Mr. J. Boyle
Pl E

DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

7634

FILE: B-192149 DATE: September 12, 1978

MATTER OF: Foss Alaska Line

DIGEST:

1. RFP contemplated (1) that offerors would submit one rate for 2-year contract term and rate was to be computed on "100 percent basis" and (2) that award would be made based on low evaluated price. GAO would not object to agency's acceptance of price proposal with separate rates for each year where rate was computed on "80 percent basis" because those deviations relate only to form and are not material.

2. Agency and one offeror contend that proposal, which deviates from RFP's contemplated pricing structure, may not be accepted because (1) all offerors were not advised that such deviations would be permitted, and (2) deviation may have exposed other offeror to less risk. Contention is without merit because deviation relates to form only and record indicates that offerors had sufficient information to make business judgment regarding actual risk involved.

3. Contention that one offeror failed to propose acceptable service regarding 21-day delivery requirement is without merit. Agency explains and record shows that both offerors proposed acceptable and substantially similar service.

4. Contention, first made after closing date for receipt of initial proposals, that cost factor should have been added to offeror's prices to represent greater risk of loss and damage is untimely under 4 C.F.R. § 20.2(b)(1) (1977) and will not be considered on merits since alleged solicitation defect was not protested prior to closing date for receipt of initial proposals.

5. Contention--that Government-stuffed-container factor of 10 percent instead of 24 percent should have been used to evaluate price proposals--was not raised within 10 working days after basis of protest was known; therefore, it is untimely under 4 C.F.R. § 20.2(b)(2) (1977) and will not be considered on merits.

6. Where (1) Government's actual needs would be satisfied under initial RFP, (2) one offeror's minor deviation from RFP's contemplated price scheme was not material, and (3) proposals may be evaluated on equivalent basis, best course of action is for agency to award under initial RFP to low total priced otherwise acceptable offeror.

The United States District Court for the District of New Jersey has requested our opinion in connection with civil action No. 78-1223, entitled Sea-Land Service, Inc. v. Brown, et al. That civil action concerns the same subject matter involved in a bid protest filed with our Office by Foss Alaska Line (FAL) regarding request for proposals (RFP) No. N0003378R1301 issued by the Department of the Navy, Military Sealift Command (MSC), for the furnishing of ocean transportation services between Seattle, Washington, and Adak, Alaska, on a contract carriage basis (less than shipload lots) by United States flag vessels for a minimum period of 2 years. In response to the RFP, two offers were received, one from FAL and one from Sea-Land Service, Inc. (Sea-Land). The problem here concerns the proper method of evaluating FAL's offer; in FAL's view, it should be awarded the contract without further procurement action; in Sea-Land's view, it should be awarded the contract without further procurement action; and MSC believes that another round of best and

final offers is required before award can be made. To assist in resolving the problem, the court has ordered, with the consent of the parties, that FAL, MSC, and Sea-Land provide our Office with detailed reports. Those thorough and well-documented reports and comments form the basis for our views.

BACKGROUND

The RFP solicited rates for three categories of containerized and breakbulk cargo (i.e., vehicles; refrigerated or "reefer" cargo; and general cargo, not otherwise specified, or "NOS") to be stated on a per measurement ton, or 40 cubic feet (MT) basis, to be effective for the 2-year period. Estimated quantities for each category were provided in the RFP. The RFP further provided for a minimum charge per container for cargo NOS and reefer cargo loaded or "stuffed" into the carrier's container by the Government, equal to the offered rate per MT times 100 percent of the agreed average interior capacity of the container--the "100 percent basis." A container can seldom, if ever, be utilized to 100 percent of the interior capacity of the container because of such factors as cargo shape, weight, packaging, and securing. Most military cargo moving from Seattle to Alaska "free flows" to the ocean carrier's commercial terminal and is stuffed by the ocean carrier. Since the Government has no control over the amount of cargo placed in a container, the RFP specified there would be no minimum charge for a container stuffed by the carrier. The RFP did not specify what proportions of those cargoes would be stuffed by the carrier and Government but for evaluation purposes MSC used a factor of 24 percent. The RFP also provided that in evaluating offers "[a]nticipated annual cost for use in determining the cost favorable carrier will be determined by pricing out the categories and volumes of cargo shown in paragraph 5(f) at the applicable rates set forth by each offeror in the appropriate statement of rates."

Sea-Land's offer contained one rate for each category of cargo for the 2-year period and was predicated on the "100 percent basis" when stuffed by the Government. FAL, on the other hand, submitted an offer which varied from the RFP in two respects: (1) it offered one set of rates for the first year and another, higher set of rates for the second year; and (2) it provided that, with respect to cargo NOS and reefer cargo to be stuffed by the Government, the minimum charge per container would be calculated by multiplying the offered rate per MT by 80 percent of the stated interior capacity of the container--"80 percent basis."

MSC initially decided that FAL's offer was acceptable and should be evaluated on the 100-percent basis. Subsequently, during discussions, FAL was again advised that its offer was acceptable. Later best and final offers were received; evaluated prices follow:

Sea-Land	FAL
$6,393,964 (100-percent basis)	$6,741,264 (100-percent basis) */
$6,393,964 (100-percent basis)	$6,287,326 (80-percent basis).

*/Obtained by increasing Foss' Government-stuffed rate by 25 percent.

Based on the 100-percent basis price evaluation, award was made to Sea-Land as the low-priced offeror and FAL was so advised. Foss immediately protested to MSC's contracting officer. After due consideration the contracting officer determined that the award to Sea-Land was null and void and that negotiations should be reopened.

MSC's Position

MSC believes that upon receipt of FAL's offer, the contracting officer should have (1) informed FAL that its offer was not in compliance with the

RFP and requested FAL to revise its offer so as to be fully responsive to the RFP, pursuant to the Defense Acquisition Regulation (DAR) § 3-805.3(a) (1976 ed.), or (2) if there was merit to the changes FAL proposed, the RFP should have been modified to allow both offerors an opportunity to submit offers on the same basis, as required by DAR § 3-805.4(a) or (c). The error was magnified in MSC's view because FAL was advised its offer was acceptable, after it had raised the point in negotiations. The error was further compounded in MSC's view when FAL's price was compared with Sea-Land's by MSC's erroneously increasing FAL's price by a 25-percent increase on certain rates.

MSC contends that since DAR requirements were not followed by the contracting officer, the award to Sea-Land was a nullity and was not binding on the Government. MSC's rationale is (1) a contracting officer's authority is limited to the actual authority conferred by statute or regulation (The Floyd Acceptances, 74 U.S. (7 Wall.) 666, 675-676 (1868); Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947)); (2) private parties are charged with notice of all limitations upon the contracting officer's authority (United States v. Zenith-Godley Co., 180 F. Supp. 611 (S.D.N.Y. 1960)); and (3) a contracting officer is an agent of the Government and as such may bind the United States only in accordance with the authority granted him by statute or regulation (Condec Corp. v. United States, 369 F.2d 753 (Ct. Cl. 1966)).

MSC also contends that it was equally clear that an award could not be made to FAL because Sea-Land was not given an opportunity to compete on the same basis as FAL, as required by DAR § 3-805.4(c).

Next MSC believes that reopening the negotiations is the only appropriate and fair remedy for past errors in the procurement process and is lawful even though both offerors now know each other's prices. In support MSC refers to several

of our decisions; for example in Silent Hoist & Crane Co., Inc., B-186006, June 17, 1976, 76-1 CPD 392, where bids were solicited three times--the first solicitation was canceled following receipt of bids because the contracting officer determined the requirement could be met at a substantially lower price than that bid by the only bidder; thereafter, two bids were received in response to a second solicitation but, before award could be made, the assets of the low bidder were purchased by another firm and it was determined award could not be made to either the low bidder or its successor, and that the other bidder's price was unreasonably high; in response to a third solicitation the successor firm bid a substantially lower price than the only other bidder, Silent Hoist. Silent Hoist argued that the third solicitation constituted an "auction" but our Office concluded the agency's action was proper in the circumstances.

MSC also argues that a situation similar to the instant one was involved in Computer Network Corporation; Tymshare, Inc., 56 Comp. Gen. 245 (1977), 77-1 CPD 31. There, after receipt and evaluation of proposals, the Navy awarded a contract to Tymshare. An unsuccessful offeror, Computer Network Corporation (CNC), contended that Tymshare's offer had been improperly evaluated and that under a proper evaluation CNC's offer was low. The contracting officer agreed and terminated the contract with Tymshare and awarded the contract to CNC. Tymshare then protested, contending that CNC's offer did not comply with a mandatory technical requirement of the RFP. Our Office determined that Tymshare's offer had been improperly evaluated initially and that CNC's offer should not have been accepted because it did not comply with a mandatory requirement. Under the circumstances, we recommended that the Navy "reopen negotiations," even though the initial offers had been revealed to the competing parties.

MSC further contends that our decision in E. Walters & Company, Inc.; Dynamit Nobel A G; Nico Pyrotechnik K G, B-180381, May 3, 1974, 74-1 CPD 226, contains a factual situation virtually identical to the instant situation. There, following receipt and evaluation of proposals, the Army awarded a contract to Dynamit Nobel. The other offerors contended that the evaluation was improper; the Army terminated the contract for convenience and issued a new RFP with revised requirements and evaluation factors. E. Walters & Company contended that the resolicitation was improper because it should have been awarded the contract as low-priced offeror under the original solicitation and because Dynamit's price had been disclosed. We noted that the revised needs of the Army might affect the prices offered and we concluded that the resolicitation did not constitute an auction.

FAL's Position

In sum, FAL submits that (1) the separate rates for each contract year and an 80-percent utilization factor for determining the minimum charge for source-stuffed containers represented a valid and acceptable means of calculating the relative cost to the Government over the term of the contract; (2) even if the use of separate rates for each year and an 80-percent utilization factor could be said to be deviations from the RFP, they were not substantive in nature and did not prejudice Sea-Land's ability to compete for the contract; (3) MSC's initial erroneous decision to evaluate FAL's price by using a 100-percent utilization factor to determine the charge for source-stuffed containers can be corrected now, without reopening, merely by proper calculation of the prices in FAL's offer, and (4) there is simply no compelling reason to reopen negotiations.

With regard to FAL's first contention, FAL argues that the RFP does not require offerors to

utilize and charge the same rates in each year of the contract; indeed, the RFP's evaluation of offers section refers to "[a]nticipated annual cost." FAL also argues that the total contract cost is readily found by adding the two cost figures for years 1 and 2.

With respect to the use of an 80-percent utilization factor, FAL notes that the utilization factor and the rate per MT are essential in calculating the minimum charge per container, and that using a 100-percent utilization factor and a lower rate could result in the same minimum charge per container as would result from an 80-percent utilization factor and a higher rate. FAL also notes that the RFP calls for MT rates and provides that MSC will calculate the minimum charge for source-stuffed containers by multiplying the rate by the container utilization factor; thus, the actual calculation was to be made by MSC and was not a part of the offer. The total estimated minimum cost to the Government for source-stuffed containers would then equal the MSC-calculated minimum charge per container multiplied by the number of containers estimated to be moved under the contract.

FAL believes that its approach to the instant RFP was acceptable and similar to the situation in the Court of Claims' decision in Tidewater Management Services v. United States, Ct. Cl. No. 103-74 (March 22, 1978). There, the low offeror's proposal was based on an innovative analysis of underlying costs associated with Navy mess hall services and proposed significantly fewer hours than the number estimated by the Navy. That RFP contemplated only two manning schemes but the low offeror, Integrity Management, proposed six different manning schemes. The Navy's selection of Integrity Management was challenged and rejected by the Court of Claims because although Integrity's offer did not comply with the assumptions of the

RFP and although the RFP did not contemplate new techniques, it did not bar them. Therefore, the court concluded that:

> "When proposals in the best interests of a Government procurement do not violate the terms of the solicitation, they are not to be disregarded because they are innovative in a way not foreseen and not forbidden by the RFP."

With regard to FAL's second contention, FAL states that the use of separate rates for each year and an 80-percent utilization factor only represent another method to calculate total estimated cost and the basic economics of contract performance remain the same. In FAL's view, Sea-Land would not have arrived at any lower total estimated cost to the Government using FAL's methods of calculation than it did using its own methods of calculation because each carrier has certain revenue as a goal no matter how rates are calculated. FAL argues that here, as in the Tidewater case, the use of a novel approach by an offeror did not reflect a change in the scope of work or the Government's requirements as set forth in the RFP.

Concerning FAL's third contention, FAL states that MSC erred in its evaluation of FAL's offer by applying FAL's rate per MT to a 100-percent utilization factor because FAL's rate MT ton on an 80-percent basis was necessarily higher than it would have been had Foss submitted its rate on a 100-percent basis. FAL argues that the error can be corrected by proper calculation based on existing information without reopening negotiations.

With regard to FAL's fourth contention, FAL argues that reopening negotiations would produce an impermissible "auction" atmosphere since the offerors know the details of each other's rates. In FAL's view, the proper remedy is to correct the evaluation of FAL's offer, making FAL the low responsible offeror, and to award the contract under the initial RFP to FAL. FAL states that MSC has made no substantive changes in the RFP to be used

in reopened negotiations and the circumstances do not justify resolicitation. Further, FAL contends that the decisions cited by MSC are inapplicable because: resolicitation was approved in Silen: Hoist & Crane Co., Inc., supra, solely because the bids under the two previous solicitations were unreasonably high; resolicitation was approved in Alco Metal Stamping Corp., B-181071, September 4, 1974, 74-2 CPD 141, solely because the only bid under the initial IFB was held to be unreasonably high; resolicitation was approved in New England Engineering Co., Inc., B-184119, September 26, 1975, 75-2 CPD 197, solely because there was an ambiguity in the IFB which made it impossible to tell whether project completion was required within 90 or 180 days; and resolicitation was approved in Santa Fe Engineers, Inc., B-184284, September 26, 1975, 75-2 CPD 198, solely because there was an ambiguity in the phasing of work provision of the IFB which was confusing to the bidders. FAL believes that MSC's reliance on the E. Walters & Company, Inc., and Computer Network Corporation decisions is also misplaced.

FAL concludes that reopening negotiations here--where each offeror has the other's offer, where the only error in the procurement process was one of mathematical evaluation, and where there has been no substantive change in the RFP--would seriously undermine the integrity of the competitive procurement system.

Sea-Land's Position

In sum, Sea-Land contends that (1) the award was made in accordance with the RFP and applicable statutes and regulations and, therefore, constitutes a binding contract which should be honored, (2) negotiations should not be reopened, and (3) FAL's offer should have been rejected for not complying with the 21-day delivery time requirement and the 100-percent rate basis requirement.

With regard to Sea-Land's first contention, Sea-Land states that its offer was in accordance with the RFP and was the cost favorable offer; therefore, the award constituted a binding and enforceable 2-year requirements contract. Sea-Land also notes that the contract contains no "termination for the convenience of the Government" clause and no other provision for declaring the contract "null and void." In Sea-Land's view the controlling case is John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964), in which the court stated:

> "Where a problem of the validity of the invitation or the responsiveness of the accepted bid arises after the award, the court should ordinarily impose the binding stamp of nullity only when the illegality is plain." 325 F.2d at 440.

There, the court ruled that the bid was responsive to the invitation and the invitation was sufficiently clear and, thus, the initial award was valid. Sea-Land also refers to other cases, including Warren Bros. Roads Co. v. United States, 355 F.2d 612, 615 (Ct. Cl. 1965), in which a similar standard was pronounced:

> "If the contracting officer acts in good faith and his award of the contract is reasonable under the law and regulations, his action should be upheld. In other words, a determination should not be made that a contract is invalid unless its illegality is palpable."

Citing Lanier Business Products, B-187969, May 11, 1977, 77-1 CPD 336, Sea-Land contends that our Office's decisions have held that once a contract comes into existence, even if improperly

awarded, it should not be canceled, that is, regarded as void ab initio, unless the illegality of the award is "plain." The test of a plainly illegal award is whether the award was made contrary to statute or regulation because of some action or statement by the contractor or whether the contractor was on direct notice that the procedures being followed were inconsistent with statutory or regulatory requirements; if the test is not met, a contract may not be canceled, but can only be terminated for the convenience of the Government.

In Sea-Land's view, FAL could have submitted an offer based on one price for both years and a rate based on the 100-percent basis as required by the RFP; instead, FAL elected--without notice or any consultation--to submit an offer which constituted a departure from the RFP; therefore, FAL is "at fault" in causing this controversy.

With regard to Sea-Land's second contention, Sea-Land and FAL oppose any reopening of negotiations and Sea-Land argues that the same cases cited by FAL prohibit reopening negotiations under these circumstances. Both parties believe that a proper award can be or has been made without reopening negotiations. Sea-Land also argues that MSC's possible unilateral mistake concerning FAL's offer is not grounds for canceling Sea-Land's contract.

Regarding Sea-Land's final contention, Sea-Land states that (1) an analysis of the sailing schedule in FAL's offer shows that the delivery time FAL proposed was in excess of the 21-day delivery requirement in the RFP, (2) MSC should have increased FAL's evaluated total price by $378,000 due to the greater risk of loss and damage associated with FAL's tug and barge operation relative to Sea-Land's service; and (3) if MSC had used the more realistic factor of 10 percent versus 24 percent as the expected Government-stuffing percentage, Sea-Land would have been the low-price evaluated offeror no matter how FAL's price proposal was evaluated.

ANALYSIS--Evaluation of FAL's Offer

First, we must consider the effect of FAL's offer which was submitted on the 80-percent basis. The RFP contained an evaluation scheme simply designed to permit the multiplication of disclosed estimated quantities by rates (in dollars per MT) supplied by offerors for each of nine separate categories so that the summation of the products would represent an offeror's relative estimated total price over the life of the contract. The procuring agency contemplated that (1) rates for certain Government-stuffed containers would be proposed on the basis that the Government would pay for shipping 100 percent of the container's capacity no matter how much was in the container, (2) MSC used a factor of 70 percent to represent average container fill for evaluation purposes, and (3) award would be made to the responsible, low-total-priced offeror which proposed otherwise acceptable service.

FAL's offer was not calculated on the 100-percent basis because FAL believed that for the Government-stuffed containers, a realistic average container fill would be about 80 percent. Therefore, under FAL's proposal the Government would pay for shipping only 80 percent of a container's capacity when the fill was less than 80 percent and the Government would pay for the actual amount shipped when the fill was above 80 percent. For evaluation purposes it is noteworthy that the Government used a factor of 70 percent to represent the average actual utilization of capacity.

When properly evaluated, FAL's total estimated price for the required service was lower than Sea-Land's. FAL's proposal did not change any term or condition of the RFP's service requirements. It is argued by MSC that FAL's 80-percent basis price proposal had the effect of reducing some of the risk to which it would have otherwise been exposed on the 100-percent basis. The risk referred to by MSC is that fewer than the estimated number of containers would be

stuffed by the Government. In this regard, we note that MSC's detailed example shows that rates proposed on the 100-percent basis versus the 80-percent basis are lower to project the same total revenue; MSC concludes that the amount FAL would have reduced its rates had it proposed based on the 100-percent basis is unknown because of the risk factor. We do not believe that the reduced risk argument had any impact on Sea-Land's offered price because the Government apparently disclosed that for evaluation purposes it would be assumed that the Government would stuff 24 percent of the containers but Sea-Land, the incumbent contractor, believed that over the term of the contract the 24-percent estimate was unrealistic and the Government would only stuff 10 percent of the containers. Thus, we have no basis to conclude that Sea-Land, in structuring its proposed rates, did not fully consider the risk associated with the Government's stuffing fewer than 24 percent of the containers.

Each offeror knew from the RFP that the bottom line--relative estimated total price--was the basis for selecting the otherwise acceptable offeror. Each offeror also knew from the RFP that the quantities estimated for each category were not guarantees that such amounts would be shipped. Risks were inherent in any selection of rates for each category but both offerors knew how the selection was to be made. Both offerors structured their rates based on their own circumstances--fixed costs, overhead, variable costs, profit, etc.--and their best business judgments with the intent of offering the lowest total estimated cost to the Government. From the Government's standpoint, a price proposal structured either way would be acceptable as evidenced by the initial and revised RFP's. In any event, no matter how efficiently the Government stuffs the containers, FAL's bid prices will result in a lower total cost to the Government.

Accordingly, while the structure of FAL's price proposal--the 80-percent basis--differed from the RFP's scheme, the difference was one of form and not of substance and was not a material deviation because FAL would have been obligated to perform

the required service at the firm fixed rates stated in its proposal.

Secondly, FAL's price proposal contained one rate for the first year and a higher rate for the second year. For purposes of evaluation, it is our view that the two separate rates present no material problem; MSC had no difficulty in obtaining a firm estimated total price over the term of the contract. For that reason, Sea-Land's contention--that FAL's two-rate price proposal was unacceptable--is without merit. Further, Sea-Land's concern--that an extension beyond the 2-year term would create a serious problem in deciding what price rate should apply--is without basis since article I:17 of the RFP specifically provided for amending the rates after the initial 2-year period.

The above conclusions are supported by our recent decision in I.T.S. Corporation, B-190562, January 24, 1978, 78-1 CPD 64, where the solicitation requested firm fixed rates for a single line of display type, as follows:

"(a) Lines up to 7" in length
..... per line .....$
"(b) Lines over 7" in length
... . per line .....$"

I.T.S. proposed one price for each category, while a competitor proposed a price for category (a) and a variable price ($1.50 for 7 inches plus 25 cents for each additional inch) for category (b). The agency knew that the maximum line length is 16 inches and, therefore, evaluated the competitor's bid based on the maximum price, which was lower than the protester's. Since the competitor's bid was otherwise responsive, the specific price for each order can be determined and while it might be less, it could not exceed the price used for evaluation; thus, we concluded that although the structure of the competitor's bid price deviated

from the solicitation's contemplated scheme, it could nevertheless be evaluated essentially on the same basis as the protester's by using the competitor's maximum price. See also Shamrock Five Construction Company, B-191749, August 16, 1978; Tidewater Management Services v. United States, supra. We believe that the same rationale is applicable in the instant case.

Thirdly, Sea-Land's belief that FAL failed to propose acceptable service regarding the RFP's vessel sailings and delivery time requirement of 21 days is incorrect. MSC thoroughly explains that the service Sea-Land presently provides and proposes to continue is not significantly different from FAL's proposal and that both offerors' proposals satisfied the RFP's requirements. After careful review, we must agree with MSC analysis that both proposals were acceptable.

Finally, Sea-Land's contentions--that (1) FAL's operation would subject the Government to greater risk of loss and damage and, therefore, a cost factor should have been added to FAL's price for evaluation purposes, and (2) that for purposes of evaluation a factor of 10 percent should have been used instead of 24 percent--are untimely under our Bid Protest Procedures, 4 C.F.R. part 20 (1977). Section 20.2(b)(1) requires offerors to protest any alleged solicitation defect before the closing date for receipt of initial proposals. Here, as MSC notes, the RFP's evaluation scheme did not include any factor for relative risk to the Government of loss and damage; if Sea-Land believed that one was required or would have been appropriate, the time to protest was not after fully participating in the procurement. Section 20.2(b)(2) requires protests based on alleged improprieties other than solicitation defects to be filed within 10 working days after the basis of protest is known. Here, Sea-Land did not protest MSC's use of the 24-percent factor within the required time. Accordingly, we will not consider the merits of these two contentions.

CONCLUSION AND RECOMMENDATION

We note that MSC has canceled the award to Sea-Land and moreover the record does not reflect that Sea-Land undertook any work under the award. While the court has not requested our views concerning the propriety of the cancellation, we point out the Court of Claims has read a "termination for convenience of the Government" clause into an executed contract. G.L. Christian and Associates v. United States, 312 F.2d 345 (Ct.Cl. 1963), cert. denied, 375 U.S. 418 (Ct. Cl.), reh. denied, 320 F.2d 345 (Ct. Cl. 1963), cert. denied, 375 U.S. 954 (1963), reh. denied, 376 U.S. 929, 377 U.S. 1010 (1964). For a discussion on the impact of the Christian doctrine on public contract law see Shedd, The Christian Doctrine, Force and Effect of Law, and Effect of Illegality on Government Contracts, 9 Public Contract L.J. 1 (1977). Further, we note that even in cases where the Court of Claims ruled that the Government had wrongfully canceled contracts (John Reiner & Co. v. United States, supra, and Brown & Son Electric Co. v. United States, 325 F.2d 446 (Ct. Cl. 1963)), recovery of anticipated profits was not allowed.

The final matter for our consideration is whether the proper course of action would be to make award to FAL under the initial RFP or to reopen negotiations based on the revised RFP as MSC suggests. The revised RFP, in MSC's view, removes uncertainty by stating: (1) expected containers utilization factors for three categories (as 65 percent, 67 percent, and 68 percent as compared with 70 percent for each category used in evaluation under the initial RFP); (2) the estimated volume of cargo for evaluation purposes has been revised as follows:

	Container Required			
	North Bound		South Bound	
Cargo NOS	13,500 */	[13,500] **/	2,000	[2,986]
Vehicles	6,500	[6,500]	2,500	[2,500]
Refrigerated	2,500	[2,455]	0	[0]

*/ Initial amount
**/ Revised amount is in brackets

and (3) the percentage of estimated weight to be stuffed by the Government was revised to 22.8 percent as compared with 24 percent used in the initial RFP.

Both competitors believe that MSC's revisions to the RFP are not substantial and both contend that reopening under the revised RFP would be like reopening under the initial RFP, thus creating an auction atmosphere in violation of sound procurement practice. As we noted above, FAL proposed to satisfy the Government's requirements as they were stated in the initial RFP and those requirements reportedly have not changed; both offerors had all the information necessary to properly price their proposals; and Sea-Land already was given the opportunity to submit its best evaluated total price. Accordingly, we conclude that Sea-Land was not prejudiced by FAL's proposal, Sea-Land would not be prejudiced by not reopening negotiations, and the Government's needs would be satisfied under the initial RFP.

Our decision in Square Deal Trucking Co., Inc., B-183695, October 2, 1975, 75-2 CPD 206, supports our instant views. There, the solicitation contemplated that award would be based on the lowest aggregate monthly charge for two services; the two low bids received were as follows:

	CLIN	Quantity	Unit Price	Total
Bidder A	1	12 mo.	$125	$1,500
	2	300	68	20,400
			$193	$21,900
Bidder B	1	12 mo.	$120	$1,440
	2	300	70	21,000
			$190	$22,440

There, the agency recommended resolicitation to clarify that award was to be made based on total evaluated price and not low total unit price. We concluded that it was not shown that competition would be adversely affected by the solicitation's award provisions; therefore, award could properly be made to the low properly evaluated bidder, thus avoiding an "auction" atmosphere incident to a resolicitation.

Our position is also supported by the rationale of Tennessee Valley Service Company--Reconsideration, B-188771, September 29, 1977, 77-1 CPD 241, which involved a solicitation that provided that award would be made based on the lowest aggregate bid for all items specified; estimated quantities were provided in one section and unit prices were requested in another section of the solicitation. In response, some bidders provided only unit prices and others provided extended prices. The protester submitted the low total extended price and another bidder submitted the low total unit price; the agency recommended resolicitation. Again, we found that enough information was in the solicitation for bidders to exercise their best business judgment in structuring their prices and all bidders should have known that award of such Government contracts must be made based on the low evaluated cost for the total work to be performed. We recommended that award be made under the solicitation because bidders could not be prejudiced by a proper evaluation of submitted bids.

The underlying rationale for both decisions is our view that (1) rejection of bids after opening tends to discourage competition (see 52 Comp. Gen. 285 (1972)), and (2) cancellation after bid opening is generally inappropriate if award under the solicitation would serve the actual needs of the Government (see GAF Corporation; Minnesota Mining and Manufacturing Company, 53 Comp. Gen. 586, 591 (1974), 74-1 CPD 68; 49 Comp. Gen. 211 (1969)). In sum, we believe that the same rationale is applicable in the instant negotiated procurement. Therefore, award may properly be made to FAL under the initial RFP.

By letter of today, we are advising the court and the Secretary of the Navy of our views.

Milton J. Socolar

Acting Comptroller General
of the United States

M. J. Boyle
P & I

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-192149 September 12, 1978

The Honorable
The Secretary of the Navy

Dear Mr. Secretary:

Enclosed is a copy of our decision of today in the matter of Foss Alaska Line, B-192149. Our views are based on the lengthy, detailed, and thorough submissions of the parties. We conclude that in the circumstances the best course of action is for the Military Sealift Command (MSC) to award the contract to Foss Alaska Line under the initial request for proposals (RFP).

We would appreciate advice on the action taken on the recommendation.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

Enclosure

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-192149

September 12, 1978

The Honorable Vincent P. Biunno
United States District Judge
United States District Court
District of New Jersey

Dear Judge Biunno:

Enclosed is a copy of our decision of today in the matter of Foss Alaska Line, B-192149. Our views are based on the lengthy, detailed, and thorough submissions of the parties. We conclude that in the circumstances the best course of action is for the Military Sealift Command (MSC) to award the contract to Foss Alaska Line under the initial request for proposals (RFP).

We would appreciate receiving a copy of your order disposing of the litigation in question.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

Enclosure