

Transportation Procurement Trends Toward Integrated Services, and Registration Requirements Abound

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Buy-side decisions for transportation and logistics services are increasingly driven by both internal subject matter experts and their corporate procurement teams. The traditional procurement perspective yields certain behaviors such as highly structured competitive bid processes and their timelines. The traditional logistics practice of procuring mode-specific service offerings is also, at least anecdotally, giving way to a trend toward going out to bid for wide ranging integrated services with multimodal door-to-door results. One essential question when developing or reviewing RFQ responses is whether, in fact, the desired services may be lawfully offered and performed.

Risk to both the service provider and the enterprise shipper is palpable where the services under bid cannot be lawfully performed by the respective provider. Some service providers have built out wide ranging portfolios of legacy operating authorities held either directly or across the corporate family. Other providers keenly recognize where holding one authority effectively extends available service offerings to other modes, such as the ability of Indirect Air Carriers and Non-Vessel Operating Common Carriers to perform what amounts to incidental transportation brokerage pursuant to 49 USC § 14916. Yet others may offer carefully constructed “shipper’s agent” services where permitted by the respective legal structure and diligent observance of operating parameters. Nonetheless, failure to observe basic requirements place service providers at risk for regulatory enforcement and expanded damages along with simple allegations of contract breach and negligence. Shippers conversely risk failing to comply with internal corporate policies, supply chain interruption impacting performance and customer service, and unnecessary negative headlines.

Understanding the basic “ground rules” for offering a wide range of services, including those outside of core offerings, is key to customer satisfaction and risk management in this procurement environment. The following sections identify certain common transportation and logistics services that are often fundamental to integrated services and project logistics: (1) Motor Carrier Brokerage; (2) Ocean Freight Forwarder service; (3) Non-Vessel Operating Common Carrier service; (4) Indirect Air Carrier service; and (5) Customs House Brokerage. The regulated scope of offerings is identified for each as well as its basic registration requirement. Certain other common services where registration is less significant a consideration are also described, such as Intermodal Marketing Companies, Export Forwarding Agents, and Warehousing.

Motor Carrier Brokerage

Service Scope - The term “broker” means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds

itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation. 49 USC § 13102.

Registration Requirement - A person may provide interstate brokerage services as a broker only if that person-- (1) is registered under, and in compliance with, section 13904; and (2) has satisfied the financial security requirements under section 13906. 49 USC § 14916.

Ocean Freight Forwarder

Service Scope - The term “ocean freight forwarder” means a person that-- (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments. Also, the term “ocean transportation intermediary” means an ocean freight forwarder or non-vessel-operating common carrier. 46 USC § 40102.

Registration Requirement - A person in the United States may not advertise, hold oneself out, act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary’s license issued by the Federal Maritime Commission. The Commission shall issue a license to a person that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary. 46 USC § 40901.

Non-Vessel Operating Common Carrier

Service Scope - The term “non-vessel-operating common carrier” means a common carrier that-- (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier. Also, the term “ocean transportation intermediary” means an ocean freight forwarder or non-vessel-operating common carrier. 46 USC § 40102.

Registration Requirement - A person in the United States may not advertise, hold oneself out, act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary’s license issued by the Federal Maritime Commission. The Commission shall issue a license to a person that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary. 46 USC § 40901.

Indirect Air Carrier

Service Scope - The term “air carrier” means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation. 49 USC § 40102. The term “indirect air carrier” (IAC) Indirect air carrier (IAC) means any person or entity within the United States not in possession of an FAA air carrier operating certificate, that undertakes to engage indirectly in air transportation of property, and uses for all or any part of such transportation the services of an air carrier. 49 CFR § 1540.5.

Registration Requirement - No indirect air carrier may offer cargo to an aircraft operator operating under a full program or a full all-cargo program specified in part 1544 of this subchapter, or to a foreign air carrier operating under a program under § 1546.101(a), (b), or (e) of this subchapter, unless that indirect air carrier has and carries out an approved security program under this part. 49 CFR § 1548.5.

Customs House Broker

Service Scope - The term “customs broker” means a person who is licensed under this part to transact customs business on behalf of others. The term "customs business" means those activities involving transactions with CBP concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collected by CBP on merchandise by reason of its importation, and the refund, rebate, or drawback of those duties, taxes, or other charges. "Customs business" also includes the preparation, and activities relating to the preparation, of documents in any format and the electronic transmission of documents and parts of documents intended to be filed with CBP in furtherance of any other customs business activity, whether or not signed or filed by the preparer. However, "customs business" does not include the mere electronic transmission of data received for transmission to CBP and does not include a corporate compliance activity. 19 CFR § 111.1.

Registration Requirement - Except as otherwise provided in paragraph (a)(2) of this section, a person must obtain the license provided for in this part in order to transact customs business as a broker. 19 CFR § 111.2.

Lesser Regulated Services

A broad range of core and ancillary integrated supply chain offerings do not carry any significant registration or operational requirements. Intermodal marketing, for example, may be generally conducted without any operating authority although most in the space present FMCSA-issued broker permits as evidence of ability to perform. Export forwarding agents likewise have no operating authority type requirements apart from registering to use services key to that function such as the Census Bureau’s AES Direct. Warehousing services are relatively speaking the least regulated of all. No federal authority is required although those laws of the state and municipality having jurisdiction will govern together with published industry best practices.

Planning Ahead to the Pitch and Beyond

What is old is new again to some degree, as is often the case. Integrated service offerings and bids take on the character of project logistics where the goal is essentially to seek accomplishment of the desired traffic flows on time and under budget. Planning for responding to, or even developing, an RFQ and subsequent service delivery requires a common understanding of the goals and precisely what services are sought. Those services may take on a project manager character covering a wide range of modes. For service providers this role is consultative in nature and allows performance at its very best, but this role can also challenge the lawfulness of that available range of services and underlying relationships. Paying attention to those boundaries, and buttoning up any areas of weakness, can be essential to successful delivery in this environment.

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