

Ashen 149135



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kumasi Ltd./Kukawa Ltd.; Crowley Maritime Corporation; Puerto Rico Marine Management, Inc.

File: B-247975.7; B-247975.8; B-247975.9;
B-247975.10; B-247975.11

Date: May 3, 1993

Thomas J. Touhey, Esq., Donald A. Tobin, Esq., and James A. Kelley, Esq., Bastianelli, Brown & Touhey, for Crowley Maritime Corporation; Wayne A. Keup, Esq., Dyer, Ellis, Joseph & Mills, for Kumasi Ltd./Kukawa Ltd.; and Daniel R. Weckstein, Esq., and William M. Dozier, Esq., Vandeventer, Black, Meredith & Martin, for Puerto Rico Marine Management, Inc., for the protesters.
Milton J. Stickles, Jr., Esq., Cadwalader, Wickersham & Taft, for Cygnus Management, Inc.; C. K. Tankersley, Esq., Nemirow, Hu, Kurt & Tankersley, for Lykes Brothers Steamship Company, Inc.; Richard D. Gluck, Esq., and Robert J. Stefani, Jr., Esq., Robins, Kaplan, Miller & Ciresi, for First Chicago Leasing Corporation; Hopewell H. Darneille, III, Esq., John A. Ordway, Jr., Esq., Brian A. Mizoguchi, Esq., and Peter A. Gould, Esq., Verner, Liiphert, Bernhard, McPherson and Hand, for Eagle Shipholding Corporation; Dennis James Burnett, Esq., and Sean Thomas Connaughton, Esq., Haight, Gardner, Poor & Havens, for Stena Admiral Line Ltd.; Omar Wohabe, Esq., Wohabe Law Offices, for National Shipping Company of Saudi Arabia; and William A. Shook, Esq., Preston, Gates, Ellis & Rouvelas Meeds, for CMB-T Italy SRL, interested parties.
Michael McMorrow, Esq., Maritime Administration, Department of Transportation, for the agency.
David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests are sustained where agency evaluation gave importance to criterion for heavy lift capacity of proposed roll-on/roll-off ships beyond that which would reasonably be expected by offerors and, as a result, deprived offerors of the opportunity to modify their vessels, or otherwise secure higher approved capacity for deck space, so as to significantly increase their technical scores; agencies are required to set forth in a solicitation all significant evaluation factors and subfactors, and their relative importance, which will be used in the evaluation.

DECISION

Kumasi Ltd./Kukawa Ltd. (KK), Crowley Maritime Corporation, and Puerto Rico Marine Management, Inc. (PRMMI), agent for Sun Leasing Corporation, protest the awards under request for proposals (RFP) No. DTMA91-92-R-200079, issued by the Maritime Administration, Department of Transportation (MarAd), for ships to be used in the Ready Reserve Force (RRF). MarAd awarded nine contracts for 12 roll-on/roll-off (RO/RO) vessels. The protesters generally allege that MarAd's evaluation of proposals was unreasonable and inconsistent with the evaluation criteria set forth in the solicitation.

We sustain the protests of Crowley and PRMMI, and deny the protest of KK.

BACKGROUND

Under the Merchant Act of 1936, 46 U.S.C. App. §§ 1001 et seq. (1988), and the Merchant Ship Sales Act of 1946, 50 U.S.C. App. §§ 1735 et seq. (1988), MarAd is charged with responsibility for creating and maintaining a merchant fleet that can be converted to military use in times of national emergency. As part of this responsibility, MarAd owns and maintains a number of inactive vessels that can be activated in the event of an emergency; these vessels make up the RRF. In October 1991, the Department of Defense (DOD) and MarAd issued a joint report on the RRF, based in part on the fleet's performance during Operations Desert Shield and Desert Storm. The report concluded that, while the RRF's overall performance record was impressive, its size and condition were inadequate to ensure the same quality of performance under less favorable conditions than existed in the Persian Gulf. In particular, the report noted a shortage of RO/RO vessels (ships with ramps that allow vehicles to be driven on and off board); the report recommended the priority acquisition of additional RO/ROs. In early 1992, DOD completed a congressionally mandated mobility requirements study; the study recommended that, to meet those requirements within funding constraints, MarAd purchase 18 additional RO/ROs by 1996.¹

¹The mobility requirements study is a classified document which was not made a part of the record. The statements here are based on MarAd's testimony regarding unclassified portions of the study.

By the time the mobility requirements study was completed, MarAd had issued this RFP. The solicitation contemplated the award of multiple firm, fixed-price contracts for different types of ships, including RO/ROs. The solicitation generally required that upon delivery all vessels be "seaworthy and in good running condition," fit for continued service for 180 days and in compliance with all requirements of the vessel's classification society--e.g., the American Bureau of Shipping--and possess all licenses and certifications required for operation by the country of registration. In addition, the solicitation required RO/ROs to possess at least 100,000 square feet of useable RO/RO space, defined as space having a greater than 350 pounds per square foot (PSF) loading capability and/or more than 9 feet, 6 inches of overhead clearance.

The solicitation provided for award to be made to "that set of ships that offers the best value to the Government." The RFP listed the evaluation factors, in descending order of importance, as military utility, proposed firm-fixed price "of the vessel in its current operating condition ('as is')," and MarAd's adjustment to the fixed price to account for "upgrade" costs. Military utility, the only technical evaluation factor, was generally defined as the functional capabilities of the vessel that would enable it to contribute to the RRF's ability to perform its mission, as measured by the extent to which the vessel met or exceeded the minimum requirements set forth in the solicitation and offered other serviceable benefits, such as logistical supportability and low manning.

The solicitation provided for military utility to be evaluated based upon the following subfactors, listed in descending order of importance: military lift capability, cargo gear, type of propulsion, age, speed, cruising range and maneuverability. With respect to military lift capability, the most important subfactor under military utility, section M ("Evaluation Factors for Award") of the solicitation listed three considerations, including, in descending order of importance, total capacity above 100,000 square feet, militarily useful square footage, and load capacity and configuration of ramps/elevators. In addition, the statement of work (SOW) in the solicitation provided that in the evaluation of military utility the agency would take into consideration a vessel's below-deck RO/RO space having a minimum deck capacity of 525 PSF and a minimum vertical clearance of 13 feet--that is, its heavy lift capacity--and below-deck RO/RO space having a minimum deck capacity of 350 PSF and a minimum vertical clearance of 9 feet, 6 inches--that is, its light lift capacity. The solicitation essentially provided for price to be evaluated on the basis of cost per unit of lift, which was to be

calculated by dividing the vessel's militarily useful total lift square footage into its adjusted price.

Prior to the closing date for receipt of proposals, PRMMI protested the terms of the solicitation, arguing that it was unduly restrictive of competition and improperly failed to include a preference under the Buy American Act, 41 U.S.C. §§ 10a-10d (1988), for U.S. flag vessels. In addition, when MarAd subsequently rejected its proposal as technically unacceptable, PRMMI protested that determination. We sustained PRMMI's protest on the basis that its proposal was improperly rejected based on a solicitation requirement that overstated the agency's minimum needs, and that the solicitation improperly failed to take into account the applicability of the Buy American Act to the procurement. We recommended that MarAd amend the solicitation to reflect its actual minimum needs and the applicability of the Buy American Act. Puerto Rico Marine Mgmt., Inc., B-247975.5, Oct. 23, 1992, 72 Comp. Gen. ___, 92-2 CPD ¶ 275. In response to our recommendation, MarAd amended the solicitation, reopened discussions, and requested revised proposals. When the agency then made award to offerors other than the protesters, these protests followed.²

PROTESTS OF CROWLEY AND PRMMI

Heavy Lift Capacity

Crowley and PRMMI contend that MarAd improperly failed to advise offerors in the solicitation or otherwise that the heavy lift capacity of the proposed vessels was the single predominant factor in the technical evaluation. Under MarAd's evaluation plan, heavy lift capacity (below-deck space having a minimum deck capacity of 525 PSF and an overhead clearance of at least 13 feet) was 4 times more important in calculating military lift capability, the most important subfactor of military utility, than either total capacity (space having a minimum deck capacity of 350 PSF and/or a minimum overhead clearance of 9 feet, 6 inches) in excess of 100,000 square feet, or light capacity. As a result, the evaluation points awarded for heavy lift capacity constituted, on average, approximately 48 percent (and as much as 59 percent) of the military utility score (i.e., the entire technical score) received by the awardees' vessels, 33 percent of the military utility score of Crowley's vessels, and approximately 44 percent of the

²In view of our recommendation here to reopen negotiations and request revised proposals, as discussed below, our discussion of the evaluation is necessarily somewhat general so as not to confer competitive advantage on any offeror.

military utility score of PRMMI's vessel.³ Indeed, according to MarAd's initial report submitted in response to the protests, "lack of substantial heavy lift and military lift capacity was the prime technical factor which resulted in the nonselection of the two Crowley vessels."⁴ All of the vessels for which award was made received higher heavy lift capacity scores than did Crowley's vessels and six of the awardees' vessels received higher heavy lift capacity scores than did PRMMI's vessel.

PRMMI maintains that if it had known of the overwhelming importance of heavy lift capacity in the evaluation, it would have increased the load capacity of additional deck space on its vessel to meet the 525 PSF capacity required for heavy lift status.⁵ In support of its position, PRMMI has furnished a naval architect's statement that the heavy lift capacity of its vessel could have been increased by 88 percent, which would have raised its technical score by approximately 42 percent.⁶ Likewise, Crowley states that it would have taken steps to increase its vessels' heavy lift capacity if it had known of the predominance of that factor. According to Crowley, additional space on its vessels could be rated as heavy lift capable without modification, and still further space could be upgraded to heavy lift capability by minimal modifications. Crowley calculates that the total heavy lift capacity of its vessels could have been increased by approximately 63 percent. This

³The percentages are based upon the available August 1992 detailed scoring.

⁴We note that agency evaluators also considered the hull and equipment, other than the engine room, of the Crowley ships to be in "very poor condition." Evaluators, however, also found the hull, equipment, and machinery of several of the awardees to be in poor condition.

⁵The solicitation specifically provided for the proposal of upgrades, stating that "[a]ny conversion work to expand a vessel's presently existing capacity or capability . . . shall be detailed in both the technical and cost parts of the offeror's proposal."

⁶During the evaluation, MarAd evaluators noted that access to some of the current heavy deck space on PRMMI's vessel was by means of an elevator rated at only 26 tons, thereby rendering the area inaccessible to such heavy equipment as the M-1 tank. The solicitation, however, did not establish a higher, mandatory minimum load-bearing capacity for elevators serving heavy lift space and the agency included such space in its evaluated figure for the vessel's heavy lift capacity.

would have increased its technical score by 21 percent, and given it an overall ship score higher than that received by 3 of the awardees.⁷

It is fundamental that offerors must be advised of the basis upon which their proposals will be evaluated. Republic Realty Servs., Inc., B-242629, May 7, 1991, 91-1 CPD ¶ 446. In particular, contracting agencies are required to set forth in a solicitation all significant evaluation factors and subfactors, and their relative importance. Federal Acquisition Regulation § 15.607(e); 41 U.S.C. § 253a(b)(1)(A) and (B) (1988). Agencies may not give importance to specific factors or subfactors beyond that which would reasonably be expected by offerors. See Coopers & Lybrand, 66 Comp. Gen. 217 (1987), 87-1 CPD ¶ 100; see also Devres, Inc., 66 Comp. Gen. 121 (1986), 86-2 CPD ¶ 652.

Here, the statement of evaluation factors in section M of the solicitation neither included heavy lift capacity among the major subfactors constituting military utility--e.g., military lift capacity, cargo gear, type of propulsion, etc.--nor listed the subfactor among those to be considered in evaluating the military lift capacity of offered vessels. Although the SOW advised offerors that evaluation of a vessel's military utility would take into consideration its heavy lift capacity, nowhere in the solicitation were offerors advised of the relative importance of this subfactor. They were given no basis in the solicitation to expect, nor does it appear that they should otherwise have known, that heavy lift capacity would be four times as important in the evaluation than either total capacity in excess of 100,000 square feet, which section M listed as the most important element of military lift capability, or light lift capacity, and could account for up to 59 percent of the overall military utility--i.e., technical--score. In these circumstances, we conclude that MarAd improperly failed to put offerors on notice of the importance of heavy lift capacity in the evaluation, and that this failure could have had a significant impact on the award decision.

Light Lift Capacity

PRMMI also challenges MarAd's evaluation of light lift capacity. As noted above, the statement of evaluation factors in section M provided that the evaluation of military lift capability would take into account a vessel's militarily useful square footage. The SOW defined usable

⁷It is unclear whether Crowley's figure for potential additional heavy lift capacity fully takes into consideration the solicitation's definition of qualifying heavy lift space as below-deck space.

RO/RO space "as that having greater than 350 PSF deck loading and/or greater than 9 feet, 6 inches overhead clearance." In addition, the SOW stated that the evaluation of a RO/RO vessel's military utility would take into consideration its "below-deck RO/RO space having a minimum of 13 feet of vertical clearance with a minimum deck load of 525 PSF"--i.e., its heavy lift capacity--and its "below-deck RO/RO space having a minimum vertical clearance of at least 9 feet, 6 inches with a minimum deck load of 350 PSF"--i.e., its light lift capacity. As provided for in MarAd's internal evaluation plan, however, in calculating light lift capacity, the agency only included space having a minimum deck capacity of 350 PSF, and a vertical clearance of at least 9 feet, 6 inches but less than 13 feet. As a result, space having a deck capacity of between 350 and 525 PSF, and an overhead clearance of at least 13 feet was included in neither the heavy lift figure--because the deck capacity was less than 525 PSF--nor in the light lift figure--because the overhead clearance was 13 feet or more.⁸ PRMMI maintains that this was unreasonable. We agree.

In a negotiated procurement, contracting officials have broad discretion in determining the manner and extent to which they will make use of technical and cost evaluation results. TRW, Inc., 68 Comp. Gen. 511 (1989), 89-1 CPD ¶ 584. However, they do not have the discretion to announce in the solicitation that they will use one evaluation plan, and then follow another; once offerors are informed of the criteria against which their proposals will be evaluated, the agency must adhere to those criteria in making its award decision or inform all offerors of any significant changes made in the evaluation scheme. Dewberry & Davis, B-247116, May 5, 1992, 92-1 CPD ¶ 421.

Here, the solicitation separately provided for evaluation of light lift capacity, that is, space having a minimum deck capacity of 350 PSF and a minimum overhead clearance of 9 feet, 6 inches. Notwithstanding this definition of the relevant space, MarAd excluded from the light lift category space that satisfied the stated minimum qualifications for light lift, and was not otherwise included in heavy lift capacity, simply because the overhead clearance equalled or exceeded 13 feet. MarAd has furnished no reasonable

⁸PRMMI calculates that MarAd's approach excluded 84,312 square feet of qualified space from the light lift figure for its ship and that this would have increased its technical score by approximately 10 percent if evaluated. Although it is unclear whether all of this claimed space meets the solicitation definition of light lift space as below-deck space, it does appear that a substantial amount of covered space qualifies as light lift capable.

explanation for this omission, and it appears to us that the omission in fact was unjustifiable since the space in question satisfied the solicitation definition of usable RO/RO space. Furthermore, MarAd itself, in explaining its selection of two of the vessels for which award was made, found space with an overhead clearance in excess of 13 feet to be advantageous, since it permitted the carrying of oversize equipment. Indeed, at the hearing conducted by our Office in this case, the chairman of the agency's Source Evaluation Board testified that he would view an evaluation approach excluding from consideration space with a minimum deck capacity of 350 PSF and an overhead clearance of 13 feet or more as unreasonable. Transcript (TR) at Volume II, page 105. According to the chairman, "the higher the overhead," the more desirable was the ship. TR II:85-86. We therefore conclude that MarAd's evaluation in this regard was unreasonable.

Upgrade Adjustment

Crowley and PRMMI challenge the amount of the adjustment made to their proposed prices to account for the additional upgrade costs that the government would have to incur for the vessels if purchased. Section M of the solicitation provided for the agency to add to an offeror's fixed price the estimated cost:

"[T]o upgrade the vessel to: meet U.S. Coast Guard certification and American Bureau of Shipping classification requirements, and correct the deficiencies, perform the repairs and overhauls, etc. noted by the Offeror in his proposal and/or discovered by the Government through its query of prior owners, operators, charterers, or through its predelivery inspection of the vessel."

MarAd made substantial adjustments for what it termed "Found Deficiencies," adding as little as 1 percent to the offered fixed prices of some ships, but as much as 25 percent to the prices of others, for potential but currently undiscovered deficiencies, and for reflagging foreign vessels to meet United States standards.

PRMMI contends, and MarAd concedes, that the agency acted improperly when, in calculating the upgrade cost adjustment under Section M for Found Deficiencies, it included as part of its upgrade adjustment substantial amounts that PRMMI

already had included in its proposal.⁹ According to MarAd, its improper double-counting of costs already included in PRMMI's proposal added approximately 7 percent to the evaluated price of PRMMI's vessel.

Both PRMMI and Crowley argue that MarAd improperly added to their proposed fixed prices the cost of work which was not necessary to meet regulatory or classification society requirements, but instead constituted what the agency considered to be desirable enhancements for vessels entering the RRF.¹⁰ We agree.

The RFP specifically stated that MarAd would add to the proposed fixed prices the cost to upgrade the vessel to meet U.S. Coast Guard certification and American Bureau of Shipping classification requirements, and to correct deficiencies, but it nowhere provided for evaluation of the cost of merely desirable enhancements or other work not necessary for assuring the seaworthiness of the vessel or its compliance with regulatory and classification society requirements. Furthermore, it appears that offerors may have been adversely affected by the agency's evaluation in this regard. Had they been advised of the RRF standards and of MarAd's intention of evaluating the cost of upgrading vessels to meet those standards, offerors could have chosen to forgo the cost of submitting a proposal, see generally Mainstream Eng'g Corp., B-251444, Apr. 8, 1993, 93-1 CPD ¶ ____; Avondale Tech. Servs., Inc., B-243330, July 18, 1991, 91-2 CPD ¶ 72, or could have performed the work themselves. This latter option is especially significant here in view of the significant discrepancy between the protesters' estimates, as supported by the testimony of their expert witnesses, and the agency's estimates for performing specific items of work identified by the agency during the survey of the protesters' vessels. For example, the agency's estimate for certain work on the accommodations on PRMMI's vessel is approximately 3 times as high as PRMMI's.

⁹The solicitation required that upon delivery to the government a vessel be in compliance with all the requirements of the vessel's classification society and any regulatory requirements of the country of registry or otherwise, and possess all current licenses and certifications required for operation, with at least 9 months remaining before expiration or renewal. The cost of correcting any deficiencies would be borne by the contractor.

¹⁰For example, MarAd added approximately \$500,000 to the evaluated cost of PRMMI's vessel to add a cofferdam around a fuel tank.

PROTEST OF KK

KK contends that MarAd's failure to select its vessels was inconsistent with both the stated evaluation factors and the results of the agency's numerical evaluation of proposals. KK notes that two KK vessels, which are identical in size, received higher overall ship scores--i.e., technical plus cost evaluation point scores--than did 8 of the 12 awardees. The SEB concluded that the vessels possessed several strengths, including "a good amount" of heavy lift capacity (more than nine of the awardees' vessels), and a "very good speed" (higher than seven of the awardees' vessels).

MarAd's survey of the KK vessels, however, found that their hull, machinery and equipment was "generally in poor condition." The agency evaluated the vessels, which are 16 and 17 years old, as requiring a higher total cost to upgrade and reflag than any of the awardees' vessels. In explaining its decision not to select the KK ships, MarAd states that:

"[I]n the absence of powerful competing considerations, it makes no sense to select for the RRF two ships of such age. . . . [I]n the selection process age could be overcome by capacity, loading advantages resulting from cargo systems, and/or speed, but could not be overcome by the weaknesses of KK's ships.

"The Kks were in very poor material condition as evidenced by the sizeable cost adjustments for repair, as well as additional costs estimated for reflagging each vessel."

It is evident from MarAd's explanation that the primary basis for its decision not to select the KK vessels was the fact that they were older ships in very poor material condition. KK has offered no evidence showing that MarAd's conclusions regarding the condition of its vessels was inaccurate. In our view, given the very poor material condition, as documented by the agency's survey of the vessels, the potential for as yet undiscovered significant deficiencies suggested by the known problems, and the need to acquire vessels offering many years of potential future service, MarAd could reasonably find the KK vessels to be unacceptable. Whatever their capacity, without the assurance of reliable future operation, selection of the KK vessels would not further MarAd's stated objective of increasing the future mobility capability of DOD.

CONCLUSION

We conclude that MarAd's evaluation of proposals was inconsistent with the stated evaluation criteria and otherwise unreasonable. Specifically, we conclude that the agency improperly gave more importance in the evaluation to heavy lift capacity than could reasonably be expected under the stated evaluation factors; the evaluation points awarded for heavy lift capacity constituted, on average, approximately 48 percent (and as much as 59 percent) of the military utility score received by the awardees. As a result, offerors were deprived of the opportunity to modify their vessels, or otherwise to secure higher approved loading capacity for deck space, so as to significantly increase their technical scores. In this regard, both PRMMI and Crowley have stated that they would have substantially increased the heavy lift capacity of their vessels had they known of the relative importance of heavy lift capacity in the evaluation scheme. In addition, the record establishes that MarAd failed to account for all of PRMMI's current light lift capacity, double-counted the cost of certain required upgrades to PRMMI's vessel (thereby adding at least 7 percent to its evaluated price), and improperly included in the adjustments made to offerors' fixed prices the substantial cost of enhancements not required for seaworthiness or to meet applicable regulatory and classification society requirements. Accordingly, based upon our review of the record, we conclude that there was a reasonable possibility that PRMMI and Crowley were prejudiced by MarAd's evaluation.


As for the KK vessels, given their very poor material condition and age, MarAd could reasonably determine them to be unacceptable.

The protests of PRMMI and Crowley are sustained, and the protest of KK is denied.

Recommendation

We recommend that MarAd revise the solicitation to accurately describe its needs with respect to heavy lift capacity and upgrade to RRF standards, defining the prerequisites for such space and the applicable RRF standards to the extent possible, and state the relative importance that heavy lift capacity will have in the evaluation. The agency should then request revised proposals from technically acceptable offerors whose vessels

conform to the minimum qualification standards set forth in the solicitation. Further, PRMMI and Crowley are entitled to reimbursement of their protest costs, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d) (1993).


Comptroller General
of the United States