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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Sealift, Inc.

File: B-298588

Date: October 13, 2006

Constantine G. Papavizas, Esq., Winston & Strawn LLP, and Timothy B. Shea, Esq., Nemirow Hu & Shea, for the protester.

Brian A. Bannon, Esq., and Andrew W. Dyer, Jr., Esq., Blank Rome LLP, for TransAtlantic Lines, LLC, an intervenor.

Robert M. Elwell, Esq., and Daniel W. Wentzell, Esq., Military Sealift Command, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that awardee's warranted fuel consumption rate is understated does not provide a basis for questioning award where fixed-price contract is to be awarded and contract provides mechanism for government to recover any increased costs due to failure of contractor to perform at warranted rate.

DECISION

Sealift, Inc. protests the award of a contract to TransAtlantic Lines, LLC (TAL) under request for proposals (RFP) No. N00033-06-R-5409, issued by the Department of the Navy, Military Sealift Command (MSC), for charter of a tank vessel. Sealift principally complains that TAL understated its vessel's fuel consumption rate.

We deny the protest.

The RFP provided for award of a fixed-price contract to the offeror who submitted the lowest-priced, technically acceptable proposal. With respect to price, offerors were required to propose a charter hire rate and a warranted fuel consumption rate (at specified speeds). The total evaluated price was to take into consideration both the charter rate and the cost of fuel, based on the warranted fuel consumption and speed information. Following receipt and evaluation of proposals, TAL was selected for award as the low-priced, technically acceptable offeror.

Sealift maintains that the award is improper because TAL warranted a fuel consumption rate that is lower than the actual rate for its offered vessel, which resulted in TAL's price being evaluated as lower than Sealift's.

MSC responds that, whether or not TAL's warranted rate is accurate, since the solicitation contemplated the award of a fixed-price contract, TAL will only be paid at its warranted rate. In this regard, the Navy points out that the solicitation specifically addressed the government's redress should the offeror's ship fail to perform at the warranted fuel consumption rate; under the heading "Contract Terms and Conditions," the solicitation provides that, if the contractor breaches its fuel or speed warranties, "... the hire [payment] may be equitably decreased, the Charter may be terminated, or the Vessel may be placed off-hire, at Charterer's option so as to indemnify the Charterer to the extent of such failure." RFP at II-7. MSC concludes that TAL's stated fuel consumption rate was the proper basis for evaluating its price.

We agree with MSC. As the agency asserts, the contract is fixed-price in that—in light of the provisions that enable the agency to recover from the contractor any increased operation costs due to breaches of the warranted fuel and speed warranties—the contractor will only be entitled to payment based on its warranted fuel consumption rate. Thus, the accuracy of TAL's warranties is irrelevant. This conclusion is consistent with our decision in United States Lines, Inc., B-197894, Oct. 20, 1980, 80-2 CPD ¶ 299 at 2 (ability of awardee to perform at warranted rate of consumption is irrelevant, since contract provisions protect the government if the warranty is breached). The foundation for this analysis is our long-standing view that a below-cost bid or offer is permissible in a fixed-price environment, since contract payment will be based on the offered price, which is not subject to adjustment during performance barring unforeseen circumstances. See GTSI Corp., B-286979, Mar. 22, 2001, 2001 CPD ¶ 55 at 5.

Sealift also asserts that TAL misrepresented that it would provide a crew in the manner required by the solicitation. In this regard, the solicitation provided that "[t]he Master, Officers and crew of this Vessel shall be appointed or hired by the Owner" RFP at III-3. According to Sealift, TAL will use a vessel manager or crewing agent to hire the crew, in violation of the solicitation requirement that the owner do so.¹ However, this solicitation provision concerns a performance

¹Sealift filed its protest in our Office on August 7, 2006, based on information obtained during a July 27 debriefing. In comments filed on August 18, Sealift argued for the first time that, if the owner subcontracts for its crew, the owner will violate the small business subcontracting requirement that an offeror incur at least 50 percent of the cost of contract labor with its own employees. Sealift knew of this basis for protest based on the July 27 debriefing, where it learned, allegedly, that TAL planned to subcontract for its crew. Since Sealift did not raise this allegation
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requirement--that is, a requirement that the contractor must adhere to during contract performance--rather than a proposal requirement. In this regard, the solicitation does not require the offeror to provide the names of crew members or otherwise address how it will meet the need for a crew in its proposal. Rather, the RFP requires the owner to provide the crew list no later than 96 hours prior to the time the ship is to be delivered to the load or delivery port. RFP at I-9. As such, whether TAL complies with it is a matter of contract administration for consideration by MSC, not by our Office. Fritz Cos., Inc., B-246736 et al., May 13, 1992, 92-1 CPD ¶ 443 at 7.

The protest is denied.

Gary L. Kepplinger
General Counsel

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within 10 days of the debriefing, that is, by August 7, it is untimely and will not be considered. 4 C.F.R. § 21.2(a)(2) (2006). In any case, this argument assumes that the crew will be employed directly by the subcontractor or crewing agent. This is not established in the record, and TAL disputes it.