Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sea-Land Service, Inc.

File: B-266238

Date: February 8, 1996

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DIGEST

A solicitation will not result in the award of an enforceable requirements contract where a solicitation provision disclaims the government's obligation to order its requirements from the contractor and therefore renders illusory the consideration necessary to enforce the contract; agency's proposed amendment to that solicitation provision is ambiguous and does not clearly revive the government's obligation to order its requirements from the contractor.

DECISION

Sea-Land Service, Inc. protests the terms of request for proposals (RFP) No. N62387-95-R-8058 ("the Interport RFP"), issued by the Military Sealift Command (MSC), for ocean and intermodal transportation of Department of Defense (DOD) cargo on specified trade routes. Sea-Land protests that the RFP will not result in the awards of enforceable requirements contracts, as solicited.

We sustain the protest.

The Interport RFP was issued on October 21, 1994, to obtain rates and services for ocean and intermodal transportation of breakbulk and containerized cargo over eight trade routes from October 1, 1995 to May 31, 1996.[1] Carriers could submit proposals for any trade route on which they maintained regular commercial sailings, using either all-United States (U.S.) flagship service, all-foreign flagship service, or

[1]Sea-Land did not offer to transport breakbulk cargo in response to the RFP, and its protest is based upon the RFP provisions applicable to containerized cargo. Therefore, our decision will refer to the RFP containerized cargo provisions, although we note that the breakbulk cargo provisions are generally similar.

combination service (U.S. and foreign flagship service). The RFP incorporated the Cargo Preference Act of 1904, 10 U.S.C. § 2631 (1994), and accorded a preference to U.S. flagship service over foreign flagship service. Furthermore, to be eligible for award, carriers were required to commit 50 percent of their U.S. flagship capacity, if any, to the DOD Sealift Readiness Program for use in a military or national defense emergency.

The RFP, as issued, stated that "[t]he government contemplates award of a Firm-Fixed Rate, Indefinite Delivery, Indefinite Quantity contract." The RFP did not impose any minimum transit time, sailing frequency, or cargo accommodation requirement that a carrier must meet to be eligible for award. Rather, the RFP provided that the government would tender cargo for transport on the carrier's regularly scheduled commercial sailings.

The carrier offering the lowest rate for a given route would receive award, although multiple awards for each route were possible if the service of more than one carrier was deemed necessary. The successful carriers' names and their accepted rates would be published in the Interport Container Agreement and Rate Guide. The Agreement, which was included in the RFP, describes the services to be performed, the promises of the parties, and the methods by which the government will fill individual cargo requirements.

The promises of the carrier appear in section C-4 of the Agreement, "Carrier Requirements." Under that section, the carrier agrees to transport such cargo as the government might tender based upon the carrier's accepted Interport rates or, if applicable, its lower common carrier rates. Section C-4 does not obligate the carrier to promise the government a minimum amount of space in its vessels, but, if the carrier has adequate space to transport the cargo, the carrier "shall not refuse or discriminate in the matter of cargo space accommodations." This is in accord with The Shipping Act of 1984, 46 U.S.C. App. §§ 1701, 1709(b)(6) (1988). According to section C-4, breaching a "Carrier Requirement" may expose the carrier to a termination for default and a claim for damages.

Regarding the government's promises,[2] the Agreement provides that, as individual cargo requirements arise, "all such cargo shall be shipped via carriers holding contracts." The government warrants that it will not book cargo with carriers not awarded Interport contracts, unless "capability from carriers receiving awards is not available to meet the requirement." In a multiple award situation, the government will book cargo in order of cost favorability among Interport carriers, provided that

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[2]The government's promises appear in the following provisions of the Agreement: section C-5, "Government Obligation--Commitment of Cargo," section G-6, "Cargo Booking Policy," and section H-8, "Carrier Protection from Competition."

the low-cost carrier offers "acceptable space and a schedule meeting the delivery requirements of the cargo." If the low-cost carrier cannot meet the government's space or delivery requirements for the particular cargo, the government will book the cargo with "the next low cost carrier and so on, until a carrier can be found who can provide acceptable space and delivery schedule." The Agreement authorizes the government to make other arrangements to ship the cargo if no Interport carrier can provide adequate space.[3] Offerors were advised that the government does not guarantee any minimum volume of cargo to any carrier.

The Agreement's "Cargo Booking Policy" also contains a "Limitation of Government Liability" clause, which states

> "Nothing in this Agreement shall give the carrier any right, claim or cause of action against the Government for the Government's (1) failure to book any particular cargo or any . . . quantity of cargo with the carrier; (2) failure to utilize any or all of the vessel space dedicated by a contract carrier; (3) booking of any particular cargo or any quantity of cargo with any other carrier, whether or not such carrier has been awarded a . . . Container Agreement; (4) transporting any cargo by any means other than with the carrier; (5) otherwise failing to perform any of its promises or undertakings set forth in Sections C-4,[4] G-6, or H-8 of this Agreement; (6) right to use alternative competition methods of procuring ocean transportation, including service contracting that will obtain service from the least expensive among the same types of carriers or vessels and also the least expensive among different types of carriers or vessels."

Sea-Land submitted an initial proposal in response to the RFP by the December 9, 1994, proposal receipt date. On August 16, 1995, MSC issued amendment No. 0004 to the RFP. The amendment added four routes to the scope of the RFP. These routes were Route 6A (U.S. East Coast to Spain), Route 7 (U.S. East Coast to the Middle East Area), Route 12A (U.S. Gulf Coast to Spain), and Route 13 (U.S. Gulf Coast to the Middle East Area). The amendment invited proposals from any

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[3]Contrary to MSC's interpretation, the Interport Agreement, while it allows the government to discriminate between multiple awardees on the basis of their delivery schedules, does not clearly authorize the government to make other transportation arrangements to secure a better delivery schedule.

[4]The reference to section C-4, "Carrier Requirements," is clearly erroneous, in that this section describes carrier promises, not government promises. Although the apparent error does not affect our decision, the correct reference is section C-5, "Government Obligation--Commitment of Cargo."

interested U.S. or foreign flagship carrier, including carriers that did not submit proposals for the eight original routes.

Unlike the eight original routes covered by the Interport RFP, the four new routes were the subject of another MSC solicitation, RFP No. N62387-95-R-2600 ("the Worldwide RFP"), to which Sea-Land also responded. The Worldwide and Interport RFPs were issued simultaneously (October 21, 1994), contemplated concurrent performance periods (October 1, 1995 to May 31, 1996), and contained substantially similar terms and conditions. The Worldwide RFP, as amended, provided that "the Government contemplates award of a Firm Fixed Rate Requirements contract" as to most routes, including Routes 6A, 7, 12A, and 13. The Worldwide RFP did not incorporate the standard "Requirements" clause, set forth at Federal Acquisition Regulation (FAR) § 52.216-21, required for inclusion in solicitations contemplating requirements contracts. See FAR § 16.505.

In contrast with the Interport RFP, competition under the Worldwide RFP was restricted to U.S. flagship carriers, using either all-U.S. flagship service or combination service with foreign flagships. In its protest report, MSC states that it issued Interport amendment No. 0004 to allow foreign flagship carriers to compete for Routes 6A, 7, 12A, and 13 because it believed that U.S. flagship service under the Worldwide RFP might not suffice to meet DOD's cargo requirements. To address the overlap in requirements between the Interport and Worldwide RFPs, amendment No. 0004 advised offerors that service on Routes 6A, 7, 12A, and 13 would be

> "supplemental to U.S. flag service on these same routes . . . under [the Worldwide RFP]. Preference will be given to awardees of rates for these routes under [the Worldwide RFP] to the extent that U.S. flag service can meet requirements."

Sea-Land was the successful carrier under the Worldwide RFP for Routes 7 and 13, and one of two successful carriers for Routes 6A and 12A, effective October 1, 1995, under the Worldwide Container Agreement and Rate Guide.

On August 25, 1995, before proposals were due under Interport amendment No. 0004, Sea-Land filed an agency-level protest, asserting three protest grounds: (1) that the RFP's Sealift Readiness Program award eligibility requirement was discriminatory; (2) that the RFP would not result in an enforceable indefinite delivery, indefinite quantity (IDIQ) contract; and (3) that the government would breach the Worldwide Agreement if it allowed Interport carriers to provide service on Routes 6A, 7, 12A, and 13. MSC sustained Sea-Land's protest only as to the allegation that the RFP's IDIQ terms were defective, and, on September 8, MSC amended the Interport RFP to state that it intended to award requirements

contracts for the trade routes.[5] This protest followed. MSC proceeded with the award of the original eight trade routes on October 1, 1995, but suspended award of the amendment No. 0004 routes during the pendency of the protest.

Sea-Land protests, with respect to the prospective award of the amendment No. 0004 routes, that the Interport RFP, as amended, will not result in the awards of enforceable requirements contracts. Sea-Land argues that the RFP's "Limitation of Government Liability" clause excuses the government from purchasing its requirements under the Interport Agreement, thereby vitiating the consideration necessary to make the contracts enforceable. We agree.

A requirements contract provides for filling all actual purchase requirements of designated government activities for specific supplies or services during a specified contract period, with deliveries scheduled by placing orders with the contractor. FAR § 16.503. The essential feature of a requirements contract is that the government is committed to satisfying its requirements only through that contract and no other, while the contractor is committed to filling all such requirements that may arise. These mutual promises constitute the consideration necessary to form a binding contract. Torncello v. U.S., 681 F.2d 756 (Ct. Cl. 1982); Stanley F. Horton d/b/a T & H Rental & Snow Removal, DOTCAB No. 1231, 82-2 BCA ¶ 15967; B-160063, Feb. 10, 1967. Although the mutual promises may be modified to the extent that orders must be reasonable in relation to any estimated quantities and the known capacity of the contractor, the absence of either required promise undermines mutuality of consideration and renders the contract unenforceable. Id.; Michael O'Connor, Inc., B-185502, Apr. 5, 1976, 76-1 CPD ¶ 224. Under such circumstances, the government would incur no liability to the seller if it chose to satisfy its requirements elsewhere, while the seller would incur no liability to the government if it declined to supply the goods or services requested. Modern Sys. Technology Corp. v. U.S., 24 Ct. Cl. 360 (1991); Stanley F. Horton d/b/a T & H Rental & Snow Removal, supra; Federal Elec. Corp., ASBCA Nos. 12161, 11726, 11918, 68-1 BCA ¶ 6834.

In this case, we find that the government has assumed no legal obligation under the Interport Agreement and that the solicitation falls into the category of an illusory contract--a document which appears to contemplate a contract, but which lacks consideration and is therefore unenforceable. See Stanley F. Horton d/b/a T & H Rental & Snow Removal, supra.

Ostensibly, the Interport Agreement requires the government to fill all its cargo requirements through Interport carriers, provided that the selected carrier has enough space and provided that no U.S. flagship under the Worldwide Agreement is

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[5]The Interport RFP included the Requirements clause set forth at FAR § 52.216-21.

available to transport the cargo pursuant to the Cargo Preference Act. Although the Interport carrier has promised under the Agreement to accept all tendered DOD cargo as space permits, the government's promise to tender such cargo is negated by the "Limitation of Government Liability" clause.

Under that clause, the government may decline to book cargo with an Interport carrier, even if that carrier has enough space for the cargo and is eligible to transport the cargo under the Cargo Preference Act. Among other things, the clause expressly denies the carrier a cause of action if the government books cargo with any other carrier, "whether or not such carrier has been awarded a . . . Container Agreement"; uses "alternative competition methods of procuring ocean transportation" in order to obtain the least expensive service; or otherwise fails to perform any of its promises or undertakings specified in the Cargo Booking Policy or Carrier Protection from Competition provisions. The "Limitation of Government Liability" clause provides that "[n]othing in this Agreement shall give the carrier any right, claim or cause of action" if the government chooses to ignore the Interport Agreement and to satisfy its requirements elsewhere. In other words, the government has rendered illusory the promises made elsewhere in the agreement with regard to booking cargo by disclaiming any liability for its failure to fulfill each of these promises. The disclaimer makes the Interport Agreement akin to a basic ordering agreement (BOA), which is merely an understanding, not an obligation, that the government may enter future contracts if the need for services arises. Modern Sys. Technology Corp. v. U.S., 24 Ct. Cl. 360; see FAR § 16.703; Delta Oaktree Prods., B-248903, Oct. 7, 1992, 92-2 CPD ¶ 230.

MSC has not disclosed the origin or purpose of the "Limitation of Government Liability" clause, although MSC does not dispute that the clause deprives the contract of consideration. MSC states that it will amend the clause to restore consideration. Specifically, MSC proposes to begin the clause with the following language, "[e]xcept as otherwise specified herein, nothing in this Agreement shall give the carrier any right, claim or cause of action against the Government for the Government's (1) failure to book any particular cargo or any . . . quantity of cargo with the carrier," and so on.[6] MSC states that this language is intended to restore the contractor's cause of action should the government breach any of the obligations enumerated in the clause, but to restrict the contractor's cause of action to the Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq. (1994). In this regard, the RFP already incorporates the standard Disputes Clause, FAR § 52.233-1, advising offerors that the Contract Disputes Act applies.

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[6]This qualifying language begins the "Limitation of Government Liability" clause in the Worldwide Agreement. It is absent from the Interport Agreement awarded as to the eight original trade routes.

Sea-Land argues that one cannot reasonably interpret the agency's proposed amended "Limitation of Government Liability" clause as restoring the contractor's rights to pursue "claim[s] or cause[s] of action" under the Contract Disputes Act, which the clause otherwise precludes. The protester notes that the proposed clause does not even mention the Contract Disputes Act or the Disputes clause, and that the Contract Disputes Act already applies to all government contracts, including maritime contracts. See 41 U.S.C. §§ 602(a), 603; Bethlehem Steel Corp. v. Avondale Shipyards, Inc., 951 F.2d 92 (5th Cir. 1992). Thus, the protester questions MSC's stated goal of implementing the Contract Disputes Act via the "Limitation of Government Liability" clause--a goal that could be more readily accomplished by simply deleting the "Limitation of Government Liability" clause from the RFP. Moreover, the protester argues that the language of the planned amendment is essentially ambiguous. For example, if the phrase, "[e]xcept as otherwise specified herein," refers to every provision of the Interport Agreement (e.g., sections C-5, G-6, and H-8), then each enumerated disclaimer in the "Limitation of Government Liability" would be nullified and meaningless, contrary to accepted rules of contract interpretation.

In our view, the proposed "Limitation of Government Liability" clause is susceptible to at least two, if not more, reasonable interpretations. Presuming that the phrase, "[e]xcept as otherwise provided herein," refers to the Interport Agreement as a whole, no Interport provision is specifically exempt from the "Limitation of Government Liability" disclaimers, but numerous Interport provisions broadly contradict each enumerated disclaimer. Thus, it is not clear whether the provisions setting forth the government's putative obligations are intended to be controlling in light of the "[e]xcept as otherwise provided herein" language, or whether the disclaimer itself will be controlling in the absence of more specific language to the contrary in connection with the provisions setting forth those putative obligations. Moreover, if the amended language is read to encompass the Disputes clause incorporated into the RFP, it is not clear how this can remedy the problem since the clause already provides the contractor with the procedural right to bring a claim against the government--it does not itself provide any substantive rights and therefore would not restore the rights otherwise waived by the carrier in the "Limitation of Government Liability" clause. Accordingly, we find that the proposed "Limitation of Government Liability" clause would not clarify the government's obligation under the Interport Agreement and, therefore, would not render the contract clearly enforceable.

In addition to the absence of consideration, Sea-Land also protests that the Interport RFP is defective because it does not include all FAR clauses prescribed for inclusion in a requirements contract. FAR § 16.505 requires the following clauses to be included in solicitations contemplating requirements contracts: FAR § 52.216-18, Ordering; FAR § 52.216-19, Delivery-Order Limitations; and FAR

§ 52.216-21, Requirements. The Interport RFP includes only the Requirements clause and improperly omits the Ordering and Delivery-Order Limitations clauses.

Sea-Land raises a number of other contentions concerning the RFP that are meritless or not for our consideration. Specifically, Sea-Land protests the issuance of Interport amendment No. 0004, covering Routes 6A, 7, 12A, and 13, because these routes are subject to the Worldwide Agreement. The protester characterizes the Worldwide Agreement as a requirements contract, which generally requires the government to satisfy all its cargo requirements on the subject routes using Worldwide carriers, such as Sea-Land. Although Sea-Land grants that the government may use another carrier if Worldwide carriers lack sufficient space for the cargo, Sea-Land maintains that space will be available. Sea-Land argues that, because DOD would likely breach the Worldwide Agreement by booking cargo with Interport carriers, it is unclear what, if any, valid requirements remain under the Interport RFP. Sea-Land thus claims that amendment No. 0004 is ambiguous and that our Office should recommend that it be canceled.

The RFP unambiguously states that orders for cargo shipment along these routes would first be placed under the Worldwide Agreement to the extent that U.S.-flag service contracted for under that agreement can meet the government's requirements. Thus, to the extent Sea-Land asserts that orders placed under the Interport Agreement would breach the Worldwide Agreement, the basis for that assertion is not apparent from the RFP. To the extent Sea-Land believes that the government will place specific orders that would constitute a breach of the Worldwide Agreement contracts, its proper remedy would be a claim under the Contract Disputes Act should such action occur. See GSX Gov't. Servs., Inc., B-239549, July 5, 1990, 90-2 CPD ¶ 14.

The protester also claims that the use of foreign flagship service under Interport would likely violate the Cargo Preference Act, if the government rejects available service from Worldwide carriers or other U.S. flagship carriers in order to expedite delivery. The Interport RFP incorporates the appropriate cargo preference for U.S. flagship service over foreign flagship service and extends this cargo preference to U.S. flagship carriers under the Worldwide Agreement pursuant to amendment No. 0004. At this juncture, Sea-Land's protest merely anticipates a violation of the Cargo Preference Act during performance of the Interport contract; accordingly, we will not consider this matter.

Finally, Sea-Land protests that the Interport RFP treats U.S. flagship carriers, such as Sea-Land, unfairly by requiring them to commit 50 percent of their U.S. flagship capacity to the Sealift Readiness Program, a requirement inapplicable to foreign flagship carriers. Sea-Land urges that foreign carriers not be permitted to compete. We dismiss this protest allegation as untimely because the award eligibility requirement was not introduced by amendment No. 0004 and should have been

protested to the contracting agency before the initial proposal receipt date. 4 C.F.R. § 21.2(a)(1), (a)(3) (1995); Wheeler Bros., Inc., B-242061.2, Apr. 19, 1991, 91-1 CPD ¶ 387, recon. den., B-242061.3, June 7, 1991, 91-1 CPD ¶ 546. In addition, our Office generally does not consider protests that procurements should be more restrictive, such as by excluding a category of potential offerors. See Petchem Inc., B-228093, Sept. 8, 1987, 87-2 CPD ¶ 228.

In summary, we sustain Sea-Land's protest allegation that the RFP will not result in a requirements contract with respect to the amendment No. 0004 routes and dismiss the remainder of Sea-Land's protest. We recommend that MSC determine whether a requirements contract or some other type of agreement would best serve its needs and amend the solicitation to reflect the procurement method selected. If MSC determines that a requirements contract is the appropriate vehicle, the RFP should be amended to address the concerns discussed in this decision. We also find that Sea-Land is entitled to recover its costs of filing and pursuing this protest. 4 C.F.R. § 21.6(d)(1). The protester should submit its certified claim for costs to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.

Comptroller General
of the United States