

DECISION



Halden
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

[Protest of Contracts Awarded by Military Sealift Command]

FILE: B-197894

DATE: October 20, 1980

MATTER OF: United States Lines, Inc.

DCG 05369

DIGEST:

1. Any possible advantage offerors have in misstating speed and fuel consumption in warranty is equalized by provisions making contractor liable for increased costs to Government.
2. Allowing offeror to change during negotiations ship proposed for charter contract because modifications would have to be made to ship to be acceptable does not appear to have been improper even if change was major, since one of basic purposes of negotiated procurement is to eliminate deficiencies in proposals to make them acceptable through discussions.

United States Lines, Inc. (USL), protests the award of contracts made to two other shipping lines under request for proposals (RFP) No. N0003380R0006 for the charter of ships to the Military Sealift Command (MSC).

◁ We do not consider the protest to have merit. ▷

Under the RFP, offerors are to warrant the speed that the ships are capable of maintaining under normal conditions in moderate weather when fully laden and the average consumption of fuel at that speed for 24 hours. The RFP provides that if during any 3-month period fuel consumption is in excess of 105 percent of the warranted fuel consumption for the speed indicated, the contractor will be liable for the excess cost. The RFP further provides that, if a ship is delayed more than 12 hours because it fails to make the warranted speed, the contractor will be liable for the time lost.

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USL points out that the warranty provision requires the ships to maintain the warranted speeds and fuel consumption when the ships are "fully laden." USL contends that the contractors will not be able to meet the warranty when the ships are "fully laden." USL asserts that "fully laden" means loaded with cargo sufficient to bring the vessel down to its marks. This is the meaning USL says it relied upon in preparing its warranty. It states that the warranties made by the contractors do not reflect this meaning.

Assuming that "fully laden" means what USL says it means, it is not necessary for us to determine whether the contractor will be able to meet the speed and fuel consumption in the warranty provision. To the extent that the warranties may not reflect actual performance, the Government is protected by the provisions making the contractors liable for breach of the warranties. Capital Industries, Inc., B-190818, July 7, 1978, 78-2 CPD 17; General Fire Extinguisher Corporation, B-186954, November 15, 1976, 76-2 CPD 413; 38 Comp. Gen. 819 (1959); B-157301, December 29, 1965; B-154291, October 6, 1964.

USL also contends that it was improper to allow one contractor, Lykes Steamship Company, to offer a different ship in response to the RFP after the closing date for initial offers.

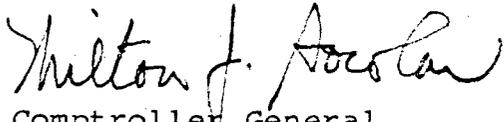
MSC determined that modifications would have to be made to the original ship offered in order to be acceptable. MSC provided Lykes an opportunity to certify that changes could be made or to offer a substitute ship prior to the best and final deadline date. Lykes Steamship Company chose the latter alternative.

We have held that a contracting agency may exclude from the competitive range a proposal whose deficiencies are so material that the revisions would be tantamount to submitting another proposal. Robinson Industries, Inc., B-194157, January 8, 1980, 80-1 CPD 20; Environmental Science and Engineering, Inc., B-189172, December 15, 1977, 77-2 CPD 465. However, we have also recognized that whether a proposal is in the competitive

range for negotiation is a matter of administrative discretion.) Western Design Corporation, B-194561, August 17, 1979, 79-2 CPD 130. Further, (the fact that an initial proposal may not be fully in accord with the requirements of the RFP is not reason to reject the proposal if the contracting agency believes the deficiency is reasonably susceptible to being made acceptable through negotiations. One of the basic purposes of a negotiated procurement is to eliminate deficiencies in proposals through discussions to make them acceptable.) Self-Powered Lighting, Ltd., B-195935, March 13, 1980, 80-1 CPD 195; TM Systems, Inc., 56 Comp. Gen. 300 (1977), 77-1 CPD 61.

(Here, MSC determined that Lykes' offer could be made acceptable through negotiations and it was accomplished prior to the best and final offer deadline date.) Given the purpose of negotiations, the substitution does not appear to have been improper even if the change was major.

The protest is denied.


For the Comptroller General
of the United States