



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 21, 2013

CBCA 3098-RATE

In the Matter of CONTINENTAL AIRLINES CARGO/UTI WORLDWIDE

Mary Tussing, Manager, Specialty Sales, of United Airlines, Chicago, IL; and Blaine Kurtz, Global Vice President, Aerospace Defense Group, of UTi Worldwide, Winchester, VA, appearing for Claimants.

Joyce Clark, Director, Transportation Audits Division, Office of Travel & Transportation Services, Federal Acquisition Service, General Services Administration, Arlington, VA, appearing for General Services Administration.

Maj. Donald N. Bugg, Commercial Law and Litigation Directorate, Department of the Air Force, Joint Base Andrews, MD, appearing for Department of the Air Force.

WALTERS, Board Judge.

The matter before this Board was brought under 31 U.S.C. § 3726(i)(1) (2006), which provides that a carrier or freight forwarder may request the Administrator of General Services to review an action taken by the Audit Division of the General Services Administration (GSA) Office of Transportation and Property Management. The Administrator has delegated the review function to the Civilian Board of Contract Appeals (CBCA). Rule 301 (48 CFR 6103.301 (2011)).

The instant claim arises out of a uniform tender issued by the Department of Defense (DOD) Defense Logistics Agency (DLA) to the claimants, Continental Airlines Cargo (now part of United Airlines) and its designated Civil Reserve Air Fleet (CRAF) agent, UTi Worldwide, for transportation services under standard carrier alpha code no. CAZQ-0024 on September 9, 2011. The tender called for the shipment of military uniform items from the DLA's Defense Depot Susquehanna Pennsylvania (DDSP), New Cumberland, Pennsylvania, to Benina Airfield (Benghazi), Libya, with delivery no later than September 15, 2011.

Claimants priced the tender at \$4.61 per volumetric (chargeable) pound. Based on the information furnished in the solicitation regarding the configuration of the pallets and the volume of materials to be shipped, the shipment had an anticipated volumetric (chargeable) weight of some 85,360 pounds and all-inclusive charge of \$393,898.71. Although one might expect there to be a relationship between actual weight and volumetric weight, the two weight measures differed in this case.

The solicitation contained the following cargo description: “Uniform items, various NSNs [National Stock Numbers](see attached spreadsheet), positioned on 164 wooden skids [pallets]; Total weight of material = 77,694 lbs; Total Cube = 8,090 cubic feet; Average weight per pallet = 473 lbs. (heaviest single pallet weight of 681 lbs); Average Cube/per pallet = 49 cubic feet (with highest single pallet cube of 66 cubic feet); Average dimension of pallets is 40L x 48W x 45H.” Claimants allege that when the pallets of items were picked up at DDSP on September 13, 2011, they could not fit onto trucks as originally planned, because the pallets did not conform to the dimensions stated in the Government’s solicitation.¹ They further state that, when the DDSP pallets were received at the JFK Airport freight containerization station on September 14, 2011, prior to being transported by airplane overseas (via Cargoitalia), they were weighed and measured “to ensure safe loading and accurate measurements for the aircraft operations.” The parties are in agreement that the actual total weight of the items shipped was 84,205 pounds, some 6511 pounds above the 77,694 pounds of actual weight stated in the solicitation. Claimants urge, however, that because of a “volume irregularity” brought about by observed deviations from the dimensions that the solicitation indicated for the pallets, there was an even more sizeable increase in the volumetric (chargeable) weight of the shipment – a chargeable weight of 108,223 pounds, rather than the 85,630 pounds of chargeable weight that had been indicated by the solicitation and that had been reflected on UTi’s tender. Claimants sought an upward tender price adjustment for this alleged volumetric difference based on the \$4.61 per chargeable pound unit price claimants had bid. This translates to a revised total tender price for the 108,223 pounds equal to \$499,401.65, i.e., an upward price adjustment of \$105,502.84. DLA, by means of a contracting officer decision, denied claimant’s request, and the denial was sustained by GSA’s Office of Transportation and Property Management.

¹ In conjunction with this allegation, claimants identify “Keith Garrison/Trans Tech Trucking” as the trucking firm responsible for transporting the materials from DDSP to John F. Kennedy (JFK) Airport, but indicate that the firm is no longer in business and provide no further information as to the extent to which dimensional differences caused loading problems and how those problems were resolved.

Under this Board's rules pertaining to these rate matters, the burden of proof is on the claimant to establish the timeliness of the claim, the liability of the agency, and the claimant's right to payment. Rule 301(b). Previously, notwithstanding a Government challenge to timeliness, the Board had found claimants' request for the Board's review to have been timely. Upon consideration of the record,² however, we find that the claimants have failed to sustain fully their burden of proof as to agency liability and their right to additional payment. Thus, as explained below, we can only provide them with partial relief.

Discussion

The Government's resistance to allowing recovery in this instance boils down to a lack of corroboration of the allegation of "volume irregularity" of the shipment and, more particularly, corroboration of the dimensional deviations claimants note for the pallets of items it obtained from DDSF on September 13, 2011. It appears that some unidentified individual from claimant UTi, on September 14, 2011, prepared a handwritten listing of dimensions (length, width, and height) for groupings of those pallets. That listing, which bears no names or signatures, is found on three pages of a form claimants provided to the Board entitled "Volume Irregularity." Claimants not only failed to identify the individual who had performed weighing and measuring of materials on September 14, 2011, and who had compiled the three page handwritten "Volume Irregularity" forms, but also failed to provide any details whatsoever as to how the weighing and measuring was accomplished.

For its part, the Government produced the affidavit of a distribution facilities specialist for DDSF, the individual at DLA who personally handled the materials in question. According to that individual, (1) she personally "broke down" and "reconfigured" the materials onto standard sized pallets, "ensuring that each pallet is uniform and compliant with DOD policies and regulations as they apply to standard palletization within the DOD," "in order . . . to ensure the safe transportation of palletized units that were placed inside containers," (2) she had each pallet "shrink-wrapped in order to preserve the materiel within," (3) she observed the movement of the pallets by forklift "to a calibrated weighing station where the materiel was weighed and dimensioned" and where "each pallet was marked with [its] unique weight and dimensions," (4) she made sure that each pallet to be

² In addition to the submissions made by the parties in this matter, the Board was provided with a copy of the appeal file that had been developed in an appeal that the claimants had earlier lodged under the Contract Disputes Act (CDA) with the Armed Services Board of Contract Appeals (ASBCA). Ultimately, the ASBCA dismissed that appeal. This Board was also furnished a copy of the Government's motion to dismiss the ASBCA appeal for lack of jurisdiction, together with appended exhibits.

shipped to Libya was loaded “in accordance with DDSF loading Standard Operating Procedures (SOP),” and (5) she personally “incorporated the items [i.e., the contents of the shipment and the weights and dimensions of the various pallets] into the Distribution Standard System (DSS).” Others, based on their first-hand knowledge, similarly provided declarations (under penalty of perjury) attesting to the precision of the Government’s weighing and measuring process for this shipment.

Under the circumstances, it is understandable why the Government was unwilling to accept as fact the contentions regarding “volume irregularity.” Claimants simply have not sustained their burden of proof in terms of establishing a 26.38% difference in volumetric (chargeable) weight (an increase in volumetric weight of 22,593 pounds above the 85,630 pounds of volumetric weight indicated by the solicitation).

By contrast, in terms of the actual weight shipped, the parties are in complete agreement that the materials shipped exceeded the 77,694 pounds indicated by the solicitation by some 6511 pounds. The contracting officer’s decision acknowledges this: “I agree that the actual weight changed from the estimated 77,694 lbs to an actual 84,205 lbs, a net difference of 6,511 lbs” This difference in actual weight represents an increase of approximately 8.38%. From the Board’s perspective, an addition of more than two and a half tons of materials to the shipment had to have resulted in some increase in volumetric (chargeable) weight, and there is nothing to indicate that the increase in volumetric weight would have been out of proportion to the increase in actual weight.

The Government advances the argument that claimants would not be entitled to an adjustment automatically for a deviation in volumetric weight from that indicated in the solicitation, that claimants were asked to provide their tender offer based on “estimates,” and that no price adjustment of any sort would be due, absent proof that claimants suffered “damages,” in the form of “greater costs to ship the goods” or that it “missed the opportunity to ship other goods, or lost profits, due to the allegedly increased volumetric weight of the shipment.” We must reject this argument. Not only does this argument contradict the various affidavits the Government furnished the Board, underscoring how exacting and precise the DLA’s approach was in assuring itself of accurate measurement and dimensioning, but the above-quoted cargo description language in the solicitation contained nothing that would convey to claimants that they were being asked to provide a tender offer on the basis of “estimates” that would be subject to material variation at their risk or that they would be expected to give a free ride to an extra two and a half tons of cargo. In our view, an appropriate and equitable adjustment in this case would increase the tender price by 8.38%. Accordingly, claimants’ tender price should be revised upward from \$393,898.71 to \$426,907.42, i.e., by \$33,008.71.

Decision

For the reasons stated above, the claim is granted in the amount of \$33,008.71.

RICHARD C. WALTERS
Board Judge