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**Comptroller General  
of the United States**

Washington, D.C. 20548

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## **Decision**

**Matter of:** Patriot Contract Services, LLC; Keystone Shipping Services, Inc.; MTL Ship Management; V-Ships Marine, Ltd.

**File:** B-278276.11; B-278276.12; B-278276.13; B-278276.14

**Date:** September 22, 1998

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Amy E. Sherburne, Esq., and Dennis J. Kelly, Esq., Kelly, Gill, Sherburne & Herrera, for Patriot Contract Services, LLC; Ralph Hill, Esq., for Keystone Shipping Services, Inc.; William A. Shook, Esq., and Kelley Doran, Esq., Preston Gates Ellis & Rouvelas Meeds, for MTL Ship Management, Marine Transport Lines, Inc.; and Thomas L. Mills, Esq., Robert A. Mangrum, Esq., Eric J. Marcotte, Esq., and Jason I. Hewitt, Esq., Winston & Strawn, for V-Ships Marine Ltd., the protesters. Lars Anderson, Esq., J. Scott Hummer, III, Esq., Wm. Craig Dubishar, Esq., and Paul N. Wengert, Esq., Venable, Baetjer and Howard, for Bay Ship Management, Inc.; Martin P. Willard, Esq., Perkins Coie, for All Marine Services, Ltd.; Laura K. Kennedy, Esq., and Kevin M. Kordziel, Esq., Jenner & Block, for American Overseas Marine Corp.; Robert J. Blackwell, Esq., and Marc J. Fink, Esq., Sher & Blackwell, for Apex Marine Ship Management Co., LLC; James A. Kelley, Esq., Donald A. Tobin, Esq., and Lori Ann Lange, Esq., Bastianelli, Brown & Kelley, for Crowley American Transport, Inc. and Crowley Marine Services, Inc.; Harold G. Bailey, Jr., Esq., Garvey, Schubert & Barer, for Interocean Uglund Management Corp.; and Raymond S.E. Pushkar, Esq., McKenna & Cuneo, for Sea-Land Service, Inc., intervenors.

Janis Rodriguez, Esq., and Michael Rose, Esq., Department of Transportation, for the agency.

Paul E. Jordan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

Where agency improperly awarded contracts to an offeror in a manner which was inconsistent with that offeror's qualified proposal and the record shows that, in assessing the impact of that improper award, the agency reasonably determined that the solicitation's price evaluation scheme was unworkable and effectively prevented agency from accurately determining best value in making multiple awards, agency reasonably took corrective action in response to eight protests, including rescinding awarded contracts, amending solicitation, reopening negotiations, and requesting a second round of best and final offers, notwithstanding the disclosure of limited information from the awardees' proposals.

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## **DECISION**

Patriot Contract Services, LLC, Keystone Shipping Services, Inc., MTL Ship Management, and V-Ships Marine, Ltd. protest the decision of the Department of Transportation, Maritime Administration (MARAD) to rescind contracts previously awarded under request for proposals (RFP) No. DTMA-91-97-R-00002, amend the RFP, reopen negotiations, and evaluate best and final offers (BAFO) submitted in response to the amended RFP. MARAD's action arises from its conclusion that corrective action was required to respond to eight protests which had challenged the technical and price evaluations of several of the ten awardees. After reviewing the protests and the procurement, MARAD concluded that, under the circumstances, it could not determine whether the original awards represented the best value to the government. The protesters assert that more limited corrective action, or none at all, would be more appropriate.

We deny the protests.

The RFP, as amended through amendment No. 0011, sought proposals for the operation and management of 89 vessels comprising the Ready Reserve Force. To be eligible for award, offerors were required to meet certain special standards including status as a United States citizen, status as a current operator or owner/operator of a large dry cargo ship and/or tanker, and possession of a document of compliance issued under the provisions of the International Management Code for Safe Operation of Ships and for Pollution Prevention (ISM Code) adopted by the International Maritime Organization.

For purposes of proposal submission, evaluation, and award, the 89 ships were divided into 39 groups, each of which included 2 or 3 ships of a given class or type. Offerors were allowed to submit electronic price proposals on any number of ships, but, in accordance with section M.6 of the amended RFP, MARAD reserved the right "to determine the number of ships within the maximum of 12 any offeror can effectively handle given the offeror's capabilities."

The RFP contemplated award of a separate contract for each group of ships on a best value basis. Twenty-three offerors submitted initial proposals by the October 27, 1997 closing date. Nineteen proposals were included in the competitive range.

In preparing their price proposals, in addition to basic pricing ("section B"), offerors submitted alternative pricing through economies of scale (EOS). RFP section L.11.2.2, amendment No. 0009. This EOS pricing was based on "generic" ship group sets applied to any ship groups and "preferred" group sets applied to ship groupings desired and specified by the offeror. Attachment A of amendment No. 0009. In addition to specifying the number of ships to which the EOS would apply, offerors

identified whether the EOS applied to groups from all coasts ("split coast") or only to ship groups on the east, west, or Gulf coasts. Offerors could propose savings with the split coast and additional savings on coast specific designations. Id. at § 1.2.4.

These prices were ultimately converted by the agency into average annual "notional" prices based upon a schedule in section M.4 of the RFP, and then subjected to various comparative price analyses. These analyses included a comparison of the prices for each ship group based on the offerors' section B prices and EOS prices. According to a declaration from the source evaluation board (SEB) chairman, the primary comparison was of the lowest generic split-coast EOS prices for each ship group based on the maximum number of ships the evaluators determined each offeror was capable of handling. The SEB also compared the offerors' lowest EOS prices, preferred or generic, to determine if a lower price was available under the preferred EOS prices. The SEB also compared the offerors' lowest possible EOS prices for each ship group without regard to the evaluators' assessment of capability. The SEB used these comparisons in making the price/technical tradeoff decisions on specific ship groups and in the assignment of specific combinations of ship groups to offerors.

After review of the proposals, oral presentations, discussions, revised cost proposals, and BAFOs, MARAD awarded the 39 contracts to ten offerors. After receiving notice of the award and debriefings, eight of the unsuccessful offerors filed bid protests with our Office.<sup>1</sup>

The initial protesters challenged the technical evaluations, including consideration of past performance of themselves and of the awardees. Several protesters alleged that MARAD had waived or relaxed the mandatory citizenship, ISM Code, and current owner/operator status requirements. Some protesters alleged that MARAD had used undisclosed evaluation criteria including the agency's assessment of the offerors' capability to handle specific numbers of ships. Some of these protesters also challenged the agency's failure to refer technical capability evaluations to the Small Business Administration for consideration under the certificate of competency procedures. Some alleged a lack of meaningful discussions and unequal discussions. Most of the protesters also challenged the price evaluations, the best value determinations and the price/technical tradeoffs, including the agency's consideration of the EOS prices.

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<sup>1</sup>These protests were filed by All Marine Services, Ltd, Bay Ship Management, Inc., Patriot Contract Services, LLC, Stapp Towing Co., Inc., American Overseas Marine Corp., Crowley Marine Services, Inc., Crowley American Transport, Inc., and Osprey-Acomarit Ship Management, Inc. After receiving notice of the agency's decision to take corrective action, our Office dismissed these protests as academic.

After reviewing the protests, the agency informed our Office on July 2 that it intended to take corrective action. The agency's decision was precipitated by its discovery that some of the awards were clearly improper. Further, in reviewing the procurement, the agency concluded that because of the complexity of the price evaluation scheme, it could not determine with a reasonable degree of certainty that the awarded contracts represented the best value to the government. The proposed corrective action included rescission of the original awards and amendment of the RFP to simplify and clarify the pricing structure, evaluation provisions, and required information on citizenship, ISM code, and owner/operator status. The agency also intended to reopen negotiations, allow submission of revised technical and price proposals based on the amendments, obtain new BAFOs, and make new best value determinations. It is this corrective action that triggered this second round of protests. The current protesters, all of whom had been awarded contracts, contend that the corrective action is unnecessary and improper because it is overbroad and will result in an improper auction.

Contracting officials in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. Rockville Mailing Serv., Inc., B-270161.2, Apr. 10, 1996, 96-1 CPD ¶ 184 at 4; Oshkosh Truck Corp.; Idaho Norland Corp., B-237058.2, B-237058.3, Feb. 14, 1990, 90-1 CPD ¶ 274 at 4. It is not necessary for an agency to conclude that the protest is certain to be sustained before it may take corrective action; where the agency has reasonable concern that there were errors in the procurement, even if the protest could be denied, we view it as within the agency's discretion to take corrective action. Main Bldg. Maintenance, Inc., B-279191.3, Aug. 5, 1998, 98-2 CPD ¶ \_\_ at 3. An agency may amend a solicitation, and request and evaluate a second round of BAFOs where the record shows that the agency made the decision to take this action in good faith, without the specific intent of changing a particular offeror's technical ranking or avoiding an award to a particular offeror. See PRC, Inc., B-233561.8, B-233561.9, Sept. 29, 1992, 92-2 CPD ¶ 215 at 3-4; Burns & Roe Servs. Corp., B-248394, Aug. 25, 1992, 92-2 CPD ¶ 124 at 5; Unisys Corp., B-230019.2, July 12, 1988, 88-2 CPD ¶ 35 at 5. We will not object to an agency's proposed corrective action where the agency concludes that the award, because of perceived flaws in the procurement process, was not necessarily made on a basis most advantageous to the government, so long as the corrective action taken is appropriate to remedy the impropriety. Rockville Mailing Serv., Inc., *supra*.

There is no evidence in the record that suggests the agency is acting other than in good faith. On the contrary, while the protesters contend that the agency has not supported its determination to take the corrective action proposed, the record supports that the agency's corrective action is appropriate and not overbroad.

In this regard, there is no legitimate dispute that the agency made improper awards to one of the offerors.<sup>2</sup> As part of a price revision, that offeror qualified its proposal by explicitly setting forth the minimum number of ships it was willing to accept. The agency advises that it overlooked this qualification letter and did not consider it in making the awards. Based upon its determination of this offeror's capability, the agency awarded the offeror contracts encompassing fewer ships than the proposed minimum. Having failed to consider this matter prior to award, the agency correctly concluded that these awards were improper and should be rescinded.<sup>3</sup> See Barents Group, L.L.C., B-276082, B-276082.2, May 9, 1997, 97-1 CPD ¶ 164 at 10; The Orkand Corp., B-224541, Dec. 31, 1986, 86-2 CPD ¶ 723 at 8; Computer Network Corp. et al.--Recon., B-186858, June 13, 1977, 77-1 CPD ¶ 422 at 6 (contract awarded may not materially vary terms of offer).

To determine the appropriate corrective action, the contracting officer consulted with the chairman of the SEB to learn whether appropriate treatment of the offeror's qualification would have affected the best value selections recommended to the source selection official. The SEB chairman reviewed the selections with other members of the SEB and ran various pricing scenarios. Based on this review, he concluded that any attempt to correct the original erroneous awards would affect the selection decisions for a minimum of two awardees and potentially affect four or more offerors.

The protesters suggest that a reevaluation or recompetition need only involve those original offerors, successful and unsuccessful, who submitted proposals on the ship groups encompassed by the improper awards. We disagree. It is evident from this record that more than those groups would be affected. For example, under a limited reevaluation which simply excluded the improper awardee, it is possible that the "best value" offeror for award of those contracts may already have the maximum number of ships, requiring a reallocation of its original awards. Reallocation of these awards may affect offerors which did not submit proposals on the improperly awarded groups. Thus, the entire award determination potentially would be affected. A similar cascade effect would be likely if there were a recompetition which allowed the improper award recipient to participate. If it demonstrated its capability to handle more ships, most, if not all, original awardees

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<sup>2</sup>Since the identity of this offeror and the precise qualification of its offer are considered proprietary information, this decision will not disclose that information.

<sup>3</sup>In taking corrective action on the improper awards, the agency also correctly concluded that it could not simply request the offeror to remove the qualification, thereby changing its price, without engaging in discussions with that offeror. If negotiations are reopened with that offeror, they must be reopened with all offerors in the competitive range. See SmithKline Beecham Pharmaceuticals, N.A., B-252226.2, Aug. 4, 1993, 93-2 CPD ¶ 79 at 4.

could be affected. Since any changes to the ship groups selected for one awardee would affect the selection decisions made for other offerors, and potentially affect the overall best value decision, the agency reasonably concluded that resolving the improper awards would require reevaluations affecting more than the original offerors for the affected ship groups.

In determining that these broader reevaluations could not be made based on the existing proposals, the agency also considered the allegations of the original protesters regarding some awardees' compliance with the citizenship, ISM Code, and owner/operator status requirements, compliance with the Service Contract Act (SCA), and the evaluation of maximum ship capability. Since there was some question whether all original awardees met these requirements, it became necessary to obtain additional information, thereby necessitating reopened negotiations with all offerors.

The agency also considered the impact of its complex pricing structure on the original competition. While MARAD anticipated that use of electronic price proposals with comparisons conducted by computer would permit it to optimize the price/technical tradeoffs to achieve the best value, upon review of the original selections the SEB chairman concluded that he could not reasonably determine the overall best value under the existing evaluation scheme. In this regard, given 39 ship groups, each of which contains 2 or 3 ships, the agency states that each offeror could submit up to 7 million generic EOS proposals. In fact, of the offerors submitting EOS proposals, the range submitted included 10 to 64 generic EOS proposals and 2 to 573 preferred EOS proposals per offeror.<sup>4</sup> According to the SEB chairman, because the awarded prices depend upon group configurations and coast, "there was almost no way to compare the equivalent of an 'awarded' price for the other [unsuccessful] offerors." Declaration of SEB Chairman, Attachment 2, ¶ 4 at 3. Due to the inability to accurately compare these prices, the SEB chair now concludes that the original pricing scheme adversely affected the best value decisions.

We agree with the SEB chairman's assessment that the original evaluation scheme prevented the agency from accurately and reasonably determining the overall best value. This is especially true in view of the sheer volume of proposed pricing among 19 offerors and the numerous combinations involved in comparing their basic and EOS prices. Further, the original price/technical tradeoff decisions were not always based on the actual awarded price. Some 22 of the 39 awarded contracts were awarded at prices higher than those in the generic split-coast price

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<sup>4</sup>For example, one offeror submitted 30 different EOS proposals resulting in 33 different prices for one ship group alone.

comparison.<sup>5</sup> It is not clear whether these awards complied with the RFP's provision that awards made on the basis of offerors' EOS proposals would have their section B revised to reflect the ship groups and EOS prices on which they were awarded. See RFP § M.7.4.1. Likewise, it is not clear that the evaluated combination of prices and technical merit represented a reasonable determination of best value.

Notwithstanding the protesters' observation that no one timely challenged the pricing structure and evaluation scheme, where, as here, the evaluation as performed was so complex and unworkable as to prevent the agency from accurately and reasonably determining the overall best value, it is appropriate for the agency to take corrective action.<sup>6</sup> Such action reasonably includes revision and simplification of the pricing structure offerors may propose and the solicitation of revised offers to allow the agency to reasonably and accurately determine the best value in a price/technical tradeoff. See Rockville Mailing Serv., Inc., supra. In sum, the agency reasonably concluded that corrective action, including reopened negotiations and submission of new price proposals, is necessary to resolve the improper awards and the serious doubts about the validity of the best value determination.

The protesters also contend that, because offerors were informed of the awardees' prices during the agency's debriefings, rescinding the original awards and reopening the competition will foster an improper auction. Where, as here, the corrective action proposed by the agency is not improper, the prior disclosure of information in an offeror's proposal does not preclude the corrective action, and the reopening of discussions and request for BAFOs does not constitute an improper auction. Unisys Corp., supra; Sperry Corp., B-222317, July 9, 1986, 86-2 CPD ¶ 48 at 4. The possibility that the contracts may not have been awarded based on a true determination of the best value has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction; the statutory requirements for competition take priority over the regulatory constraints on auction techniques. See Unisys Corp., supra. In any event, the provisions of

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<sup>5</sup>In this regard, of the 10 offerors awarded contracts, 8, including 3 of the protesters, received contracts at higher prices than the evaluated prices.

<sup>6</sup>One protester argues that a similar evaluation scheme was successfully used, without protest, in a prior MARAD procurement involving more ships. It is not clear that the last "similar" procurement involved the multitude of alternative pricing proposals involved here. In any event, each procurement action is a separate transaction, and the action taken under one is not relevant to the propriety of the action taken under another procurement for purposes of a bid protest. Digital Sys. Group, Inc., B-258262.2, Jan. 20, 1995, 95-1 CPD ¶ 30 at 3; Aguirre Architects, Inc.--Recon., B-230256.2, May 19, 1988, 88-1 CPD ¶ 478 at 2.

amendment No. 0012 will require significant restructuring of price proposals, thereby mitigating any possible auction effects. For example, certain ship groups now must be awarded together, requiring offerors to submit proposals on all of those ships, or none.<sup>7</sup> In addition, a wage determination issued after contract award is being reevaluated by the Department of Labor and offerors will be required to submit revised price proposals and collective bargaining agreements which comply with both the SCA and the wage determination. Further, all offerors will have to restructure their pricing to comply with the simplified EOS alternatives.

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<sup>7</sup>This clarification reflects another basis for reopening the competition. It appears that the agency always intended that certain ship groups be awarded to the same offerors. In fact, each of the combinations of ship groups now identified were awarded in those same configurations. However, the original RFP did not reveal this intention or notify offerors that failure to submit an offer on all ships in the combined groups would effectively prevent their receiving an award for any of those ships. Offerors must be advised of the basis upon which their proposals will be evaluated, and where a solicitation does not set forth a common basis for evaluating offers which ensures that all firms are on notice of the factors for award and can compete on an equal basis, the solicitation is materially defective. Unisys Corp., supra, at 4.



Taken in combination, these changes will render much of the disclosed pricing meaningless.<sup>8</sup> Accordingly, the corrective action taken by the agency is unobjectionable.

The protests are denied.

Comptroller General  
of the United States

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<sup>8</sup>Contrary to the request of some of the protesters, the agency has not released pricing information on the unsuccessful offerors which is comparable to the award price information released on the successful offerors. While it is sometimes appropriate to release pricing information from unsuccessful offerors in order to equalize the competition (See Sperry Corp., supra, at 5), under the circumstances of this case, we believe the agency has reasonably chosen to withhold pricing information of the unsuccessful offerors. In this regard, the agency explains that disclosure of all unsuccessful offerors' evaluated prices would prejudice all offerors, including the original awardees, since they were unsuccessful offerors on some of the ship groups on which they submitted offers. According to the agency, given the volume of pricing information submitted and the number of different evaluations using the section B and generic and preferred EOS pricing, it is not possible to provide an equivalent price to that denominated "amount awarded"; that price was dependent upon the actual ship groups awarded. Since even the original awardees were "unsuccessful" on some ships, release of all "unsuccessful" pricing would reveal all offerors' pricing strategy and proposal strategy by identifying all ships on which each offeror submitted proposals.