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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

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## Decision

**Matter of:** Patriot Contract Services – Advisory Opinion

**File:** B-294777.3

**Date:** May 11, 2005

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David A. Churchill, Esq., Kevin C. Dwyer, Esq., and David B. Dashefsky, Esq., Jenner & Block, for American Overseas Marine Corporation, an intervenor.  
David Townsend, Esq., Department of the Navy, for the agency.  
Glenn G. Wolcott, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Where solicitation required that offerors provide letters of commitment for key personnel and further required that such commitment letters “reflect mutually agreed position, salary, and benefits,” and record establishes that, contrary to the awardee’s representations, awardee did not discuss salary, benefits or location of employment with certain key personnel it proposed, GAO finds, in an advisory opinion, that the protest is meritorious.

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### DECISION

Patriot Contract Services (PCS) challenges the Department of the Navy’s award of a contract to American Overseas Marine Corporation (AMSEA) under request for proposals (RFP) No. N00033-03-R-5556 for the operation and maintenance of nine large, medium speed, roll-on/roll-off ships (LMSR) to move cargo in support of United States military forces worldwide. PCS, the incumbent contractor, filed a protest with our Office in September 2004, challenging various aspects of the procurement, including the assertion that AMSEA’s proposal contained misrepresentations regarding the availability of certain key personnel it proposed.

In December 2004, Patriot withdrew its protest with our Office and filed a similar action with the United States District Court for the Northern District of California. In March 2005, the Court requested that our Office issue an advisory opinion regarding Patriot’s protest. See 4 C.F.R. § 21.11(b) (2005). Our opinion here is issued in response to the Court’s request, and is presented in the same general

format as we normally employ to issue decisions responding to bid protests. As explained below, our Office finds the protest meritorious.

## BACKGROUND

The agency issued RFP No. N00033-03-R-5556 in December 2003, seeking proposals for the worldwide operation and maintenance of nine LMSRs.<sup>1</sup> The solicitation provided that the ships will be maintained at various layberth ports in “reduced operational status,” but requires that the contractor be able to transition the ships to fully operational status within 96 hours. Agency Report, Tab 3, RFP at 8. Offerors were advised that award would be based on the proposal offering the best overall value to the government, as measured against the following evaluation factors: technical, past performance and price.<sup>2</sup>

With regard to the technical evaluation factor, the solicitation established four subfactors, one of which was management organization. Agency Report, Tab 3, RFP, at 135. With regard to the management organization subfactor, the solicitation required each offeror to identify the key personnel being proposed, including proposed port engineers for each layberth port.<sup>3</sup> Agency Report, Tab 3, RFP, at 12, 128. With regard to key personnel, the solicitation required each offeror to submit resumes and signed commitment letters for each individual proposed. Specifically, the solicitation stated:

The offeror is required to submit up-to-date resumes of all “Key Personnel” to be employed in accomplishing the stated requirements . . . .

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<sup>1</sup> The solicitation also provided for operation and maintenance of two other LMSRs; competition for those requirements was set aside for small businesses. Patriot’s protest did not challenge the agency’s actions regarding the set-aside requirements and our recommendation here is limited to the contract regarding the nine LMSRs.

<sup>2</sup> The solicitation provided that the technical factor was more important than past performance, and that the technical and past performance factors combined were more important than price. Agency Report, Tab 3, RFP, at 134-35.

<sup>3</sup> The solicitation advised offerors to “assume six separate layberth locations” and provided, “[t]he Contractor shall employ a minimum of one port engineer per lay berth in support of this contract.” Agency Report, Tab 3, RFP, at 7, 13.

With the resumes of key personnel, the offeror shall submit a letter of commitment from the individual, stating his/her intention on the resultant contract (if awarded to the offeror). Such letters of commitment must be submitted for both current employees, as well as individuals that will accept employment after contract award. The letter of commitment must reflect mutually agreed position, salary, and benefits.

Agency Report, Tab 3, RFP, at 128-29 (emphasis added).

The solicitation provided that “[t]he Contractor agrees to assign to this contract those people identified as key personnel whose resumes were submitted with [its] proposal.” Agency Report, Tab 3, RFP, at 77. Further, the solicitation strictly limited the awardee’s substitution of proposed key personnel, stating: “During the first ninety (90) days of the contract performance period no personnel substitutions by the contractor will be made unless such substitutions are necessitated by an individual’s sudden illness, death or termination of employment.” Id.

Proposals were timely submitted by several offerors, including PCS and AMSEA.<sup>4</sup> AMSEA’s proposal included resumes and commitment letters for six individuals that AMSEA proposed as port engineers. As required by the solicitation, each of the six commitment letters represented that agreement had been reached with respect to salary, benefits, and position; specifically, each letter stated, “I am in agreement with American Overseas Marine with respect to salary, benefits, and position.” Agency Report, Tab 5, AMSEA Proposal, Chap. 3, attach. 3A.

Thereafter, the agency conducted discussions with the offerors, and subsequently requested, received and evaluated final revised proposals. The results of the agency’s evaluation of AMSEA’s and PCS’s final proposals were as follows:

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<sup>4</sup> The other offerors’ proposals are not relevant to resolution of PCS’s protest; accordingly, they are not discussed.

	AMSEA	PCS
Tech. Experience/Capability		
–Ship Maintenance	Exceptional	Exceptional
–Ship Operation	Exceptional	Exceptional
Mgmt. Of Purchasing System	Exceptional	Exceptional
Mgmt. Organization		
–Key Personnel	Very Good	Exceptional
–Organizational Structure	Very Good	Very Good
Mgmt. Systems		
–Property Control	Exceptional	Exceptional
–Quality	Very Good	Exceptional
Small Business Subcontractors	Very Good	Very Good
<b>Overall Technical Rating</b>	<b>Exceptional</b>	<b>Exceptional</b>
<b>Past Performance</b>	<b>Exceptional</b>	<b>Exceptional</b>
<b>Price</b>	<b>\$122,643,747</b>	<b>\$129,209,967</b>

Agency Report, Tab 11, Business Clearance Memorandum, at 5-8.

Although PCS’s technical proposal received higher adjectival ratings regarding two evaluation subfactors—one of which related to key personnel—the agency’s source selection authority determined that AMSEA’s and PCS’s proposals were essentially equivalent with regard to the non-price evaluation factors; accordingly, AMSEA’s proposal was selected for award on the basis of its lower evaluated price.

As discussed above, PCS filed this protest with our Office in September 2004, subsequently withdrew that protest and thereafter filed a similar action in United States District Court. In March 2005, the District Court requested that our Office issue an advisory opinion regarding PCS’s protest.

## DISCUSSION

In its September 2004 protest, PCS challenged the agency’s selection of AMSEA on several bases including an assertion that the agency improperly evaluated AMSEA’s proposed key personnel. Specifically, PCS’s protest noted that immediately after contract award AMSEA placed various employment advertisements for port engineers; therefore, PCS asserted that “AMSEA proposed personnel it did not have.” PCS Protest at 13-14 (Sept. 17, 2004). In pursuing this issue before our Office, PCS subsequently argued that AMSEA, knowingly or negligently, offered to provide employees that it could not reasonably expect to furnish during contract performance, that AMSEA’s misrepresentations were relied upon in the agency’s

evaluation, and that the misrepresentations had a material impact on the evaluation results.<sup>5</sup> PCS Comments on Agency Report (Oct. 28, 2004) at 17-18.

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<sup>5</sup> In addition to challenging AMSEA's proposal regarding key personnel, PCS's protest challenged various other aspects of the agency's evaluation of PCS's and AMSEA's proposals. In light of our conclusion that AMSEA materially misrepresented the commitment of its proposed port engineers, our opinion does not address, in detail, PCS's additional bases for protest. In summary, we found no merit in PCS's other protest allegations and provide the following brief discussion of those matters. PCS's protest generally maintained that AMSEA's experience and capability with regard to ship operation and maintenance should not have been evaluated as favorably as that of PCS, due to PCS's status as the incumbent contractor and its prior work with the specific ships at issue here. However, the solicitation provided for the evaluation of an offeror's experience and capabilities with regard to operating ships "of a similar size and/or type." Agency Record, Tab 3, RFP, at 136. That is, the solicitation's evaluation terms provided that the agency's evaluation of offerors' experience and capabilities was not limited to the particular ships at issue, nor was the agency obligated to evaluate PCS's experience with those ships more favorably than AMSEA's experience with similar ships. Agency Report, Tab 3, RFP, at 136. On the basis of the record presented to our Office, which includes evidence that AMSEA has considerable experience with ships "of a similar size and/or type," we found nothing unreasonable in the agency's evaluation of AMSEA's proposal regarding experience and capability. PCS also protested that the agency improperly evaluated PCS's proposal as "very good" rather than "exceptional" with regard to various subfactors, complaining that, absent identification of specific weaknesses, the agency was obligated to rate PCS's proposal as "exceptional." We disagree. There is no requirement that an offeror receive the highest possible rating just because its proposal does not contain specific weaknesses. See DTH Mgmt. JV, B-283239, Oct. 6, 1999, 99-2 CPD ¶ 68. Our review of the record identified no basis to question the agency's ratings of "very good" rather than "exceptional" with regard to PCS's proposal. Next, PCS's protest challenged the adequacy of the agency's discussions, complaining that, because the agency advised PCS during discussions that its price was "acceptable," PCS "did not offer the most competitive price that it could have." PCS Protest at 16-17. The record shows that, during discussions, the agency specifically advised PCS that its "Costs appear high" with regard to multiple, specifically identified aspects of PCS's proposal. Agency Report, Tab 10. On this record, PCS's assertion regarding the alleged inadequacy of the agency's discussion of proposed costs is simply without merit. Finally, PCS's protest complained that the price model disclosed in the solicitation, on which the agency relied in evaluating offerors' proposed prices, did not accurately reflect the costs that PCS maintains the agency is likely to incur. Since the basis for the agency's price evaluation was clearly stated in the solicitation, and PCS did not challenge the solicitation terms prior to submitting its proposal, its post-award challenge regarding that matter is not timely raised. 4 C.F.R. § 21.2(a)(1). In any event, we see no basis to find the

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At the time PCS withdrew its September 2004 protest in order to file at the U.S. District Court, our protest record did not contain information indicating that AMSEA's proposed port engineers would not perform under the contract. However, following the District Court's March 2005 request for our advisory opinion, counsel for PCS provided our Office with a declaration that AMSEA's president had recently made to the District Court which included the following statements:

35. . . . At the time [AMSEA] submitted its proposal and its revised proposal, AMSEA intended in good faith that its proposed port engineers would serve as AMSEA's port engineers in the event it was awarded the LMSR contract. At those times, it was unaware that any of the six proposed port engineers would subsequently be unavailable.

36. Upon the award of the LMSR contract to AMSEA, AMSEA advertised certain port engineer positions on internet websites. It did so for several reasons. First, the Navy had changed the location of the layberths (the homeport during reduced operational status) of several of the LMSR ships, meaning that . . . several of the proposed port engineers would have had to relocate to different cities if they were to accept the position. Several of them declined to relocate.

Letter from PCS Counsel to GAO (Mar. 31, 2005), attach. 2, ¶¶ 35-36.

Counsel for PCS noted that, in fact, the location of the layberths had not been changed. Id. at 3.

On April 5, 2005, counsel for AMSEA responded, acknowledging that the layberth locations had not been changed, and submitting another declaration of AMSEA's president which included the following statements:

5. . . . Prior to listing the six proposed port engineers in its proposal, AMSEA ascertained their availability for work on the LMSR contract by communicating with them and by obtaining a signed Letter of Commitment from each proposed port engineer. Those Letters of Commitment attested both to the proposed port engineers' agreements to work for AMSEA in the event it would be awarded the LMSR

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(...continued)

agency's evaluation scheme improper. In short, our review of the record identified no basis to question the agency's source selection decision other than AMSEA's misrepresentation regarding the commitment of its proposed port engineers and its failure to comply with the solicitation requirements in that regard.

contract and to their agreements with AMSEA with respect to salary, benefits, and position. . . .

6. Upon the award of the LMSR contract to AMSEA, AMSEA advertised certain port engineer positions on internet websites. In a Declaration filed in the District Court for the Northern District of California, I indicated that these advertisements were triggered, in part, by the changes in the layberth locations (the home ports during reduced operational status) of several of the LMSR ships and the unwillingness of several of the proposed port engineers to relocate. My statement was mistaken. In Amendment 5 to the LMSR Solicitation, the Navy had reserved the right to change the layberth locations of the LMSR ships and I recalled, incorrectly, that several of the proposed port engineers had declined to accept port engineer assignments because of LMSR layberth relocations. I have since rechecked, and determined that the layberths have not changed and, therefore, that layberth relocations were not a cause of the need to obtain several new port engineers.

Letter from AMSEA Counsel to GAO (Apr. 6, 2005), attach., ¶¶ 5-6.

Thereafter, during telephone conference calls with counsel for all of the parties, GAO was advised that five of the six port engineers proposed by AMSEA would not perform under the contract. In light of AMSEA's significant substitution of key personnel, along with the inaccurate representation of AMSEA's president regarding the purported rationale for those substitutions, our Office conducted a telephone hearing during which testimony was obtained from seven witnesses: AMSEA's president; an AMSEA employee who was responsible for preparing AMSEA's proposal; and the five proposed port engineers who will not perform under the contract as proposed. The testimony provided during that hearing disclosed the following information.

Among other things, the AMSEA employee who was responsible for preparing AMSEA's proposal and for communicating with the proposed port engineers regarding their commitment letters testified that, despite the RFP's requirement that commitment letters "must reflect mutually agreed position, salary, and benefits," Agency Report, Tab 3, RFP, at 129, there had been no discussion of salary, benefits, or location of employment with the proposed port engineers. Specifically, this AMSEA employee testified as follows:

GAO: . . . I assume that you asked them [the proposed port engineers] if they would perform as a port engineer under this contract, is that correct?

AMSEA Employee: That's correct.

GAO: Did you identify a particular location that they would be performing at?

AMSEA Employee: No we did not.

....

GAO: . . . [Y]ou didn't talk any specifics about where they would be working? Let me back up, I assume you did talk about salary and things like that?

AMSEA Employee: I did not talk to them about salary nor do I remember it coming up specifically.

....

GAO: And it is your testimony that you were responsible for the proposal and that to your knowledge you did not discuss salary, benefits or the location of their positions with them prior to the submission of the proposal, is that correct?

AMSEA Employee: That's correct.

Hearing Transcript at 58-62.<sup>6</sup>

The subsequent testimony of the proposed port engineers was consistent with the testimony of the AMSEA employee; that is, the five proposed port engineers testified that, prior to award of the contract, there had been no discussion of, nor agreement regarding, salary, benefits or location of employment. Hearing Transcript at 71, 84-85, 92-94, 106-07.

Further, in responding to PCS's assertions regarding the proposed key personnel, AMSEA's president first represented that AMSEA's failure to deliver the personnel proposed was because "the Navy had changed the location of the layberths . . . of several of the LMSR ships, meaning that . . . several of the proposed port engineers would have to relocate to different cities." Letter from PCS Counsel to GAO (Mar. 31, 2005), attach. 2, at ¶¶ 35-36. When it was pointed out that this

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<sup>6</sup> The telephone hearing was recorded on audiotape, copies of which were made available to counsel for each of the parties; the original audiotapes are part of GAO's protest record in this matter. Counsel for PCS subsequently had its copy of the audiotape record transcribed, and provided copies of that transcription to GAO and to counsel for the agency and the intervenor. The above citation is to the transcribed version of the hearing, which is also part of GAO's protest record in this matter.



representation appeared to be inaccurate, AMSEA's president acknowledged that his explanation for AMSEA's substitution of key personnel was "mistaken," but continued to assert that the commitment letters had been submitted in good faith, and that they reflected "agreements with AMSEA with respect to salary, benefits, and positions." Letter from AMSEA Counsel to GAO (Apr. 6, 2005), attach., ¶¶ 5. Based on the testimony provided during our Office's telephone hearing, it is clear that the revised representations of AMSEA's president in this regard are also inaccurate.

In Aerospace Design & Fabrication, Inc., B-278896, B-278896.2 et al., May 4, 1998, 98-1 CPD ¶ 139, our Office addressed similar facts. There, the awardee stated in its proposal that it had received commitments from proposed key personnel to work on the contract. However, at a hearing conducted by our Office in connection with that protest, the awardee's representatives acknowledged that there had been no discussion between the awardee and the proposed managers regarding salary, benefits, or the particular position to be filled. Id. at 5-6. In sustaining that protest, we noted that an agreement to work for a successful offeror, without reaching agreement on salary and benefits, is no more than a promise to negotiate for employment and is not a binding commitment. Id. at 7. Similarly, we have stated that "salary and benefits are generally major considerations in accepting employment and an agreement contingent upon these factors is not, we think, the equivalent of a firm commitment to accept the position offered." Scientific Mgmt. Assocs., Inc., B-238913, July 12, 1990, 90-2 CPD ¶ 27 at 7.

Here, based on the record discussed above, we conclude that AMSEA made material misrepresentations in its proposal regarding compliance with the solicitation's requirements for proposed key personnel. Further, because the solicitation expressly required agreement regarding salary, benefits, and position, it is clear that the agency relied on AMSEA's misrepresentations in evaluating AMSEA's proposed key personnel under the key personnel evaluation subfactor as "very good" and "highly qualified." Agency Report, Tab 11, Business Clearance Memorandum, at 5. Finally, in light of the relatively close evaluated ratings of AMSEA's and PCS's proposals and their proposed prices, we conclude there is a substantial chance that AMSEA's misrepresentations regarding its proposed key personnel were material to the agency's source selection decision.<sup>7</sup>

On the record presented to our Office, we conclude that PCS's protest is meritorious.

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<sup>7</sup> We believe the importance to the source selection decision of these commitment letters, and the concomitant assurance that the key personnel who were proposed and evaluated will actually perform under the contract, is further indicated by the agency's inclusion of the solicitation provision, quoted above, which strictly limits key personnel substitutions during the first 90 days of contract performance to instances of "sudden illness, death or termination of employment." Agency Report, TAb 3, RFP, at 77.

We recently stated that an offeror's submission of a proposal containing material misrepresentations should disqualify the proposal from consideration for award, noting that the integrity of the procurement process demands no less. ACS Gov't Servs., Inc., B-293014, Jan. 20, 2004, 2004 CPD ¶ 18 at 11; see also Informatics, Inc., B-188566, Jan. 20, 1978, 78-1 CPD ¶ 53 at 13. Accordingly, if our Office were resolving the protest, we would sustain it and recommend that AMSEA's contract be terminated and that a contract be awarded to PCS if otherwise appropriate.

Anthony H. Gamboa  
General Counsel