

DECISION

PL2
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

25415

FILE: B-208036, B-208036.2 **DATE:** June 9, 1983

MATTER OF: Maintenance Incorporated and Worldwide
Services, Inc.

DIGEST:

1. An IFB for the Government's meal services requirements that permits a bidder to apportion 20-100 percent of its evaluated (based on the Government estimate) bid price to a unit meal price, and any remaining portion to a lump-sum price to cover the contractor's fixed costs, does not provide an evaluation basis that reasonably assures that an award to the lowest evaluated bidder will result in the lowest cost during performance. Since all bidders do not have to apportion the same percentage of their bid price to a unit meal price, slight deviations from the Government estimate could result in one bidder displacing another as least costly.
2. An IFB for the Government's meal services requirements that permits a bidder to apportion 20-100 percent of its evaluated bid price to a unit meal price, and any remaining portion to a lump-sum price to cover the contractor's fixed costs, does not result in other than a firm fixed price contract even though the Government's average cost per meal may change with the volume of meals served. The prices are fixed without regard to the actual cost experience of the contractor, thus meeting the requirement for a firm fixed price contract.
3. The fact that an IFB for the Government's meal services requirements provides for the negotiation of a price for meals served in excess of 120 percent or less than 80 percent of the Government estimate does not violate the requirement for a firm fixed

025848

price contract resulting from formal advertising. Defense Acquisition Regulation § 3-409(2)(a) authorizes placing maximum and minimum quantity limitations on requirements contracts, and the resulting contract will be a firm fixed price contract for meal services within those limitations. The provision for negotiation is only a mechanism for making an equitable adjustment where the Government deviates from those quantities.

5. GAO will not question the Air Force's determination of its need for a pricing format for meal services that requires the bidder to apportion at least 20 percent of its bid price to a unit meal price while permitting the bidder to apply the remainder to a lump-sum price to cover its fixed costs, since the protester failed to show the determination, which is based on the need for an incentive to furnish good service, is unreasonable.
6. GAO will not question the Government's estimate for meal services where the protester has failed to show the estimate misrepresents anticipated actual requirements, was based on less than the best information available, or was the result of bad faith or fraud.

Maintenance Incorporated and Worldwide Services, Inc. protest the Air Force's format for soliciting bids to provide meal services, for one base year and two option years, at Keesler Air Force Base. The invitation for bids, No. F22600-82-B-0026, contemplated a fixed price requirements contract. It required bidders to offer two prices: 1) a lump-sum fixed price, representing the contractor's non-variable costs in providing the services, that the contractor would be paid regardless of the actual number of meals served, and 2) a fixed price per meal, representing the contractor's variable costs, that the contractor would be paid for each meal actually served. For evaluation purposes, the low bidder is determined by adding the lump-sum price to the product of the unit meal price and the Government's estimate of the number of meals to be served, and adding that sum to the price bid for certain extended operations.

Maintenance raises a number of grounds for protest:

- A) the invitation's format does not give any assurance that award will be made to the bidder offering the lowest cost to the Government, and
- B) the format provides for other than a firm fixed price contract after formal advertising.

In addition, Maintenance and Worldwide Services complain:

- C) the invitation's format places unreasonable risks on the contractor, and
- D) the Government estimates are unreasonable.

Finally, Worldwide alleges:

- E) the IFB permits punitive deductions for services found unsatisfactory through inspection.

We conclude that the first ground has merit. We deny the remainder of the protests.

I. The Solicitation

The IFB required bidders to break their total prices into two parts. Under Part A, bidders were to bid a fixed price for providing meal services over the basic contract term and each option year. The stated purpose of Part A was to cover the majority of fixed costs. Under Part B, the bidder was to bid a separate per-meal price for the base year and each option year, and an extended price based on the Government's estimate of the number of meals to be served. The stated purpose of Part B was to cover variable costs and provide a profit incentive to serve more meals. The IFB also stated that the total extended price for Part B must be at least 25 percent of the bid price for Part A (and thus at least 20 percent of the total bid price). Finally, the bidder had to bid a price for furnishing an estimated 500 hours of extended operations. The bid would be evaluated at the total of prices for Parts A and B and the extended operations price.

For example, a firm might bid \$3,600,000 per year under Part A, and \$.23 per meal under Part B for an estimated 4 million meals, or \$920,000. The Part B total thus meets the requirement to equal or exceed 25 percent of the Part A bid, or \$900,000, and the total bid for evaluation purposes would be \$3,600,000 plus \$920,000 plus the price for extended operations.

The purpose of the Air Force's pricing format is to provide incentives for the contractor to provide good service. The format is based on two principal characteristics of meal services: 1) the quality of a contractor's service has an important influence on potential patrons' willingness and desire to utilize the dining facilities, and 2) most of a contractor's actual costs are either fixed (e.g., management salaries and equipment depreciation) or vary with volume but not in a direct 1:1 ratio (e.g., direct labor salaries for cooks, servers, and cashiers). Since the quality of service affects the number of meals actually served, the Air Force required that a percentage of the bidder's price consist of a unit price per meal (Part B) to provide an incentive for the contractor to increase profit by serving more meals. While making the amount of a contractor's payments dependent on the number of meals served, the pricing format nonetheless permitted the bidder to apply the remaining portion of its price to a fixed amount, to protect the bidder against the failure to recover its fixed costs in the event the actual number of meals falls short of the Government estimate. The format, however, does not require the bidder to apportion any particular percentage of its bid price to cover fixed costs. In other words, the entire price may consist of its extended Part B, unit meal price.

The IFB also provided for a change in the contract price to cover large variations from the estimated number of meals to be served, as follows:

"a. If the actual number of meals served under this contract * * * exceeds 120% of the estimated number for a calendar quarter, the price for each meal in excess of 120% of the estimate shall be negotiated. This negotiated price shall be limited to the reasonable and allowable costs (plus overhead and reasonable profit) incurred as a result of the variation above 120% of the estimate. However, in no case shall the

negotiated price exceed the average price per meal at 120% of the estimated number of meals for that quarter.¹

"b. If the actual number of meals served under this contract in a calendar quarter * * * is less than 80% of the estimate for that quarter, the total price for that quarter will be negotiated. In no case, however, shall the negotiated price exceed the payment to which the contractor would have been entitled [the Part A quarterly price plus the Part B payment] if 80% of the estimated meals had been served."

II. Discussion

A. Format Does Not Assure Award to the Lowest Bidder.

The advertising statute governing this procurement requires award on the basis of the most favorable cost to the Government. B.B. Saxon Company, Inc., B-199501, December 22, 1980, 80-2 CPD 441. We agree with Maintenance that this invitation's format does not assure such an award. Moreover, the format does not even assure that an award will be made to the bidder with the greatest incentive to provide quality service and attract more customers.

The following hypothetical example involving three bidders illustrates both points. All three bidders have priced their proposals so that the total cost to the Government at 99 percent of the Government estimate is \$6 million for each bidder. The first bidder's extended variable price in Part B is 25 percent of its fixed price in Part A, the second bidder's Part B price is 30 percent of its Part A price, and the third bidder's Part B price is 33 percent of its Part A price. The evaluated prices at the Government estimate are as follows:

<u>Bidder 1</u>	<u>Bidder 2</u>	<u>Bidder 3</u>
\$6,012,121	\$6,013,986	\$6,015,151

¹ The average price per meal was to be calculated by adding the Part A payment for the quarter to the Part B extended price for the number of meals actually served and dividing the sum by the number of meals actually served.

At 98 percent of the estimate, Bidder 3 would displace Bidder 1 as the low bidder. Indeed, Bidder 3 always will be less costly if the actual number of meals falls short of 99 percent of the estimate, and Bidder 1 always will be less costly if that number exceeds that percentage of the estimate. The example shows that, because bidders may apportion different percentages of their evaluated bid prices between Part A and Part B, slight differences between the actual number of meals served and the Government estimate could create a situation where the lowest evaluated bidder actually would be more costly than another bidder. This situation creates a great deal of uncertainty about which bid in fact represents the lowest cost to the Government.

In addition, the example demonstrates that under the Air Force's format an award must be made to a bidder with the least incentive, relative to the other bidders, to serve more meals notwithstanding the fact that the price of the bidder having the most incentive to serve more meals may be evaluated as only a fraction of a percentage higher. The bidder with the least incentive, under the Air Force theory that serves as the basis for this type of contract, is the firm whose Part B price is the minimum 25 percent; the bidder with the greatest incentive is the firm with the greatest additional payment as more meals are served. In the example, Bidder 1 has the least relative incentive but will win the competition; Bidder 3, with the greatest incentive and thus presumably the most desirable contractor under the Air Force's theory, loses only because its bid is evaluated at .05 percent more than that of Bidder 1.

We recognize that some degree of uncertainty is inherent with requirements-type contracts. As the Air Force correctly points out, where an IFB encompasses the Government's requirements for more than one line item and requires unit prices for each item based on estimated quantities, but provides for payment based on actual quantities, almost any award has a theoretical potential for resulting in other than the lowest cost to the Government. That potential, however, poses no barrier to the award of a contract through formal advertising where the bid evaluation basis reasonably assures that an award to the lowest evaluated bidder will result in the lowest cost to the Government during actual performance. 49 Comp. Gen. 787 (1970). The general basis for evaluating the low

bidder for a multi-item requirements contract simply is the sum of the bidder's extended prices for each item, where the extended price consists of the bidder's offered unit price for each item times the Government's estimate for that item. This evaluation basis generally is regarded as providing a reasonable assurance of award to the low bidder.

The Air Force's format, however, introduces a new element of uncertainty with respect to whether the mandate for award based on the lowest bid is met. The format actually encourages a bidder to apportion its bid price between a payment that is fixed regardless of the number of meals actually served, and a variable payment dependent on the actual number of meals served. The basis for how a bidder apportions its price could be mere speculation as to the amount of meals that will be required, with the bidder allocating as much as possible to Part A (80 percent of the total) if it speculates that less than the estimated number will be required, or to Part B if it speculates that more than the estimate will be required. The format thus contemplates a situation where each bidder allocates its bid prices differently. As illustrated above, this situation, coupled with the uncertainty of an estimate, leaves little assurance that award to the lowest evaluated bidder will result in the lowest cost to the Government, see TWI Incorporated, 61 Comp. Gen. 99 (1981), 81-2 CPD 424, or to the bidder with the greatest incentive to quality performance.

It seems to us the Air Force's objectives would be better achieved by imposing the same ratio for the price of Part B to Part A on all bidders, which still would preserve the desired incentives and protections to the contractor. It appears from the record, for example, that the Air Force is satisfied that by requiring the Part B price to be 25 percent of the Part A price (as opposed to a minimum of 25 percent), the agency's needs will be met. With that requirement, the format would assure that the same bid would reflect the lowest cost to the Government no matter how many meals ultimately are served. The present format, however, simply gives no reasonable assurance that the lowest evaluated bidder will be the least costly contractor as required in a formally advertised procurement. We therefore sustain Maintenance's protest on this ground.

B. Type of Contract

Maintenance protests that the contract to be awarded under the IFB does not meet the requirement of Defense

Acquisition Regulation (DAR) § 2-104 (1976 ed.) that a contract awarded after formal advertising be of the firm fixed price type. The protester proffers two reasons for its contention: 1) the amount paid to the contractor per meal will vary with the number of meals actually served between 80 and 120 percent of the Government estimate, and 2) the IFB expressly requires the negotiation of the contractor's price for services where the actual number of meals served varies from the Government estimate by more than 20 percent. We find no merit in the protester's contention.

The regulation at DAR § 2-104 does require that contracts awarded after formal advertising be of the firm fixed price type (except that fixed price contracts with economic price adjustment may be used when some flexibility is necessary and feasible). The DAR describes a firm fixed price contract as providing for a price that is not subject to any adjustment by reason of the cost experience of the contractor in the performance of the contract. DAR § 3-404.2.

First, the fact that the rate of payment to the contractor for each meal (between 80 and 120 percent of the Government estimate) may vary with the number of meals served does not run afoul of these requirements, since the rate of payment is fixed by the prices offered in Part A and Part B without regard to the cost experience of the contractor.

Second, concerning the provision for price negotiation for meal services in excess of 120 percent or less than 80 percent of the Government estimate, the DAR provision authorizing the use of requirements contracts recommends that, if feasible, the contract should state the maximum and minimum limits of the contractor's obligation to deliver and the Government's obligation to order. See DAR § 3-409.2(a); 52 Comp. Gen. 732 (1973). Where the Government deviates from these limits the contractor could be entitled to an equitable adjustment, see Chemical Technology, Inc., ASBCA No. 21768, 78-2 BCA ¶ 13,338 (1978), or to some other amount as specifically stated in the contract, see Broken Lance Enterprises, Inc., ASBCA No. 22588, 78-2 BCA ¶ 13,433 (1978). Such an adjustment, however, does not change the fact that the contract is a firm fixed

price requirements contract for the quantities between the stated minimum and maximum. Indeed, DAR § 3-409(c) recognizes that requirements contracts with stated minimum and maximum quantities may provide for firm fixed prices. See Spaces Services International Corporation, B-207888.4, .5, .6, .7, December 13, 1982, 82-2 CPD 525.

We therefore deny Maintenance's protest that the IFB contemplates other than a firm fixed price contract.

C. Alleged Imposition of Unfair Risk on the Contractor

Maintenance basically complains that two invitation provisions involving the computation of the contractor's price and payments impose unreasonable risks on the contractor. Maintenance attacks the following provisions: 1) the provision requiring that the Part B extended variable price be at least 25 percent of the Part A price, and 2) the provision requiring the negotiation of the contract price for meals varying from the Government estimate by more than 20 percent in a calendar quarter. Worldwide joins Maintenance in raising the first contention.

Concerning the first provision, the protester contends that an efficient contractor simply cannot incur variable costs equaling 25 percent of the Part A price, and the mandated pricing format therefore leaves the contractor with insufficient discretion to decide how it will allocate basically 20 percent of the contract cost in computing its price. To the extent the Air Force intended the format to provide an incentive to provide high quality food service, the protester complains that the Air Force retains controls over major factors affecting quality, e.g., the menu selection and the provision of all food-stuffs.

Maintenance's basic objection to the second provision is that it protects the Government against price fluctuations accruing to underruns or overruns without any concern for the contractor's costs, thus imposing an unreasonable risk on the contractor. The protester alleges that at approximately 112 to 115 percent of the Government estimate, a food contractor must increase significantly the personnel to handle the additional diners. Presumably, the additional per-meal payments provided by the contractor's Part B price would not suffice to cover the contractor's additional costs. Maintenance further complains that limiting the negotiated price for meals exceeding 120

percent of the estimate to the average price per meal at 120 percent of the estimate is unfair. Finally, the protester asserts that the quarterly evaluation of the actual number of meals served may shield the Government from having to reimburse the contractor fairly for peak months, and greatly delays the contractor's payment for its increased efforts.

We believe these complaints provide no legal basis for our taking exception to the IFB's provisions. The Air Force has the responsibility to determine its minimum needs and the best way of accommodating those needs, and we will not question its determination absent a clear showing that it is unreasonable. Logistical Support, Inc., B-205724, June 17, 1982, 82-1 CPD 599. We believe the protesters have failed to make such a showing.

The Air Force reports that requiring bidders to place a significant portion of their bid price in Part B is important to assure that the agency's need for quality service is met. If the Air Force allowed the bidder to place all or substantially all of its bid price in Part A (providing for a fixed sum), the bidder would have little or no incentive to provide quality service. On the contrary, it would have an incentive to reduce the quality of service. Under these circumstances, we cannot conclude that the Air Force's provision requiring the Part B price to be at least 25 percent of the Part A price is unreasonable.

Furthermore, the protester fails to recognize that the Air Force's format exposes the contractor to less risk than traditional IFBs for meal services either requiring one lump-sum price for all services or one per-meal price, and thus is an improvement, from the standpoint of contractor risk, over traditional meal service requirements contracts. A pricing format requiring only a fixed per-meal price would place the contractor in jeopardy of not recovering his fixed costs if actual orders were less than the Government estimate, whereas a lump-sum price would impose a risk if actual orders were to exceed the estimate. The Air Force's format guarantees a fixed payment sum (under Part A) in the event of reduced quantities, and still provides a method for increased payments for orders exceeding the Government estimate (under Part B).

The IFB's provision for price adjustments when the actual number of meals varies from the Government estimate by more than 20 percent is not unreasonable merely because

a contractor might incur the risk of increased costs at a variance of only 12 to 15 percent. The purpose of this provision should not be to replicate the cost experience of the contractor, but to provide a fair basis for price competition without imposing an "impossible burden" on the contractor. See DAR § 3-409.2. The protester has not shown the Air Force was unreasonable in this regard.

Moreover, the fact that the bidder, in computing its bid, must consider a variety of scenarios that differently affect its anticipated costs does not itself render an IFB defective. There is no requirement that the agency pattern its pricing and evaluation formats after the bidder's actual cost experience. See Logistical Support, Inc., B-197488, November 24, 1980, 80-2 CPD 391. We believe the alleged risks associated with the IFB's format simply reflect the risks inherent in most types of contracts, for which bidders legitimately are expected to allow in computing their bids. Palmetto Enterprises, 57 Comp. Gen. 271 (1978), 78-1 CPD 116.

This same conclusion applies to the invitation's provision for quarterly, as opposed to monthly, evaluations of the number of meals served for the purpose of a price adjustment. The Air Force has reported that measuring meal variations on a quarterly rather than monthly basis eases contract administration. The risk that the contractor in any quarter may encounter costly peak periods, offset by slower periods without a corresponding savings to the contractor, is something the bidder must figure into its bid price.

Maintenance's final point is that it is unfair to limit the negotiated price for meals exceeding 120 percent of the estimate to the average per meal price at 120 percent of the estimate. In our view, this matter, involving the permissible limitations on the contractor's adjustment for quantities above or below the contract's stated maximum and minimum, is properly for resolution in connection with the administration of the contract and, if necessary, ultimately by a board of contract appeals or the courts under the "Disputes" clause. See J.C. Hester Company, Inc., B-205628, December 28, 1981, 81-2 CPD 714.

Finally, we see nothing improper about limiting price adjustments to the average per-meal price at 80 or 120 percent of the Government estimate. We note that the recovery limitation affects all potential bidders equally and therefore the protester's competitive position is not prejudiced by our deferring to the board or the courts.

D. Propriety of Estimate

Both Maintenance and Worldwide protest that the Government estimate is defective. Maintenance proffers four circumstances as causing doubt as to the reasonableness of the estimate: 1) although the original IFB contained an estimate of 4,563,014 meals per year, the Air Force issued an amendment reducing the number by 474,742 meals (to 4,090,272); 2) the estimate includes 513,497 more meals per year than Maintenance, the incumbent contractor, has experienced in the last year of performance; 3) the Air Force's own projections indicate a projected decrease in the student population at Keesler Air Force Base over the next 2-1/2 years; and 4) another contractor at another Air Force base has experienced overruns of approximately 30 percent over the past 3 years, thus indicating the poor "track record" by the Air Force in making its estimates. Worldwide states only that the IFB's estimates "are unrealistic, do not represent the best available information and are not calculated in accordance with Air Force regulations."

The procurement regulation at DAR § 3-409.2(a) provides that when an agency solicits bids for a requirements contract on the basis of estimated quantities, the estimate "should be as realistic as possible." We therefore have held that the estimate stated in the IFB must be based on the best information available and present a reasonably accurate representation of the agency's anticipated actual needs. Space Services International Corporation, supra. There is no requirement that the estimate be absolutely correct. Since the protester bears the burden of proof, we normally will not sustain a challenge to an agency's estimate unless it is shown that the estimate misrepresents anticipated actual requirements, is not based on the best information available, or resulted from bad faith or fraud. Id.

The protesters have failed to meet this burden.

Even though Maintenance points out that the estimate in the solicitation for the prior contract was too low and that the current estimate was adjusted downwards, we cannot deduce from that argument alone that the IFB's estimate is likewise faulty. The record shows, contrary to Worldwide's assertion, that the present estimate was formulated by the Air Force's Manpower Office in accordance with the guidelines set out in Air Force Regulation 146-14 (February 17, 1981). That regulation, at paragraph 3.6.b, requires the

consideration of historical factors and the most recent information available concerning anticipated future use. Here, the estimate was calculated taking into account, among other things, the actual number of meals served over the past 12 months, the personnel strength at Keesler Air Force Base over the past 12 months, the amount by which the actual number of personnel served exceeded the authorized number of personnel, and the anticipated number of authorized personnel--including both students and permanent enlisted strength--to be served meals at Keesler Air Force Base during the contract period. Moreover, even after this IFB was issued, the meal estimate was revised to reflect the most current information available. In these circumstances, we cannot find that the meal estimate is faulty or based on other than the best information available.

We consider Maintenance's reference to the accuracy of the Air Force's prior estimate for another Air Force base irrelevant in resolving whether the current IFB's estimate was based on the best information available and reflected a reasonably accurate representation of anticipated actual needs. Although the prior estimate may have been based on the same methodology as the Air Force employed here, Maintenance has not shown that the overruns were attributable to any fault in the methodology, as opposed to factors peculiar to the other Air Force base. Moreover, the Air Force's experience at the other base is inconsistent with Maintenance's presentation of other circumstances that suggest the Keesler estimate is too high.

We deny the protester's challenge to the IFB's estimate.

E. Alleged Punitive Deduction Provisions

Worldwide contends, without explanation, that the price deduction scheme under the IFB's inspection of services provision is punitive and unfair. We have recently considered the propriety of the Air Force's including provisions in IFBs which permit the Air Force to deduct the value of an entire service from a contractor's payment if the contractor fails to perform just one of several tasks comprising the service. Environmental Aseptic Services Administration and Larson Building Care, Inc., B-207771, et al., February 28, 1983, 83-1 CPD 194. We assume that the protester is complaining about similar provisions here. We basically held that unless the task rendered the entire service unfit for the Government's purpose, the Air Force could not deduct the full value of

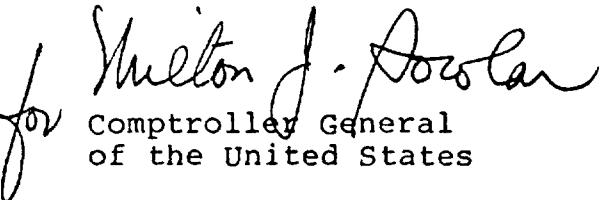
the service without unreasonably and unfairly imposing a penalty on the contractor. Where bids had been opened, we did not recommend that the Air Force necessarily should cancel the IFB and issue a revised one; rather we advised the Air Force that in administering the contract it should avoid taking unreasonable deductions, and instead pursue its other remedies under the contract. We assume the Air Force will implement that recommendation in this case, and therefore this protest ground does not pose an obstacle to a valid award.

III. Conclusion and Recommendation

We sustain the protests to the extent that the Air Force's pricing format, by basically permitting a bidder to apportion 20 to 100 percent of its total bid price to its Part B meal price, does not reasonably assure that an award to the lowest evaluated bidder will result in the lowest price to the Government during performance. To alleviate this problem, we recommend that in future solicitations the Air Force require that all bidders uniformly compute their Part B prices to be the same specified percentage of their Part A prices. As stated above, it appears that the Air Force in fact has determined the precise ratio that will provide a sufficient incentive to provide quality service and at the same time afford adequate protection to bidders under the circumstances of each procurement.

We also recommend that in this case the Air Force compute the bids at 80 percent and 120 percent of the Government estimate to determine if the lowest evaluated bidder would remain low. If that bidder would remain low, we recommend that the Air Force make award under the IFB since the deficiency did not preclude fair competition. If the lowest evaluated bidder would not be low, we recommend the Air Force cancel the IFB and resolicit using an appropriately amended invitation.

The remaining protest grounds are dismissed in part and denied in part.

for 
Comptroller General
of the United States