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

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B-177247

April 30, 1973

National Maritime Union of America
c/o Abraham E. Freedman
Counselor at Law and Proctor
in Admiralty
36 Seventh Avenue
New York, New York 10011

Gentlemen:

Reference is made to the letter of October 13, 1972, and subsequent correspondence, protesting against the award of a contract to Hudson Waterways Corporation (Hudson) under request for proposals (RFP) No. N00033-72-R-0046, issued by the Military Sealift Command (MSC).

The RFP requested offers for operation of 13 Navy tankers for a period of five years commencing on November 1, 1972, with a right to terminate after the first year on 30 days notice. The vessels consist of 8 each T-2 type tankers and 5 each T-5 type tankers. Offerors were advised that the T-2 type tankers are scheduled to be inactivated over the next five years. The RFP stated that the negotiating authority was 10 U.S.C. 2304(a)(10); that a cost-plus-award fee contract would be awarded, and that an award fee would be designed as an incentive over and above the fixed-fee to encourage optimum performance and economy in operation.

The following evaluation factors were set forth in Paragraph 7 of the RFP:

(a) Experience of Operations which encompassed the offeror's company history in tanker operations including type, grade, and service of tankers and other ships currently being operated;

(b) Management staff which included education, experience and number of technical shore personnel in the following categories each of which were briefly described:

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(1) Operations
(2) Maintenance and Repair
(3) Purchasing and Property Control
(4) Accounting
(5) Insurance Claims;

(c) Operating costs (experience and projected for MSC tankers) which included existing union agreements, manning and wage scales, overtime, fringe benefits, state unemployment taxes, subsistence, insured loss experience including deductibles, premiums, number of claims and total amount paid and

(d) Fixed fee.

An Evaluation Board comprised of MSC personnel from various divisions was established to assist in the evaluation of the information requested by the RFP. Eight proposals were received and distributed to the Evaluation Board. The initial review found that two of the offerors did not have the minimum experience in tanker operations required by the solicitation and therefore these two offerors were not given any further consideration.

By telegram of September 21, 1972 to the remaining six offerors, MSC requested projections of the offerors' yearly expense (365 days) in the following categories:

Base Wages - Regular
Wages - Overtime
Wages - Other
Payroll Taxes
Subsistence

Offerors were instructed that the wage projections were to be based on union agreements effective as of June 16, 1971, for licensed personnel and June 16, 1972, for unlicensed personnel; that "wages-other" included vacation, pension and welfare, and training costs; that "wages-overtime" and "Subsistence" were to be based on the most recent 12-month experience and that breakdown figures should be available for a scheduled meeting as set forth in the telegram. The Evaluation Board met with each of the offerors on September 25 and 26 and thereafter best and final offers were requested from the six offerors by September 28.

Based on data submitted by the offerors, MSC's Comptroller and the contracting officer prepared a five year projection of the costs of operations for each of the offerors. Hudson, whose employees are affiliated with the Seafarers International Union (SIU), had the lowest projected costs of operations for the five year period ($4,916,870). Two other offerors, with employees affiliated with the SIU, had the second and third lowest projected costs of operations. Mathiasen, whose employees are affiliated with the National Maritime Union (NMU), had the fourth lowest projected costs of operations ($5,449,783). The company with the fifth lowest projected costs of operation ($5,553,224) was Marine Transport Lines, Incorporated (MTL), whose employees are also affiliated with the NMU.

MSC has furnished our Office with its breakdown of the estimated costs of operations for Hudson, Mathiasen, and MTL, based on the data furnished by the offerors, a copy of which was made available to you. MSC's breakdown indicates that while most of the costs of operation are basically equal, Hudson's projection for "wages-other" for each type of tanker is substantially lower than the projection on this item for either Mathiasen or MTL. The five year projection of the costs of operation for each offeror was submitted to the Evaluation Board and, after review, the Board recommended an award to Hudson. The contracting officer approved this recommendation and a notice of award was sent to Hudson on October 2, 1972.

Thereafter you protested the award to our Office and also filed a petition in the District Court for the District of Columbia (Civil No. 2236-72) on November 9, 1972, for a preliminary injunction to restrain MSC from transferring any ships until our Office had an opportunity to decide the protest. The District Court on November 21, 1972, denied the motion for a preliminary injunction. Most of the ships have been transferred at this time.

Your protest urges that the award to Hudson was invalid. You contend that MSC's projected costs of operation for Hudson based on figures furnished by Hudson for labor costs, overtime rates and fee were inaccurate and that Mathiasen and MTL actually have lower costs of operation than Hudson. In any event you contend that costs may not be considered as controlling in awarding cost-reimbursement type contracts, and that a single award weakens the United States flag merchant marine.

With respect to the labor costs included in MSC's projection you have furnished your version of the projected unlicensed labor costs for Hudson and Mathiasen based on forms submitted to the Pay Board by two employer associations. One of the Pay Board forms concerns a collective bargaining agreement for 17,500 employees affiliated with the NMU. The other Pay Board form concerns salary and benefits adjustments for 6,210 employees affiliated with the SIU. You urge that the rates on the Pay Board forms indicate that Mathiasen has lower labor costs than Hudson.

MSC tested the accuracy of the various wage costs submitted by Hudson against Hudson's collective bargaining agreements with SIU and was satisfied that Hudson's rates were realistic. Apparently MSC never considered the rates on the Pay Board forms in the evaluation. However, we have no basis for concluding that MSC's reliance on the union agreements was unreasonable or that the Pay Board forms establish the inaccuracy of MSC's projection of labor costs. In this regard MSC has advised that since the unions representing licensed personnel had not completed their negotiations for 1972 agreements, at the time of the evaluations, the offerors were requested to use the 1971 agreements for licensed personnel. On the other hand the 1972 union agreements for unlicensed personnel were completed as of the time of evaluation and offerors were instructed to use the data from the new agreements in submitting the cost estimates for this item.

You contend that your overtime rate of 81 percent is more realistic than Hudson's overtime rate of 80 percent because your rate was based on actual experience with MSC tankers whereas Hudson's rate was based on experience in the commercial sector. With respect to this contention MSC contends that it was proper to use the same overtime percentile of straight time wages for both Mathiasen and Hudson. It further states that even after applying the same overtime rates Hudson's overall costs of operation were still low. Also, MSC advises that the overtime percentiles of Hudson and Mathiasen have since been verified in establishing basic crew costs for escalator clauses in charter parties covering periods in excess of one year. The overtime percentiles used in negotiating the basic crew costs was 80 percent in the case of Mathiasen and 75 percent in the case of Hudson.

You have urged, however, that MSC should test the realism of the overtime rate for the offeror by applying current NMU and SIU overtime rates to past selected representative voyages of MSC tankers. MSC did not make such an analysis since it was satisfied that Hudson's overtime percentile was realistic. Also, MSC is not aware of any change in current collective bargaining agreements that would require the use of a different overtime percentile for Hudson. We find no basis to object to MSC's evaluation of overtime costs.

With regard to fees, you contend that the projected $50 daily fixed management fee offered by Hudson, which was $10 per day less than the actual management fee under the Mathiasen and [illegible] contracts, was

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unrealistic. MSC accepted Hudson's offer of the fee at face value since the fee was fixed. MSC further reports that the fixed-fee covers an insignificant portion of the total costs and as such would not affect the outcome of the evaluation.

We have noted that the award of cost-reimbursement type contracts requires exercise by procurement personnel of informed judgments whether submitted proposals are realistic as to proposed costs as well as to technical approach. 50 Comp. Gen. 390 (1970). Based on our review we find that the record supports that MSC had an adequate basis for its judgment that Hudson's costs were realistic in each of the categories questioned by you.

With regard to the argument that MSC violated Armed Services Procurement Regulation (ASPR) 3-805.2, because costs were made the controlling factor in selecting Hudson as the successful offeror, our Office has held that estimated costs and fee should be considered in the evaluation even in cost-reimbursement type contracts. See 50 id. 390. MSC reports that Hudson met all of the qualifications for an operator required by the RFP. In this regard MSC found that Hudson presently operates seven United States flag tankers as well as a number of dry cargo ships (some under charter to MSC) and containerships for its parent, Seatrain Lines, Incorporated, in berth service. The other five offerors under consideration were also ultimately found to be acceptable to MSC. Therefore, costs became the factor which differentiated the offerors. We believe it was proper for the agency to give consideration in the evaluation to its assessment of each offeror's cost proposal in terms of cost realism or probable cost to the Government. See B-176763, April 11, 1973, 52 Comp. Gen. __________.

You also contend that since 10 U.S.C. 2304(a)(10) as implemented by ASPR 3-210.2(xi) authorizes the use of negotiations when the procurement includes services for the operation of Government-owned vessels, this must be construed as recognizing the anti-competitive factors such as rivalry between unions that are unique in the maritime industry. Therefore you contend that it was improper to use competitive procedures in awarding this contract. Tied in with this argument is the further contention that by awarding a contract to a single concern, MSC may weaken the United States flag merchant marine by the elimination of certain carriers.

Under 10 U.S.C. 2304(g), proposals must be solicited from the maximum number of qualified sources and discussions must be conducted with all of the offerors within the competitive range. The implementing sections of ASPR also require that negotiated procurements be competitive to the maximum practicable extent. See ASPR Sections 3-101, 3-102 and 3-805.

We do not interpret ASPR 3-210.2(xi) as permitting an exception to the basic requirement for competition. Therefore,we believe MSC was merely following the mandate of the statute and regulation by utilizing competitive procedures in this procurement.

Further, MSC reports that tankers have been operated in the past by concerns affiliated with only one union without weakening the United States flag merchant marine. Moreover, the tankers will continue to be operated under the American flag, manned by American citizen merchant marine crews affiliated with American unions. In the circumstances we do not find that the award to Hudson may be questioned on this basis.

For the foregoing reasons your protest is denied.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States