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R Newman
Proc I

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-192078

DATE: October 18, 1978

MATTER OF:

Lewis Management and Service Company

DIGEST:

1. Based on experience as incumbent, and despite IFB provisions to contrary, protester alleges that procuring activity will require that mess attendants' function as second cooks and cook's helpers under direct supervision of Government employees creating proscribed personal services contract and that IFB should have stated manpower and hours to reflect this. Protest concerns performance requirements which are matters of contract administration for resolution under "Disputes" clause of contract and not under GAO Bid Protest Procedures.
2. New ground of protest filed almost 3 months after bid opening alleging defect in IFB (lack of manpower requirements for mess attendant services) is untimely under Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1978), and not for consideration on merits.
3. IFB provision makes mess attendant contractor accountable for losses of dishes, flatware, and related items. Of 10 bids received, only protester objected to provision. Because protester has estimated cost of compliance and there is no evidence of record that other prospective contractors cannot make similar estimates, it appears that provision imposes no undue burden since cost of compliance can be estimated and estimated cost can be included in bid price.

4. DAR requires that Government make certain findings before awarding contract during pendency of protest; however, DAR does not require that Government make any findings before opening bids even though protest has been filed before bid opening.

On April 14, 1978, Altus Air Force Base issued invitation for bids (IFB) F34612-78-B-0016 for mess attendant services. The contract performance period extended from October 1, 1978, to September 30, 1979, with options for two subsequent fiscal years. Fifty firms were solicited, and 10 bids were received.

Although Lewis Management and Service Company (Lewis), the incumbent contractor, did not submit a bid, it filed a protest with the procuring activity before bid opening. Among other things, Lewis contended that the IFB was ambiguous and that bid opening should be delayed until the IFB was amended. The procuring activity denied Lewis' protest, and bids were opened on schedule. Lewis subsequently filed a timely protest with our Office. The bases of protest follow.

Based on Lewis' alleged experience as the incumbent contractor, the IFB is ambiguous and incomplete in that it does not accurately reflect that mess attendants will be required to perform the duties of second cooks or cook's helpers. In performing these duties, the mess attendants will be under the direct supervision of Government employees, which will result in a proscribed personal services contract. This could create serious wage and hour problems since mess attendants will be required to function as higher paid second cooks and cook's helpers.

In addition, the IFB does not set forth the minimum and maximum number of employees or the minimum and maximum number of hours required to perform the contract. Lewis contends that as a result

of these omissions, bidders are not competing on an equal basis, a responsive bid cannot be submitted, and unbalanced bidding is encouraged. Lewis requests that the resolution of the protest be delayed until the procuring activity complies with its Freedom of Information Act (FOIA) request by providing bidding data.

Lewis contends further that the contractor is responsible for dishes and flatware which diners take from the dining halls even though the contractor has no control over the situation. Lewis also asserts that the procuring activity violated the Defense Acquisition Regulation (DAR) by opening the bids in the face of the protest. Lewis maintains that the IFB should be canceled, the defects corrected, and another IFB should be issued.

We have been informed by the Department of the Air Force (Air Force) that award of the contract has been authorized during the pendency of Lewis' protest. With regard to the protest, the Air Force states in substance that the IFB contains complete and accurate statements of mess attendant duties. The prescribed duties are not those of a second cook or cook's helper. Moreover, the IFB provides that mess attendants are to be under the direct supervision of contractor employees; consequently, the IFB does not contemplate the creation of a proscribed personal services contract. Further, the Air Force states that Lewis' protest relates to its performance as the incumbent contractor. Therefore, the protest involves matters of contract administration which are not for resolution by the General Accounting Office. Moreover, Lewis' allegation concerning the duties it was required to perform as the incumbent contractor were investigated and were found to be without merit.

Although Lewis denies that the protest relates to its prior contract performance, it appears that Lewis agrees with the Air Force that the IFB as worded is not deficient regarding the creation of a personal services contract. Lewis asserts that, despite rather than because of the IFB provisions, this type of contract will be created because the awardee will

have to devote manpower and hours over and above that contemplated by the IFB. In effect, Lewis' protest including the failure of the IFB to reflect the additional manpower and hours challenges the Air Force's assertion as to what will be required under the contract. Disagreements concerning performance requirements are matters of contract administration which are for resolution under the "Disputes" clause of the contract. E.F. Reid, Inc., B-183172, March 7, 1975, 75-1 CPD 141; Precision Service & Sales Co., B-186139, April 16, 1976, 76-1 CPD 263. See, also, Potomac Industrial Trucks, Inc., B-188146, July 13, 1977, 77-2 CPD 18; General Automatic Corporation, B-190216, January 5, 1978, 78-1 CPD 8; C.G. Ashe Enterprises, Inc., B-191848, May 19, 1978, 78-1 CPD 388. Matters of contract administration are not for resolution under our Bid Protest Procedures, which are reserved for considering whether an award or proposed award of a contract complies with statutory, regulatory or other legal requirements. C.G. Ashe Enterprises, Inc., supra.

A portion of the protest regarding the lack of manpower requirements in the IFB and the alleged improper consequences thereof could be viewed as not involving contract administration insofar as the IFB's need for such requirements for the stated mess attendants' duties is concerned. However, this is untimely under 4 C.F.R. § 20.2(b)(1) (1978) and not for consideration on the merits, since it is a new ground of protest which challenges the propriety of the solicitation and was not filed until almost 3 months after bid opening. Thus, we find no reason to delay the resolution of this protest until the procuring activity complies with Lewis' FOIA request.

Section F.30.f. of the IFB provides as follows:

"f. Joint inventory will be taken at the end of each month by the contractor and dining facility supervisor to establish accountability for the following items: forks, knives, spoons, glasses, cups, dishes, saucers, platters, bowls, etc. The contractor will be held liable for loss in excess of ten percent and make amends for the loss as stipulated in the contract."

Lewis contends that this provision is improper because the contractor has no control over the diners which remove Government property from the dining halls. Fifty bids were solicited and 10 were received. None of the prospective contractors except Lewis protested the inclusion of section F.30.f. in the IFB. Moreover, there is no evidence of record that the cost of compliance with that section cannot be estimated by other prospective contractors. In fact, Lewis has informally advised at a conference on the protest that compliance costs an estimated \$100 to \$150 per month. It appears that section F.30.f. places no undue burden on the contractor since the cost of compliance can be estimated and the estimated cost can be included in the bid price. Cf. The Ellis Company, B-189390, B-189937, January 27, 1978, 78-1 CPD 70.

While DAR § 2-407.8(b) (1976 ed.) requires that the Government make certain findings before awarding a contract during the pendency of a protest, DAR does not require that the contracting officer make any findings before opening bids, even though a protest has been filed prior to bid opening.

Based on the foregoing, the protest is denied to the extent that it has been considered on the merits.

R. M. K. 1/14
Deputy Comptroller General
of the United States