Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sea-Land Service, Inc.

File: B-278404.2

Date: February 9, 1998

Michael A. Hopkins, Esq., and Raymond S.E. Pushkar, Esq., McKenna & Cuneo, for the protester.
Thomas J. Duffy, Esq., Department of the Army, and Charna J. Swedarsky, Esq., and John M. Binnetti, Esq., Department of the Navy, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that request for proposals (RFP) for international ocean and intermodal transportation services improperly fails to set forth evaluation criteria for determining technical acceptability is denied where these criteria are apparent when the RFP is read as a whole; related argument that RFP should impose fixed minimum requirements for certain evaluation criteria is denied where the criteria, as stated, meet the agency's needs and maximize competition.

2. RFP's establishment of a price ceiling for contracts involving specialized services based upon the pricing for contracts involving normal commercial services is unobjectionable where the agency reasonably expects that the rates for the specialized services--which involve less comprehensive services, more significant cargo guarantees, and more substantial liquidated damages for the government's failure to meet those guarantees--should be lower than the rates for the normal commercial services.

3. RFP provision instructing that, on each individual route or zone, the lowest offered rate for each category will be accepted unless the contracting officer determines that it exceeds charges to the public for the carriage of like goods is consistent with the Cargo Preference Act of 1904 and, therefore, unobjectionable.

4. RFP provision allowing for the post-award adjustment of maximum cargo limitation under certain conditions is unobjectionable where the agency has shown that the need to make such adjustments may arise under the unique circumstances of the procurement, and where it would be unreasonable for offerors to construe the limitation as a guarantee of a specific rate of carriage and to structure their proposals accordingly.

5. Under RFP contemplating award of multiple indefinite delivery, indefinite quantity contracts, protest that minimum quantity of one container per carrier is insufficient consideration to bind the parties is denied where the nature of the acquisition dictates the possibility that the government may order only this quantity, and where other factors surrounding the acquisition show an intent to form binding contracts. Protest that the maximum quantity--the total capacity of all contract carriers which is available for transport--is unrealistic is denied where the agency reasonably explains that the varying nature and unpredictability of its requirements necessitate this quantity.

6. RFP's establishment of predetermined pricing or pricing formulas for various specialized services amounting to a small percent of the anticipated contract value is unobjectionable where the agency explains that charges for such services can unreasonably drive up the cost for shipping and the array of rates poses an administrative burden; it is within the agency's discretion to solicit a contract which maximizes risks on the contractors and minimizes administrative burdens on the government.

7. Protest that RFP's requirement that equipment pool levels be based on a shipper's average weekly shipment requirements reflects unreasonably high levels is denied where the record reasonably supports the stated levels; related liquidated damages provisions are unobjectionable where the government has shown that it reasonably expects to suffer damages if the level is not maintained and the extent of such damages would be difficult to ascertain.

8. Protest that RFP contains certifications in contravention of a statutory prohibition is denied where the prohibition does not apply to solicitation provisions, and where, in any event, the provisions at issue are not "certifications" within the intent of the prohibition.

9. Protest that RFP improperly requires carriers to commence performance without a valid contract is denied where this interpretation of the RFP does not give effect to all of its provisions and is, therefore, unreasonable.

DECISION

Sea-Land Service, Inc. protests the terms of request for proposals (RFP)

No. N00033-97-R-6723, issued by the Joint Traffic Management Office (JTMO) of the Military Traffic Management Command (MTMC), Department of the Army,[1] to procure ocean and intermodal transportation services on a worldwide basis. Sea-Land contends that numerous solicitation terms are defective for a variety of reasons.

We deny the protest.

BACKGROUND

DOD has an ongoing need to ship military cargo in support of military service personnel and their dependents, as well as defense missions and requirements via ocean and intermodal (ocean in combination with motor/rail/inland water) transportation between the continental United States and numerous worldwide points, as well as between foreign points. This solicitation represents DOD's effort to combine two approaches to procuring these services under one umbrella solicitation.

The traditional approach asks operators of commercial U.S. flag vessels to offer rates to provide the services of their choice between the locations of their choice. Container rates are solicited for the ocean transportation portion of a movement and, separately, for the overland (linehaul) transportation portion of a movement. These rates are used in combination--as multifactor rates--to derive rates for transporting cargo between designated origins and destinations. Single factor container rates are also solicited to obtain one rate that includes all segments of the transportation. Breakbulk rates are solicited for port-to-port transportation of noncontainerized items. Finally, ancillary charges and miscellaneous rates are solicited for specific services. Carriers awarded contracts will ship DOD's cargo on their regularly scheduled commercial routes, in the same vessels and at the same time as commercial cargo.

These worldwide solicitations may result in the acceptance of more than one carrier's rates to transport cargo between the same points, if it is determined that the services of more than one carrier are necessary to meet DOD transportation requirements on any route. At the conclusion of negotiations, the JTMO publishes

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[1]This solicitation was originally issued by the JTMO under the authority of the Department of the Navy's Military Sealift Command (MSC). At the time, the JTMO was an MSC/MTMC organization responsible for contracting for the transportation of Department of Defense (DOD) and DOD-sponsored cargoes on a liner basis in the foreign and domestic offshore commerce of the United States. As a result of a reorganization and transfer of functions, this procurement is now being conducted by the JTMO as an organization under the sole authority of the MTMC.

the carriers' names and accepted rates.[2] As DOD customers generate individual requirements for ocean transportation, the JTMO books the cargo with the carrier whose accepted rates represent the lowest overall cost to the government and whose sailing schedule meets the cargo's delivery requirements. If that carrier has space available, the JTMO issues a shipping order to that carrier. If that carrier has no more capacity on its vessel at the time of booking, or if its schedule does not meet the required cargo delivery date, the JTMO books the cargo with the next lowest-priced carrier that can meet the cargo's delivery requirements.

In 1992, DOD implemented an additional approach to contracting for these transportation services--individual service contracts. Under such contracts, a shipper commits to providing a carrier with a certain minimum quantity of cargo for a fixed period. In exchange, the carrier agrees not only to provide preferred rates but to meet certain service commitments. See The Shipping Act of 1984, 46 U.S.C. App. § 1702(21) (1994). These contracts were initially utilized for individual DOD components with clearly defined and predictable cargo movement needs.

This RFP, issued September 10, 1997, incorporates both the traditional method of contracting for multiple carriers of ocean and intermodal transportation services, adding service commitments by the carriers and cargo commitments by the government (the General Contract) for most DOD customers, as well as the customized single carrier service contracts for individual customers with additional special needs (the CSS contracts). Awards of fixed-price, indefinite delivery, indefinite quantity (IDIQ) contracts for the General Contract portion of the solicitation will be made to the low cost, technically acceptable offerors. RFP § M-2.a. Award of a fixed-price IDIQ contract for a route or zone under a particular CSS will be made to the single overall low cost, technically acceptable offeror meeting the requirements of that particular CSS route or zone. RFP § M-4.A. All contracts awarded under this RFP will be effective between February 1 and September 30, 1998, at an overall estimated value of $250 million.

Each carrier was required to submit rates for all offered services on all offered routes or zones, as well as information about its offered services. This information included a detailed description of each vessel proposed for use, such as its size and cargo capacity; a detailed description of all container types and ancillary equipment proposed for use; and a description of the service for all routes or zones offered, including the frequency of sailing and transit times. In this regard, section L-15 of

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[2]Prior to this solicitation, the rates, terms, and conditions for this service were published in the MSC Worldwide Container Shipping Agreement, later known as the Global Container and Shipping Agreement, and the MSC Interport Agreement(s). The new contracts resulting from this solicitation will be published as the General Contract and, as discussed further below, the Customer Service Section (CSS) contracts, which will be known collectively as the Universal Service Contract.

the RFP advised that offerors were required to demonstrate their technical capability to perform the offered services in order to receive award; technical capability was defined as including the ability to provide the applicable carrier services on the routes offered with the assets identified in service and equipment profiles. The determination of technical acceptability was also to include a consideration of past performance and compliance with solicitation requirements.

Sea-Land filed its initial protest prior to the closing date of October 24, and filed its supplemental protest just prior to the amended closing date of October 31. Despite two post-protest amendments to the solicitation, Sea-Land's challenges to numerous provisions remain.[3] Among the provisions at issue are those concerning certain technical and price evaluation criteria; a maximum cargo limitation; the minimum and maximum volume commitments; predetermined prices for certain services; and equipment pools. Our review of the record and the arguments submitted by both Sea-Land and the JTMO leads us to conclude that the challenged provisions are unobjectionable when considered in the context of this acquisition.

EVALUATION CRITERIA

Technical Acceptability

General Contract awards will be made to the low-cost, technically acceptable offerors. RFP § M-2.a. provides that all such offers will be evaluated for technical acceptability and for fair and reasonable prices, as specified in RFP § M-3. Since that section only addresses the pricing evaluation, Sea-Land argues that the RFP fails to clearly set forth the evaluation criteria the agency will use to determine whether an offer is technically acceptable. The JTMO counters that the RFP, when read as a whole, does clearly set forth these evaluation criteria.

Where a dispute exists as to the actual meaning of a solicitation requirement, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. Sea-Land Serv., Inc., B-246784.2, Aug. 24, 1992, 92-2 CPD ¶ 122 at 11. While this solicitation is not a model of clarity, our review confirms the JTMO's position that the criteria for determining technical acceptability are apparent when the solicitation is read as a whole.

RFP § M-1, which applies to all offers of service, sets forth the areas that will be considered in determining technical acceptability: a contractor must demonstrate its technical capability to provide the services on all route indices for which it offers services (RFP § M-1.a. and b.); a contractor's failure to comply with any

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[3]The JTMO received numerous proposals in response to the solicitation. On January 12, 1998, the JTMO notified this Office that it had proceeded with award notwithstanding the protests.

solicitation requirements will be grounds for rejection as technically unacceptable (RFP § M-1.c.);[4] a contractor's past performance will be evaluated as part of its ability to perform the contract (RFP § M-1.d.); and offers will be evaluated for compliance with the Cargo Preference Act of 1904, 10 U.S.C. § 2631 (1994) (RFP § M-1.e.). Sections M-2.b. and M-4.H of the RFP, which apply to the General Contracts and CSS contracts, respectively, state that the contracting officer will consider information publicly filed with various agencies to determine technical acceptability. Hence, in our view, the RFP does set forth the areas that will be considered in evaluating an offeror's technical acceptability.

As to the General Contract, Sea-Land further contends that the RFP improperly fails to set forth fixed minimum requirements for areas that will be considered under the technical capability factor--cargo capacity commitments, sailing frequency, and transit times. Sea-Land asserts that, in the absence of such requirements, the RFP cannot represent the agency's minimum needs and precludes firms from intelligently structuring their offers.

A solicitation's evaluation factors and subfactors must be tailored to the acquisition in question. Federal Acquisition Regulation (FAR) § 15.605(a) (June 1997). Moreover, in preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to obtain full and open competition and may include restrictive provisions or conditions only to the extent that they are necessary to satisfy the agency's needs. 10 U.S.C. § 2305(a)(1) (1994). The determination of the agency's needs and the best method of accommodating them is primarily within the agency's discretion. Premiere Vending, 73 Comp. Gen. 201, 206 (1994), 94-1 CPD ¶ 380 at 7. Agencies enjoy broad discretion in the selection of evaluation factors, and we will not object to the use of particular evaluation criteria or an evaluation scheme so long as the factors used reasonably relate to the agency's needs. Id.; Leon D. DeMatteis Constr. Corp., B-276877, July 30, 1997, 97-2 CPD ¶ 36 at 3-4.

This acquisition does not seek to force carriers to alter their normal commercial service because the JTMO recognizes that DOD is only one of many shippers purchasing cargo space on the carriers' vessels. In recognition of this reality, the JTMO seeks to ship DOD's cargo on carriers' regular commercial sailings, allowing the carriers to freely select their routes, port itinerary, sailing frequency, vessels (and, thus, capacity), vessel rotation, and type of cargo to be carried. For this

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[4]The first sentence of RFP § M-1.c. reserves to the government "the right to reject any offer in whole or in part under this RFP." Sea-Land's focus on the "plain meaning" of the language in section M-1.c. to argue that this sentence may provide the contracting officer an unqualified right to reject offers for any reason is misplaced; the provision is unobjectionable when this sentence is read in concert with the entire solicitation.

reason, the RFP does not require all carriers to reserve the same fixed minimum cargo capacity on their vessels for DOD cargo but, rather, a small percentage which varies depending upon the route offered. RFP Attachment (Att.) 11, §§ C-7.a.(3)(b) and (c). All carriers must sail at least once a month, id. at § C-5, but, beyond that, all carriers must provide and maintain the regular sailing schedules and transit times listed in their proposals or be subject, generally, to the payment of liquidated damages.[5] Id. at §§ H-3.o.B.2., 3., and 5.

The agency's needs are to transport individual shipments from origin to destination with the lowest-cost carriers that can meet the shipments' delivery requirements. Individual shipments are of varying sizes and have varying delivery schedules, neither of which can be anticipated prior to award. The absence of fixed minimum requirements allows an array of carriers, with varying capacities and services, to compete for the opportunity to transport these DOD shipments. The JTMO clearly could establish fixed minimum requirements sufficiently high to meet all of its anticipated shipments, but their imposition would place a disproportionate burden on smaller carriers with smaller vessels and less frequent sailings, perhaps disrupting their normal commercial schedules. Hence, the JTMO believes, and we agree, that the absence of fixed minimum requirements under this multiple award scheme enables more shippers to compete using the commercial schedules of their choice to meet the agency's needs.[6] Under this approach, the JTMO can select a carrier depending upon individual bookings from a variety of shippers for the best value tailored to that shipment, thereby meeting its needs. Sea-Land's contention that the absence of fixed minimum requirements leaves the JTMO with no objective basis to compare offers is incorrect; the basis of comparison is whether carriers can provide the services offered.

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[5]The RFP does allow carriers to modify their schedules after award under specified procedures. RFP Att. 10, § H-5.e.B.3.

[6]Sea-Land contends that the "individualized" requirements put larger carriers like itself at an unfair competitive disadvantage because they must bear the additional costs and risks associated with committing more cargo than their smaller competitors. We disagree. The cargo commitment requirements apply proportionally equally to all carriers, and the remaining requirements allow each carrier to retain its normal shipping schedule; thus, the overall effect on all carriers is the same. The fact that offerors may respond to the RFP differently is a matter of business judgment and does not preclude a fair competition. See US Defense Sys., Inc., B-248845, Sept. 23, 1992, 92-2 CPD ¶ 197 at 4.

Pricing

In evaluating the pricing proposed for CSS contracts, the contracting officer will compare the ocean and single factor rates submitted by the overall low cost evaluated offer to the corresponding ocean and combined ocean/linehaul multifactor rates contained in the General Contract. No contract for a CSS route or zone will be awarded if the overall lowest cost offer contains rates equal to or greater than the lowest available rates for the same movements under the General Contract. RFP § M-4.D.

Sea-Land argues that it is not a legitimate government interest for the JTMO to use the pricing for a service with normal, commercial requirements--the General Contract service--as a ceiling price for a service with enhanced, specialized requirements--CSS contracts. Sea-Land asserts that the imposition of such a ceiling unduly restricts competition by discouraging potential offerors from competing for award of CSS contracts because they cannot factor into their prices the additional costs of providing specialized services.

We have addressed a similar issue in Sea-Land Serv., Inc., B-246784.6, B-253068, Aug. 5, 1993, 93-2 CPD ¶ 84 at 7-9; see also Sea-Land Serv., Inc., B-246784.2, supra, at 9. A CSS contract is narrowly defined and requires a less comprehensive service capability than a General Contract. Moreover, the cargo commitments under the CSS contracts--where the winner takes all--are far more substantial than those made in the General Contract--where multiple awardees split the requirements.[7] This allows the awardee to focus its resources on a narrow requirement with a high volume of guaranteed cargo movements. Its marginal investments to provide the enhanced services are compensated for by lower risks and larger volume inherent in the CSS contracts. As in common commercial practice, the JTMO expects that these economic realities will be reflected in lower individual rates offered for the CSS contracts, and has chosen to incorporate that expectation into its price analysis.[8]

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[7]Sea-Land's argument that the RFP makes greater cargo guarantees under the General Contracts than under most of the CSS contracts is premised upon its view that the RFP's maximum cargo limitation "guarantees" low cost offerors meeting the delivery requirements 75 percent of the available cargo on given routes. As discussed below, we disagree.

[8]Sea-Land's speculation that this might lead to an irrational result by denying a CSS contract to a low-cost offeror with one rate higher than a comparable General Contract does not show that the underlying basis for the JTMO's rationale is unreasonable.

There is nothing inherently unreasonable about conducting procurements which parallel commercial sector service contracts, and it is not unduly restrictive of competition for an agency to predesignate pricing ceilings in order to protect legitimate government interests. Sea-Land Serv., Inc.., B-246784.6, B-253068, supra, at 8-9. Given the significant cargo commitments the JTMO is willing to make to one carrier under the CSS contract, and the substantial liquidated damages for failure to meet those commitments, the agency has a legitimate interest in negotiating better rates than it would otherwise have available under the General Contract, and in obtaining better rates than carriers would generally offer their commercial clients for lower volume commitments. We thus have no objection to the agency's designating price ceilings here. Id. at 9.

Sea-Land also objects to the language in RFP § M-3(1)(a)1, which concerns the evaluation of pricing for General Contract awards. That provision states that on each individual route or zone, the lowest offered rate for each category will be accepted unless the contracting officer determines that the rate exceeds charges to the public for the carriage of like goods, pursuant to the Cargo Preference Act of 1904. Sea-Land argues that this provison is unreasonable and does not properly implement that Act because it could allow the government to accept a higher-priced offer in lieu of the lowest-priced offer if the lowest-priced offeror's price is higher than its commercial price.

The Cargo Preference Act of 1904 and, specifically, the so-called McCumber Amendment thereto, restrict American shippers dealing with DOD to charges not "higher than the charges made for transporting like goods for private persons." 10 U.S.C. § 2631 (1994); Sea-Land Serv., Inc., B-270504, Mar. 15, 1996, 96-1 CPD ¶ 155 at 3; see United States Lines Co. v. United States, 223 F. Supp. 838, 844 (S.D.N.Y.), aff'd on other grounds, 324 F.2d 97 (2d Cir. 1963); Sea-Land Serv., Inc., ASBCA No. 46,608, Mar. 2, 1995, 95-1 BCA
¶ 27,539.

The language in RFP § M-3(1)(a)1 is similar to that in a clause which we have previously found unobjectionable.[9] In Sea-Land Serv., Inc., B-270504, supra, at 2-3, we concluded that the language merely reflects the government's statutory right to insist that it not pay rates higher than a carrier's comparable commercial rates for the shipment of cargo. As the JTMO states, while the "irrational result" cited by Sea-Land is possible, under the plain language of the statute the ceiling is based on

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[9]The principal distinction between the two provisions is that RFP § M-3(1)(a)1 contemplates the effect of the ceiling during the evaluation, and the provision we previously reviewed contemplated the effect of the ceiling after award, in case the parties, through oversight or omission, failed to set prices in accordance with the ceiling. There is nothing improper about the solicitation's inclusion of both RFP § M-3(1)(a)1 and a provision similar to that discussed in our prior decision.

a carrier's own charges, not another carrier's charges. The burden for ensuring that the statutory price ceiling is not breached rests with the individual carrier, and that carrier rightfully risks rejection if it is exceeded. See id. at 3.

MAXIMUM CARGO LIMITATION

The RFP provides that the government intends to book cargo such that no carrier receives more than 75 percent of the total military container cargo, inclusive of CSS contract cargo, available for carriage outbound from the United States over certain major routes. RFP Att. 11, § G-2.b.(1). This provision is intended to support the defense mobilization base by ensuring that, to the extent possible, more than one U.S. flag carrier will carry DOD cargo on a route.

The RFP further provides that this percentage may be increased, decreased, or deleted, or a similar limitation may be established for another route, if the contracting officer determines that such a change is warranted in view of (a) the number of carriers who have established and maintained a regular carriage service on the stated routes; (b) the reasonableness of the rates offered on these routes; (c) or in the interest of national defense. Id. at § G-2.b.(2). The JTMO explains that if, for example, only two awards are made on a route and one awardee subsequently changes its service, the government may need to transport more than 75 percent of the cargo with the other carrier.

Sea-Land does not contest the JTMO's right to impose maximum cargo limitations, but only its ability to revise or add them after award. Sea-Land construes the limitation as a "guarantee" of 75 percent of the available cargo on a route to the low-cost carrier meeting the delivery requirements of that cargo and, as a result, asserts that offerors are entitled to rely upon this 75 percent "guarantee" in formulating their technical and price proposals.[10]

The maximum cargo limitation represents the JTMO's acknowledgment of the fact that it is contracting with commercial shippers who are not precluded from revising their commercial shipping schedules, after award, in ways that might not meet the government's needs. See RFP Att. 10, § H-5.e.B.3. Since it has no way to predict

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[10]According to Sea-Land, since its cost of performance would be based upon the 75 percent "guarantee," and since the RFP does not give offerors the opportunity to obtain an equitable adjustment if the limitation is revised, the provision violates the RFP's "Changes Clause," FAR § 52.243-1, Alternate IV. That provision generally authorizes the contracting officer to make various changes to the contract subject to an equitable adjustment if those changes cause an increase or decrease in the cost of performance. Given our conclusion below, we find no merit to this allegation.

the future actions of carriers prior to award, the JTMO must retain the flexibility to revise the limitations in order to ensure the carriage of its cargo. The most that can be said of the maximum cargo limitation is that it "guarantees" the low-cost carrier on these routes "up to" 75 percent of the available cargo if it meets the delivery requirements for that cargo. Even so, prior to award, there is no way to know how many carriers will service a route or how often given carriers will have both sufficient cargo capacity and delivery schedules to ship the government's cargo. As a result, the elements of this "guarantee" are so uncertain that it is simply unreasonable for an offeror to rely upon the limitation in formulating its proposal. The RFP provides offerors with sufficient data to formulate their proposals and, as risk exists in any contract, offerors are expected to use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. Crowley Am. Transport, Inc., B-259599.2, June 19, 1995, 95-1 CPD ¶ 277 at 4. To the extent Sea-Land chooses to rely upon the maximum cargo limitation in formulating its proposal, it does so at its own risk.

VOLUME COMMITMENTS

Sea-Land argues that the General Contract portion of the RFP is defective because it contains minimum quantities that are nominal as to each individual carrier, and because the stated maximum quantity is not realistic.

An IDIQ contract may be used when the government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that will be required during the contract period, and where it is inadvisable for the government to commit itself for more than a minimum quantity. FAR § 16.504(b). An IDIQ contract shall require the government to order and the contractor to furnish at least a stated minimum quantity of supplies or services and, if and as ordered, the contractor to furnish any additional quantities, not to exceed a stated maximum. FAR § 16.504(a)(1). To ensure the contract is binding, the minimum quantity must be more than a nominal quantity but should not exceed the amount the government is fairly certain to order. FAR § 16.504(a)(2). Estimated maximum quantities should be realistic and based on the most current information available. FAR § 16.504(a)(1). These estimates need not be precise; rather, such estimates are unobjectionable so long as they were established in good faith or based on the best information available, and accurately represent the agency's anticipated needs. Howard Johnson, B-260080, B-260080.2, May 24, 1995, 95-1 CPD ¶ 259 at 3; International Tech. Corp., B-233742.2, May 24, 1989, 89-1 CPD ¶ 497 at 3-4.

The RFP sets forth minimum volume guarantees for all carriers in the aggregate on given major trade routes, but guarantees each carrier a minimum of one Forty-Foot

Equivalent Unit (FEU)[11] over the contract term. RFP Att. 11, §§ H-3.o.A.1.(a), (b), and (f). Sea-Land argues that a guarantee of only one FEU for each individual carrier is nominal and provides inadequate consideration for each contract with individual carriers.

An IDIQ contract is binding so long as the buyer agrees to purchase from the seller at least a guaranteed minimum quantity of goods and services; the stated minimum quantity forms the consideration for the contract. See Sunbelt Properties, Inc., B-249307, Oct. 30, 1992, 92-2 CPD ¶ 309 at 3; see Willard, Sutherland & Co. v. U.S., 262 U.S. 489, 493 (1923). Since the prohibition against a "nominal" minimum quantity is designed to ensure that the intent to form a binding contract is present, the determination whether a stated minimum quantity is "nominal" must consider the nature of the acquisition as a whole.

This solicitation allows for the award of contracts to multiple carriers to transport cargo on the same routes or zones. Since the JTMO may have multiple choices in shipping its cargo on particular routes or zones, and since it is not possible to know whether a given carrier is the best value until individual orders arise, it is impossible to ascertain beforehand whether an individual carrier will carry more or less cargo during the life of the contract. Since the minimum quantity may not exceed the amount the government is fairly certain to order, FAR § 16.504(a)(2), the JTMO asserts that one FEU is the only minimum quantity that would not mislead carriers or subject the government to undue risk.

Sea-Land has given us no reason to disagree with the JTMO's rationale here, or to find that the quantity of one FEU per carrier here means that there is insufficient consideration. While the quantity of one FEU is minimal, other factors surrounding the acquisition underscore the government's intent to form a binding contract. The JTMO points out that, in its experience, all carriers are awarded rates on multiple routes and generally receive significant cargo. Further, since the RFP generally prohibits a carrier from transporting more than 75 percent of the cargo volume on the major outbound routes, as discussed above, as a practical matter no carrier can transport all of the cargo on these routes and at least two carriers transport the bulk of the cargo. Considering all of the circumstances, we cannot conclude that the stated minimum quantity per carrier here represents insufficient consideration to form a binding contract.

With respect to the maximum quantity, the total cargo to be shipped on the specified routes or zones during the term of the contract shall not exceed the total FEU vessel capacity of all carriers holding contracts under the contract and which are available to transport cargo on such routes and zones. RFP Att. 11, § H-3.o.A.2.

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[11]The acronym "FEU" is an industry term for cargo volumes transported in standard intermodal containers measuring 8 feet high, 8 feet wide, and 40 feet deep.

Sea-Land argues that this amount cannot be realistic or based on the most current information available, and that it exceeds the agency's needs.

According to the JTMO, DOD generates large volumes of cargo which are transported around the world as requirements arise, and which may substantially increase at any given point in time depending on the nature of the missions, citing as examples peacekeeping operations with the United Nations and allies in Somalia, Haiti, and Bosnia. Projections based on historical movements are not useful given the unpredictable nature of these events, and the mechanical reliance on such projections to establish a maximum quantity could result in DOD's inability to respond to rapidly changing requirements. We cannot agree with Sea-Land's assertion that the JTMO can factor in amounts for unexpected surges based upon its prior experience with unexpected surges; this experience would, by definition, have little specific predictive value in determining the maximum quantity that will be ordered over the life of the contract. See Alice Roofing & Sheet Metal Works, Inc., B-275477, Feb. 24, 1997, 97-1 CPD ¶ 86 at 5-6. As the JTMO explains, this is not a situation where it has simply declined to try to establish a more exact level of maximum quantities; rather, the varying nature and unpredictability of DOD customers' requirements necessitate the use of the stated maximum quantity. Under the circumstances, we have no basis to conclude that the estimate here is not established in good faith or based on the best information available, or that it does not accurately represent the agency's anticipated needs. Howard Johnson, supra, at 4.[12]

PREDETERMINED PRICES

The RFP establishes predetermined pricing or pricing formulas for various specialized services.[13] Sea-Land asserts that the imposition of predetermined pricing for these services unduly restricts competition; since the government knows when it will require these services at the time of booking it should select the low cost carrier at the time of booking based on full and open competition.

The government has wide power to prescribe charges for services ancillary to transportation of goods. Household Goods Carriers Bureau, Inc. v. Department of Defense, 783 F.2d 1101, 1104 (D.C. Cir. 1986). Such prescription of charges gives

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[12]We are also unpersuaded by Sea-Land's comparison of this maximum quantity with the lesser maximum quantities provided for under the RFP's national emergency provisions, as the two programs are substantially different.

[13]The services at issue here are stop-off service; empty government-owned or leased containers; tank containers; 45-foot containers; high cube containers; linehaul for refrigerated cargo; and expedited delivery service. The JTMO's uncontested assessment is that these services account for 1 percent of the contract's value.

the agency a rational and practical means for selecting low cost carriers, instead of having to take account of all the potential variations in changes submitted by different carriers. Id.

The JTMO explains it has found that certain charges ancillary to transportation can drive up the total cost for a shipment significantly, resulting in extra charges that are out of proportion to the basic service. If the government does not accept these necessary ancillary charges as offered by a carrier, the government cannot ship the cargo. If only one carrier services a route and the contracting officer has rejected the ancillary charge as unreasonable, the government cannot ship cargo requiring the ancillary service without modifying the contract. In addition, the JTMO has found that the prices proposed for these services have varied widely between offerors in past procurements, making price reasonableness determinations difficult. To avoid this dilemma, the JTMO established predetermined pricing or pricing formulas for some of these ancillary charges, at rates based upon the contracting officer's business judgment as well as prior and current rates for these services. The JTMO has provided a detailed justification for its decision as to each contested service.

Sea-Land's objection that the JTMO will know at the time of booking whether these services are necessary and can obtain competitive pricing at that time ignores the agency's concerns, which we find reasonable. Sea-Land does not dispute the JTMO's assertion that these services account for a tiny percent of the contract's value. Further, while Sea-Land suggests that the prices are not compensatory, the fact that solicitation provisions impose a risk that payments under the contract might not cover the costs of performance does not, by itself, make the provisions improper. See Courtney Contracting Corp., B-242945, June 24, 1991, 91-1 CPD ¶ 593 at 5. It is within the agency's discretion to solicit a proposed contract which maximizes risks on the contractor and minimizes administrative burdens on the government. James Foos & Assocs., B-249496.2, Jan. 6, 1993, 93-1 CPD ¶ 22 at 3-4. Offerors must use their professional expertise and business judgment to assess the risk's magnitude and the possible associated cost in preparing their proposals. Crowley Am. Transport, Inc., supra.

EQUIPMENT POOLS

To meet a given shipper's needs, the contracting officer may unilaterally modify a General Contract to require a carrier to establish an equipment pool (consisting of containers and chassis) at a designated location(s); the cost of establishing and maintaining the pool will be borne by the carrier. RFP Att. 11, § C-11.a.(2)(a). A "required" pool will only be established if a pool cannot be voluntarily agreed upon, and the overall size of the required pool will be based on the specific shipper's average weekly shipment requirements from a specific point--the number of containers that must be in the pool on a day-to-day basis shall be equal to the weekly average required. Id.

This provision arises from a related solicitation for the Defense Logistics Agency's Prime Vendor program for food items, under which the prime vendor ships food and beverage products from its continental United States distribution centers to overseas U.S. military facilities, Navy ships, and military hospitals. The JTMO explains that the requirement is needed to give the customer the flexibility to fill weekly supply orders and to react within short time frames for out-of-the-ordinary surges. Since that contract has not yet been awarded, the instant RFP cannot specify particular levels which must be maintained. However, the levels set forth here are guided by the fact that the requirements that must be met under the Prime Vendor program are measured on a weekly volume basis. Since there is no way to predict what the daily requirements will be until orders are placed, and since orders are placed on a weekly basis, it is conceivable that the daily requirements could necessitate the use of the number of containers typically used in a week.

Sea-Land does not dispute the need for equipment pools, and its assertion that the JTMO has provided no justification for requiring a daily level that is equal to the average weekly requirements is unsupported. The justification--the need to fill unpredictable weekly supply orders and to react within short time frames for unusual surges--is reasonably related to what is presently known about the requirements. In addition, the RFP provides that, when more information is available about those requirements, the contracting officer will reduce the pool size by the number of unused containers and pay the carrier the cost of positioning a container that was not used during the term of the contract. Id. at § C-11.a.(2)(c). We therefore find the level of the pool to be unobjectionable.[14]

Sea-Land's complaint about the size of the pool is at the heart of its challenge to the related liquidated damages provision. Carriers that do not maintain the pool at the stated levels shall be assessed container detention charges for each container per day until the proper pool level is obtained. Id. at § C-11.a.(2)(b). Sea-Land contends that this constitutes an unenforceable penalty because it imposes liquidated damages that are not reasonable and have no reference to probable

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[14]As for Sea-Land's assertion that allowing the agency to modify the contract to establish or change the equipment pool constitutes an unauthorized deviation from the RFP's "Changes Clause," the JTMO asserts that there would be no changes in the cost of performance since the cost to position containers that are used would be incurred anyway, and the government will also pay for the costs of positioning a container that was not used during the term of the contract. RFP § C-11.a.(2)(c). The JTMO states that such costs will include both out-of-pocket and loss of use costs, and Sea-Land's suggestions to the contrary are speculative and will not be considered.

actual damages. Sea-Land maintains that liquidated damages should not be imposed until the equipment pool is completely depleted.

Liquidated damages provisions are authorized where the government reasonably expects to suffer damages if the contract is improperly performed and the extent of such damages would be difficult to ascertain. See FAR § 11.502(a). Before we will rule that a liquidated damages provision imposes a penalty, the protester must show that there is no possible relationship between the amounts stipulated for liquidated damages and losses which are contemplated by the parties. Sea-Land Serv., Inc., B-270504, supra, at 5-6.

Sea-Land has made no such showing. First, its objection is not based upon the liquidated damages rate per container, but upon the size of the pool, which we have found unobjectionable. Further, the record shows that the JTMO reasonably expects to suffer damages if the pool is not maintained at the stated level. Again, it is possible that the daily requirements could necessitate the use of the number of containers typically used in a week, and the failure to meet this potential requirement could result in actual damages. As the JTMO explains, the equipment pool is not only for land-based military facilities, but also for forward-deployed units for which this is the only source of supply; problems associated with failure have a real-time adverse impact. Since the government cannot know the daily requirements until the orders are placed, the extent of these damages would be difficult to ascertain. Considering all of the circumstances, as well as the RFP's promise to adjust the size of the pools when more information is available, we have no basis to object to the liquidated damages provisions.

IMPROPER CERTIFICATIONS

Sea-Land argues that the RFP contains certifications in contravention of section 29 of the Office of Federal Procurement Policy Act, 41 U.S.C.A. § 425 (West Supp. 1997), as amended by section 4301 of the Defense Authorization Act of 1996, Pub. L. No. 104-106, 110 Stat. 205 (1996) (the Act). Under that section, a requirement for a contractor's certification may not be included "in the [FAR]" or "in a procurement regulation of an executive agency" unless it is specifically imposed by statute or has been properly justified. 41 U.S.C.A. § 425(c)(1) and (2). Sea-Land asserts that the RFP contains three provisions for certifications that are neither imposed by statute nor properly justified and are, as a result, improper.

The plain language of 41 U.S.C.A. § 425(c) does not prohibit the inclusion of nonstatutory certifications in solicitations or contracts. In any event, even if one could read the prohibition to apply to solicitations or contracts, the provisions here are not "certifications" within the intent of the law. A certification is "the formal assertion in writing of some fact." Black's Law Dictionary (5th Ed. 1979) at 206. Specific certifications elsewhere eliminated by the Act include the procurement integrity certification, section 4304 of the Act, and the certification regarding a drug-

free workplace, section 4301(a), both of which required contractors to separately certify, in writing, that they met the relevant requirements. In this regard, the Act makes it clear that the impetus behind the prohibition was the desire to reduce the administrative and enforcement burdens posed by an array of such certifications that had accumulated in various sets of procurement regulations. Sections 4301(b)(1)(A)(i) and 4301(b)(1)(B)(i)(I).

Two of the provisions here require no separate certification in writing, but are merely contract requirements. RFP Att. 11, §§ C-7.b. and c generally require the carrier to "represent" that services in connection with inland transportation will be performed in accordance with applicable law; "warrant" that it can perform certain services listed in its schedule; "warrant" that it is authorized to accept orders and receive payments for such services; and "warrant" that its offer of rates has considered various factors. RFP Att. 11, § C-8.a. requires the carrier to "warrant" that, notwithstanding the contract terms, the government shall be provided transportation at rates that do not exceed those charged the public for similar services. The third provision, RFP Att. 11, § C-11.h(8), does not require the contractor to separately certify that it meets some set of requirements. It allows the carrier to assess a maintenance charge on the government under certain conditions, and simply requires the contractor to "certify" such charges. In view of the language of the law and these provisions, Sea-Land's allegation has no merit.

PERFORMANCE WITHOUT A CONTRACT

An IDIQ contract for services contemplates the issuance of orders for the performance of tasks during the period of the contract. See 10 U.S.C. § 2304d(1) (1994). Such orders are contracts within the overall IDIQ contract, see FAR § 2.101 (definition of contract), and are subject to the terms and conditions of that contract. FAR § 52.216-18(b).

Sea-Land asserts that the RFP improperly requires carriers to commence performance without a contract of carriage,[15] or task order, citing section G-1.a. of RFP Att. 11, entitled "General Conditions of Service--Documentation":

> When transportation services are ordered under this Contract, a Shipping Order . . . will be issued by the Government within three days after sail date. The Government will also prepare all necessary papers, including vessel papers or manifests listing the cargo stowed in containers aboard the vessel and they will be receipted for by the carrier or his agent. Such papers . . .

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[15]A contract for the transportation of property or passengers is known as a contract of carriage, or a contract of affreightment. 13 Am. Jur. 2d Carriers § 226; see also Todd Shipyards Corp. v. The City of Athens, 83 Fed. Supp. 67 (D. Md. 1949).

> together with the Shipping Order constitute the contract of carriage, and all the terms of this contract shall be deemed as incorporated therein. . . .

Sea-Land argues that if the Shipping Order is the contract of carriage, and is not issued until after the sailing date, the government is improperly requiring carriers to perform without a contract. At a minimum, Sea-Land contends, the RFP is ambiguous regarding the document or action that forms the contract--whether it is when the government places the booking with the carrier or when the Shipping Order is issued. The JTMO counters that the solicitation is not ambiguous when read as a whole, but clearly recognizes that the booking initiates the contractual relationship and the Shipping Order and other papers merely document that relationship.

A solicitation term is only ambiguous if it is susceptible to more than one reasonable interpretation when read in the context of the solicitation as a whole. Lankford-Sysco Food Servs., Inc.; Sysco Food Servs. of Ariz., Inc., B-274781, B-275081, Jan. 6, 1997, 97-1 CPD ¶ 11 at 3. Where a dispute exists as to the actual meaning of the terms of a solicitation, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. Id. at 3-4.

As the JTMO points out, the heading of section G-1.a. makes it clear that the provision was intended to describe the documentation of the contract, not the contract itself. The fact that documents will not be issued until after sailing does not mean that the carriers are required to perform without a contract, since another RFP provision makes it clear that the government intends that its contractual obligations commence upon the booking. Under RFP Att. 11, §§ H-3.o.B.5.(d)(2), (3), the government is liable to the carrier for liquidated damages if it fails to cancel a booking or if cargo is not available to load aboard the scheduled vessel through no fault of the carrier. As a result, the booking unquestionably initiates the contractual relationship, and the order culminates upon the issuance of the documentation. Sea-Land's reading of the solicitation improperly fails to give effect to these provisions and is, as a result, unreasonable. Nabholz Bldg. and Management Corp., B-274930, Nov. 21, 1996, 96-2 CPD ¶ 196 at 3.

In responding to Sea-Land's argument on this issue, counsel for the JTMO stated that, with respect to booking procedures, the JTMO may need to make oral bookings on rare occasion. Sea-Land countered that, even if a booking creates a binding legal relationship between the parties, the RFP nevertheless is defective because it does not authorize oral orders. See FAR § 52.216-18(c) (orders may be issued orally only if authorized in the solicitation's schedule). We need not address this issue. Whether or not a booking is an "order" within the meaning of the FAR, the RFP requires that bookings be made by electronic means, RFP § H-3.o.B.4.(a); it makes no reference to oral bookings. Accordingly, any questions about the

propriety of oral bookings concern not the solicitation, but the administration of the contract.[16]

OTHER CLAUSES

Sea-Land contends that the RFP's incorporation by reference of the order of precedence clause, FAR § 52.215-33 (June 1997),[17] is not appropriate because the RFP does not use the Uniform Contract Format. Sea-Land asserts that the application of the clause would "effectively" deviate from the FAR, might not represent the agency's intent, and creates an ambiguity in the RFP. Since the provision is a standard clause, it does not improperly deviate from the FAR, and the JTMO disputes that it does not represent its intent. Moreover, no ambiguity exists in the RFP since, if the need for its use arises, it gives clear guidance as to the order of precedence.

Sea-Land also contends that the RFP improperly incorporates by reference Defense Federal Acquisition Regulation Supplement (DFARS) § 252.209-7003 (Sept.1994), "Disclosure of Commercial Transactions with the Government of a Terrorist Country," which has been canceled. The JTMO concedes that Sea-Land is correct, and explains that proofreading errors prevented it from correcting this oversight in its last amendment. The JTMO plans to address this oversight administratively, and asserts that Sea-Land cannot have been prejudiced by its inclusion.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F. 3d 1577, 1581 (Fed. Cir. 1996). Sea-Land asserts that the inclusion of the clause precluded it from revisiting its corporate policies against conducting commercial

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[16]As for Sea-Land's arguments that the RFP fails to comply with the requirement that orders contain specific information, FAR § 16.505(a)(6), there is no requirement that this information be set forth in the RFP. To the extent that the JTMO fails to comply with these requirements during the term of the contract, such matters concern the administration of the contract and are not for our review. 4 C.F.R. § 21.5(a) (1997).

[17]This clause is now found at FAR § 52.215-8 (FAC 97-02).

transactions with the governments of terrorist nations. In our view, this assertion is too vague to constitute a reasonable possibility of prejudice; Sea-Land has not explained what impact, if any, this policy would have had on its proposal.[18]

The protests are denied.

Comptroller General
of the United States

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[18]Sea-Land's assertion that the RFP improperly incorporates the June 1997 version of FAR § 52.215-10 instead of the May 1997 version overlooks the fact that the FAR in its entirety was reissued in June.