

Mr. Burkard



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** American President Lines, Ltd.

**File:** B-236834.3

**Date:** July 20, 1990

Robert T. Basseches, Esq., I. Michael Greenberger, Esq., and Elise J. Rabekoff, Esq., Shea and Gardner, for the protester.

William Coffey, Esq., for Sea-Land Service, Inc., an interested party.

Richard S. Haynes, Esq., Charna Swedarsky, Esq., and Karen Nappo, Esq., Office of the General Counsel, Department of the Navy, for the agency.

Richard P. Burkard, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest is sustained where agency's determination that rates offered were not fair and reasonable is unsupported by record and where evaluation criteria concerning rates were applied to offerors inconsistently.

### DECISION

American President Lines, Ltd. (APL) protests the rejection of various transportation rates it offered in response to request for proposals (RFP) N00033-89-R-2300, issued by the Military Sealift Command (MSC). APL argues that MSC failed to offer a rational explanation for rejecting certain rates offered by APL.

We sustain the protest.

### BACKGROUND

The RFP, which was issued December 5, 1989, sought prices from U.S. flag ocean carriers for ocean transportation and intermodal transportation services for the period from April 1 to September 30, 1990, and was considered the second

cycle of the RFP. (Each solicitation for a 6-month period is termed a "cycle.") The transportation services for containerized Department of Defense (DOD) cargo were divided geographically by trade route and subdivided by zone. For example, route 1, the primary trade route at issue here, consists of the Far East area, and it is subdivided into five zones as follows:

Zone A1	Kwajalein
Zone A2	Korea
Zone A3	Okinawa
Zone A5	Philippine Islands
Zone E	Japan

For each zone, inbound and outbound rates were solicited for transporting containers carrying three types of cargo: vehicles, refrigerated cargo, and cargo NOS (not otherwise specified.) APL, Sea-Land Service Company, and Lykes Brothers Steamship Company, among others, submitted prices for the rates in this cycle.

The RFP provided that container agreements would be awarded to all technically acceptable, responsible carriers who submitted offers which are fair and reasonable. Thus, awards could be made to one or more offerors for the same requirement.

The RFP also contained a "Cargo Booking Policy" provision which explained that cargo would be "booked" by individual rate category within each route to the low cost carrier. In the event the low cost carrier could not provide acceptable space and an acceptable delivery schedule, then cargo would be booked to the next low cost carrier and so on, until a carrier could be found who could provide acceptable space and an acceptable delivery schedule. The RFP provided, with respect to outbound cargo on routes 1, 5, and 6A, that cargo would be booked in a manner designed to achieve, as nearly as possible, a certain specified distribution among carriers. For example, where there are two carriers, cargo would be booked, based on rate favorability, in such a way that no one carrier received more than 65 percent of the cargo on that route for this cycle. This provision was termed the maximum cargo limitation. However, the RFP stated that no minimum volume of cargo is guaranteed at any time to any carrier.

On January 8, 1990, APL submitted its proposal in response to the RFP, offering rates on route 1, other routes, and for ancillary services. On February 14, 1990, MSC issued a request for best and final offers, to which APL responded on February 21. By letter dated March 5, the contracting officer notified APL that certain categories of rates offered were rejected since MSC determined that they were not fair and reasonable. Certain other APL rates were found acceptable for route 1.

On March 6, the contracting officer notified APL that the maximum cargo limitation applicable to route 1 had been deleted. Consequently, all of the outbound route 1 cargo would be transported by the low-priced offeror. The protester states that MSC offered no explanation for this action. On March 9, APL requested a debriefing to discuss the basis of the contracting officer's rejection of its rates. APL filed its protest with our Office on March 14, 1990, alleging that the deletion of the maximum cargo limitation was improper and that its rates were fair and reasonable. By letter dated March 16, the agency denied APL's request for a debriefing, advising that the basis for the contracting officer's decision to reject certain rates would be submitted in response to APL's protest.

Subsequent to the protest, the record shows that the agency entered into negotiations with APL which resulted in APL agreeing to lower its prices slightly in exchange for MSC reinstating the maximum cargo limitation. MSC accepted several "revised" rates and on April 24, APL withdrew its protest concerning the maximum cargo limitation. APL's protest against MSC's rejection of its other rates remains for our consideration. MSC determined that it was in the best interest of the United States to continue performance on route 1.

#### THE EVALUATION METHOD

The RFP set out the evaluation factors for award. As stated, award would be made to all carriers who submit rates which are fair and reasonable. The RFP stated that the contracting officer is required to make an affirmative determination that all prices (rates) are fair and reasonable. The RFP provided further that in determining whether carriers' rates are fair and reasonable, the contracting officer would conduct an analysis in which one or more of the following criteria will be used:

- "1. A determination of adequate price competition resulting from a comparison of a carrier's offered rates with the offers of its competitors.

"2. A comparison of the offered rates with all applicable commercial tariff rates for the same or similar services, including . . . service contract rates. . . . This may involve a comparison with commercial tariff rates for a representative market basket of commodities historically shipped by the Department of Defense and the Contracting Officer's assessment as to whether the commercial rate represents a competitive market rate.<sup>1/</sup>

"3. A comparison of proposed rates with prior proposed and contract rates for the same or similar service.

"4. For container cargo only, a comparison of rates offered for containers under 32 feet with rates offered for containers over 32 feet.

"5. A comparison of rates offered, where appropriate, with the level of market rates overseas for the same or similar services."<sup>2/</sup>

The RFP incorporated the Cargo Preference Act of 1904, 10 U.S.C. § 2631 (1988) (1904 Act). The 1904 Act requires that all supplies bought for the military must be transported on U.S.-flag ships and prohibits U.S.-flag vessels from charging higher rates to carry military supplies than they charge for transporting like goods for private persons. Evaluation factor 2 and the referenced

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<sup>1/</sup> The RFP also contained a statement that the contracting officer will make an assessment of market conditions, including consideration of trade route serviced, supply and demand, the rate of foreign exchange, balance of trade, and the general international economic environment. The agency states that an assessment of market conditions was used as supporting data for the determinations made on other bases and was not used independently to reject a rate.

<sup>2/</sup> The parties apparently agree that "overseas" was a typographical error; the contracting officer stated at a pre-proposal conference that the RFP should have read "overland." In any event, this evaluation factor was apparently not applied in rejecting any of APL's offered rates.

"market basket" were incorporated into the RFP by the agency to insure compliance with this statutory requirement. The market basket was intended to be a mechanism to allow MSC to meaningfully compare commercial rates to rates offered to MSC to transport cargo NOS in containers.<sup>3/</sup>

The market basket was based on a list of the major DOD commodities shipped in containers as cargo NOS in fiscal year 1989. This listing, which was provided to the carriers prior to issuance of the RFP, was intended to indicate to carriers the type of cargo that would be shipped. Under the RFP, the contracting officer was to develop a "market basket" commercial rate by examining U.S.-flag carrier commercial tariff rates for container cargo for similar commodities by trade zone. The contracting officer then was to calculate the average rate for those commodities and compare that rate to the rate offered by carriers as one of the factors in determining whether a rate was fair and reasonable.

#### DISCUSSION

APL argues that MSC has failed to articulate any reasoned explanation for its rejection of its rates despite its many opportunities to do so. It also asserts that each of MSC's decisions to reject the challenged APL rate violated clearly established legal standards and was unreasonable. We agree that the record does not support most of the agency's evaluation decisions.

Evaluation and award are required to be made in accordance with the terms of the solicitation. Environmental Technologies Group, Inc., B-235623, Aug. 31, 1989, 89-2 CPD ¶ 202. The Competition in Contracting Act of 1984 provides that the head of an agency shall evaluate sealed bids and competitive proposals based solely on the factors specified in the solicitation. 10 U.S.C. § 2305(b)(1) (1988). In reviewing protests against allegedly improper

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<sup>3/</sup> Because MSC ships containers which are already sealed with the shipping invoice or "manifest" enclosed, the carrier does not know the contents of the containers and therefore generally is not aware of what precise items are being shipped. The market basket was also intended to provide offerors with information concerning the commodities to be shipped.

evaluations, our Office will examine the record to determine whether the agency's judgment was reasonable and in accord with the evaluation criteria listed in the solicitation. Space Applications Corp., B-233143.3, Sept. 21, 1989, 89-2 CPD ¶ 255.

We have recognized that such judgments by their nature are often subjective; nonetheless, the exercise of these judgments in the evaluation of proposals must be reasonable and must bear a rational relationship to the announced evaluation criteria upon which competing offers are to be selected. See Wadell Eng'g Corp., 60 Comp. Gen. 11 (1980), 80-2 CPD ¶ 269. Implicit in the foregoing is that these judgments must be documented in sufficient detail to show that they are not arbitrary. Where, as in this case, the record before us does not provide adequate supporting rationale for the decision, we are unable to conclude that the agency had a reasonable basis for its decision. Id.

With the exception of four rates and two linehaul rates, discussed below, we cannot conclude, based on the record before us, that MSC's rejection of APL's rates was reasonable. The agency's report and comments fail to address with any specificity valid reasons for rejecting APL's rates.<sup>4/</sup> Rather, MSC defended its position with generalities and conclusory statements. Where the record does provide information concerning the agency's decision-making process, it shows that the agency misapplied the evaluation criteria or applied them inconsistently.

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<sup>4/</sup> MSC's initial report on this protest contained the contracting officer's handwritten workpapers which allegedly support the determination to reject the APL rates at issue. MSC declined to provide a rate by rate explanation for its price unreasonableness determination. These workpapers contained notations, references to tariffs, and many calculations, which, for the most part, were indecipherable and not identified to particular rates. We requested that the agency organize these notes and provide some explanation as to how these calculations supported the rate rejection. The workpapers were reorganized with a cover sheet explaining the notations. However, since it was still difficult to review the analysis, we asked the agency to provide examples, using the worksheets, to show why the contracting officer rejected these rates. While the examples have established the agency's rationale for the rejection of certain rates, as our decision explains, we disagree that MSC has provided a reasonable basis for the rejection of all of APL's rates.

We find that MSC improperly rejected 11 separate rates on route 1 that were approximately the same as, identical to, or lower than previously accepted rates from either Sea-Land or APL.<sup>5/</sup> The agency argues that the prior acceptance of a rate does not bar rejection of such rates under the current procurement since "each procurement stands alone." Discount Mach. & Equip., Inc.--Reconsideration, B-230567.2, June 17, 1988, 88-1 CPD ¶ 580. Here, however, the RFP specifically defined price reasonableness by reference to previous rates. Therefore, under the terms of the solicitation, the agency was obligated to consider, as an evaluation factor, prior proposed and prior contract prices.

APL states, and MSC does not dispute, that the MSC Commander advised APL during price negotiations, that rates which were accepted for the previous cycle would be considered "fair and reasonable" for this cycle. Moreover, in each instance where the rate offered by APL is in the same range as a previously accepted rate, the agency fails to provide a rational explanation as to why that rate is now unreasonable. In the absence of such information, APL's similar rates should have been accepted.

For example, on route 1A2, inbound 20-foot vehicles, APL's offered rate of \$2,310 per container was rejected. In the previous cycle, APL's rate of \$2,363 for the same requirement was accepted. The agency does not explain why the current rate is not fair and reasonable even though it is lower than a rate that was considered fair and reasonable 6 months before. Moreover, the record shows that APL's rate was lower than that offered by its competitor, Sea-Land, in the first cycle. Thus, APL's rate compared favorably to its previously accepted rate and to its competitor's previous rate.

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<sup>5/</sup> These rates are for inbound 20-foot containers carrying vehicles from Korea, inbound 20-foot containers carrying cargo NOS from Korea, inbound 40-foot containers carrying cargo NOS from Korea, inbound 20-foot containers carrying vehicles from Okinawa, inbound 40-foot containers carrying cargo NOS from Okinawa, inbound 20-foot containers carrying vehicles from the Philippines, inbound 40-foot containers carrying cargo NOS from the Philippines, inbound 20-foot containers carrying vehicles from Japan, inbound 20-foot containers carrying cargo NOS from Japan, inbound 40-foot containers carrying cargo NOS from Japan, and outbound 40-foot containers carrying vehicles from Japan.

The only explanation provided by MSC for the rejection was that APL's 20-foot rate per ton is double its 40-foot rate. While we recognize that such a comparison is an acceptable factor to be considered by the agency, this pricing structure, alone does not render a rate unfair and unreasonable. The record shows that on one inbound route, MSC accepted a 20-foot rate that was almost three times the 40-foot rate for the same cargo on the same route and zone.<sup>6/</sup> On another inbound rate, MSC accepted a Sea-Land rate for 20-foot cargo NOS of \$47 per ton despite a 40-foot rate that was just over half that price per ton, \$24.<sup>7/</sup> On that same route, MSC accepted Lykes Brothers' 20-foot rate which was slightly less than twice that firm's offered 40-foot rate.<sup>8/</sup>

MSC also rejected another APL rate that was 5 percent higher than its previously accepted rate and which was lower than Sea-Land's rate accepted for the first cycle.<sup>9/</sup> In this instance, however, the agency rejected APL's (and Sea Land's) rate stating that its rate was two times greater than commercial rates. APL argues that in determining the commercial rate for inbound cargo NOS from Korea in 20-foot containers, the agency did not compare commercial rates for similar goods.

The RFP stated that in determining commercial rates, the agency would consider a market basket of commodities shipped by DOD. By letter dated December 4, 1989, the Commander, MSC, advised offerors that he had "approved the RFP with a market basket consisting of a generic list of commodities," which was attached. The list named 23 items ranging from specific commodities such as beer, cereals, and paper, other than napkins and towels, to more general categories such as furniture, subsistence NOS, and general cargo NOS.

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<sup>6/</sup> Route index 5, inbound continental Europe and the United Kingdom and Ireland to the United States East Coast vehicle rates offered by Lykes Brothers.

<sup>7/</sup> Route Index 11, inbound.

<sup>8/</sup> Last cycle, MSC uniformly accepted 20-foot inbound rates from both APL and Sea-Land which were two times the 40-foot rate offered by these carriers, respectively.

<sup>9/</sup> Route 1A2, inbound from Korea, cargo NOS in 20-foot containers.

MSC states that it determined the commercial rate for cargo traveling inbound for route 1 by identifying rates for various commodities from commercial tariffs found in the Asia North American Eastbound Rate Agreement Tariff and calculating the average rate. Rates considered in determining a commercial rate included commodities such as garments, lawn care products, Christmas decorations, telephone machine and video camera parts, and General Department Store Merchandise (which was included in the contracting officer's workpapers in some form six times). Based on the average of these commercial rates, the agency determined that APL's rate for transporting cargo NOS was higher than commercial rates.

We find that there are several defects in this market basket evaluation. First, there is no indication that the commodities actually used to establish a market basket correlated in any way to the goods which DOD actually ships. The protester asserts that it is well known among carriers that inbound cargo from the Far East consists primarily of household goods and privately owned vehicles and that it is doubtful that under this RFP that DOD will transport lawn care products, department store merchandise, or telephone machine parts. The record shows that in determining the reasonableness of APL's rates, MSC has examined commercial rates for commodities such as those, which are not items which DOD actually ships.

Second, as shown above, the commodities MSC actually used for the market basket were not the same as or similar to those listed in the RFP attachment. For example, garments and lawn products are not reasonably related to any of the RFP attachment commodity categories. By using different and dissimilar commodities to establish commercial rates, the agency evaluated offers by using criteria not stated in the RFP. Consequently, we find the market basket method used to determine commercial rates to be defective and therefore an improper basis to reject APL's rate.<sup>10/</sup>

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<sup>10/</sup> We also question the use of certain commercial service contract tariffs for comparison purposes. These service contracts are negotiated by corporations for shipment of their products. In most cases, however, these rates are for a certain level of guaranteed traffic. Thus, these rates reasonably could be expected to be lower than those offered MSC, which guarantees no traffic.

Once MSC determined the commercial rate that it believed applied to certain routes and zones as an evaluation factor, it applied that factor inconsistently. For example, on route 1E, Japan, outbound vehicles in 40-foot containers, MSC refused to accept APL's rate of \$1,277, which was identical to APL's previous cycle rate, notwithstanding that the commander, MSC, in an earlier memorandum, recommended that the agency accept the APL rates accepted in the previous cycle.<sup>11/</sup> The agency declined to do so, arguing that it was precluded from accepting the rate under the 1904 Act; MSC determined that APL's price exceeded the commercial rate, which MSC determined to be \$811.05. Nevertheless, the record shows that MSC accepted Sea-Land's rate of \$1,087, despite the fact that this rate exceeded the commercial rate.

The agency also acted unreasonably in determining that certain APL rates which had increased slightly from the last cycle were unacceptable based on a comparison to competitor's rates. For example, on route 1A3, Okinawa, inbound cargo NOS in 40-foot containers, MSC rejected a rate which was 2 percent higher than the APL rate it had accepted in the previous cycle. That rate was only 4 percent higher than the Sea-Land rate which was accepted. The record shows that MSC accepted rates on trade route 1 which exceeded the low rate by 11, 12, and 15 percent; MSC accepted rates on other routes that exceeded the low rate for that rate and zone by 20, 34, and 53 percent. Thus, based on this record, we find that the agency applied this evaluation factor inconsistently and that absent an extremely wide disparity in prices or other convincing evidence of price unreasonableness, a comparison to competitor's rates, alone, may not serve as the basis for rejection of rates.

We find, however, that four rates on route 1 were properly rejected, and therefore we decline to disturb the agency's decision with respect to those rates. These rates were APL's outbound rates for 20-foot vehicle containers on routes 1A2, 1A3, 1A5, and 1E, each of the zones served by APL. APL's offered rate for these exceeded its competitor's rate by 55 to 72 percent. In each case, the agency stated

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<sup>11/</sup> Both MSC and APL agree that the March 5 memorandum written by the commander, at a minimum, constitutes a recommendation that MSC accept all APL outbound rates which are the same price or lower than an accepted APL rate under the previous cycle.

as a reason for the rejection, "comparison to competitor's rates." Since the RFP provides that MSC may reject a rate for any one of the stated evaluation factors, we have no reason to find that it was unreasonable to reject rates which so greatly exceed those of Sea-Land. On route 1A3, for example, where APL's rate exceeded Sea-Land's by the lowest margin, 55 percent, its price per container was \$1,000 more per container than its competitor. Moreover, APL has presented no evidence to demonstrate that its outbound 20-foot vehicle container rates are reasonable, despite the consistent wide disparity. Consequently, we have no basis to object to the rejection of these rates.

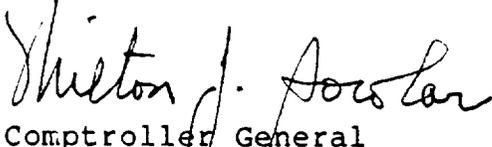
In response to a request from our Office for examples of the agency's analysis for rejecting APL's rates, MSC reports that APL's 20-foot container linehaul rate from Placenta, California, to Los Angeles, California, and from Portland, Tennessee, to Los Angeles, California, are 78 to 80 percent higher than Sea-Land's respective rates. Consistent with our prior reasoning regarding route 1 ocean transportation, we find the rejection of these rates proper based on the explanation provided.

With regard to the linehaul rates for point to point routes in the United States, the contracting officer's workpapers merely assigned an "X" next to the numerous APL rates rejected. The workpapers do not state the reason for the rejections. The agency's report, prepared by counsel, does not specifically address the rejection of linehaul rates, but states that the rejection resulted from an unfavorable comparison to competitor's rates and/or the commercially available market. We are reluctant to accept the representations as to the reason for rejection as stated in the counsel's report. First, there are no commercial rates cited and thus no basis to review the reasonableness of the rejection on that ground. Second, while APL's rates are generally higher than competitors, the percentage difference for each route varies significantly, and the record shows that some of the rates are the same or in line with rates previously accepted. Therefore, we find no basis on this record to support MSC's rejection of these rates.

Finally, with respect to shipment on flat racks, we also sustain the protest on the basis that the record does not support the agency's decision to reject the rates. While conclusory statements by the agency appear in the record concerning various rates, we are unable to find a rational basis in the record for the rejections.<sup>12/</sup>

#### CONCLUSION

In the absence of any rational explanation for the rejections, we sustain the protest with respect to all the protested rates, except for the four rates on route 1 and the two linehaul rates identified above, and we recommend that the agency include APL's rates in its container agreement for the remainder of the cycle. We also recommend that if the agency intends to use the stated evaluation criteria for evaluation of rates in future cycles, that it document its reasons for rejection of the rates and apply the criteria consistently to all offerors. If a market basket is to be used for comparison, the goods selected for the market basket should reflect the commodities anticipated to be shipped by the agency based on actual shipping needs as accurately as the agency can determine. The commercial tariffs chosen as the basis for comparison to offered rates should also correspond to the commodities to be shipped under the RFP. Further, we find that APL is entitled to the costs of pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990).

*for*   
Comptroller General  
of the United States

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<sup>12/</sup> For linehaul rates outside the continental United States, APL's rates were rejected for mileage over 375. The agency reports that this service is seldom needed and has decided that the service will not be acquired under the container agreement. We thus view the issue as to the reasonableness of the rejection of these rates as academic.