



Comptroller General  
of the United States  
Washington, D.C. 20548

# Decision

**Matter of:** North Pacific Seafoods Incorporated

**File:** B-249133

**Date:** October 20, 1992

Arun Bhalaiik for the protester,  
Bradley D. Gilman, Esq., Robertson, Monagle & Eastaugh, for  
Ocean Prowler Partnership, an interested party,  
James K. White, Esq., Department of Commerce, for the  
agency,  
Mary G. Curcio, Esq., and Andrew T. Pogany, Esq., Office of  
the General Counsel, GAO, participated in the preparation of  
the decision.

## DIGEST

1. Protest that as the low, technically acceptable offeror, protester was entitled to the contract award is denied since the solicitation did not require that award be based on price and the procuring agency reasonably determined that the awardee's technically superior proposal offset the protester's slight price advantage.
2. Protest that agency's evaluation of proposals was improper is denied where review of record shows that evaluation was reasonable and the protester does no more than present its disagreement with the agency's evaluation.
3. Protest that agency failed to use the proper solicitation format in procuring charter services, which is not filed until after the closing time set for receipt of proposals, is dismissed as untimely since it concerns an impropriety apparent from the face of the solicitation.

## DECISION

North Pacific Seafoods Incorporated protests the award of a contract to Ocean Prowler Partnership under request for proposals (RFP) No. 52ABNF200074, issued by the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, to charter a commercial fishing vessel for 75 days.

We deny the protest in part and dismiss it in part.

The RFP was issued on March 23, 1992, to acquire a 75-day charter of a commercial fishing vessel, including a master and crew, to conduct a biological assessment of sablefish and other groundfish resources in the Gulf of Alaska via longline fishing.<sup>1</sup> As issued, the RFP provided for offerors to submit technical proposals and to propose a daily charge to the government to charter the vessel.<sup>2</sup> The RFP also required offerors to estimate the number of gallons of fuel the vessel would consume over a 24-hour period. In this regard, the RFP provided that in determining the cost to the government to charter a particular vessel, the government would use its historical fuel consumption data to arrive at an estimated average daily cost of fuel and then add this figure to the charter price.

The RFP provided four evaluation factors with subfactors against which technical proposals would be evaluated. These were: (1) vessel efficiency and safety, including vessel size, horsepower, previous fishing history, fishing equipment, deck configuration and office space; (2) the vessel's ability to accommodate the scientific field party, including berthing capacity and galley capacity; (3) the expertise, experience, and competence of designated captain and crew, and the vessel's past performance; and (4) desirable items, including electronic equipment and previous experience in fisheries research work of the crew and captain.

The RFP also provided that in the award decision price would be considered slightly more important than technical quality. The RFP advised, however, that in determining the competitive range, the overall evaluation of price and technical factors would be used, and reserved to the government the right to make an award on the basis of other than price alone to obtain increased benefits.

NOAA received five offers by April 23, the closing date for the receipt of proposals. After evaluating the offers, NOAA included three, including those submitted by the protester and Ocean Prowler in the competitive range. On the technical side, Ocean Prowler was ranked second and the

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<sup>1</sup>Longline fishing gear consists of a long length of line, or many lengths, with a series of hooks or leaders of several lengths secured to the main line(s) varying distances apart.

<sup>2</sup>While the RFP requested offerors to propose a daily charge to charter the vessel, NOAA in fact expected offerors to offer the vessel at no cost to the government due to a provision in the solicitation that permitted the vessel owner to retain the fish to process and sell after the scientific observations and the necessary sampling had been completed.

protester was ranked third. With regard to price, which was based on estimated fuel costs since the three offerors all offered to provide the charter services to the government at no cost, the protester was ranked first and Ocean Prowler was ranked second.

On May 12, NOAA issued amendment No. 2 to the solicitation. The amendment notified the offerors that daily fuel and moorage costs were now required to be included in the daily charter price. On May 14, NOAA provided written discussion questions, to which each offeror was requested to respond by May 19. After reviewing the responses, NOAA requested the offerors to submit best and final offers (BAFO) by May 29.<sup>3</sup> In its BAFO, North Pacific offered to pay the government \$10,001 if the government chartered its vessel for the full 75 days. Ocean Prowler offered to charter its vessel to the government at no cost. NOAA, after reviewing the BAFOs, ranked Ocean Prowler first technically and North Pacific second. Subsequently, the agency performed a cost/technical tradeoff and determined that the technical advantages of the Ocean Prowler proposal more than offset the \$10,001 cost advantage offered by North Pacific.<sup>4</sup> As a result, the contract was awarded to Ocean Prowler. North Pacific protests this decision.

North Pacific first protests that as the low cost, technically qualified offeror, it should have received the contract award. North Pacific also challenges as

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<sup>3</sup>The third competitive range offeror dropped out of the procurement at this time.

<sup>4</sup>After NOAA reviewed the BAFOs, Ocean Prowler received a raw technical score of 71.53 and a weighted technical score of 28.61 based on a 40 percent weight for the technical proposal. North Pacific received a raw technical score of 59.50 and a weighted score of 23.80. North Pacific, based on its offer to pay the government to charter its vessel, received 60 points for cost. Even though it offered to provide the charter at no cost to the government, Ocean Prowler received 0 points. Thus, the combined technical and cost scores of North Pacific and Ocean Prowler were 83.80 and 28.61, respectively. Upon reviewing these results, the agency concluded that because it offered to provide the charter services at no cost to the government in comparison to North Pacific's offer to pay the government, Ocean Prowler would always receive 0 points for its cost proposal. NOAA therefore conclude that this analysis did not provide the government with a realistic picture of the relative benefits of the proposals, and as a result abandoned it. Instead, the agency performed a narrative cost/technical tradeoff based on the relative merits of the proposals.

unreasonable NOAA's determination that Ocean Prowler submitted a superior proposal.<sup>5</sup>

Generally, when conducting a negotiated procurement, the government is not required to make award to the technically acceptable firm offering the lowest price unless the RFP specifies that price will be the determinative award factor. See Encon Mgmt., Inc., supra. Here, while the RFP did state that cost would be considered slightly more important than technical factors, the award criteria did not require award to the low-priced offeror; it provided for award to other than the low-cost offeror if such an award were beneficial to the government. In short, it provided for the kind of cost/technical tradeoff that was made here. Thus, contrary to the position maintained by North Pacific, the firm was not entitled to the award simply because it submitted the low cost, technically acceptable offer.

NOAA's conclusion that Ocean Prowler submitted a superior technical proposal was based on a number of factors. First, the agency considered that the Ocean Prowler, the awardee's vessel, was 43 feet longer than the Sonya S, the vessel offered by the protester. The agency believed that based on its larger size, the Ocean Prowler would provide a number of advantages to the government, such as being less vulnerable than the smaller Sonya S to the vagaries of weather that could reduce the ability to complete the work within the desired time frame or perhaps preclude completion altogether. The agency also believed that platform stability for the scientists and their work would decrease with a shorter length. In addition, NOAA was concerned that the high workloads imposed on the scientific party during the survey demanded that the sampling procedures be streamlined and very efficient. Based on the schematics

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<sup>5</sup>In its protest, North Pacific also asserts that if the agency had "stuck" to its original evaluation plan and awarded the contract on the basis of the combined point scores for the cost and technical proposals, it would have received the award. In addition, North Pacific points out that there was fewer than 5 points separating the two offerors technical proposals and asserts that this difference does not warrant an award to Ocean Prowler. We disagree. First, we note that the solicitation did not state that the award would be made to the offeror with the highest combined point scores. Further, point scores are useful only as guides to decision making and are generally not controlling. Accordingly, an agency may make a cost/technical tradeoff based on a written narrative justification, which finds that one proposal is superior to another, rather than on a comparison of point scores. See Encon Mgmt., Inc., B-234679, June 23, 1989, 89-1 CPD ¶ 595.

provided for the Sonya S, the agency found that the accommodation of scientists and necessary work tables and equipment in the factory area would be inefficient at best. Finally, NOAA viewed as less than desirable the fact that the two-man staterooms in the Sonya S had been converted to three-man staterooms and that most of the berthing was located in the forward location of the ship where motion is exaggerated. The agency found that both of these factors reduced liveability and noted that because fatigue is a major problem for those participating in the survey, living quarters and the provision of good resting areas are critical to good performance.

In its protest, North Pacific complains that NOAA improperly used vessel length as a measure of stability, seaworthiness, seakeeping ability and creature comfort to the scientists. According to North Pacific, there is no "Naval Architectural" basis for using vessel length to measure any of these factors. Rather, asserts North Pacific, stability, seaworthiness, and seakeeping ability should be based on data such as center of gravity, buoyancy, expected sea states, hull strength, and shape. North Pacific also avers that creature comfort should be measured by the angular acceleration of roll and pitch rather than vessel length.

In response, NOAA asserts that it did not assess degree of stability, but simply determined that stability and seaworthiness are functions of vessel length and that greater vessel stability equates with higher productivity for NOAA research scientists and, therefore, an enhanced likelihood of overall mission success.

Based on our review of the record, we do not find that NOAA's conclusions regarding the relative merits of the proposals submitted by Ocean Prowler and North Pacific regarding size are unreasonable. In the comments North Pacific provided in response to the agency report, North Pacific did not dispute or otherwise reply to NOAA's explanation concerning the evaluation of ship size. Thus, even if North Pacific is correct that stability, seaworthiness, and seakeeping ability should be based on factors such as center of gravity, buoyancy, expected sea states, hull strength, and shape, North Pacific has not demonstrated that NOAA could not also consider vessel length in assessing vessel stability and seaworthiness. Notably, the mere fact the North Pacific disagrees with NOAA does not demonstrate that NOAA's evaluation was unreasonable. Similarly, North Pacific has not provided any information to demonstrate that it was not reasonable for NOAA to consider that three-man staterooms and berths that were located in the front of the vessel where motion is exaggerated did not provide as attractive living as arrangements two-man staterooms and

berths located in other than the front of the vessel. Accordingly, we find NOAA's evaluation reasonable.

In addition to finding that the size of the Ocean Prowler was more suited to meet its needs, NOAA also found that the Ocean Prowler offered a superior captain and crew. Specifically, NOAA was concerned that the smaller size of the Sonya S forced it to work with a smaller crew so that some of the crew had dual responsibilities that would adversely impact the scientific work. In addition, Ocean Prowler offered a crew with more experience in government survey work. In this regard, NOAA reports that the captain of the Ocean Prowler has 5 years longline research survey experience and all named crew have at least 1 year of such experience. In contrast, the crew of the Sonya S has no similar survey or research experience. NOAA therefore concluded that the additional, more experienced crew offered by the Ocean Prowler promised a greater margin of safety, less risk of crew fatigue, and greater assurance that the scientific sampling would meet established standards for timeliness and accuracy. The agency notes that the key to success in the survey is interannual comparability of the data and utilization of crew not skilled in scientific work could jeopardize the ability to make meaningful interannual comparisons in relative population size.

North Pacific questions the evaluation board's conclusion that the Ocean Prowler is more suitable because it is larger and can carry a larger crew. In this regard, North Pacific asserts that in prior years the longline survey has been conducted with a total crew of 16. According to North Pacific, it operates with a crew of 16 and therefore NOAA was not justified in favoring the Ocean Prowler.

NOAA responds that while the solicitation required 10 to 14 crew members, in its proposal North Pacific provided resumes for only 9 crew members. In addition, NOAA notes that, as discussed above, it also found the crew of the Ocean Prowler more experienced.

North Pacific has not provided us a basis to question the agency's conclusion that the captain and crew offered by the Ocean Prowler were superior to that offered by North Pacific. While it may be that North Pacific in fact works with a crew of 16, as asserted by the agency and as our review of its proposal confirms, North Pacific only provided resumes for 9 crew members. More importantly, the agency has found, and North Pacific has not disputed, that the crew of the Ocean Prowler is more experienced.

NOAA also found the Ocean Prowler more advantageous because it had three plate freezers as opposed to two plate freezers on the Sonya S. In addition, the Ocean Prowler plate

freezers are larger than those on the Sonya S. According to NOAA, it was concerned that the plate freezers on the Sonya S would not be capable of keeping up with the catching capacity of the Sonya S at all times. NOAA noted that there is very little leeway for malfunction without interruption of the catching process and scientific sampling and that the work schedule can tolerate little in the way of delay without significantly adding to the cost of the operation and sacrificing the collection of resource information.

North Pacific challenges this position. North Pacific asserts that in fact the additional plate freezer on the Ocean Pacific will not enhance the reliability of the refrigeration system. According to North Pacific, the plate freezers are an auxiliary component of the refrigeration system and do not impact the reliability of a refrigeration system. North Pacific also asserts that any breakdown of the plate freezers can normally be corrected on board the vessel within the hour.

In response, NOAA asserts that the number and reliability of plate freezers will affect production rates and in turn the accomplishment of scientific work. The agency reasons that a plate freezer is bound to malfunction from time to time and asserts that in the absence of backup freezing capability the ability to maintain reasonable progress in the conduct of scientific sampling will be diminished.

North Pacific's only reply to NOAA's response is that since offerors were not required to keep the catch, the number of plate freezers is not a relevant factor to consider. In our view, this is not a sufficient basis on which to conclude that the agency's evaluation and its conclusion that the Ocean Prowler proposal was superior is unreasonable. First, it is entirely reasonable for the agency to find a proposal with more plate freezers superior because it provides the agency with assurance that in the event a plate freezer breaks down, the work will continue. Insofar as North Pacific argues that the number of plate freezers is irrelevant because offerors are not required to keep the catch, the fact is that given its past experience, the agency had a reasonable basis to expect that the offerors would in fact keep the catch. North Pacific does not argue that it intended otherwise.

Finally, the agency asserts that the Ocean Prowler was better able to meet its needs because it had more space for storage of scientific equipment and supplies. The agency's concern here is that it have a safe environment for its equipment and one that affords efficient and easy access. North Pacific has not challenged the agency's position here and we consider it reasonable.

In conclusion, based on our review of the record, we have no basis on which to question NOAA's determination that the Ocean Prowler was superior. Accordingly, we find that the agency properly determined to award the contract to Ocean Prowler at its slightly higher cost.

North Pacific also protests that NOAA did not use the correct solicitation format to secure the true market value of the contract to the United States insofar as offerors were required to quote a daily rate to charter the vessel. In this regard, North Pacific asserts that NOAA knew that due to the large value of the catch the successful offeror would be able to retain, and the benefit the offeror would receive by obtaining data of the fishing grounds, all offerors would offer to charter the vessel to the government at no cost.

This basis of protest is untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), a protest based on an alleged impropriety in a solicitation must be filed prior to the time set for receipt of initial proposals. Here the format that the agency used to secure the chartering services was apparent from the face of the solicitation. Therefore, since North Pacific did not challenge the solicitation format until June 19, 1992, after the closing time set on April 23, the protest is untimely.

The protest is denied in part and dismissed in part.

  
for James F. Hinchman  
General Counsel