



General Services Administration  
1500 East Bannister Road  
Kansas City, MO 64131

July 19, 1997

Mr. Joseph M. Harrison  
President  
American Movers Conference  
1611 Duke Street  
Alexandria, VA 22314-3482

Dear Mr. Harrison,

This responds to your letter of November 22, 1996 and to your letter of January 15, 1997 to the extent the same issues are raised in that letter.

### **Inclusion of Brokers**

The Broker Supplement to the Domestic and International Tenders of Service (Broker Supplement) states in Paragraph B1-3.6, Brokerage Commission, "Nothing in this supplement, the DTOS or the ITOS shall prevent the broker participant from collecting a commission from the carrier used by the broker to furnish transportation and accessorial services." You have questioned whether this office has the authority to alter a long established GSA legal position that the payment of commissions by carriers to brokers would be "improper" under the Anti-Kickback Act of 1986 (Letter of October 30, 1990 to General Counsel of GAO from Stuart Young, GSA Assistant General Counsel, p. 5). The US General Accounting Office (GAO) in its decision PHH Homequity Corporation, as cited your letter, concurred in that position. The instant situation is, however, distinguishable from that forming the basis of GAO's decision, and consequently does not represent an alteration of GSA's legal position.

In its decision, GAO used a single test to determine whether commissions would be "improper;" namely, whether the contractor would actually be performing brokerage services. The GAO found that that under the terms of the proposed contract, the broker would not be performing brokerage services, but rather would be "impartially administering the established selection procedures rather than acting on behalf of any specific carriers..." (Ibid, p. 4). On that basis, it concluded that the contractor would be improperly influenced through the payment of commissions in its actions on the Government's behalf and that "the prohibition against commissions is an unobjectionable method of avoiding these results." (Ibid, p. 4.)

Application of the GAO test to the present situation produces very different results. Since Move Management Service Providers (MMSP) will be selected for a specific move by the Government in accordance with the same criteria as any other participant in the program, see 49 CFR 101-40, and the Government will exercise no further control over any subsequent selection process, the MMSP is not “impartially administering the established selection procedures,” but rather acting on behalf of itself and of specific carriers. Accordingly, a broker is at that point performing brokerage services, services which the GAO agreed were compensable. (Ibid, p. 4.)

The other policy concerns raised in the PHH case do not exist here. In PHH, the agencies were concerned that if carriers were forced to pay commissions, they simply would increase their TOS rates to the Government during the next rate filing cycle. For a carrier to do that in this instance would be at the carrier’s risk. Under the current procurement, agencies will be able to contract for all move services, including transportation, or for transportation services only. If the carrier raises its rate, it runs the risk of becoming noncompetitive with the broker; that is, an agency may chose the broker’s full service rate over the carrier’s rate for transportation only, should the two rates become non-discriminating. As to your argument that pricing discussions between a broker and its carrier(s) when the carrier(s) might also be preparing its own pricing for the GSA program may be illegal, we see no difference in that than in the pricing discussions that presently occur between a carrier and its agent where the agent, as a carrier in its own right, may be preparing its own GSA pricing.

In addition, you have asked how we intend to evaluate customer satisfaction with broker (herein after referred to as MMSP, Move Management Service Provider) service and how those CSI’s would be used. Again, the Broker Supplement clearly states that the MMSP will be subject to the Customer Satisfaction Rating System. An MMSP will be evaluated using GSA Form 3080, Household Goods Carrier Evaluation, by both the relocated employee and the Responsible Transportation Officer. GSA will conduct the same review and analysis based on returned GSA Forms 3080 for MMSP’s as for Transportation Service Providers (TSP; otherwise referred to as “carrier”) and issue for the MMSP’s a Customer Satisfaction Index under the same rules as we negotiated with the industry several years ago. As to how those CSI’s would be used, we have not yet arrived at a final decision on that and would be pleased to work with you and the MMSP’s to arrive at an appropriate solution.

Finally, you have suggested special pricing treatment for move management services (MMS). By establishing a pricing category specifically for MMS in the recently issued Request for Offers, we have effectively addressed your concerns. Federal agencies that are interested in purchasing MMS realize that the additional services involved in MMS require a level of compensation greater than that for just transportation services. Accordingly and even in a competitive environment, MMSP’s have the flexibility to add to the TSP charges a charge for MMS. This in effect is the substance of your suggestion.

### **Permit All Currently Approved Carriers to Provide Move Management Services Do Not Require a Broker's License**

You have suggested that we permit currently approved carriers to provide MMS in addition to the transportation services they have traditionally provided. On a number of occasions, the last being the Industry Council meeting on December 12, 1996, we have publicly indicated our willingness to consider such a course of action. Such willingness, however, has been qualified by our concerns that there is no public basis, a tariff provision, or record, operation as a household goods broker, on which to predicate a finding of capability or experience on the part of approved carriers. In that regard, members of our respective staffs met in mid-February, 1997 to work out the details of carrier participation in the MMS program. We requested applications for Direct Move Management Services in early June with responses due July 18, 1997. We have received several requests for approval.

### **GSA's Proposal Discriminates Against Carriers and Small Business Brokers Are Automatically Assigned A Complete Scope**

You have also complained that both the process of and basis for approving MMSP's and their scope of operation assignment are unfair relative to carriers. We disagree. The establishment of the MMS program provided for new services from a new group of providers in competition with existing services and vendors. To act other than expeditiously would have protected existing services and vendors and denied the Government the benefit of the new services and the fruits of a broadly competitive marketplace.

Regarding the basis for approval and the assignment of the brokers' scope of operation, you ignore the fundamental difference between carriers and brokers. Carrier applicants must undergo a more extensive scrutiny than broker applicants. Carriers do the work of a move. Carriers provide the truck and driver; they pack and load shipments; they haul them to the destination, provide warehouses for storage and deliver the property to the new residence. To accept a carrier as competent to do this work requires an extensive review and analysis of its operational and financial strengths and weaknesses and a determination of where the carrier can best provide its services. Brokers, on the other hand, make arrangements for a move. Brokers perform functions of the traffic management office; they are the advisor and counselor to the relocating employee; and they assist carriers in scheduling and planning a move. To accept a broker as competent does not require a review of hauling ratios, traffic patterns, or loss and damage statistics; rather it requires a finding that the broker has successfully advised and interpreted a client's relocation policy to both the relocating employee and carrier, that it has successfully acted as the client's and relocating employee's advocate with the carrier and that it has successfully purchased and used carrier services. If the broker has been successful at these things, then its scope of operation cannot be limited to a geographical basis, since geography is not inherent in what it does.

## **Separate Tenders**

You have asked for clarification of our plan to permit carriers to offer separate rates for different Federal agencies. Under the terms of the current Federal regulations, 41 C.F.R. 101-40, Federal agencies must get household goods rate and routing information from GSA and Federal agencies may not negotiate household goods transportation rates and services with carriers. This is the basis for the provision in the TOS prohibiting carriers from giving a Federal agency a rate tender outside the CHAMP program. When that regulation changes with the removal of the requirement to get rate and route information from GSA and the authorization for individual agencies to negotiate their own tenders, GSA will be unable to continue any requirement restricting the filing of tenders to GSA. In order to deal with the regulatory change and still provide Federal agencies with the opportunity to outsource rate negotiations, among other things, we have established a special capability that allows any Federal agency to use our program to solicit rates for its own specific use. This, in turn, gives a carrier the opportunity to target more precisely its rate filing. Contrary to your assertion, a carrier may only file rates consistent with its GSA scope of operation.

If you have any question or comments, please feel free to contact me at 816-823-3646 or by e-mail at [william.hobson@gsa.gov](mailto:william.hobson@gsa.gov)

Sincerely,

*S/W. P. Hobson*

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