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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Keystone Ship Berthing, Inc.

File: B-289233

Date: January 10, 2002

Lars E. Anderson, Esq., and Paul N. Wengert, Esq., Venable, Baetjer & Howard, for the protester.
Daniel W. Wentzell, Esq., and Sean M. Costello, Esq., Department of the Navy, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where layberth services are critical to maintaining the mission readiness of ships, the agency reasonably included in the solicitation a risk allocation clause that serves as an incentive to the contractor to anticipate contingencies and to act in a manner that will minimize any disruptions in contract performance.

DECISION

Keystone Ship Berthing, Inc. (KSB) protests the "reduction in contract" clause included in request for proposals (RFP) No. N00033-01-R-5300, issued by the Department of the Navy, Military Sealift Command (MSC), for fixed-price, per diem layberth services for seven Large Medium Speed Roll-On, Roll-Off (LMSR) government-owned, contractor-operated vessels that provide sealift capacity for unit equipment, including vehicles and rotary wing aircraft, in support of Army divisions and other units. The LMSRs are normally maintained at a reduced operating status at layberths for extended periods until deployed. KSB maintains that the RFP's reduction in contract clause is directly contrary to, and in effect nullifies, provisions in the Federal Acquisition Regulation (FAR) addressing post-award contract administration matters.

We deny the protest.

The RFP, issued on July 10, 2001, included the following clause:

> **H-3 REDUCTION IN CONTRACT**
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> (a) In the event that the layberth becomes unfit for the safe berthing of the vessel, or the Contractor becomes unable to control access to or security of the facility for any reason not due to the fault of the Government or the Government's contractors, or in the event the contractor fails to maintain the facility to the standards required by the terms of this contract, the per diem rate specified in Section B shall be reduced for each day that the facility is unfit or the Contractor has failed to comply with requirements set forth above and elsewhere in this contract, by an amount to be determined by the Contracting Officer to reflect the reduced value of the services provided under this contract or to reflect the reduced value of the facility to the Government. In no event will the amount of the reduction exceed the contractor's per diem as specified in Section B of this contract. In the event that the pier becomes unsafe or unusable and the Government is required to move the vessel(s) to a safe berth, not due to the fault of the Government or the Government's contractors, payment of the per diem rate specified in Section B of this contract shall cease entirely until such time as the pier becomes safe and the vessel is able to resume layberth at the pier. All costs associated with such a move, including the cost of the replacement layberth shall be for the account of the Contractor.

RFP at 46.

KSB, which is currently providing layberth services to MSC in Baltimore, Maryland, under a contract containing clause H-3, argues here that clause H-3 is directly contrary to, and in effect nullifies, the termination for default clause at FAR § 52.249-8(c), which provides that "the [c]ontractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the [c]ontractor."[1] FAR § 52.249-8(c) lists nine examples of causes beyond the control and without the fault or negligence of the contractor that would excuse the contractor's failure to perform; these examples are as follows: acts of God or of the public enemy; acts of the Government in either its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes, freight embargoes; and unusually severe weather. KSB maintains that under clause H-3, MSC will be able to monetarily penalize a

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[1] KSB also argues that clause H-3 is directly contrary to, and in effect nullifies, the termination for convenience clause at FAR § 52.249-2 and the changes clause at FAR § 52.243-1.

contractor for occurrences which are beyond the control and without the fault or negligence of the contractor and which would otherwise excuse a contractor's failure to perform under the FAR termination for default clause. Hearing Transcript (Tr.) at 15. KSB believes that the RFP's reduction in contract clause is unduly burdensome on competition since it requires a contractor to assume the risk of nonperformance under circumstances that would otherwise excuse a contractor from having its contract terminated for default.

The determination of the needs of the government and the best method of fulfilling those needs is primarily the responsibility of the contracting agency. We will not question the agency's determination unless it is shown to be unreasonable. Tracor Jitco, Inc., B-220139, Dec. 24, 1985, 85-2 CPD ¶ 710 at 4.

At the hearing, the contracting officer explained that a layberth service contract supports MSC's surge mission, that is, "when a balloon goes up and there's a crisis somewhere in the world that requires military action or potential military action, . . . these ships have so many days to get underway, . . . and they load up with all types of equipment, ammunition, aircraft, whatever supports Army units." Tr. at 10. The contracting officer stated that a layberth service contract is vital to supporting the readiness posture of the ships, specifically, that "ships [cannot be] in a readiness posture without well-functioning layberth service contracts," and that if a layberth becomes inoperable for any reason, this would detrimentally affect mission requirements. Tr. at 11.

In light of the criticality of layberth services for purposes of maintaining the mission readiness of ships--a matter not meaningfully disputed by KSB--the agency explained that the RFP's reduction in contract clause has been included in solicitations for layberth services for approximately 12 years, basically as an incentive to the contractor to anticipate contingencies and to act in a manner that will minimize the duration of any disruptions in contract performance, even where the circumstances causing a disruption were not the result of the contractor's fault or negligence. Tr. at 18, 27-29.[2] In what he characterized as "temporary" or "interim" circumstances,

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[2] In the approximate 12-year period that clause H-3 has been included in layberth service contracts, the contracting officer could not recall any circumstances where clause H-3 had been invoked to penalize an innocent offeror. Tr. at 19, 24-25. In fact, the contracting officer could remember only one instance where MSC considered, but ultimately decided against invoking clause H-3 because the government, not the contractor, was the primary cause of the disruption in the performance of the layberth services. Tr. at 19. (This example is consistent with the contracting officer's representation that clause H-3 would not be invoked if the circumstances leading to a contractor's inability to perform were caused by the government. Tr. at 47.) In addition, under its current layberth services contract in Baltimore, KSB reports that the agency has never invoked clause H-3. Tr. at 24.

where the layberth is not "total[ly]" out of commission, the contracting officer explained that it would be administratively less burdensome to invoke clause H-3 and to assess per diem contract reductions for a limited period of time when layberth services are not being provided by the contractor than to terminate the contractor for default, since the agency still requires these critical services and intends for the contractor to do whatever is necessary (including securing replacement layberth facilities) in order to continue to provide MSC with the services contemplated by the RFP. Tr. at 29-30, 46-49. According to the contracting officer, only if the contractor's failure to perform is "permanent" would the agency proceed to terminate the contract. Tr. at 48-50.

In addressing KSB's specific argument that clause H-3 is unduly burdensome on competition, requiring a contractor to assume the risk of nonperformance under circumstances that would otherwise excuse a contractor from having its contract terminated for default, MSC maintains that the remedies for nonperformance available to the government are not circumscribed by the FAR termination for default clause. Tr. at 57. Pointing to FAR § 52.249-8(h), which provides that "[t]he rights and remedies of the Government in this [termination for default] clause are in addition to any other rights and remedies provided by law or under this contract," (emphasis added), the agency states that it is "seeking to bargain for additional remedies when there's not a default." Tr. at 55. In other words, MSC maintains that clause H-3 is not inconsistent with the FAR termination for default clause, but rather provides under the terms of the contract for additional remedies necessary for the agency to satisfy its requirements for critical layberth services. Tr. at 57. Accordingly, it is MSC's position that where the RFP sets forth how risks will be allocated between the government and the contractor, a potential contractor can intelligently decide whether, in the exercise of its business judgment, to accept such risks by submitting a competitive proposal. Tr. at 33-34, 50.[3]

On this record, we have no basis to disagree with MSC's position, as set forth above, that clause H-3 is not inconsistent with the FAR provisions addressing post-award contract administration matters (e.g., the FAR termination for default clause). Moreover, we conclude that in challenging clause H-3 as unduly burdensome on competition, KSB does no more than express disagreement with MSC's decision on how to allocate post-award risks between the government and the contractor under a contract for the performance of critical mission requirements. KSB has failed to demonstrate that MSC abused its discretion or otherwise acted in an unreasonable

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[3] MSC suggests that a potential contractor can contingently price and/or obtain insurance to cover the possible risks associated with clause H-3. Tr. at 21. Other than disputing the agency's suggestion by generally asserting that "insurance is unavailable for most of the events and potential liabilit[ies] of [clause] H-3, Protester's Post-Hearing Comments at 5; Tr. at 23, 37-38, KSB does not provide any meaningful, substantive support for its assertion.

manner in determining to shift risks to the contractor from the agency. Tracor Jitco, Inc., supra, at 5. In this respect, the mere presence of risk in a solicitation does not make the solicitation inappropriate or improper. Id. at 4-5. We further point out that during the pendency of this protest, MSC received initial proposals from five to ten offerors, including KSB, Tr. at 11-13,[4] which evidences that clause H-3 was not so burdensome as to preclude competition. Tracor Jitco, Inc., supra, at 5.

Finally, to the extent KSB speculates that MSC will unconscionably invoke clause H-3, MSC acknowledges that it has a duty to mitigate a contractor's liabilities under this clause, just as it would if it were to terminate the firm's contract for default. Tr. at 34. In the context of this protest of an alleged solicitation impropriety, however, we are not willing, or able, to anticipate all of the possible scenarios that could arise where MSC would have to decide whether to invoke clause H-3. If circumstances arise where a contractor believes that MSC is not reasonable in its invocation of clause H-3 during contract performance, that is a matter of contract administration, which is for review by a cognizant board of contract appeals or the Court of Federal Claims, not our Office. Bid Protest Regulations, 4 C.F.R. § 21.5(a) (2001).

The protest is denied.

Anthony H. Gamboa
General Counsel

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[4] We note that other than the protest filed by KSB, no other offeror protested, even to the agency, the terms of the RFP, including clause H-3. Tr. at 13-14.