



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: C.W. Over and Sons, Inc.

File: B-274365

Date: December 6, 1996

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for the agency.

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GAO, participated in the preparation of the decision.

DIGEST

1. Federal Acquisition Regulation requirement that the value of an indefinite quantity contract be more than nominal does not apply to individual tasks under a contract that includes a provision guaranteeing that minimum contract value will be \$800,000.
2. Solicitation requirement that contractor perform certain tasks that cannot be definitively priced prior to award does not create unreasonable risk where such potential tasking requirements are minimal and the price for such work will be the subject of negotiation between the contractor and the agency.
3. Where solicitation lists prices for more than 25,000 tasks, protester's identification of a small number of prices that may not reflect the most recent actual costs does not require canceling the solicitation because offerors' proposed coefficients are intended to reflect the risk associated with such price variations.

DECISION

C.W. Over and Sons, Inc. (Over) protests the provisions of request for proposals (RFP) No. MDA904-96-R-0702, issued by the Maryland Procurement Office, National Security Agency (NSA), to perform a variety of construction, renovation, and repair services. The solicitation contemplates award of an indefinite delivery/indefinite

quantity contract under which the agency will issue delivery orders for specific tasks. Over, the incumbent contractor, asserts that the solicitation contains various flaws.

We deny the protest.

BACKGROUND

Over is currently performing a contract under which it provides construction services to NSA which Over describes as "identical" to the services sought under the protested solicitation. Over's current contract was awarded in 1994; there are two remaining options, each for a 1-year period, which the agency does not intend to exercise due, in part, to the agency's belief that it can reduce its costs through competition.

Prior to the agency's issuance of this solicitation, Over requested the agency to exercise the remaining options of its current contract. By letter to the agency dated July 3, 1996, Over stated:

The purpose of this letter is to offer you an unsolicited proposal In return for an agreement from you that the government will exercise the remaining two options of your contract with my firm, I will relocate my warehouse and project management functions off of Ft. Meade and into facilities under my control^[1] without passing these additional costs I am incurring to the government. At the same time, I am willing to enter into a discussion of adjusting my coefficients contained in these two remaining option[s] to achieve some reduction in their cost to you."

Declining to accept Over's offer, the agency issued the solicitation on July 5, 1996, and, as in Over's current contract, incorporated a unit price book (UPB) containing more than 25,000 line items of pre-priced construction tasks.² The prices in the UPB are calculated to reflect the standard direct labor costs and materials for each task, but not the contractor's overhead and profit. The solicitation calls for offerors to propose various fixed coefficients reflecting the offerors' overhead and profit; the coefficients will be applied to the UPB prices to establish contract prices for the

¹These were actions the agency had previously sought.

²As Over explains, "Very few activities involved with construction projects are new or experimental. Most have been repeated countless time[s] and the time and level of effort necessary to complete individual activit[ies] is a known fact."

listed tasks.³ Regarding tasks not listed in the UPB, the solicitation references various Means Cost Data publications,⁴ from which the levels of effort necessary to perform unlisted tasks may be derived, stating that contract prices for such non-prepriced items will be derived from the Means Cost Data publications, applicable Davis-Bacon Act wage rates, and the contractor's coefficients.

The solicitation provides that proposals will first be evaluated for technical acceptability, and that award will be made on the basis of the technically acceptable proposal offering the best value to the government, considering price and past performance, and that price will be the most significant factor. Consistent with the requirements of the Federal Acquisition Regulation (FAR) § 15.608(a)(2)(iii) (FAC 90-31), section M also states that "firms lacking relevant past performance history shall receive a neutral evaluation for past performance."

The deadline for submission of proposals was 3 p.m. on August 28, 1996. This protest was filed at 10 a.m. on that date.

DISCUSSION

Over first protests that the solicitation violates FAR § 16.504(a)(2) which states: "To ensure that the [indefinite-quantity] contract is binding, the minimum quantity must be more than a nominal quantity." Although RFP section H.25 states: "The minimum contract value which will be required and paid under this contract is \$800,000," Over refers to an RFP provision which establishes a nominal value (\$0.01) as the minimum for any individual delivery order, arguing that this provision violates the FAR requirement.

An indefinite quantity contract is binding only if the buyer agrees to purchase a guaranteed minimum quantity of goods or services. Mason v. United States, 615 F.2d 1343 (Ct. Cl.1980). However, individual delivery orders issued under such a contract do not have to be in some minimum amount in order to be binding. See Sunbelt Properties, Inc., B-249307, Oct. 30, 1992, 92-2 CPD ¶ 309; International Creative and Training, Ltd., B-245379, Jan. 6, 1992, 92-1 CPD ¶ 26. Here, there is a

³Offerors were required to provide co-coefficients for the base year and each option year applicable to the following categories of work: normal working hours; overtime hours; small requirements; and "fly-away services" (services performed outside a 50-mile radius of Fort Meade, Maryland).

⁴Section VII of the statement of work referenced the Means Facilities Construction Cost Data, 53rd Annual Edition; the Means Mechanical Cost Data, 18th Annual Edition; the Means Plumbing Cost Data, 18th Annual Edition; and the Means Electrical Cost Data, 18th Annual Edition.

guaranteed minimum value of \$800,000 for the base contract period. FAR § 16.504(a)(2) requires no more.

Over next asserts that the solicitation provisions regarding non-prepriced items render the procurement defective. Over complains that the nature of non-prepriced work is "unpredictable, unknown and risky" and maintains that, due to inclusion of these items, the solicitation lacks sufficient certainty for offerors to compete.⁵

The agency first responds that the quantity of non-prepriced work contemplated under this solicitation is minimal. Under Over's current contract, non-prepriced tasks have made up approximately 15 percent of the total contract value.⁶ The agency explains that these items have been added to the UPB in the current solicitation, thereby substantially decreasing the level of non-prepriced tasking reasonably anticipated. The agency also notes that, under the terms of the solicitation, the contract price for any non-prepriced items will be subject to negotiation between the agency and the contractor. Specifically, section H.18 of the solicitation provides that the contractor will prepare a pricing proposal for non-prepriced tasks based on its own inspection of the work site as well as the Means Cost data, applicable Davis-Bacon Act wage rates, and its coefficients. On the basis of these facts, the agency maintains that the risk flowing from non-prepriced tasks under the solicitation is not excessive.

A solicitation need not be so detailed as to remove every uncertainty from the minds of prospective offerors or eliminate every performance risk for the contractor. LBM, Inc., 70 Comp. Gen. 493 (1991), 91-1 CPD ¶ 476. Bean Dredging Corp., B-239952, Oct. 12, 1990, 90-2 CPD ¶ 286; AAA Eng'g & Drafting, Inc., B-236034, Oct. 31, 1989, 89-2 CPD ¶ 404; I.T.S. Corp., B-228919, Nov. 25, 1987, 87-2 CPD ¶ 521. As risk inheres in any contract, offerors are expected to use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. See Custom Env't'l Serv., Inc., 70 Comp. Gen. 184 (1991), 91-1 CPD ¶ 38; McDermott Shipyards, Div. of McDermott, Inc., B-237049, Jan. 29, 1990, 90-1 CPD ¶ 121.

⁵In pursuing this protest, Over repeatedly refers to Army FAR Supplement (AFARS) Subpart 17.91 which governs the Army's use of job order contracts, arguing that NSA's solicitation violates the AFARS. As the agency points out, NSA is not subject to the AFARS. Accordingly, to the extent Over's protest asserts a violation of that regulation, it fails to state a valid basis for protest.

⁶This amount includes tasking requirements that have been ordered repeatedly. As the agency points out, a task is truly non-prepriced only the first time it is ordered.

Over's current contract includes similar provisions regarding non-prepriced items. As discussed above, by letter dated July 3, 1996, Over expressly offered to make certain concessions to the agency, including a reduction of its coefficients, if, rather than re-competing the requirements, the agency agreed to exercise the remaining contract options. Over does not explain how the nature of the non-prepriced work can be so "unpredictable, unknown and risky" as to preclude meaningful competition under the protested solicitation when it forms a part of a contract that Over is requesting the agency to extend--at a reduced price from that currently in effect. In any event, in light of the limited amount of non-prepriced work to be performed, along with the fact that such work will be the subject of negotiation between the parties, we see no basis to conclude that the level of risk in this solicitation is unacceptable.

Over next challenges a provision in the statement of work (SOW) regarding scheduling of work. Section VI(d) of the SOW provides that, prior to award of individual delivery orders, the contractor will submit a critical path method (CPM) schedule and states that such schedules are generally based on a production rate of 600 square-feet per day. Over complains that this production rate may not be reasonable for smaller projects.

Prior to Over's protest, the agency responded to various requests for clarifications, amending the solicitation to incorporate the answers provided. A question regarding the appropriate production rate for purposes of creating a schedule was raised and responded to by the agency. Specifically, the agency stated that, while a 600 square-foot production rate would normally be applicable to large projects,⁷ the production rate applied to any given project could vary, depending on the facts and circumstances of the project.

As noted above, an agency need not identify with absolute certainty all aspects of contract performance. LBM, Inc., *supra*; Bean Dredging Corp., *supra*. The determination of an agency's minimum requirements and the best method of accommodating those requirements are primarily within the agency's discretion, and we will not question the exercise of that discretion unless the record shows it to be unreasonable. CardioMetrix, B-257408, Aug. 3, 1994, 94-2 CPD ¶ 57.

Here, again, the provisions regarding the production rate in this solicitation are essentially the same as the terms under which Over's current contract is being performed. Again, we are unpersuaded that the alleged lack of precision regarding the basis for establishing a schedule creates an unacceptable level of risk when

⁷Section VIII of the SOW specifically identified the characteristics of "small requirements."

Over has repeatedly requested that the agency extend its current contract with the same provision.

Over next complains that some of the prices in the UPB for this solicitation are different from the prices for similar tasks performed under similar Army contracts.⁸ Over asserts that the UPB for this solicitation should be revised to reflect the Army price list.

The agency states that it conducted a market survey prior to issuing this solicitation but notes that, due to the number of items priced in the solicitation, it cannot guarantee that each and every one of the 25,000 items reflects the most recent cost data. The agency maintains that providing offerors an opportunity to submit coefficients to be applied to the prices in the UPB effectively protects the offerors from pricing disparities.

We find no merit in Over's challenge to this solicitation based on the fact that the NSA price list is not identical to the Army's price list. Over has questioned approximately 200 of the 25,000 items. Further, as the agency notes, the appropriate price for any given item will vary based on a variety of every-changing factors. It is precisely this fluctuation that the offerors' proposed coefficients are intended to address.

Finally, Over challenges the solicitation provision regarding the evaluation of offerors' past performance. Over states:

"C.W. Over has no idea what the following sentence means: 'Vendors lacking relevant past performance history will receive a neutral assessment for past performance.' How is past performance, the principle evaluation criterion next to price, to be evaluated when a 'neutral' rating can be given no relevant history?"

As the agency points out, FAR § 15.608(a)(2)(iii) provides, "Firms lacking relevant past performance history shall receive a neutral evaluation for past performance." The solicitation language, and the FAR provision it reflects, clearly provides that

⁸In pursuing this protest, Over complains that NSA refers to the contract solicited here as a "delivery order construction contract," while the Army and its applicable regulations refer to a substantially similar contract as a "job order contract." We view these arguments as extensions of Over's assertions, discussed above, that NSA is violating the AFARS. Since NSA is not bound by the Army's terminology or its regulations, we do not consider this issue further.

proposals submitted by offerors lacking relevant past performance history will neither be penalized nor credited with regard to the past performance factor. See, e.g., Excalibur Systems, Inc., B-272017, July 12, 1996, 96-2 CPD ¶ 13.

The protest is denied.

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