



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

December 9, 2008

CBCA 1105-RATE

In the Matter of LOGISTICS INTERNATIONAL, INC.,

Alan F. Wohlstetter of Denning & Wohlstetter, Washington, DC, counsel for Claimant.

James F. Fitzgerald, Director, Audits Division, Office of Transportation and Property Management, General Services Administration, Arlington, VA; and Aaron J. Pound, Office of General Counsel, General Services Administration, Washington, DC, appearing for General Services Administration.

Bruce D. Ensor, Surface Deployment and Distribution Command, Office of the Staff Judge Advocate, Scott Air Force Base, IL, appearing for Department of the Air Force.

GOODMAN, Board Judge.

Claimant Logistics International, Inc. has asked this Board to review the determination of the Transportation Audit Division of the General Services Administration (GSA) to offset \$115,721.76 from funds due claimant.

Factual Background

Claimant is a Transportation Service Provider (TSP) participating in the International Through Government Bill of Lading (ITGBL) procurement of the Surface Deployment and Distribution Command (SDDC) of the Department of the Army. Claimant submitted a bid in response to the SDDC's International Personal Property Rate Solicitation I-16 (the solicitation) which sought One Time Only (OTO) rates for the shipments at issue.

The solicitation contained the following bid evaluation criteria:

SDDC will evaluate all competitive bid offers received from Transportation Service Providers as well as alternative shipping methods. When the OTO method is selected, the Transportation Service Provider offering the lowest overall responsive bid will be notified of the shipment award.

Solicitation, Item 702.f.

The awardee was to provide door-to-door transportation of household goods (Code 6 of the solicitation) and unaccompanied baggage (Code 8 of the solicitation) between points in the Middle East, and other overseas points and points in the United States. As explained by claimant, under both Codes 6 and 8, TSPs bid single-factor door-to-door rates expressed in dollars and cents per hundredweight. Pursuant to the solicitation the qualified TSP with the lowest code rates was awarded the shipments. In addition to being paid its single-factor rate for each shipment, the TSP was reimbursed by the Government the actual costs, without additional mark-up, for war risk and fuel surcharges assessed by the commercial airlines on shipments outbound from origin points in the Middle East.

Claimant was the low bidder and selected for award for the shipments at issue. Claimant states that it contracted with three companies -- Swift International, Inc., of Doha, Qatar, Al Sawan of Kuwait City, Kuwait, and Gulf Express of Kuwait (referred to by claimant collectively as its origin agent) -- to act as an agent in the performance of origin and destination services on the shipments. The companies comprising the origin agent are all owned by the same individual (the owner).

After a post-payment audit, GSA determined that claimant was not entitled to its full OTO rate and surcharges because the invoices from the origin agent included amounts designated as "discount for prompt payment." Because GSA believed that the inclusion of these charges on the invoices reduced the costs paid by claimant for services of the origin agent and reimbursable surcharges, GSA concluded that claimant was contractually obligated to repay these sums to the Government as the Government should receive the benefit of the contractor's reduced costs to perform. GSA therefore withheld \$115,721.76 from funds due claimant.

Claimant denies that any discount was taken by its origin agent and that the origin agent's invoices were paid in full without reduction. Claimant submitted affidavits from its Vice President who explained that the origin agent billed claimant by itemized invoices which included the charges for the agent's origin or destination service and other charges where applicable, such as prepaid air freight charges, war risk, and fuel charges. These

charges were totaled, and after this total each invoice included an amount designated on the invoice as a “discount for prompt payment.” Claimant states that the owner of the origin agent directed claimant by written instruction to pay the amounts designated as “discount for prompt payment” directly to a bank account that was held in his name and to pay the remainder of the total billed amount to the origin agent.¹ Thus, claimant asserts that for each invoice the two payments -- one to the origin agent and the other to the origin agent’s owner -- equaled the total billed without reduction. As for the war risk and fuel surcharges, which were included in the total amount billed, claimant paid the origin agent for these charges (as they were included in the total billed) and then submitted these charges without markup to the Government for reimbursement.

Discussion

GSA initially asserted that its offsets of funds were justified because the amounts designated as “discount for prompt payment” on the invoices of claimant’s origin agent were discounts which reduced claimant’s cost of performance for which the Government is entitled to receive the benefit. Claimant asserts that it did not receive a discount for any shipment from its origin agent and the two payments that claimant made for each invoice equaled the total amount of the invoice without reduction, despite the designation of a component of the total amount of the invoice as a “discount for prompt payment.” Additionally, claimant asserts that even if claimant had paid less than the total invoiced amount to its origin agent, as a matter of law GSA is not entitled to an offset as claimant was to be paid its bid rate regardless of its actual cost of performance.

GSA’s initial position in this case was based upon its post-performance review of what it considers to be the claimant’s cost of performance, its apparent determination that the procurement was governed by the Federal Acquisition Regulations (FAR) that governed cost-reimbursement contracts, and its implication that it evaluated the bids using cost analysis. GSA stated in its initial response to claimant’s request for review at this Board:

GSA contends that the original cost assessed for moving these shipments did not account for prompt payment discounts, and the credit should be reflected in the billing of the Government

. . . .

¹ Declaration of Desmond M. Allum (Aug. 21, 2008), Attachment 2 (origin agent owner’s Letter of Instruction, dated April 4, 2005).

The single factor rate includes all land, water and air transportation as defined in the SDDC International Rate Solicitation 1-16 (1-16). When any factor of cost changes, the single factor rate should change similarly.

....

Once [claimant] accepted a prompt payment discount, the actual cost of shipment was lowered. Therefore, a credit is due to the Government.

[Claimant] states that there is no statute or procurement regulation that authorizes the Government to offset discounts paid to a TSP by its agent. FAR 31.201-5 states that, “[t]he applicable portion of any income, rebate, allowance or other credit relating to an allowable cost and received by or accruing to the contractor shall be credited to the Government either as a cost reduction or a cash refund.” Although the FAR provides for shipments procured by contracts other than bill of lading type, this provision is relevant guidance demonstrating the intent of the Government regarding the administration of contracts.

After the claimant’s claim and GSA’s reply in this case, the Board directed the parties to supplement the record on various issues. Board Order (Jul. 25, 2008). In response to the Board’s inquiry, claimant submitted information which it contended supports its position that it paid the origin agent’s invoices in full without taking a discount. GSA acknowledged that the bids for this procurement were lump sum bids without any itemization of the bidders cost elements, that no cost analysis of the bid as defined in FAR 15.404-1(c)² was performed prior to award, and that no determination was made by the Government that this procurement was subject to FAR or FAR Part 31.

Thereafter the Board directed GSA to review claimant’s supplemental information and state whether the information was sufficient for the Government to conclude that discounts were not taken by claimant. Board Order (Oct. 3, 2008). GSA concluded that the information did support “total payment of the Debit invoice. However the payment to the owner is suspected to be a rebate.”

² This regulation reads in relevant part: “Cost analysis is the review and evaluation of the separate cost elements and profit in an offeror’s . . . proposal . . . and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be, assuming reasonable economy and efficiency.”

GSA's position in this case is inconsistent with its method of bid evaluation and the terms of the solicitation. The solicitation in this procurement did not require bidders to submit information concerning anticipated costs to perform the contract if awarded nor is there any provision in the solicitation that would allow GSA to adjust the contract price based upon the costs of performance. Bidders were only required to submit a bid price, and award was made to the bidder who submitted the lowest responsive bid. GSA had no information as to "any factor or cost" prior to award and therefore could not have assessed the "original cost" for making the shipments as it alleges. For GSA to assert that it had evaluated an "original assessed cost" and that it had an expectation of reducing the contract price when a "factor of cost changes" is contrary to its method of bid evaluation and the terms of the solicitation.

Claimant's contractual arrangement with its origin agent was an element of claimant's cost to perform and was not a factor to be evaluated by GSA when it received claimant's bid. GSA therefore could not have had any expectation as to what claimant's costs from this arrangement might be. Whether claimant paid its origin agent the full amount of its invoices or less than the full amount³ has no affect on claimant's entitlement to be paid the OTO rate it was awarded for the shipments at issue and to be reimbursed surcharges incurred.

Decision

The claim is granted. Claimant is entitled to be paid the \$115,721.76 withheld by GSA.

ALLAN H. GOODMAN
Board Judge

³ After reviewing claimant's supplemental documentation, GSA concluded that the documentation did support a "total payment" of the invoices but makes an alternative argument that "payment to the owner is suspected of being a rebate." GSA had previously cited several FAR provisions that refer to rebates but thereafter acknowledged that the procurement is not governed by FAR. GSA has also asserted claimant is liable pursuant to 49 U.S.C. §14902 which also refers to rebates but has no application to a TSP's payment relationship with its origin agent. GSA's assertion that claimant's payment to the owner of the origin agent is "suspected" of being a rebate, without any evidence that it was a rebate or discussion of a valid legal basis for liability if this were proven, is insufficient to support GSA's offset of funds in this case.