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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Day Zimmermann Hawthorne Corporation

File: B-287121

Date: March 30, 2001

Joan K. Fiorino, Esq., John C. Dulske, Esq., and Valinda J. Astoria, Esq., Thurman & Phillips, for the protester.
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DIGEST

1. Protest that contracting agency improperly failed to include the clause at Federal Acquisition Regulation § 52.250-1, "Indemnification Under Public Law 85-804," in solicitation that includes requirements for ordnance handling and support services is denied where the record shows that the Navy's decision was reasonable.

2. Protest that solicitation that includes requirements for ordnance handling and support services imposes inordinate and unjustified risks that unduly restrict competition is denied where the solicitation provided offerors with extensive detail in order to inform them about any risks that might exist in the performance of the contract and imposed numerous safety requirements that limit those risks, and where competition does not appear to have been unduly restricted; the mere presence of risk in a solicitation does not make it improper.

DECISION

Day Zimmermann Hawthorne Corporation (DZHC) protests the terms of request for proposals (RFP) No. N00244-00-R-0021, issued by the Department of the Navy to obtain ordnance handling operations support and specific base operations support services for the Naval Weapons Station Seal Beach, California and its detachment in Fallbrook, California. The procurement is being conducted pursuant to Office of Management and Budget (OMB) A-76 cost comparison guidelines. DZHC contends that the solicitation improperly fails to include the clause at Federal Acquisition Regulation (FAR) § 52.250-1, "Indemnification Under Public Law 85-804," and imposes inordinate and unjustified risks that unduly restrict competition. DZHC also

contends that the Navy will have an unfair competitive advantage during the cost comparison.

We deny the protest.

These services are required to support Seal Beach's mission as the primary retail ammunition supply point for the West Coast. The selected service provider is to provide responsive, reliable, affordable, and cost-effective ammunition receipt, segregation, storage, and issue operations at Seal Beach and Fallbrook, as well as reliable and cost-effective facilities operation and maintenance and other specified support services to Navy and other defense and federal tenants at these installations. Among the services to be provided are facilities operation, maintenance and repair; transportation; bachelor quarters operation and maintenance; administrative support; Navy Occupational Safety and Health program support; environmental program support; contingency preparedness; and ordnance handling operations. The Navy plans to select the best value proposal for the cost comparison with the in-house management plan. If the results of the cost comparison favor performance by contract, the Navy anticipates the award of a fixed-price contract with award fee provisions to the private contractor.

The ordnance handling operations function includes receiving, segregating, storing, repackaging, moving, lifting, transporting, and issuing conventional ammunition, mines, torpedoes, missiles, and components at the Seal Beach and Fallbrook installations. RFP attach. 1, annex 10, § 10.1.1. The Navy expects the service provider to use to full advantage the equipment and facilities provided by the government to offer the safest and most efficient ordnance handling services possible. In this regard, the RFP required that these services be conducted in accordance with a wide range of safety-related guidance and directives, and set forth numerous specific criteria and standards for their performance. Id. §§ 10.1.3, 10.1.10.1. Among other things, since any site where ordnance is handled or stored requires large surrounding areas free of inhabited structures and other facilities where human life might be endangered, the service provider was to ensure that all handling, storage, movement, and shipment of ordnance was conducted within each station's explosive safety quantity-distance limits, i.e., safety zones. Id. § 10.1.3; RFP § C.1.5.1. The RFP cautioned that the services will rely heavily on knowledgeable, experienced individuals capable of identifying potential safety risks, assessing the immediate need, and applying all actions necessary to control and eliminate the danger and perform the mission, and established minimum requirements for proposed ordnance handling operations personnel. RFP at 19-21. The RFP included extensive historical workload data associated with these services in order to assist contractors in preparing their proposals. RFP attach. 1, annex 10.

Since the installations encompass environmentally and historically sensitive lands, the service provider is required to comply with all applicable federal, state, and local environmental laws and statutes, and with all Department of Defense and Navy

prescriptive environmental requirements. RFP § C.1.5.3. The RFP included a summary listing of the applicable environmental laws, statutes, and policy requirements. The RFP advised potential offerors that operations in these sensitive areas were generally subject to assessment, review, and restrictions. Id.

These services are to be provided on government installations. As a result, the RFP included the clause at FAR § 52.228-5, "Insurance-Work on a Government Installation." Pursuant to that clause, the RFP set forth the kinds and minimum amounts of insurance required for the services to be provided here. In addition to general liability coverage for bodily injury, the RFP required automobile and aircraft liability insurance for bodily injury and property damage associated with performance of the contract. The solicitation also incorporated the clauses at FAR §§ 52.245-2 (Alternate 1) and 52.246-25, which limit a contractor's liability for loss, destruction of, or damage to government property.

Amendment No. 3, issued November 28, incorporated questions and answers from prospective offerors. In response to Question No. 56, "Will the Navy provide indemnification to the Service provider to cover explosive and environmental incidents?," the Navy replied, "No."

On December 20, DZHC filed a timely agency-level protest in which it argued that the Navy was required to incorporate FAR § 52.250-1, "Indemnification Under Public Law 85-804," into this solicitation. This clause provides that it is to be inserted in contracts whenever the approving official determines that the contractor shall be indemnified against "unusually hazardous or nuclear risks." DZHC argued that the solicitation's allocation of risk subjected contractors to inordinate and unjustified risks that unduly restricted competition, and that the in-house management plan will have an unfair competitive advantage during the cost comparison. Proposals were submitted during the pendency of the agency-level protest. The Navy subsequently denied DZHC's protest and the firm filed the same protest here.

DZHC argues that the nature of this procurement requires the Navy to incorporate FAR § 52.250-1 into this solicitation. DZHC contends that the ordnance handling support services to be provided here are "unusually hazardous" because they involve the handling and transportation of explosives on installations which encompass environmentally and historically sensitive locations, and asserts that the Navy declined to incorporate the clause based upon its overly restrictive definition of the term "unusually hazardous." We do not agree.

Public Law No. 85-804, codified at 50 U.S.C. § 1431-35 (Supp. IV 1998), grants to the President the authority to authorize any agency which exercises functions in connection with the national defense to enter into contracts or into amendments or modifications of contracts, and to make advance payments, without regard to other

applicable legal provisions whenever such action would facilitate the national defense.[1] 50 U.S.C. § 1431. The legislative history of the statute indicates that it may also be used as the basis for making indemnity payments under certain government contracts, the so-called "residual powers." ECR Current Materials at 1005, 1021. The legislative history explains that "[t]he need for indemnity clauses in most cases arises from the advent of nuclear power and the use of highly volatile fuels in the missile program. The magnitude of the risks involved under procurement contracts in these areas have rendered commercial insurance either unavailable or limited in coverage." S. Rep. No. 85-2281, at 3 (1958), reprinted in 1958 U.S.C.C.A.N. 4043, 4045.

Part 50 of the FAR implements Public Law No. 85-804, and Subpart 50.4, "Residual Powers," governs the indemnification authority. Various provisions therein set forth standards for use of the indemnification clause and describe the mechanism of the indemnification process. Pursuant to FAR § 50.403-3, the contracting officer is to insert the clause at § 52.250-1, "Indemnification under Public Law 85-804," in contracts whenever the approving official determines that the contractor shall be indemnified against "unusually hazardous or nuclear risks."

As a threshold matter, we agree with the Navy that these indemnification provisions are couched in terms of a post-award environment, when an actual contract exists. However, we do not read the statutory or regulatory language to prohibit a solicitation's inclusion of FAR § 52.250-1 or language indicating that the government anticipates providing for indemnification, such as in solicitations for goods or services for which indemnification has historically been granted. See Air Force Indemnification Guide for Unusually Hazardous or Nuclear Risks, July 7, 1997, Revision A (Apr. 1, 1998) at 3, 6, at <www.safaq.hq.af.mil/contracting/toolkit/part50>. Here, DZHC has alleged that the Navy's decision not to include this indemnification provision resulted in a defective solicitation. In such cases, since the decision whether to include an indemnity provision is within an agency's discretion, Dames & Moore, B-257139, Aug. 30, 1994, 1994 U.S. Comp. Gen. LEXIS 711 at *5, our review is limited to considering whether that decision was reasonable. See B&P Refuse Disposal, Inc., B-253661, Sept. 16, 1993, 93-2 CPD ¶ 177 at 2-3. Our review of the record shows that the Navy's decision here was, in fact, reasonable.

The Navy states that, while the handling or physical movement of ordnance may be viewed as "hazardous," it is not "unusually hazardous" as contemplated by Public Law No. 85-804. The Navy states that no nuclear materials are involved; the extensive environmental and safety standards set forth in the solicitation minimize the risks of accidental incidents; performance will take place on government installations; and there is no history of incidents requiring indemnification for catastrophic events. The Navy's decision here is consistent with prior practice. The

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[1] A discussion of the origins and uses of Public Law 85-804 can be found in the Extraordinary Contractual Relief (ECR) Reporter Current Materials at 1003-1029.

Deputy Counsel to the Assistant Secretary for the Navy for Research, Development and Acquisition states that the Navy has not provided indemnification for non-nuclear hazardous work, with the exception of repairing the U.S.S. Cole after it was the target of a terrorist explosion. Agency Supplemental Report attach. 1. This statement is supported by other information in the record showing that the Navy historically authorizes Public Law 85-804 clauses in contracts for the procurement of nuclear-powered vessels, missiles, and components or subcomponents, and for disposal of low-level nuclear waste. Environmental Cleanup: Defense Indemnification for Contractor Operations, (GAO/NSIAD-95-27, Nov. 1994) at 4-5.

As a general matter, this type of relief has been associated with claims of death, injury, or property damage arising from "nuclear radiation, use of high energy propellants, or other significant risks not covered by a contractor's insurance. Items procured under these types of contracts generally relate to nuclear-powered vessels, nuclear missiles, experimental nuclear energy work, explosives, or performance in hazardous areas." ECR Current Materials at 7980-81. DZHC's reliance on the fact that the clause has been used in explosives-related contracts ignores the evidence in the record showing that these have been contracts for the operation and management of Army ammunition plants. Environmental Cleanup: Defense Indemnification for Contractor Operations, supra, at 2, 4; "Public Law 85-804 Indemnification," Army Material Command Office of Command Counsel Newsletter 99-2, at <www.amc.army.mil.amc/command_counsel/newsletter_97.html>; see also Thiokol Corp., ACAB No. 1240 (Feb. 2, 1993), 4 ECR ¶ 71. DZHC has made no effort to show that the "unusually hazardous" risks inherent in the operation and management of an ammunition plant are also present in the provision of ordnance handling and support services. Moreover, DZHC has not rebutted evidence provided by the Navy to show that other Navy and DOD installations have also declined to include indemnification provisions in contracts for ordnance handling and support services. Under the circumstances, we cannot conclude that the Navy unreasonably decided that this procurement posed no "unusually hazardous" risks. Since the presence of such risks is a prerequisite for the inclusion of the indemnification clause, we deny DZHC's protest on this basis.

DZHC argues that the RFP imposes inordinate and unjustified risks on the successful private contractor, which unduly restricts competition. In so arguing, DZHC first contends that the Navy expects offerors to purchase coverage for explosive and/or environmental incidents, but does not clearly set forth this expectation because the general liability insurance required by the solicitation does not ordinarily include such coverage.

Nothing in the solicitation suggests that the Navy intended to require offerors to purchase coverage for explosive and/or environmental incidents, and the Navy states that it had no such intention. The Navy explains that there is no history of explosive or environmental incidents that would suggest such a requirement was necessary, and points to the solicitation's imposition of numerous explosives and environmental

safety requirements on the contractor that are intended to limit the possibility of such incidents. The Navy explains that the risks contractors choose to bear beyond the general liability insurance coverage required by the solicitation are a matter of their business judgment, and that it would be inappropriate to impose such a requirement when the premiums charged can vary greatly depending on each offeror's unique situation.

DZHC contends that, absent a requirement for this additional coverage and attendant liability limitations, there is no reasonable limitation on the contractor's risk. In this regard, DZHC asserts that the RFP failed to provide sufficient detail to reasonably put potential offerors on notice about the extent, depth, and breath of the potential liability facing the contractor. As a result, competition will be restricted and offers will be submitted at widely divergent prices.

An agency's decision not to include a solicitation requirement for a particular type of insurance is not unduly restrictive of competition where, as here, the agency reasonably determines that such insurance is not necessary to protect the government's interests. See McNamara-Lunz Vans & Warehouses, Inc., B-256848, Aug. 3, 1994, 94-2 CPD ¶ 56 at 3-4. Here, unlike in the case it cites in support of its position, BMAR & Assocs., Inc., B-281664, Mar. 18, 1999, 99-1 CPD ¶ 62, the RFP does provide reasonable limitations on a contractor's risks that led the Navy to believe additional coverage was not warranted. The solicitation provides extensive detail about the services to be provided, imposed voluminous guidance in the form of regulations and directives, set forth numerous criteria and performance standards, described strict personnel qualification requirements, allowed for site visits, and provided extensive historical workload data. All of this information combined to provide offerors with ample detail to put them on notice about the extent, depth, and breadth of the potential liability that might face them, and to limit that liability. Beyond that, offerors were free to limit their own risk by purchasing additional coverage using their business judgment based upon their unique situations and risk-tolerance levels.

As regards the risk of liability without insurance, the mere presence of risk in a solicitation does not make the solicitation inappropriate or improper. Tracor Jitco, Inc., B-220139, Dec. 24, 1985, 85-2 CPD ¶ 710 at 4-5; see also Aalco Forwarding, Inc., et al., B-277241.8, B-277241.9, Oct. 21, 1997, 97-2 CPD ¶ 110 at 22-23. It is within the agency's discretion to offer for competition a proposed contract that imposes maximum risks on the contractor and minimum burdens on the agency. Tracor Jitco, Inc., supra, at 5. DZHC does not rebut the Navy's assertion that [DELETED] contractors[2] that usually compete for and perform this type of work submitted proposals here, which suggests that the solicitation was not so burdensome as to preclude competition. While it is true that [DELETED] prices are [DELETED], we

[2] [DELETED]

have no basis to attribute this [DELETED] to a difference in [DELETED] costs for insurance coverage.

DZHC finally argues that the Navy will have an unfair competitive advantage during the cost comparison because private offerors must include costs for the coverage of explosive and/or environmental incidents, but the in-house management plan need not include such costs.

Again, with respect to the competition between private offerors, there is no requirement to include such costs. Offerors were free to include such costs, or not, based upon their business judgment. With respect to the competition between the proposal selected for the cost comparison and the in-house management plan, the Navy notes that since the government always enjoys the benefits of being self-insured, OMB Circular No. A-76 mandates that certain adjustments be made to the in-house estimate to take into consideration the stated requirements imposed on the contractor. See, e.g., OMB Circular No. A-76, part II, chapt. 2.D.7. The Navy asserts that its estimate, which remains sealed, has accounted for such an offset. Since the Navy has not yet selected the best value proposal or completed the cost comparison, any challenge by DZHC to the anticipated cost comparison is premature. See ITT Fed. Servs. Corp., B-253740.2, May 27, 1994, 94-2 CPD ¶ 30 at 14; Del-Jen, Inc., B-218136, Feb. 27, 1985, 85-1 CPD ¶ 250 at 1-2.

The protest is denied.

Anthony H. Gamboa
General Counsel