

**Board of Contract Appeals**  
General Services Administration  
Washington, D.C. 20405

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May 21, 2004

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GSBCA 16353-RATE

In the Matter of MENLO WORLDWIDE FORWARDING, INC.

Ralph L. Kissick of Zuckert Scoutt & Rasenberger, L.L.P., Washington, DC, appearing for Claimant.

James F. Fitzgerald, Director, Audit Division, Office of Transportation and Property Management, Federal Supply Service, General Services Administration, Washington, DC, appearing for General Services Administration.

Lt. Col. Robert M. Reist, Chief, Acquisition and Fiscal Law Division, Office of the Staff Judge Advocate, Air Mobility Command, Department of the Air Force, Scott Air Force Base, IL, appearing for Department of the Air Force.

**PARKER**, Board Judge.

Menlo Worldwide Forwarding, Inc., formerly known as Emery Worldwide, a CNF Company (Emery), has asked the Board to review the final decision of the General Services Administration's (GSA's) Audit Division, Office of Transportation and Property Management, that applied alternation of tender rates to abrogate the payment provisions of an agreement made in 1999 by the depot at Hill Air Force Base, Utah (Hill), to obtain guaranteed priority air freight transportation services from Emery. Because GSA's actions were without a legal basis, we grant the claim.

### Background

In early January 1999, Emery introduced an airfreight delivery service called "Gold Priority Guaranteed Service." This new service provided Emery's customers with guaranteed delivery times for both small package deliveries (up to 150 pounds), which a few carriers including Emery had been offering, and heavyweight shipments (up to 10,000 pounds), which no company then offered. Subject only to very limited exceptions (for weather, air traffic control and the like, but not for equipment failures), if the guaranteed delivery times were not met, all related shipping charges would be refunded by Emery. Previously, if a delivery arrived late, the customer still paid shipping charges based on whenever the shipment was actually received.

In February 1999, Emery representatives contacted John Wojciechowski, the Transportation Officer at Hill, which was one of Emery's largest Government customers. Emery already was providing Hill with its regular freight-all-kinds (FAK) service, but that service does not include guaranteed delivery times. After reviewing a brochure describing Emery's Gold Priority Guaranteed Service and being briefed about its benefits, Mr. Wojciechowski said Hill would be interested in using the service. He indicated that, under the Department of Defense's (DoD's) acquisition policy of using best commercial practices, he had authority as the Depot Transportation Officer to enter into "best value" local agreements tailored to Hill's particular requirements. It was agreed that Emery's Salt Lake City account manager would meet with him to discuss a possible local agreement bringing the new Gold Priority Guaranteed Service to Hill.

At the same time, Emery began the process of complying with DoD's new tender rules. Air Mobility Command (AMC) Freight Traffic Rules Publication No. 5 (AFTRP 5), effective April 1, 1999, and Military Traffic Management Command (MTMC)<sup>1</sup> Standard Tender Instruction Publication No. 364-B (MTMC Pub. 364), effective August 1, 1998, established a uniform set of business standards governing all tenders for the carriage of DoD freight by air. Emery discussed its planned Gold Priority Guaranteed Service and how to proceed, not only with AMC, but also with responsible officials at MTMC and DoD. AMC, MTMC, and DoD all were supportive of the guaranteed delivery concept. From late summer 1998 through early 1999 Emery was in contact with Tamara Thouvenot, Chief, International Airlift Expansion, Airlift Procurement Division, Headquarters AMC, who was AMC's designated point of contact for the new tender rules and their implementation. On January 11, 1999, the day that Emery publicly announced its new Gold Priority Guaranteed Service, Emery's Global Account Manager - Government Sales, Mike McVeigh, called Ms. Thouvenot to tell her that Emery was officially launching the new service for commercial customers and wanted to offer it to DoD customers, too. Mr. McVeigh explained the concept of the comprehensive Gold Priority Guaranteed Service, which would be priced at slightly higher rates than Emery's FAK services because there would be value added for DoD with the guaranteed delivery times. He pressed AMC to add a designation

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<sup>1</sup>MTMC was renamed the Surface Deployment and Distribution Command as of January 1, 2004.

(like "G") to the new tender format so that DoD users would understand that higher tender rates denoted guaranteed delivery services. Ms. Thouvenot asked Mr. McVeigh to send her something in writing. In response, Mr. McVeigh faxed her that same day Emery's press release announcing implementation of the new Gold Priority Guaranteed Service, and on January 21, 1999, he sent her a memorandum enclosing copies of the terms that would apply to the service. After receiving these materials, Ms. Thouvenot told Mr. McVeigh that AMC liked the Gold Priority Guaranteed Service, provided that any related tenders conformed to the new tender rules.

Emery understood this as AMC's authorization to proceed. As Mr. McVeigh states in his affidavit:

My understanding from what Ms. Thouvenot told me was that we could file a separate Gold Priority Guaranteed Service tender so long as we didn't include any reference to a related [Emery] service guide or other publication on the tender form; it would be left up to the DoD users to determine whether the higher rates were tied to useful higher value services. Neither Ms. Thouvenot nor anyone I spoke to at AMC, MTMC or DoD said we couldn't offer our Gold Priority Guaranteed Services, or said that we could not submit a separate tender for those services when we already had a tender for our FAK services in place. No one I spoke to ever mentioned a possible rate alternation issue.

The AMC guidance, while not as helpful as a change in the tender rules would have been, gave us sufficient authorization to proceed. It meant that we could file a separate tender with AMC for the comprehensive Gold Priority Guaranteed Service, and with that approved then we'd need to contact the individual DoD locations and explain to the Transportation Officers the characteristics of our new service and the value that justified the higher tenders rates. Frankly, that's no different than what we now have to do with respect to FAK services, since the revised tender format provides only basic, uniform information for all FAK tenders entered into DoD's computer systems, leaving it up to each Transportation Officer to somehow determine the specific characteristics and quality of the carrier and the FAK services that are being offered at the stated rates.

With the go-ahead from AMC, Emery filed a new tender with AMC to authorize use of the Gold Priority Guaranteed Service at Hill. This tender, Emery No. 1003, stated that it only applied at Hill. As discussed with Ms. Thouvenot, it was priced with rates slightly higher than those in the company's general FAK tender then in effect, in order to reflect the value added service that would be provided to Hill with the Gold Priority Guaranteed Service. Further, as required by AMC's guidance, Emery No. 1003 made no mention of an Emery service guide or other publication. Emery No. 1003 was approved by AMC with an April 1, 1999, effective date. The approved tender and its rates were then loaded by MTMC into DoD's Global Freight Management System and Power Track for use by Hill, invoicing by Emery, and payments by DoD.

Following AMC's approval of Emery No. 1003, Emery had its Salt Lake City Senior Account Manager responsible for Hill, Bryce Worthington, meet with Hill's Transportation Officer, Mr. Wojciechowski. That meeting took place at Hill on or about March 5, 1999. Mr. Worthington discussed the Gold Priority Guaranteed Service in detail with Mr. Wojciechowski, including going over the brochure explaining the service that Emery previously had provided him. Mr. Worthington also gave Mr. Wojciechowski a copy of Emery No. 1003, then approved by AMC, and discussed the rates in that tender with him. Mr. Wojciechowski said he was interested in a customized version of Emery's guaranteed service. For Hill, which already could obtain guaranteed small package delivery service (through a GSA government-wide contract), Mr. Wojciechowski wanted the guarantee of delivery times for Hill's heavyweight shipments, coupled with a commitment from Emery to give those shipments boarding priority over Emery's commercial traffic. At the March 5, 1999, meeting, the two men eventually agreed on a series of benefits and preferences that Mr. Wojciechowski requested, tailored to Hill's specific needs. The rates would be those specified in Tender No. 1003.

In short, the Hill Transportation Officer followed up on AMC's approval of Emery's Gold Priority Guaranteed Service and tender rates, and negotiated to obtain additional benefits at no added cost to the Government. The customized Gold Priority Guaranteed Services have proved so beneficial to Hill that it not only discontinued using Emery's FAK services altogether after March 1999, but it has significantly increased the volume of freight offered to Emery.

By notices issued in July 2003, the GSA Audit Division alleged that Emery overcharged DoD a total of \$198,491.88 (with interest) on 1160 guaranteed priority shipments originating at Hill during the period from January 31, 2001, to January 25, 2002. In each case, the Audit Division cited AFTRP 5, Item 215(3), "Alternation of Rates - DoD Tenders," as the basis for the overcharge notice, asserting that Emery's Hill site-specific tender for the guaranteed delivery services and Emery's lower priced FAK tender covering non-guaranteed services are subject to alternation of rates, on the assumption that the two tenders cover the same services. By agreement with GSA, Emery paid \$271.97 under protest in response to three of the overcharge notices, and on October 14, 2003, it hand-delivered a protest/request for reconsideration (dated October 9, 2003) to GSA using these three notices as test cases. On October 31, 2003, GSA issued a three-page decision maintaining that alternation is proper. Since that decision, GSA has been issuing overcharge notices based on the same alternation premise with respect to the similar agreements Emery has at six other locations, as well as for additional Hill shipments, bringing the total amount in dispute to almost \$1,000,000 and counting. GSA already has offset over \$140,000 from funds otherwise owed Emery, in addition to the \$271.97 that Emery paid in protest on the three test cases. Emery has sought review of GSA's decision by this Board.

### Discussion

GSA's arguments in this case attempt to justify the agency's decision to take money away from Menlo (Emery) for providing a new service that by all accounts is fairly priced and for which its customer, Hill, is happy to pay. It appears from GSA's somewhat confusing and at times self-contradicting submissions that GSA originally did not realize

that the Gold Priority Guaranteed Service was different from the services called for under Emery's FAK tender, and GSA simply applied the lower FAK tender rates to the transactions. Later, when it became apparent that Hill had ordered services different from Emery's FAK services, GSA continued to assert that alternation of rates applied, and added a second basis for offsetting the payments, arguing that Emery's new tender failed to comply with DoD's tender rules. GSA has failed, however, to explain how the new tender failed to comply with the DoD rules.

The asserted basis for GSA's offset was "alternation of rates." Alternation of rates means that, if a carrier has more than one rate that applies to a service, the carrier's lowest applicable rate is applied. See AFTRP 5 Item 215(3). Alternation of rates only applies, however, where more than one rate applies to the same service. We are aware of no case (and GSA has cited none) in which alternation of rates has been held to apply to tenders for different levels of service. The rule has always been that "officers of the Government have no authority to contract for interstate or intrastate transportation rates higher than those available to the general public for the same or similar service." Hilldrup Transfer & Storage Co., 58 Comp. Gen. 375 (1979) (emphasis added).

Consistent with this rule, DoD's AFTRP 5 Item 225 provides:

When a carrier publishes different levels of service at varying rates, carrier will bill the Government at the rate applicable to the actual service performed and not to exceed the rate applicable to the service requested.

AFTRP 5 at 3-4. This is exactly what Emery did. Emery billed Hill at the agreed AMC-approved rates applicable to the Gold Priority Guaranteed Service actually provided to Hill, which was the only Emery service that Hill requested. The Gold Priority Guaranteed Service was not similar to the FAK service because of the addition of an important new feature -- guaranteed delivery. By maintaining that alternation of rates was appropriate, GSA is in essence arguing that, although Hill ordered a Honda Accord with a premium package of options, it may only pay for a Honda Accord without the options package because both vehicles are Honda Accords. This is not, and has never been, the law.

GSA also argues that Emery's tender for the Gold Priority Guaranteed Service was not valid because it failed to comply with the requirements of AFTRP 5, although the agency has yet to provide either Menlo or this Board with a clear statement as to why this would be so. In their submissions, GSA and AMC have admitted that a tender for Emery's Gold Priority Guaranteed Service is allowable under AFTRP 5. Apparently, however, GSA believes the Hill tender to be invalid either because (1) Hill's Transportation Officer negotiated for additional free services that Emery would provide under the new tender without first obtaining AMC's approval or (2) AFTRP 5 prohibits Emery's FAK tender and its Gold Priority Guaranteed Service tender from being in effect in the same location at the same time.

Both arguments are without merit. First, there is nothing in AFTRP 5 that would render Emery's Gold Priority Guaranteed Service tender invalid because additional free services were negotiated by Hill's Transportation Officer. AMC approved the original Gold Priority Guaranteed Service tender. To argue without any basis that AMC would have rejected a tender that provided the same services, plus additional services at no additional cost, borders on the absurd and can in no way justify a refusal to pay for legitimate services rendered.

Moreover, Hill's Transportation Officer acted in accordance with a Policy Directive promulgated by DoD via a department-wide memorandum on January 15, 1998. Claimant's Submission (Jan. 30, 2004), Attachment 2 (Memorandum on Transportation Acquisition Policy) at 3-7. The memorandum explains that: "The attached Transportation Acquisition Policy establishes, for the first time, a definitive, flexible DoD policy for the acquisition of transportation and related services." *Id.* at 3. The memorandum goes on to state: "The policy requires the use of best-commercial practices and best-value evaluation procedures when acquiring transportation services." *Id.* The use of "best commercial practices" and "best value" procedures, the Policy Directive provides, is to be accomplished through "a variety of flexible procurement instruments." *Id.* at 5. These include not only FAR-based commercial item contracts, but also "tariffs and tenders, as appropriate." *Id.* "Regardless of the procurement instrument that is used, the following policy, guidelines and requirements shall be addressed in all acquisitions of transportation and related services." *Id.*

Whatever the outer limits of the Hill Transportation Officer's authority to negotiate local changes to AMC-approved tenders may be, it is clear that, here, Mr. Wojciechowski acted within his authority when he concluded that he could obtain the Gold Priority Guaranteed Service that AMC already had authorized, with an added site-unique package of extra services at the same rates that AMC had approved. By comparison to the FAK service that Hill was receiving at the time, and even the standard Gold Priority Guaranteed Service, the customized Gold Priority Guaranteed Service-plus clearly represented the "best value" for Hill. GSA's argument that the Transportation Officer's negotiation of additional free services somehow invalidated the AMC-approved tender is not reasonable in light of the relevant authorities.

With regard to GSA's second argument for the Gold Priority Service tender being invalid -- that AFTRP 5 prohibits Emery's FAK and Gold Priority Service tenders from being in place at the same location at the same time -- we have not found, nor has GSA pointed us to, any provision in AFTRP 5, or any other document, that would support this argument. To the contrary, AFTRP 5 Item 225 recognizes that service providers may offer "different levels of service at varying rates." AFTRP 5 at 3-4.

#### Decision

GSA's actions in connection with Menlo's Gold Priority Guaranteed Service were without a legal basis. Accordingly, the claim is granted. GSA shall (1) withdraw all overcharge notices and cease taking offsets on the same basis with respect to the tender rates for the Menlo's Gold Priority Guaranteed Service and (2) repay Menlo for all amounts offset by GSA or paid by Menlo in connection with the service.

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ROBERT W. PARKER  
Board Judge