



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

40309

R-179478 (P)

December 28, 1973

Texas Trunk Company, Inc.  
1024 S. Laredo Street  
San Antonio, Texas 78207

Attention: Mr. William H. Arlitt  
President

Gentlemen:

Reference is made to your telegram dated August 16, 1973, and subsequent correspondence from you and James P. Gardner Associates, Attorneys, protesting against the award of a contract to any other firm under invitation for bids (IFB) No. DSA-400-74-R-0062, issued by the Defense General Supply Center (DGSC), Defense Supply Agency, Richmond, Virginia, for the supply of field desks to four locations.

Item 0001 of the IFB called for the supply of 454 desks to Tracy, California; item 0002 for 77 desks to Columbus, Ohio; item 0003 for 339 desks to Memphis, Tennessee; and item 0004 for 581 desks to Richmond, Virginia. Bids could be made on an f.o.b. destination or an f.o.b. origin basis on items 0001, 0003, and 0004. On item 0002, bids could be made only on a f.o.b. destination basis. Bid opening was to take place on August 3, 1973; however, Amendment 0001 dated August 2, 1973, extended the opening date to August 8, 1973.

On August 8, 1973, the six bids received were opened. The bid by Miller Manufacturing Company, Inc. was withdrawn with DGSC's permission due to a mistake in its bid. The other bids received were recorded as follows:

<u>Bidder</u>	<u>Tracy, California</u>		<u>Columbus Ohio</u>
	<u>f.o.b. destination</u>	<u>f.o.b. origin</u>	<u>f.o.b. destination</u>
Remco Products, Inc. (Remco)	\$110.00	\$108.00	\$118.00
Pluribus Products, Inc. (Pluribus)	\$118.00	\$108.00	\$114.00
Texas Trunk, Co., Inc.	\$111.24	N/B	\$111.98
Auto Skate Co., Inc.	\$125.00	\$110.00	\$120.00
Winslow Corp.	N/A	\$114.00	\$117.00

[Protest of Award to Furnish Desks]

PUBLISHED DECISION  
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B-179478

<u>Bidder</u>	<u>Memphis, Tennessee</u>		<u>Richmond, Virginia</u>	
	<u>f.o.b.</u> <u>destination</u>	<u>f.o.b.</u> <u>origin</u>	<u>f.o.b.</u> <u>destination</u>	<u>f.o.b.</u> <u>origin</u>
Remco	N/B	\$108.00	N/B	\$108.00
Pluribus	\$113.00	\$108.00	\$112.00	\$108.00
Texas Trunk	\$110.73	N/B	\$110.56	N/B
Auto Skate	\$120.00	\$110.00	\$118.00	\$110.00
Winslow Coop	N/B	\$114.00	N/B	\$114.00

Your bid was made on an "all or none" basis.

DGSC proposed to award item 0001 to Remco and items 0002, 0003 and 0004 to Pluribus after evaluating the bids as follows:

Item 0001 Remco (f.o.b. origin)		Texas Trunk (f.o.b. destination)	
unit bid	\$108.00	unit bid	\$111.24
less 1/2% discount	.54	less 1/2% discount	.56
plus transportation	.2688		
unit cost	<u>\$107.7268</u>	unit cost	<u>\$110.68</u>
Item 0002 Pluribus (f.o.b. destination)		Texas Trunk (f.o.b. destination)	
unit bid	\$114.00	unit bid	\$111.00
less 1/3% discount	.38	less 1/2% discount	.56
unit cost	<u>\$113.62</u>	unit cost	<u>\$111.42</u>
Item 0003 Pluribus (f.o.b. origin)		Texas Trunk (f.o.b. destination)	
unit bid	\$108.00	unit bid	\$110.70
less 1/3% discount	.36	less 1/2% discount	.51
plus transportation	\$ 1.1685		
unit cost	<u>\$108.8085</u>	unit cost	<u>\$110.19</u>
Item 0004 Pluribus (f.o.b. origin)		Texas Trunk (f.o.b. destination)	
unit bid	\$108.00	unit bid	\$110.50
less 1/3% discount	.36	less 1/2% discount	.50
plus transportation	.7287		
unit cost	<u>\$108.3687</u>	unit cost	<u>\$110.00</u>

Your bid was determined to be low on only item 0002. However, your bid was on an "all or none" basis. Accordingly, it is proposed that split awards to Remco and Pluribus be made since your total evaluated bid is \$160,093.76, as compared to the \$157,500.32 total evaluated cost of the proposed split award.

B-179478

You contend that the evaluation of the bids was in violation of clause D-9 of the IFB, which incorporated the following clause from Armed Services Procurement Regulation (ASPR) paragraph 2-217.1(a)D(vi):

"EVALUATION-F.O.B. ORIGIN. Land methods of transportation by regulated common carrier are normal means of transportation used by the Government for shipment within the United States (excluding Alaska and Hawaii). Accordingly, for the purpose of evaluating bids (or proposals), only such methods will be considered in establishing the cost of transportation between bidder's (or offeror's) shipping point and destination (tentative or firm, whichever is applicable), in the United States (excluding Alaska and Hawaii). Such transportation cost will be added to the bid (or proposal) price in determining the overall cost of the supplies to the Government. When tentative destinations are indicated, they will be used only for evaluation purposes, the Government having the right to utilize any other means of transportation or any other destination at the time of shipment."

You contend that the carriers, whose rates were used by the procuring activity in evaluating the bids, are not "regulated common carriers", but agricultural cooperative "dead head" haulers not regulated by the Interstate Commerce Commission (ICC).

You further allege that "section 22" rates (i.e., special reduced rates tendered to the Federal Government by carriers pursuant to 49 U.S.C. 22) can only be utilized for purposes of evaluation in accordance with ASPR 19-217. You state that ASPR 19-217.1 expressly excludes the use of "section 22" rates in f.o.b. destination contracts and directs that if such rates are to apply to f.o.b. origin contracts, ASPR 7-103.25 must be included in the IFB. You conclude that since this clause did not appear in the IFB, it is indicated that "section 22" rates were not contemplated and, therefore, should not be used in evaluating the bids under the IFB.

You also contend that when transportation costs are a factor in the evaluation of bids, those costs must be computed on the basis of rates to be effective at the time of shipment and that the rates must actually have been filed or published at the time of bid opening. You state that inasmuch as the administrative report only indicates the existence of "section 22" tenders on the date of bid opening, but makes no comment as to their validity at the date of shipment, these rates should not be utilized in the evaluation of the bids under the present IFB.

B-179478

You finally contend that the transportation rates used by the procuring activity were unrealistically low. You conclude that if these transportation rates had been computed in accordance with ASPR and the terms of the IFB, your bid would have been low.

The procuring activity determined the unit transportation costs for evaluation of the bids as follows:

<u>Item</u>	<u>Low Evaluated Bidder</u>	<u>Weight/Freight Rates</u>	<u>Unit Transportation Costs</u>
0001 To Tracy, California	Remco From Rancho Cordova, California	30,020 pounds @ \$.22 per hundred pounds, Hall's Trucking Company (Hall) Quotation No. 1; 13,110 pounds as 20,000 pounds @ \$.28 per hundred pounds, Trez Transport Company (Trez) Quotation No. 1.	\$.2688
0003 To Memphis, Tennessee	Pluribus From Brooklyn, New York	32,205 pounds @ \$1.23 per hundred pounds, Malone Freight Lines, Inc. (Malone) Quotation No. 148.	\$1.1685
0004 To Richmond, Virginia	Pluribus From Brooklyn, New York	35,055 pounds @ \$.66 per hundred pounds, 20,140 pounds as 24,000 pounds @ \$.80 per hundred pounds, George W. Brown, Inc. (Brown) Quotation No. 69	\$.7287

Malone is regulated by the ICC under Certificate No. MC-75840. Brown is also regulated by the ICC under Certificate No. MC-65491. Hall and Trez are not regulated by the ICC. However, they are regulated by the Public Utilities Commission of California (CPUC). Hall has been issued CPUC Radial Highway Common Carrier Permit No. CAL-T-84923. Trez has been issued permit No. CAL-T-101339.

It is clear that the United States may utilize tenders issued by state-regulated carriers for intrastate shipments. See Public Utilities Commission of California v. United States, 355 U.S. 134 (1958); United States v. Georgia Public Service Commission, 371 U.S. 285 (1965). Moreover, use of the means of transportation which is most advantageous to the Government is required by ASPR 19-100. Also ASPR 19-301.1(a) states that "the best available transportation rates in effect or to become effective prior to the expected

date of the initial shipment and on file or published at the date of bid opening, shall be used in the evaluation." (Underscoring supplied.) Furthermore, the inclusion of estimated freight costs in determining the low bidder is in accord with 10 U.S.C. 2305(c), which requires that award shall be made to that responsible bidder, whose bid "will be most advantageous to the Government, price and other factors considered."

We find that the purpose of ASPR 2-201(a)D(vi) is to comply with the above statutory directive, and the directives of ASPR 19-100 and 19-301, by insuring that award is made to the bidder offering the lowest evaluated overall cost to the Government, including transportation costs. In cases where a bidder's production facilities are in the same state as the delivery point under the IFB, we believe that ASPR 2-201(a)D(vi) contemplates that the term "regulated common carriers" includes common carriers who are regulated by the state, since the carriers offering the lowest possible rates for these intrastate shipments are likely to be intrastate carriers regulated only by the state.

In reviewing your contention that the rates of carriers whose tenders were used in evaluation were unrealistically high, we note that the transportation rates under Malone Quotation No. 148 for the shipment from Brooklyn to Memphis are slightly higher than as computed by the procuring activity. This tender offers the Government class 35 rates, truckload minimum 32,000 pounds, as published in Table No. 1 of Malone Tariff No. 2-A, MF-ICC No. 26. The procuring activity used the rates in Supplement No. 32 of this tariff (i.e., \$1.23 per hundred pounds). However, these rates were superseded by Supplement No. 35 effective June 18, 1973. Therefore, as of bid opening August 8, 1973, the appropriate rate was \$1.35 per hundred pounds. This would raise the unit transportation cost of shipping the desks from Brooklyn to Memphis to \$1.2825 (32,205 pounds x \$1.35 ÷ 339 units). Pluribus' total unit cost, if evaluated on the basis of the rates in Supplement No. 35, would have been \$108.9225 (\$108.00 - \$.36 + \$1.2825). This is still lower than your evaluated total unit cost of \$110.18.

Also, the procuring activity used Brown Quotation No. 69 in computing transportation costs from Brooklyn to Richmond. We note that this tender was cancelled on April 6, 1973. However, we also note that Brown Quotation No. 73, which would cover the shipment of the desks from Brooklyn to Richmond for the same rates offered in Quotation No. 69, was issued on April 16, 1973, and was in effect at bid opening.

It appears that the procuring activity computed the transportation costs of several bidders under this IFB by use of tenders issued by agricultural cooperatives, who are exempted from regulation by the

B-179478

ICC. See 49 U.S.C. 303(b)(5). However, since the carriers whose rates were used in computing the transportation costs of the bidders to whom award is proposed are regulated common carriers, it cannot be said that you were prejudiced by this apparent use of the tenders of agricultural cooperatives.

With regard to your contention that the non-inclusion of ASPR 7-103.25 in the IFB precludes the use of "section 22" rates in evaluating the bids, we note that the wording of this clause appears verbatim at the end of clause H-6 of the IFB. Moreover, even if this clause was not included in the IFB we do not feel that this would preclude the use of "section 22" rates in evaluating the bids, since ASPR 19-217.1(a) only requires the inclusion of this clause if the contractor may be required by the Government to ship under prepaid commercial bills of lading.

The legal status of "section 22" tenders is that of continuing unilateral offers, which may be withdrawn by the carrier in accordance with the terms of the particular tender. However, we consistently have found that "section 22" rates, when they are available to the Government, should be used in the evaluation of f.o.b. origin bids so long as they are in effect or to become effective prior to the date of the expected shipment and on file or published at the date of bid opening. 46 Comp. Gen. 77 (1966); B-172011, August 3, 1971. Moreover, we have held that there is no provision in ASPR for evaluating the responsibility of carriers or the likelihood that the "section 22" rates would still exist on the date of shipment. See 46 Comp. Gen. 77, 83 (1966). Therefore, even though there is no assurance that such tenders will be effective as of the date of shipment, they may be considered in the evaluation so long as they are in effect or to become effective prior to the date of the expected shipment and on file or published. 46 Comp. Gen. 77, supra., ASPR 19-301.1(a).

You cite 39 Comp. Gen. 774 (1960) to support your position as to the necessity of the agency finding that the tenders would exist on the shipment date. That case involved a bidder asking to have his bid evaluated on the basis of reduced rates obtained by his "rate shopping" after bid opening. In that case, we stated that "while transportation costs may be calculated on the basis of rates to be effective at the time of shipment, such rates must have been actually filed or published at the time of evaluation." (Underscoring supplied.) Since the rates there involved had not been filed or published at the time of evaluation, even though they would be effective at the time of shipment, they were not for consideration.

B-179478

You also contend that you received no notice of Amendment 0001 and did not know of its existence until after the scheduled opening called for on the face of the IFB. You state that this "tactic" cost you more favorable quotes from suppliers.

We note that a signed copy of the amendment, which bears your August 6, 1973 receipt stamp, was received by the agency, along with a letter modifying certain option prices, by the time of bid opening. Although you apparently did not receive the amendment prior to the originally scheduled bid opening, it appears that you received it in time to revise certain prices. Furthermore, there is no indication in the record that the apparent late receipt resulted from any deliberate act by the agency or that you raised any objection prior to the extended bid opening. Therefore, we are unable to perceive of any prejudice to your firm.

You also raise certain questions concerning three previous solicitations by DGSC for field desks and you state that this procurement history clearly reflects "the bumbling ineptness of the other prospective bidders." You further state that there has yet been no production under the contracts awarded to Remco and Pluribus pursuant to these prior solicitations. You feel that it is incongruous that these contractors be found responsible under the present IFB since they are unable to deliver under existing contracts for the same item.

The procuring activity determined that Remco's and Pluribus' capacity to perform has been satisfactorily established, based upon favorable preaward surveys and current performance under the prior contracts for field desks referred to by you. In this regard, we have been informed by the DGSC that Pluribus has made five partial shipments totaling 1256 desks and delivery is shortly anticipated on 682 additional desks. Furthermore, it is reported that Pluribus was given a 30 day extension on delivery because of difficulty in obtaining tubing. Pluribus reportedly is not delinquent for either the original quantity or the option quantity. Remco was reportedly delinquent in deliveries because of difficulty in obtaining plywood. However, an extension was granted because it was determined that the delay was beyond Remco's control. Although Remco has made no deliveries, it now has 500 desks completed and ready for inspection and packing, 300 desks 98 percent completed and the balance of the contract quantity under production.

B-179478

Responsibility is a question of fact to be determined by the contracting officer and necessarily involves the exercise of a considerable range of discretion. Where, as in this case, there is no convincing evidence that the determination was arbitrary, capricious or not based upon substantial evidence, we will not substitute our judgment for that of the contracting officer. 45 Comp. Gen. 4 (1968), 51 Comp. Gen. 703, 709 (1972).

In view of the foregoing, your protest is denied.

Sincerely yours,

**R.F. KELLER**

Deputy Comptroller General  
of the United States