



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Aalco Forwarding, Inc., et al.

File: B-277241.15

Date: March 11, 1998

Alan F. Wohlstetter, Esq., and Stanley I. Goldman, Esq., Denning & Wohlstetter; James M. McHale, Esq., Seyfarth, Shaw, Fairweather & Geraldson; Thomas M. Auchincloss, Jr., Esq., Leo C. Franey, Esq., and Brian L. Troiano, Esq., Rea, Cross & Auchincloss, for the protesters. Thomas J. Duffy, Esq., Maj. Jonathan C. Guden, and Ramon Morales, Esq., Department of the Army, for the agency. Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Under a solicitation contemplating the award of multiple indefinite delivery, indefinite quantity contracts to implement a pilot program for moving and storage services, protests that the contract minimum of \$25,000 per contractor is only nominal consideration insufficient to bind the parties are denied, where the nature of the acquisition dictates the possibility that the government may order only this quantity and the establishment of long-term commitments with relatively few prime contractors, who will potentially be provided greater shipping volumes than under the current program, shows an intent to form binding contracts.
2. Under a solicitation contemplating the award of multiple indefinite delivery, indefinite quantity contracts to implement a pilot program for moving and storage services, protests that the maximum quantities for the various traffic channels are unrealistic are denied, where it cannot be determined that the maximums were not established in good faith or based on the best information available, or that they do not accurately represent the agency's anticipated needs, given the contracting agency's reasonable explanation that the varying nature and unpredictability of its requirements necessitate the stated maximums.
3. On a solicitation for an indefinite quantity of moving and storage services, a price evaluation scheme that evaluates offerors' prices by applying them in a notional shipment, including all possible accessorial services that may be ordered under the contract, is not objectionable, even though the notional shipment is not representative of a typical shipment that may be ordered under the contract, where the notional shipment provides a common basis for price evaluation under the solicitation, the agency requires a evaluation model that encompasses all accessorial

services that may be ordered under the pilot program, the agency has no basis on which to provide estimates for the accessorial services given the lack of historical information, and the protesters have not established that the notional shipment will produce a materially misleading result.

4. Protests that Service Contract Act should not apply to a solicitation for moving and storage services are denied where the Department of Labor, which is statutorily charged with implementation of the Act, has determined that the Act applies and that determination is not clearly contrary to law.

5. Protests that Service Contract Act wage determinations issued with a solicitation for moving and storage services do not cover all localities where the services will be performed and all classes of service employees that may be utilized are denied, where the Department of Labor's determination that wage rates need only be established for the states from which shipments originate is not so unreasonable as to be contrary to law and where the protesters can avail themselves of established procedures for adding classes of employees to the wage determinations.

DECISION

Aalco Forwarding, Inc. and 121 other firms protest the terms of request for proposals (RFP) No. DAMT01-97-R-3001, issued by the Military Traffic Management Command (MTMC), Department of the Army, for all personnel, equipment, materials, supervision, and other items necessary to provide transportation and transportation-related services for 50 percent of the eligible Department of Defense (DOD) and U.S. Coast Guard sponsored personal property shipments from North Carolina, South Carolina, and Florida, to any or all of 13 destination regions in the continental United States (CONUS) and/or any or all of 5 destination regions in Europe.¹ The solicitation implements a pilot program to reengineer DOD's personal

¹The firms protesting this solicitation are: Aalco Forwarding, Inc.; AAAA Forwarding, Inc.; Air Van Lines International, Inc.; Allstates Worldwide Movers; Aloha Worldwide Forwarders, Inc.; Alumni International, Inc.; American Heritage International Forwarding, Inc.; American Mopac International, Inc.; American Shipping, Inc.; American Vanpac Carriers; American World Forwarders, Inc.; Apollo Forwarders, Inc.; Arnold International Movers, Inc.; Astron Forwarding Company; BINL Incorporated; Burnham Service Company, Inc.; Cavalier Forwarding, Inc.; Classic Forwarding, Inc.; Davidson Forwarding Company; Deseret Forwarding International, Inc.; Foremost Forwarders, Inc.; Gateways International, Inc.; Global Worldwide, Inc.; Great American Forwarders, Inc.; Hi-Line Forwarders, Inc.; International Services, Inc.; Island Forwarding, Inc.; Jet Forwarding, Inc.; Katy Van Lines, Inc.; Lincoln Moving & Storage; Miller Forwarding, Inc.; Northwest Consolidators; North American Van Lines; Ocean Air International, Inc.; Senate Forwarding, Inc.; Shoreline International, Inc.; Stevens Forwarders, Inc.; Von Der
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property shipping and storage program. In these protests, the protesters primarily contend that the RFP does not properly specify contract minimum and maximum quantities of services to be ordered, that the RFP's price evaluation scheme is defective, and that the Service Contract Act of 1965 (SCA), 41 U.S.C. §§ 351-358 (1994), was improperly applied to this RFP.²

The protests are denied.

¹(...continued)

Ahe International, Inc.; Wold International, Inc.; Zenith Forwarders, Inc.; A Advantage Forwarders, Inc.; Sentinel International Forwarding, Inc.; T.R.A.C.E. International, Inc.; Acorn International Forwarding Company; AAA Systems, Inc.; A.C.E. International Forwarders; American Red Ball International, Inc.; Apex Forwarding Company, Inc.; Armstrong International, Inc.; Arpin International Inc.; Art International Forwarding, Inc.; Atlas Van Lines International Corporation; Coast Transfer Company, Inc.; Crystal Forwarding, Inc.; CTC Forwarding Company, Inc.; Diamond Forwarding, Inc.; Dyer International, Inc.; Harbour Forwarding Company, Inc.; HC&D Forwarders International, Inc.; Jag International, Inc.; The Kenderes Group, Inc.; Pearl Forwarding, Inc.; Rainier Overseas, Inc.; Rivers Forwarding, Inc.; Ryans's World; Sequoia Forwarding Company, Inc.; A-1 Relocation, Inc. d/b/a A-1 Movers of America; A-1 Moving & Storage, Inc.; Able Forwarders, Inc.; A Columbia Forwarders; Aero Mayflower Transit, Inc.; Lile International Companies d/b/a American Movers; American Red Ball Transit Co.; American Van Services, Inc.; Andrews Van Lines, Inc.; Apollo Express Van, Inc.; A. Arnold & Son Transfer & Storage Company, Inc.; Paul Arpin Van Lines, Inc.; Art and Paul Moving & Storage; Associated Forwarding, Inc.; Associated Storage and Van, Inc.; Atlas Van Lines, Inc.; Bekins Van Lines Co.; Burnham World Forwarders; Carrier Transport International, Inc.; Carlyle Van Lines, Inc.; Coastal Moving Company; Conrad Group, Inc.; Davidson Transfer & Storage Co., Inc.; Denoyer Bros. Moving & Storage Co.; Door To Door Moving & Storage; Exhibit Transport, Inc.; Ferriss Warehouse & Storage; Fogarty Van Lines, Inc.; Global Van Lines, Inc.; Horne Storage Co., Inc.; Lift Forwarders, Inc.; Lynn Moving and Storage, Inc.; A.D. McMullen, Inc.; Mid-State Moving & Storage Inc.; Movers Unlimited, Inc.; Nilson Van & Storage; North American Van Lines, Inc.; Northwest Consolidators, Inc.; Ogden Transfer & Storage Co.; OK Transfer & Storage, Inc.; Pan American Van Lines, Inc.; Riverbend Moving & Storage, Inc.; Royal Forwarding, Inc.; Sells Service, Inc.; South Hills Movers, Inc.; Stanley's Transfer Co., Inc.; Starck Van Lines, Inc.; StarTrans International, Inc.; Stearns Forwarders, Inc.; Stearns Moving & Storage of Kokomo, Inc.; Stevens Van Lines, Inc.; Terminal Storage Company, Inc.; United Van Lines, Inc.; Von Der Ahe Van Lines, Inc.; Wainwright Transfer Co. of Fayetteville, Inc.; and Weathers Bros. Transfer.

²The small business protesters have also protested the agency's small business set-aside determinations, which are the subject of another decision of today.

BACKGROUND

This procurement was the subject of prior decisions in Aalco Forwarding, Inc., et al., B-277241.8, B-277241.9, Oct. 21, 1997, 97-2 CPD ¶ 110, which denied various protests primarily against the acquisition of these services under the Federal Acquisition Regulation (FAR) part 12 commercial item procedures, and in Aalco Forwarding, Inc., et al., B-277241.12, B-277241.13, Dec. 29, 1997, 97-2 CPD ¶ 175, which denied protests that the RFP unnecessarily bundled certain contract requirements to the detriment of small business concerns.

As previously noted, the RFP was issued pursuant to the commercial item procedures of FAR part 12, and implements a pilot program for 50 percent of the eligible outgoing personal property shipments from the three origin states in the test area.³ The RFP contemplates the award of firm, fixed-price, indefinite delivery/indefinite quantity (IDIQ) contracts for a period of performance of a base year with 2 option years. RFP at 2.

The RFP provides that the government will award contracts to the responsible offerors whose offers represent the best overall value, and allows the government to award a single task order contract or to award multiple task order contracts for the same or similar services to two or more sources; MTMC anticipates making multiple awards. RFP at 37-38. The non-price evaluation factors listed in descending order of importance are past performance/experience and subcontracting plan (which is not applicable to small business offerors); these factors, when combined, are significantly more important than price. RFP at 38. The RFP provides for separate methodologies for evaluating price reasonableness for domestic channels and for international channels. To evaluate price reasonableness for international channels, a "notional shipment" encompassing all the possible services will be used. RFP at 39.

For all domestic shipments, pricing is requested from origin to destination for the base year and each option year for a basic transportation contract line item number (CLIN) and a storage-in-transit (SIT) and SIT-related services CLIN. RFP section B.

³Some protesters maintain that it remains unclear how the agency intends to allot 50 percent of the eligible shipments to the pilot program. As we have previously indicated, the agency has stated that orders under the existing program and under the pilot program will be randomly allocated on a per shipment basis. See Aalco Forwarding, Inc., et al., B-277241.8, B-277241.9, supra, at 7 n.6. In any event, we agree with the Army that the solicitation does not have to identify the agency's internal procedures for managing the allotment of shipments and we have no reason to question the contracting officer's statement that the shipping offices will identify the eligible shipments and assign them equitably between the current program and the pilot program.

The pricing is to be based upon the Professional Movers Nationwide Household Goods Commercial Relocation Tariff, STB HGB 400-L in effect as of May 5, 1996, and the MTMC Domestic Personal Property Rate Solicitation Exception Appendix to the tariff dated January 16, 1997.⁴ RFP attachment 7. For international shipments (including household goods and unaccompanied baggage), single factor rates per net hundredweight are solicited for transportation from origin to destination for the base year and each option year for surface shipments and for air shipments; unit prices are also requested for various specified accessorial services CLINs, such as special crating, stopoffs, extra labor, vehicle waiting time, reweigh, and SIT, which are not included in the transportation single factor rates. RFP section B and attachment 7.

The RFP requires offerors to list in their proposals the daily capacity (in pounds) that they are committing to this contract for the base year and each option year per traffic lane (shipments from an origin shipping office to a destination region) for each traffic channel (shipments from an origin state to a destination region) for which offers are submitted.⁵ RFP attachment 3 and Performance Work Statement (PWS) at 19. Each offeror's committed daily capacity will be used by the agency in determining the number of contracts to be awarded for each traffic channel, RFP at 37, and to obligate the contractors to provide requested services up to their committed daily capacities, PWS at 19. Although a minimum committed daily capacity is not specified, the RFP states that committed daily capacities must be reasonable, based on the historical tonnage projections. *Id.* The RFP, as amended, also provides historical monthly/yearly tonnage data and numbers of shipments for each traffic lane for fiscal years 1994, 1995, and 1996. RFP attachment 4.

As amended, the RFP recognizes that the SCA is applicable to this procurement by incorporating the standard clause, FAR § 52.222-41, and including wage determinations specifying the minimum wages to be paid for certain covered labor categories.⁶ RFP at 31 and attachment 8.

⁴Certain tariff provisions are specifically excluded from application under this solicitation. For example, the tariff's peak season (summer) transportation rates are inapplicable.

⁵There are 53 traffic channels (38 domestic and 15 international) under the pilot program from the three origin states. Some of the traffic channels are partially set aside for small business.

⁶Contrary to the assertions of some of the protesters, the solicitation contains provision for price adjustment, FAR § 52.222-43, in the event of adjusted wage determinations during the contract term. RFP at 32. Because the RFP is issued under the commercial item procedures of FAR part 12, the SCA is inapplicable to subcontractors. FAR § 12.504(a)(10).

Once the contracts are awarded, personal property shipments will be ordered by the government through task orders; the orders will be placed on a rotational basis until the contract minimum (\$25,000) for each awardee is reached, and then issued based upon the contractor's proven value to the government. RFP at 29 and PWS at 19.

ANALYSIS

Contract Minimums and Maximums

The protesters argue that the RFP is defective because it contains a minimum dollar amount of orders that is only nominal as to each contractor and because the stated maximum quantities are not realistic.

An IDIQ contract may be used when the government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that will be required during the contract period, and where it is inadvisable for the government to commit itself for more than a minimum quantity. FAR § 16.504(b). An IDIQ contract shall require the government to order and the contractor to furnish at least a stated minimum quantity of supplies or services and, if and as ordered, the contractor to furnish any additional quantities, not to exceed a stated maximum. FAR § 16.504(a)(1). To ensure the contract is binding, the minimum quantity must be more than a nominal quantity but should not exceed the amount the government is fairly certain to order. FAR § 16.504(a)(2). Estimated maximum quantities should be realistic and based on the most current information available. FAR § 16.504(a)(1). These estimates need not be precise; rather, such estimates are unobjectionable so long as they were established in good faith or based on the best information available, and accurately represent the agency's anticipated needs. Sea-Land Serv., Inc., B-278404.2, Feb. 9, 1998, 98-1 CPD ¶ __ at 11.

The RFP sets forth contract minimums of \$25,000 per contract awarded for the base period and each exercised option period.⁷ RFP at 2. The \$25,000 contract minimum amount remains the same independent of the number of channels awarded per contract. Id. According to the contracting officer, the \$25,000 minimum quantity "is based upon approximately up to about seven shipments per contract award."⁸ The

⁷Contrary to some protesters' assertions, there is no ambiguity as to the minimum.

⁸The \$25,000 contract minimum is based on an average shipment cost, although the number of shipments actually equating to the \$25,000 contract minimum will vary depending on the prices proposed for each channel, the weight of each shipment, whether any accessorial services and storage are ordered, and whether the shipments are domestic or international.

protesters contend that a contract minimum of \$25,000 for each contractor is only nominal and provides inadequate consideration to make the contracts binding.

An IDIQ contract is binding so long as the buyer agrees to purchase from the seller at least a guaranteed minimum quantity of goods and services; the stated minimum quantity forms the consideration for the contract. See Sunbelt Properties, Inc., B-249307, Oct. 30, 1992, 92-2 CPD ¶ 309 at 3; see Willard, Sutherland & Co. v. U.S., 262 U.S. 489, 493 (1923). Since the prohibition in FAR § 16.504(a)(2) against a "nominal" minimum quantity is designed to ensure that the intent to form a binding contract is present, the determination whether a stated minimum quantity is "nominal" must consider the nature of the acquisition as a whole. Sea-Land Serv., Inc., *supra*, at 12.

The solicitation here allows for multiple awards to transport personal property shipments on the same channels and provides for a best value basis for selecting among the contractors once the \$25,000 minimums are satisfied. Thus, for each channel, MTMC may have multiple choices of contractors in shipping a service member's or civilian employee's household effects. Since it is not possible to know, after the minimums are satisfied, whether a given contractor will be used under the best value ordering scheme until individual orders arise, it is uncertain whether an individual contractor will carry more shipments than \$25,000 worth per year during the life of the contract. Moreover, an offeror may be awarded only one of the low volume channels with a handful of shipments per year. As the minimum quantity on any one contract may not exceed the amount the government is fairly certain to order, FAR § 16.504(a)(2), we think the \$25,000 contract minimum is an amount that would not mislead contractors or subject the government to undue risk under the best value award scheme for the task orders.

While the contract minimum of \$25,000 may be relatively low for higher volume channels or where a contractor receives award and commits capacity for multiple channels with significant volumes, the establishment of long-term commitments with relatively few prime contractors, who will potentially be provided greater shipping volumes than under the current program in order to achieve the needed economies of scale, underscores the government's intent to form binding contracts. The fact that the RFP does not provide a minimum quantity proportionate to contractor's committed daily capacity for each awarded channel or is not otherwise linked to the estimated traffic volume for each channel does not detract from the enforceability of the contracts to be awarded, given the uncertainty associated with the number of orders to be placed with each contractor.⁹ See Sunbelt Properties,

⁹Some protesters now contend that instead of \$25,000 as the uniform minimum for each contract, the contract minimums should take into account the substantial and significant variances in the awarded contracts, and the obligations assumed by the
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Inc., supra. Considering all of the circumstances, we cannot conclude that the stated minimum quantity per contractor here represents insufficient consideration to form a binding contract. Id.; Sea-Land Serv., Inc., supra, at 12.

With respect to the maximum quantities, MTMC has reiterated in its response to the protest that the maximum dollar amount for the entire pilot test program is \$75 million for the base period and for each exercised option period. RFP at 2. Attachment 6 to the RFP specifies the maximum dollar amount per channel (origin state to destination region) based on historical data. In this regard, the solicitation complies with FAR § 16.504(a)(4)(ii) by specifying the total maximum dollar value of services to be acquired under each contract as the channel maximums. A contractor receiving a contract award of one channel will be awarded the channel maximum amount for the contract maximum and all contractors receiving a contract award for the same channel will receive the same channel maximum. RFP at 2. If a contractor is awarded a contract containing numerous channels, the channel maximums will be added to make an aggregate total contract maximum.¹⁰ Id.

The agency explains that the contract maximums are simply ordering limitations per channel, not estimates of the amount of dollars successful offerors will be awarded under the resulting contracts. According to MTMC, the varying nature and unpredictability of the government's requirements necessitate the use of the stated maximum quantities, which were derived by multiplying the average cost per shipment by the estimated average annual number of shipments for the pilot

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awardees with regard to domestic and international services, traffic volume per channel, number of channels awarded per contract, and contractors' committed daily capacity per contract. However, we note that the \$25,000 contract minimum was established by MTMC in response to earlier protests by many of these same protesters against the RFP's previous contract minimums of an aggregate minimum guarantee (approximately 10 percent of the total projected annual pilot program cost) broken down by each traffic channel, and then designated in the aggregate for each contractor in proportion to the capacity each contractor committed to the channels for which it received award. In the earlier protests, the protesters stated that "[t]he need for identical, fixed minimums and maximums . . . is obvious" and requested that the solicitation instead state the minimum to be guaranteed each contractor. In response, MTMC agreed that the RFP did not clearly state the minimum guaranteed quantity and amended the solicitation accordingly to provide a contract minimum of \$25,000 per contractor, and the protesters have given us no convincing reason to find that this is insufficient consideration.

¹⁰Contrary to some protesters' assertions, we find no ambiguity with regard to the stated maximums.

program based on historical data from fiscal years 1994 and 1995. The resulting amount was increased by a factor of 50 percent to meet unforeseen contingencies and to ensure the maximum was high enough to cover potential increases in requirements.¹¹ This \$75 million contract maximum was then apportioned to each channel based upon the ratio of the tonnage in a channel to the total tonnage for the pilot program based on the historical data.

Some of the protesters contend that the maximums are overstated based on more recent historical shipment data for fiscal year 1996. Other protesters apparently argue that the maximums may be understated, given the requirements of this RFP that are intended to provide for higher quality service and additional services, and the cost experience under a pilot program for similar services at Hunter Army Airfield. However, none of the protesters have shown that the maximums for these channels are unrealistic in reflecting MTMC's anticipated needs considering the varying historical data in its totality, *i.e.*, fiscal years 1994, 1995, and 1996, and the possibility of large troop deployments from the origin states.¹² In this regard, an agency can factor in amounts for anticipated surges in the requirements in establishing maximums. Sea-Land Serv., Inc., *supra*, at 13.

Moreover, we note that offerors will not have to unnecessarily commit resources to service a misleadingly large order limitation because they are not obligated to accept any shipments beyond their committed daily capacities, which are based on the resources they wish to commit to the contract and will be evaluated by the agency based on the historical tonnage data furnished with the RFP. While the protesters may disagree with the methodology employed by the agency in

¹¹The agency also states that the added percentage accounts for the possibility that contractors providing exceptional service might be offered additional shipments above and beyond their committed daily capacities.

¹²Some protesters contend that the RFP fails to provide a reasonable estimate of MTMC's requirements for the pilot program because the historical data supplied with the RFP may not reflect MTMC's projected requirements, especially as the most recent fiscal year 1996 data evidences a significant decline in shipments on some of the international channels. We have previously found reasonable the agency's position that the historical information is the best available to the government. Aalco Forwarding, Inc., et al., B-277241.8, B-277241.9, *supra*, at 8 n.9. The protesters have not persuaded us that the inclusion of the recent historical data for fiscal year 1996 warrants a different conclusion, or that MTMC need provide further assurances that no further adjustments to the data are needed. Additionally, MTMC states that any current information on base closings or force reductions potentially affecting the number of shipments will be furnished to interested parties whenever it becomes available (the agency states it does not yet have such information).

establishing the maximums, we have no basis to conclude that the contract maximum amounts here were not established in good faith or based on the best information available, or that they do not accurately represent the agency's anticipated needs, given the varying nature and unpredictability of the government's requirements under the pilot program, as evidenced by the historical data supplied with the RFP itself. Id.

Price Evaluation for International Channels

Some of the protesters contend that the RFP's price evaluation for the international channels is an unreasonable hypothetical basis for price evaluation. The solicitation's price evaluation scheme provides as follows:

(2) International channels.

A notional international shipment will be used to perform price analysis for international CLINs. The notional shipment will consist of a 4000 pound surface shipment and a 500 pound air shipment. Each shipment will have a 10 cubic feet special crating requirement, one domestic and international stopoff, [4] hours of domestic and international regular labor, [4] hours of domestic and international overtime labor, [4] hours of domestic and international vehicle waiting time, one reweigh, 90 days domestic and international SIT, and one excessive distance carry charge based on 200 pounds for domestic and international mini-storage. MTMC will select one of the three CLINs for pickup and delivery out of SIT transportation charge for the price evaluation. . . . A factor of 65 [percent] will be applied to the surface shipment and a factor of 35 [percent] will be applied to the air shipment. The resulting prices will be added together to determine a cumulative total price, by channel. These prices for the base period and the two option periods will be reviewed separately and together for price reasonableness.

RFP at 39. The contracting officer states that the notional shipment is necessary because MTMC does not have historical data regarding accessorial services for international shipments, such as special crating, stopoffs, extra labor, vehicle waiting time, and reweighs, and consequently could not provide a proposed estimated quantity for each accessorial service in the price schedule for such shipments.¹³ The contracting officer explains that a notional shipment that includes

¹³According to the contracting officer, had such data been available, it would have been provided as estimates in the RFP, and an extended or total price for each service could then have easily been obtained by multiplying each offeror's proposed unit price by the estimated quantity for each accessorial service.

all possible accessorial services provides a common baseline for evaluation for all offers submitted for these channels, and that without the notional shipment the agency would not be able to determine which offeror submitted the lowest price.

The protesters argue that the notional shipment is an unreasonable basis for price evaluation of the proposed CLIN pricing, in lieu of specifying estimated quantities, because the notional shipment includes accessorial services for the 500-pound air shipment (which they claim would typically be an unaccompanied baggage shipment) that are rarely, if ever, performed, and because the notional shipment does not allow for consideration of the variances in the need for particular accessorial services on each shipment. The protesters also argue that the 65/35 percent weighting factor to be applied to the notional surface and air shipments dramatically varies from relative total revenues of surface and air shipments in the current program.

Agencies must consider cost to the government in evaluating competitive proposals. 10 U.S.C. § 2305(a)(3)(A)(ii) (1994); Health Servs. Int'l, Inc.; Apex Env'tl., Inc., B-247433, B-247433.2, June 5, 1992, 92-1 CPD ¶ 493 at 3-4. While it is up to the agency to decide upon some appropriate, reasonable method for proposal evaluation, an agency may not use an evaluation method that produces a misleading result. Id. at 4. Such method must include some reasonable basis for evaluating or comparing the relative costs of proposals, so as to establish whether one offeror's proposal would be more or less costly than another's. See Health Servs. Int'l, Inc.; Apex Env'tl., Inc., supra; Penn. Ferrara, Adler & Eichel, 66 Comp. Gen. 242, 245 (1987), 87-1 CPD ¶ 134 at 3-4. Where estimates for various types of required services are not reasonably available, an agency may establish a reasonable hypothetical, consistent with the RFP requirements, to provide a common basis for comparing the relative costs of the proposals. See High-Point Schaer, 70 Comp. Gen. 524, 528-30 (1991), 91-1 CPD ¶ 509 at 6-8.

As noted, the agency lacks historical data to project estimates for the accessorial CLINs for the international shipments, but needs a price evaluation scheme that accounts for the prospective ordering of all possible accessorial services and that provides a common basis for proposal comparison and determining the relative cost to the government. The protesters know from their participation and experience in the current program that each international shipment will necessarily be different due to the many variables inherent in each move.¹⁴ It thus appears that no single

¹⁴The protesters contend that since, in calculating the average cost per shipment for the contract maximums, the agency included a percentage for accessorial services, the agency must have information that can be used for estimates of accessorial services. However, there is no indication that the agency has information that would allow it to provide quantity estimates for each type of accessorial service for

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realistic shipment would be sufficiently representative to present a reasonable basis for cost comparison, particularly given the agency's desire to evaluate all possible accessorial services.¹⁵ We note that the protesters have suggested no viable alternative to the agency's approach. Under the circumstances, we find no basis to object to the use of the notional shipment, including all possible services, to evaluate the relative costs of the proposals, even though the notional air and surface shipments may not be exactly replicated in reality. See id.

The protesters' specific objections to the notional shipment evaluation scheme also provide no basis for us to object to the RFP. The protesters assert that certain of the accessorial services specified in the notional air shipment are rarely, if ever, performed on unaccompanied baggage shipments. According to the contracting officer, while this is likely, it will not always be the case under this RFP because the accessorial services listed in the price schedule and evaluated in the notional shipment are applicable for all shipments. In this regard, the RFP requires contractors to service both household goods and unaccompanied baggage shipments, PWS at 3, and seeks prices (single factor rates) per hundredweight for surface or air transportation subject to a 500-pound minimum, with no distinction being made between household goods and unaccompanied baggage. RFP section B and attachment 7. In other words, not all air shipments are unaccompanied baggage shipments, and the premise of the protester's argument is not consistent with the RFP. Further, the accessorial services, which are separately priced in the solicitation, and used for the notional shipments, apply to both household goods and unaccompanied baggage shipments. RFP attachment 7. Given the agency's requirement to evaluate all possible accessorial services, the failure of the protesters to show how this methodology will necessarily produce a materially misleading result, and the fact that all proposals will be evaluated on a common basis, the protesters' assertions regarding the relative rarity of certain accessorial services on unaccompanied baggage shipments provide no basis to object to the RFP's notional shipment evaluation scheme. See High-Point Schaer, supra.

The protesters also argue that the particular notional shipment formula substantially misstates the cost to the government by failing to reflect that, historically, the percentages of total revenue generated from surface shipments is greater than the 65 percent factor to be applied to the notional 4000-pound surface shipment and the percentage of total revenue generated from air shipments is less than the 35-percent

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which the RFP requests prices, and the protesters have not shown that reasonable estimates are otherwise available.

¹⁵The contracting officer also states that by including all accessorial services that may be ordered in the notional shipment, she will be able to take into consideration unbalanced offers which might not otherwise be evaluated.

factor to be applied to the notional 500-pound air shipment. However, the factors to be applied to the notional shipment reasonably reflect what the agency anticipates will be the allocation of surface and air shipments during the pilot program, rather than a replication of the total costs to the government of these two types of shipments under the current program. Given the substantial differences in the requirements of the current program compared to the pilot program, the current program's allocation of revenues to surface and air shipments may well be inapposite to the relative weights assigned to the surface and air shipments factors in the notional shipment price evaluation scheme for the pilot program. Since, according to the agency, the number of shipments is a more dependable factor than revenue or tonnage, and since orders will actually be placed on a per shipment basis, the number of shipments seems an appropriate basis on which to weight the relative proportions of surface and air shipments in the notional shipment price evaluation scheme.

Service Contract Act

As currently amended, the RFP implements the SCA and contains wage determinations issued by the Department of Labor (DOL) for the origin states of North Carolina, South Carolina, and Florida, establishing the minimum wages and fringe benefits to be paid to the following occupations identified by MTMC as classes of service employees expected to be employed under the contracts: warehouseman, material handling laborer, forklift operator, shipping packer, and several classes of truck driver.

The SCA requires federal contractors to pay minimum wages and fringe benefits as determined by the Secretary of Labor to employees under service contracts exceeding \$2,500. When the Act applies to a particular contract, that contract must contain certain provisions specifying the level of wages to be paid, 41 U.S.C. § 351(a)(1), and the minimum level of fringe benefits to be provided, 41 U.S.C. § 351(a)(2).

Some of the protesters contest the applicability of the SCA to this procurement.¹⁶ The basis of the protesters' contention that the SCA is inapplicable is the statutory exemption for "any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect." 41 U.S.C. § 356(3). According to the protesters, the domestic portion of the pilot program will involve the carriage of freight (household goods in this case) by truck by common carriers, and since the contracts to be awarded will be subject to effective published tariffs which will govern the carriage of the personal property shipments, the statutory exemption to the SCA applies to the domestic motor carrier service to be provided under the pilot program.

DOL, not our Office, has the primary responsibility for interpreting and administering the SCA, and a contracting agency may follow the DOL's views on the applicability of the SCA unless they are clearly contrary to law. Delta Oaktree Productions, B-248903, Oct. 7, 1992, 92-2 CPD ¶ 230 at 2; Associated Naval Architects, Inc., B-221203, Dec. 12, 1985, 85-2 CPD ¶ 652 at 1-2. DOL is accorded deference in the interpretation both of the SCA as a statute that has been committed to DOL for implementation and enforcement and of the regulations it has issued in implementing the SCA. Relief Servs., Inc.; Radiological Physics Assocs., Inc., B-252835.3, B-252835.4, Aug. 24, 1993, 93-2 CPD ¶ 116 at 4 n.1.

DOL has determined that the SCA applies to this RFP, as evidenced by its issuance of the wage determinations included in the RFP, the notes of the meeting between DOL and the Army regarding the applicability of the SCA, and DOL's concurrence with the Army's position in response to the protests that the above-cited statutory exemption to the SCA is inapplicable on the grounds that published tariff rates do not govern the contracts to be let under the solicitation for the pilot program. The applicable DOL regulation interpreting the exemption, 29 C.F.R. § 4.118 (1997), states in pertinent part that:

a contract for transportation service does not come within [the statutory] exemption unless the service contracted for is actually governed by published tariff rates in effect pursuant to State or Federal law for such carriage. The contracts excluded from the reach of the [SCA] by this exemption are typically those where there is on file with the Interstate Commerce Commission [ICC] or an appropriate

¹⁶MTMC had initially determined that the SCA did not apply to this RFP. In earlier protests, other protesters alleged that the RFP should have incorporated the SCA and applicable DOL wage determinations. After meeting with DOL officials concerning this matter, the contracting officer concluded that the procurement was indeed subject to the SCA, requested wage determinations from DOL, and proceeded to amend the solicitation to incorporate the relevant SCA clauses and wage determinations.

State or local regulatory body a tariff rate applicable to the transportation involved and the transportation contract between the Government and the carrier is evidenced by a Government bill of lading citing the published tariff rate.¹⁷

While the solicitation requests that prices for the domestic portion of the pilot program be quoted as a percentage of a specified commercial tariff, the tariff does not itself govern the rates to be charged the government, but merely serves as a baseline for pricing of the contracts to be awarded, and the rates submitted by offerors can be higher or lower than the specified tariff. In this regard, the version of the commercial tariff referenced in the solicitation is not the current version used for commercial purposes and the rates are, in effect, frozen for the duration of the contracts, notwithstanding any later versions of the tariff applicable to other shippers. Although, as the protesters note, individual carrier tenders under the current system may also be stated as a percentage of a tariff, the current system is exempt from application of the SCA under a separate administrative exemption, 4 C.F.R. § 4.123(d)(3), and the reduced rates of the current system are specifically authorized by statute, 49 U.S.C. § 13712 (Supp. I 1996) (formerly 49 U.S.C. § 10721(b)(1) (1994)).¹⁸

Thus, we cannot find DOL's position that the statutory exception to the SCA applies only when tariff rates are applicable without exception to be clearly contrary to law, and will not further consider the matter. If the protesters wish to challenge the applicability of the SCA to the present solicitation, their proper course of action is to bring the matter before the DOL's Wage and Hour Division Administrator for an official ruling. 29 C.F.R. § 4.101(g); Ober United Travel Agency, Inc., B-252363, May 7, 1993, 93-1 CPD ¶ 375 at 3.

The protesters next contend that if the SCA does apply to this procurement, the statewide wage determinations issued for the three origin states do not encompass the localities in the CONUS destination regions where delivery services (such as unloading and unpacking) will be performed, and thus the wage determinations included with the RFP are incomplete.

¹⁷Although tariffs are no longer filed with the ICC following the enactment of the ICC Termination Act of 1995, Pub. L. No. 104-88, carriers are still required to publish their tariff rates. 49 U.S.C. § 13702 (Supp. I 1996).

¹⁸These statutes also exempt government traffic moving at the reduced rates from application of 41 U.S.C. § 5 (1994), which requires advertisement for proposals and contracts for supplies or services for the government. In contrast to the current program, the pilot program is being advertised and conducted under FAR procedures, and offers can be based on percentage increases, not just reductions, to the specified tariff.

Since the primary responsibility for interpreting and administering the SCA is vested in DOL, that agency's determination as to the manner in which the SCA will be applied is not objectionable unless so unreasonable as to be clearly contrary to law. Midwest Serv. and Supply Co. and Midwest Engine Inc., B-191554, July 13, 1978, 78-2 CPD ¶ 34 at 5.

Here, the record shows that the "locality" on which to base the wage determinations was the subject of discussions between the Army and DOL. The Army informed DOL that the contracts would be awarded on a channel basis from each origin state to destination region, explaining that a contractor would have to pick up shipments from any point within the origin states, possibly pick up additional shipments en route, possibly make partial deliveries en route, and provide delivery at destination, thus presenting the potential for a "bewildering" number of prevailing wage rate determinations for numerous areas of performance. In response, DOL recommended the use of statewide wage determinations for the origin states, which would apply to the services to be provided for any movements originating in each state regardless of where the services are in fact provided. MTMC was informed by DOL officials that contracts let by the United States Postal Service for the transportation of mail from and to multiple mail distribution centers follow a similar procedure, which avoids the assertedly incongruous result of requiring a different wage rate each time a carrier's covered employees cross into different localities. Based on DOL's advice, the contracting officer requested and obtained prevailing wage rate determinations for the three origin states. We cannot conclude here that the use of statewide wage rate determinations from the origin states for traffic channels emanating from those states is so unreasonable as to be clearly contrary to law, given the "elastic and variable meaning" of the term "locality" as used by DOL, 29 C.F.R. § 4.54(a), and DOL's responsibility for interpreting and administering the SCA. See Midwest Serv. and Supply Co. and Midwest Engine Inc., *supra*, at 5-7; The Cage Co. of Abilene, Inc., 57 Comp. Gen. 549, 553-554 (1978), 78-1 CPD ¶ 430 at 7-9.

The protesters finally contend that wage determinations have not been obtained for each class of service employee who will be performing the services under the contracts, such as for transportation arrangers (including freight forwarders), the contract and operations managers required by the RFP, and the other workers who will perform such required services as movement counseling; claims processing; quality control monitoring; answering telephone inquiries; and secretarial, clerical, and data processing activities.

MTMC explains that the categories of workers included in the wage determinations were derived based on its experience with other FAR-based procurements for moving and storage services as well as on DOL suggestions in this regard. As noted by MTMC, offerors may utilize different types of employees to accomplish the contract requirements, and there are established procedures for adding other

occupations to a wage determination known as the "conformance process," which is detailed in the wage determinations attached to the RFP and in FAR clause § 52.222-41(c)(2) incorporated in the RFP.¹⁹ See FAR § 22.1019. Since these procedures and the DOL regulations, 29 C.F.R. 4.6(b)(2), provide an orderly method by which such omitted employees can be appropriately classified and afforded SCA protection, we do not conclude that the solicitation is defective in this respect. See Midwest Serv. and Supply Co. and Midwest Engine Inc., *supra*, at 8.

The protests are denied.

Comptroller General
of the United States

¹⁹Under these procedures, the contractor initiates the "conformance process" on a Standard Form 1444, Request for Authorization of Additional Classification and Rate, which is submitted to the contracting officer for review. The contracting officer then submits the form with recommendation to the DOL Wage and Hour Division for appropriate action. Here, the contracting officer notes that no prospective offerors have contacted her at any time to inquire or complain about occupations which were not listed in the RFP's wage determinations.