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GAO

United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-192149

FEB 12 1979

DLG00899

Anne Singer, Esq.
Assistant United States Attorney
970 Broad Street
Newark, New Jersey 07102

Dear Ms. Singer:

Subject: [Sea-Land Service, Inc. v. Brown, et al.] Civil Action No. 78-1223 (D.N.J., decided December 11, 1978)

We have reviewed the court's opinion in the above-referenced matter and we have been advised that the Government has filed its notice of appeal with the Third Circuit Court of Appeals. We endorse the decision to appeal and we offer the following comments and suggestions in an effort to support that appeal. We have also reviewed the Government's prior briefs and have attempted not to repeat those arguments. We understand briefs are due on or about February 16, 1979.

Points

I. THE COURT ERRED IN CONCLUDING THAT FOSS' PROPOSAL MATERIALLY DEVIATED FROM THE ESSENTIAL REQUIREMENTS OF THE RFP.

II. THE COURT ERRED IN CONSIDERING A CHALLENGE TO THE RFP'S EVALUATION SCHEME NOT RAISED PRIOR TO THE CLOSING DATE FOR RECEIPT OF PROPOSALS.

III. IF MSC'S FAILURE TO DISCLOSE EVALUATION WAS MATERIAL--AS THE COURT CONCLUDES, THEN THE PROPER REMEDY IS TO AMEND THE RFP AND CONDUCT ANOTHER ROUND OF BEST AND FINAL OFFERS--NOT DIRECT AN AWARD TO ANY OFFEROR.

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Argument

I. THE COURT ERRED IN CONCLUDING THAT FOSS' PROPOSAL MATERIALLY DEVIATED FROM THE ESSENTIAL REQUIREMENTS OF THE RFP.

A. FOSS' PROPOSAL MAY BE PROPERLY EVALUATED AS SUBMITTED

"As the Court sees it, there is no possible way in which this deviation can be regarded as one of form rather than substance." (T-p.42). The court's conclusion is further explained in its October 13, 1978, opinion and the following passage from the December 11, 1978, hearing:

> "Some of the cargo is shipped in containers packed or 'stuffed' by the carrier, and some is shipped in containers stuffed by military personnel. In accordance with the RFP, Sea-Land's rates (prices) were on the basis that government stuffed containers would be stuffed to 100% of capacity (volume or weight). Foss's proposal was made on the assumption that government stuffed containers would be stuffed to less than 80% of capacity, and on those it proposed charging 80% of the [illegible] stuffed rate. If the containers were stuffed to more than 80%, the [illegible] 80% charge would be adjusted upwards on a proportional basis to reflect the actual percentage stuffed.
>
> "Applying the [illegible]0% assumption to projections of [illegible]ts, the aggregate cost, which [illegible] unit price times volume, produced a lower total of dollars than the Sea-Land proposal. However, if the Foss 80% assumption

were adjusted mathematically to match the Sea-Land criteria, the total cost of the Foss proposal was higher." Court's Opinion, October 13, 1978, p.2

"MS. SINGER: Your Honor, just very briefly on this argument of Sea-Land, this 80 percent versus 100 percent difference is significant.

"I know the Court is award that the GAO found that that different was simply one of form and not substance. And I think that the calculation --

"THE COURT: I'm aware they said that, but that's the element on the basis of which the Foss bid was taken to be the lower bid. If Foss were calculated at 100 percent, it would have been the higher bid." (T-p.27).

We emphatically believe that no mathematical adjustment of Foss' rates is necessary in order to validly compare them to Sea-Land's and to select the offeror submitting low-evaluated price. As indicated in our October 27, 1978, letter to you, under the RFP's evaluation scheme, offerors were given the estimated quantities for each of nine categories of cargo and they were asked to propose a rate for each category in dollars per measurement ton (MT). With this information the Navy would perform the calculations and determine the low-priced offeror. In the calculations, the Navy assumed that only a percentage (e.g., 24 percent of outbound container cargo NOS) of the containers would be stuffed by the Government and the Government could utilize only an average of 70 percent of the container's capacity. Contrary to the court's view, both offerors knew that the Government could only use an average of 70 percent of a container's capacity. In theory, the computation for one offeror would be as follows, given one type of cargo, 24 percent to

be Government stuffed at 70-percent capacity, and 100 MT to be shipped at a proposed rate of $80 per MT:

	Actual MT	Billable Tons	(100 percent basis)	Rate	Price
Carrier stuffed	76	76		$80	$6,080
Government stuffed	24	34		80	2,720
				TOTAL	$8,800

Again in theory, the same type computation would occur if an offeror based its rate on the 80-percent basis.

	Actual MT	Billable MT	(80 percent basis)	Rate	Price
Carrier stuffed	76	76		$80	$6,080
Government stuffed	24	27		80	2,176
				TOTAL	$8,256

The Navy's intent was to perform the above-type calculations for each of nine categories of cargo, total the price, and select the low-total-priced offer. The only difference between the 100-percent basis and the 80-percent basis is the number of billable tons for Government-stuffed containers. This is the key point--Sea-Land priced its proposal using a larger number of billable tons than Foss did, but the actual amount shipped would be the same in either case and lowest total price to be paid by the Government will flow from the Navy's evaluation method.

The court's suggestion that the proper method of comparing an 80-percent rate to 100-percent rate is to increase the former by 25 percent, is

obviously improper and incorrect. The court also erroneously believes that Sea-Land based its proposed prices on the RFP's guidance that Government-stuffed containers would be stuffed to 100-percent capacity, whereas Foss assumed those containers would be stuffed to 80-percent capacity. It is important to note, however, that neither Sea-Land nor Foss assumed that Government-stuffed containers would be 100-percent full or even 80-percent full. Both experienced offerors and the Navy knew that an average of 70-percent capacity is the best historical average that could be obtained. Therefore, the offerors would not have been misled or prejudiced by the RFP's pricing scheme.

Next, it is essential to understand--and it is apparent the court did not--how the Navy actually evaluated the proposals. Initially, the Navy mathematically increased the rates proposed by Foss--just as the court now believes should be done. Later, the Navy submitted that this was improper and for the reasons stated in the above example, we agreed. A copy of the Navy's proper evaluation of Foss' proposal is enclosed. For illustrative purposes, we will reproduce here the Navy's proper evaluation of item 1 based on Foss' and Sea-Land's proposed rates for year number 2, reflecting Foss' higher rate:

Sea-Land

Container Cargo Nos. 13,500 MT	Annual RFP	Cargo Tonnage Billable	(100%)	Rate 2d yr.	Total
Government stuffed	3,240	4,568		$89	$206,552
Carrier stuffed	10,260	10,260		89	913,140
					$1,319,692

Foss

Container Cargo Nos. 13,500 MT	Annual RFP	Cargo Tonnage Billable (80%)	Rate 2d yr.	Total
Government stuffed	3,240	3,654	$80.15	$ 292,868
Carrier studded	10,260	10,260	80.15	822,339
				$1,115,207

When each of the nine categories is evaluated for each year the total-evaluated price is:

Foss	$6,287,326
Sea-Land	6,393,964

Thus, Foss submitted the low-evaluated price.

B. THE COMPTROLLER GENERAL'S ADVISORY OPINION RATIONALLY EXPLAINS THAT FOSS' PROPOSAL, WHILE DIFFERENT IN FORM, CAN BE PROPERLY EVALUATED AS SUBMITTED, PREJUDICES NEITHER THE NAVY NOR SEA-LAND, AND DOES NOT AFFECT ANY PRICING PROVISION OF THE RFP.

In sum, our decision, Foss Alaska Line, 57 Comp. Gen. _____ (B-192149, September 12, 1978), 78-2 CPD 192, concluded that, while the structure of Foss' price proposal--the 80-percent basis--differed from the RFP's scheme, the difference was one of form and not of substance and was not a material deviation because Foss would have obligated to perform the required service at the firm-fixed-rates stated in its proposal.

Past decisions of our Office have considered situations where bids did not conform to the intended price format. For example, in I.T.S. Corporation, B-190562, January 24, 1978, 78-1 CPD 64, the solicitation requested firm-fixed rates for a single line of display type, as follows:

"(a) Lines up to 7" in length
..... per line .....$

"(b) Lines over 7" in length
..... per line .....$"

I.T.S. proposed one price for each category, while a competitor proposed a price for category (a) and a variable price ($1.50 for 7 inches plus 25 cents for each additional inch) for category (b). The agency knew that the maximum line length is 16 inches and, therefore, evaluated the competitor's bid based on the maximum price, which was lower than the protester's. Since the competitor's bid was otherwise responsive, the specific price for each order can be determined and while it might be less, it could not exceed the price used for evaluation; thus, we concluded that although the structure of the competitor's bid price deviated from the solicitation's contemplated scheme, it could nevertheless be evaluated essentially on the same basis as the protester's by using the competitor's maximum price.

Another example occurred in the matter of Shamrock Five Construction Company, B-191749, August 16, 1978, 78-2 CPD 123. There, the solicitation requested price for removing old garage doors and a price for installing new garage doors; one item would not occur without the other; award was to be made to the low total price. Shamrock initially provided a price for each item and a total price, as follows:

Item	Description	Amount
0001	Install new doors	$213,444
0002	Remove old doors	7,301
	Total items 0001 and 0002	$220,745

But, prior to submitting the bid, Shamrock altered the total price by crossing through $220,745 and writing the following:

"total may be reduced to $205,745."

Now, the items did not add to the revised total and on that basis the second low bidder protested. We held that although we cannot determine how Shamrock intended to allocate the price reduction as the solicitation contemplated, that fact is immaterial since (1) the division of cost between the two operations is simply a matter of accounting; (2) the doors are to be removed and replaced on a one-to-one basis, and (3) the low bidder is to be determined on the basis of the low-total price and Shamrock's low total price is capable of evaluation on an equal basis with other bids. We determined that Shamrock's bid was responsive to the invitation for bids because it unequivocally offered to perform the work at a definite price in total conformance with the terms and specifications of the invitation.

Another example cited in our September 12, 1978, decision, was the case of Tidewater Management Services, Inc. v. United States, 573 F.2d 65 (Ct. Cl. 1978). There, the Navy issued a request for proposals (RFP) for mess attendant services and required that offerors submit a schedule for the two representative days envisioned by Navy personnel. The successful offeror proposed a total price based on six representative days but submitted schedules only for the two mentioned in the RFP. The court found that while the Navy contemplated only two types of days, the RFP did not prohibit proposals based on more than two types of days and when proposals in the best interests of the Government do not violate the terms of the RFP, they may not be disregarded because they are innovative in a way not foreseen and not forbidden by the RFP.

In the instant matter, the Navy's request for proposals to move certain quantities of cargo in particular containers on certain dates was not met with objection from either offeror and neither

offeror suggested any deviations in that regard. The Navy contemplated an artificial pricing scheme based on the univerisally recognizable impossibility that each Government-stuffed containers would be 100 percent of capacity. Undisputedly the Navy and both offerors knew that an average of 70-percent fill was the historical and expected fill and the Navy used the 70-percent factor in the evaluation. Foss took no exception to the quantity, quality or delivery requirements of the RFP and proposed its prices on an artificial basis not prohibited by the RFP. Since Foss' artificially based prices are easily evaluated by using the Navy evaluation scheme (as demonstrated above), Foss' total price can be compared to Sea-Land's on an equal basis.

Moreover, each offeror knew from the RFP that the quantities estimated for each category were not guarantees that such amounts would be shipped, therefore, risks were inherent in any selection of rates for each category but both offerors knew how the selection was to be made. Both offerors structured their rates based on their own circumstances--fixed costs, overhead, variable costs, profits, etc.--and their best business judgments with the intent of offering the lowest total estimated cost to the Government. From the Government's standpoint, a price proposal structured either way would be acceptable as evidenced by the initial and revised RFP's . In any event, each offeror knew from the RFP that the bottom line--relative estimated total price--was the basis for selecting the otherwise acceptable offeror.

In sum, like in the I.T.S. Corporation and Sharrock matters, Foss' deviation from the RFP contemplated scheme was not prohibited and was capable of evaluation on a basis equal to the other offer.

C. FOSS' PROPOSAL WAS ACCEPTABLE, AS SUBMITTED

The court interprets section 3-805.3(a) of the Defense Acquisition Regulations (DAR) as requiring that proposals must be fully "responsive" to an RFP in order to be acceptable. (T-p.42). We believe that this novel approach is incorrect and, in part, forms the basis for the court's erroneous conclusion that Foss' proposal was "nonresponsive."

First, responsiveness, by definition, refers to the concept that a bid must take no exception to a material element of a solicitation issued pursuant to the rigid formal advertising statutes and regulations. As such, the concept of responsiveness has no general applicability to a solicitation issued pursuant to the more flexible negotiated procurement procedures, statutes, and regulations. Computer Machinery Corporation, 55 Comp. Gen. 1151 (1976), 76-1 CPD 358. In context, it appears that the court believes that Foss' proposal was unacceptable and not "nonresponsive."

Secondly, to be considered unacceptable, a proposal must take exception to a mandatory solicitation provision affecting quantity, quality, delivery, or price. See, e.g., State Mutual Book and Periodical Service, Ltd., B-191008(2), April 3, 1978, 78-1 CPD 264 (offeror proposed delivery by U.S. mails where RFP expressly provided that delivery by U.S. mails not be acceptable).

The next three cases are examples of offers that took exception to material provisions of an RFP. In Napora, Inc., B-190045, February 1, 1978, 78-1 CPD 94, we concluded that an RFP provision increasing fourfold the maximum potential level of effort of the contract and a provision specifying a fixed rate of secretarial/clerical to technical labor were material requirements, obviously affecting price, quality, and quantity. In National Motors Corporation, et al., B-189933, June 7, 1978, 78-1 CPD 416, we agreed that a technical proposal, which provided no details concerning the manufacture or

capacity of its overrunning clutch, was not fully self-contained as the RFP required and, therefore, was unsatisfactory. In Telos Computing, Inc., and Proprietary Software Systems, Inc., B-191789, September 12, 1978, 78-2 CPD 191, we agreed that an offeror's failure to propose delivery within the time required by the RFP was primary deficiency, making the proposal technically unacceptable.

On the other hand, in Computer Sciences Corpopration, B-190632, August 4, 1978, 78-2 CPD 85, the agency's ordering office in Kansas City told the protester, CSC, that its proposal could be made acceptable by modifying its basic contract. Modifications to the basic contract had to be processed in the agency's Washington office 4 days before copies of the modification were due in Kansas City. CSC advised that it would comply and did but CSC failed to timely furnish a copy of the modification to the Kansas City office and the agency rejected CSC's proposal. We concluded that CSC's failure to comply with the formalities of communication required by the agency was not a material defect in CSC's offer because (1) while formally advertised procurements have strict rules regulating the communication of bids, negotiated procurements are characterized by greater flexibility and here no warning was given that failure to comply with the copy requirement would result in rejection of an offer, and (2) if the Kansas City office issued an order to CSC on the latter date, CSC would have been obligated to furnish services conforming to its modified basic contract. Further, we concluded that the "copy requirement" could not affect the price, quality or quantity of the offer and, therefore, was not material. See 40 Comp. Gen. 321, 324 (1960).

No one contends that Foss' price proposal takes exception to time of delivery, amount to be shipped, or the required manner of shipment. The dispute centers on the pricing scheme only.

Since we have shown above that the Foss' price proposal was capable of evaluation, as submitted, on a basis equal to Sea-Land's, Foss' proposal takes no exception to solicitation affecting price.

Thirdly, DAR § 3-805.3(a) does not mention the word "responsive" and has not been interpreted as the court suggests.

Lastly, it is noted that the concept of "minor deviations "from the solicitation is also related to strict formal advertising; the more flexible negotiated procurement method includes by definition the possibility that all acceptable proposals will not all be like each other or the RFP, except where expressly prohibited in the RFP. See Computer Sciences Corporation, supra.

II. THE COURT ERRED IN CONSIDERING A CHALLENGE TO THE RFP'S EVALUATION SCHEME BECAUSE IT WAS NOT RAISED PRIOR TO THE CLOSING DATE FOR RECEIPT OF PROPOSALS.

Here the RFP disclosed that award would be made to the offeror who submitted the low-total-evaluated price. The offerors knew the estimated quantities to be shipped, they knew that the Government would stuff some containers, and they knew that the Government could only use 70 percent of the container. These facts are undisputed. Sea-Land knew from experience the percentage of Government stuffed containers per category of cargo, including the 24 percent for cargo NOC. Sea-Land's request for reconsideration, p.2. Foss asked for the historical data and the Navy provided it. Neither asked what percentage the Navy planned to actually use in evaluation and neither was told, but since neither offeror was given any other information, it was reasonable for the Navy to use the informally disclosed historical percentages as evaluation factors.

A. From the above, any offeror could readily see that the omission of the Government-stuffed percentage for each category was apparent on the face of the solicitation. During our Office's consideration of the matter, Sea-Land filed lengthy and detailed comments on the Navy's report and Foss' protest and about a week later Sea-Land filed a final rebuttal. At no time during our initial consideration of the matter, did Sea-land raise as an issue the RFP's omission of the Government-stuffed percentage, even though at that time, Sea-Land was intimately familiar with the actual proposal evaluation employed by the Navy. Sea-Land raised the issue for the first time on reconsideration.

First, Procedures promulgated by the Comptroller General governing the consideration of bid protests before our Office provide that protests involving apparent solicitation improprieties must be filed prior to the closing date for the receipt of initial proposals. 4 C.F.R. § 20.2(b)(1)(1977). Such protests filed after that time are untimely and will not be considered. Consistently following that policy, in fiscal year 1978 alone, hundreds of untimely protests were dismissed without consideration on the merits. The rationale for the rule is simply this: a firm is not allowed to participate in a procurement and then file a protest--based on a matter which was known or should have been known from the solicitation--when it learns that it is not the successful firm. These rules are intended to assure that protests are filed in time for some effective remedial action when warranted. Where a firm does not apprise the Government within a reasonable time of its objections to a procurement action, it is generally not in the Government's best interests to allow that firm to hamper the Government's business of procuring goods and services.

In the instant matter, the RFP's omission of the Government-stuffed percentage per category can be considered no less than an "apparent"

solicitation defect. The obligation rests on the offerors to carefully scrutinize the RFP, including the evaluation factors, and to seek clarification from the agency, if necessary. Honeywell, Inc., B-184825, November 24, 1975, 75-2 CPD 346; Kappa Systems, Inc., 56 Comp. Gen. 675, 689 (1977), 77-1 CPD 412. Without question, both offerors believed that they possessed enough information--including the "historical" Government-stuffed percentages based on Sea-Land's then current contract--to intelligently price their proposals with the goal of submitting the low total price. Both participated, wihout objection, in the procurement. In such circumstances, a protest filed after the closing date should not be heard on the merits.

Our exhaustive research shows that the only judicial test of this rationale is Airco, Inc. v. Energy Research and Development Administration, 548 F.2d 1294 (7th Cir. 1975). There, a prime contractor of the Government issued a request for proposals and three firms responded. All proposals were technically acceptable and discussions were conducted with all three regarding price. On that basis the prime contractor notified Airco that it was the successful offeror but that no contract could be formed until ERDA approved. ERDA believed that certain improper discussions would cloud any award to Airco and ERDA directed that another round of discussions be held and best and final offers be requested. Airco did not appeal ERDA's decision to our Office or to the courts; instead, Airco acquiesced in the decision by participating in the second round of negotiations. In the words of the court, "[w]e believe, at any rate, that Airco waived its right to object to that decision. * * * Airco evidently was willing to accept a contract if it won the second round * * *. It is clear that Airco's real complaint is not that a second round of [sic] bidding was held, but that it lost the second round." 528 F.2d at 1300.

Here, Sea-Land reviewed the solicitation--as it was duty bound to do--and observed that the Government would stuff some containers. Sea-Land knew that "historical" data in its possession reflected the percentages applicable to each category of cargo. The Navy in fact used those percentages in the evaluation scheme. If Sea-Land believed that it needed more information to intelligently price its proposal, then it was duty bound to ask for it prior to the closing date for receipt of initial proposals. Sea-Land's failure to do so is equivalent to Airco's acquiesence in the second round. Sea-Land's real objection is not to the nondisclosure of the percentages or the use of the "historical" percentages but that it lost the competition. Such objection should not have been heard on the merits by the lower court.

B. Assuming, arguendo, that the omission of the Government-stuffed percentage from the RFP was not "apparent," then Sea-Land's protest could be governed under the rationale or another part of our Bid Protest Procedures, 4 C.F.R. § 20.2 (b)(2) (1977). That section provides that "protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier." Here, Sea-Land first raised the basis of protest in its request for reconsideration--substantially more than 10 days after Sea-Land discovered the Navy's actual evaluation scheme. As stated above, when a firm does not apprise the Government within a reasonable time of its objections, it is generally not in the Government's best interests to allow that firm to hamper ongoing procurements. For years, the Comptroller General has uniformly followed this policy and, on that basis, hundreds of untimely protests have been dismissed without consideration on the merits.

C. Even though the RFP did not disclose the percentage of Government-stuffed cargo per category, since Sea-Land knew--from its own records--the "historical" percentages and since it had no

other contrary information from the Navy, Sea-Land's reliance on any other percentages was a business judgment which Sea-Land was free to make at its peril.

D. Well established principles of competitive negotiated procurement require that offerors should be advised of the evaluation factors to be used in evaluating proposals since competition is not served if offerors are not given information to intelligently price their proposals. See, e.g., Tracor, Inc., 56 Comp. Gen. 64 (1976), 76-2 CPD 386. Here, the Navy made a good faith effort to advise all offerors in the RFP that "[i]n evaluating offers and making the award, consideration will be given to the following principal factors: Anticipated annual cost * * *. Anticipated annual cost for use in determining the cost favorable carrier will be determined by pricing out the categories and volumes of cargo shown in paragraph 5.(f) at the applicable rates set forth by each offeror in the appropriate statement of rates. * * *" The RFP also disclosed that the Government would stuff some containers. Offerors knew that the Government could only average 70-percent fill and offerors knew the "historical" percentages of Government-stuffed cargoes. In actual fact, offerors needed no more information to intelligently price their proposals. If an offeror desired more information, then the burden was on that offeror to request it from the Navy. Kappa Systems, Inc., supra. No one did and no other information was actually necessary.

Accordingly, it is fair to conclude that no offeror was actually prejudiced by the RFP's omission of the Government-stuffed percentages because the Navy formally and informally disclosed sufficient information regarding evaluation.

III. IF MSC'S FAILURE TO DISCLOSE EVALUATION INFORMATION WAS MATERIAL--AS THE COURT CONCLUDES, THEN THE PROPER REMEDY IS TO AMEND THE RFP AND OBTAIN NEW BEST AND FINAL OFFERS--NOT DIRECT AN AWARD TO ANY OFFEROR.

The court concludes that (1) Foss' deviating proposal interplaying with the undisclosed evaluation factor make it impossible to rationally compare the two proposals from a cost effective standpoint, and (2) Foss' proposal should be rejected and Sea-Land's is the only one left entitling Sea-Land to award (T-pp. 46,47). If the court is correct in concluding that the Navy's failure to disclose the percentages of Government-stuffed containers was a material departure from the requirements of the Defense Acquisition Regulations (T-p.43), then the RFP was defective and no award may properly be made.

The proper remedy in such circumstances is to amend the RFP and conduct another round of best and final offers to select the successful offeror. The logic is simply this: if the RFP omits material information, then offerors could not intelligently make proposals, the Government's needs may not be satisfied, and either the Government or the awardee may be substantially disadvantaged by undisclosed conditions and terms.

In other materially defective RFP matters, the Comptroller General has held that award under a defective RFP would be improper. See, e.g., E.R. Hitchcock & Associates, B-186456, March 29, 1977, 77-1 CPD 218 (RFP failed to clearly and adequately describe the technical requirements for shipping containers); Parkson Corporation, B-187101, February 11, 1977, 77-1 CPD 103 (RFP's specifications did not accurately reflect agency's minimum needs); National Health Services, Inc., B-186186, June 23, 1976, 76-1 CPD 401 (RFP did not inform offerors that "experience" and "performance record" would be areas of evaluation); Smoke Detectors, B-191459, August 1, 1978, 78-2 CPD 83 (RFP did not state all specifications; corrective action recommended); Unidynamics/St.Louis, Inc., B-181130, August 19, 1974, 74-2 CPD 107 (RFP did not reflect that test methods other than that stated would be acceptable). In fact, recently the Comptroller General held that no award may

properly be made under a materially defective solicitation. Department of the Interior--request for advance decision, 57 Comp. Gen. ____ (B-193109, December 22, 1978), 78-2 CPD 432.

We note that the court did not rely on precedent to support the directed award remedy and our research reveals none. Nor can we conceive of a theory that would support a directed award under a materially defective solicitation, as the court believes is the case here.

This concludes our views in opposition to the court's decision. We would be pleased to furnish copies of documents or decisions of this Office upon request and we are prepared to assist further in any appropriate manner. If you have any questions please call me at area code 202, 275-6181.

Sincerely yours,

Michael J. Boyle 2/6/79

Michael J. Boyle
Attorney-Adviser

Enclosure