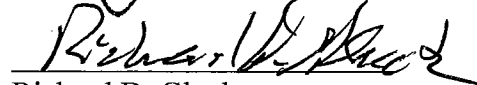
D. Enjoining and directing SDDC to provide bidders who submit rate bids in response to the defective solicitations, notice and a reasonable opportunity, after the amendment of DPS IT-2012 and 400-NG-2012 rate solicitations as directed by the Court, to resubmit rate bids in response to the amended solicitations; and

E. Granting and awarding to the Plaintiffs such other and further relief as the Court may deem just and proper.

Respectfully submitted,



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