

DECISION



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

FILE: B-212855

DATE: January 9, 1984

MATTER OF: S.F.A. Corporation

DIGEST:

1. Contract will not fail for lack of mutuality of obligation where both parties to the contract have made a promise to perform.
2. Defense Acquisition Regulation governing indefinite quantity contracts does not apply to IFB which contemplates firm, fixed-price contract.
3. GAO will not question an agency's interpretation of an agency regulation where the protester has not shown that the interpretation is unreasonable.
4. Post-bid-opening protest against agency's estimate of its needs is untimely and will not be considered on the merits.

S.F.A. Corporation (S.F.A.) protests any contract award under Department of the Air Force (Air Force) invitation for bids (IFB) No. F41612-83-B-0023, issued for audiovisual services.

The protest is denied in part and dismissed in part.

The IFB was issued to obtain a contractor to furnish all labor, products and services necessary to manage and operate the government-owned Sheppard Air Force Base Audio-visual Service Center. The successful bidder would be required to perform various services when requested by authorized Air Force personnel for a base year and two 1-year option periods. The IFB listed, by line item, the various services which the contractor could be requested to perform and it also gave an estimate of the quantity of services which would be ordered. Bidders were required to offer a fixed monthly price for each service. The awardee would be paid this fixed monthly amount unless the quantity of services ordered deviated from the Air Force estimate by more than 15 percent. In this event, the IFB provided for an equitable price adjustment.

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S.F.A. first protests that the IFB does not require the Air Force to order or the contractor to perform a minimum quantity of services. S.F.A. therefore concludes that any contract awarded under the IFB will be unenforceable because it will lack mutuality of obligation. S.F.A. further contends that the IFB contemplates the award of an indefinite quantity contract and, because it does not specify the minimum and maximum quantity of services which the Air Force can order, it violates Defense Acquisition Regulation (DAR) § 3-409.3 (1976 ed.) and Air Force Regulation (AFR) § 400-28 (September 9, 1979).

The Air Force disputes that a contract awarded under the IFB will lack mutuality of obligation. The Air Force responds that the contract will be a firm, fixed-price contract and not an indefinite quantity contract. The Air Force notes that under the DAR, there is no requirement that an IFB contemplating the award of a fixed-price contract provide the minimum and maximum quantity of services which can be ordered. Finally, the Air Force contends that AFR § 400-28 is concerned with the quality of services rendered rather than with the quantity of services which may be ordered.

We find that a contract awarded under the IFB will not fail for lack of mutuality of obligation. Mutuality of obligation exists if the contract is supported by each contracting party's promise to do something. See B-160063(1), February 10, 1967. In this case, although the Air Force has not promised to order a minimum amount of services, it has promised to pay the successful bidder a fixed monthly price and the successful bidder has promised to maintain the facility and perform the various services upon request and in accordance with the terms of the IFB. Thus, we fail to see any merit in S.F.A.'s belief that the awarded contract will be unenforceable. S.F.A.'s reliance on our decision, B-160063(1), supra, is misplaced. That case concerned bidders' bidding a unit price to supply propane gas based on an estimate of the amount of gas which would be ordered; however, bidders only would be paid for orders actually placed and the IFB stated that the government was not required to place any orders. Because we found that the government had not promised to do anything, we concluded that the contract was invalid because it lacked mutuality of obligation. That decision does not apply here where the Air Force has promised to pay the contractor a fixed monthly sum to maintain the facility and provide whatever services are required. Cf. Obligations and Charges Under Small Business Administration Service Contracts, B-198574, February 2, 1981.

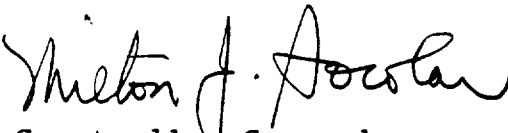
We further find that the IFB contemplates the award of a fixed-price contract and not an indefinite quantity contract. Consequently, DAR § 3-409.3 does not apply. Under this IFB, the contractor will be paid a fixed monthly sum regardless of the amount of services which the contractor is requested to perform during the month. In contrast, DAR § 3-409.3 involves a situation where the government is obligated only to order a minimum quantity of services and, with the exception of this minimum quantity, its future requirements and the total amount of contract payments are unknown. In this respect, we note that DAR § 3-409.3 specifically provides that funds for greater than the minimum quantity specified in the IFB are not obligated until orders are placed under the contract. Cf. Obligations and Charges Under Small Business Administration Services Contract, supra. We also note that the regulation specifies that indefinite quantity contracts should be only used to procure commercial or modified commercial items. S.F.A. points out that the audiovisual services requested do not fall into these categories.

As for AFR § 400-28, this regulation provides that "the statement of work (SOW) must present the actual minimum requirements of the Government." The Air Force alleges that this regulation is concerned with the quality of services required rather than with the quantity of services to be ordered. The Air Force states that the term "minimum requirements" means minimum needs and that the regulation requires an IFB to specify only the requirements which are necessary to accomplish the needed performance.

This Office is required to give great deference to an agency's reasonable interpretation of its own regulation. New Hampshire-Vermont Health Service, B-189603, March 15, 1978, 78-1 CPD 202; Computer Data Systems, Inc., B-203301, November 6, 1981, 81-2 CPD 393. In this case, the plain language supports the Air Force's interpretation, which is further substantiated by the fact that the regulation is contained among others concerning the quality of service required by the contractor. In addition, we note that the regulation essentially restates the general rule of government procurement that agency's may only solicit for minimum needs. See e.g. Interscience Systems, Inc., B-205458, March 9, 1982, 82-1 CPD 200. Given these factors, we cannot conclude that the Air Force's interpretation of AFR § 400-28, paragraph 2-7(b), is unreasonable. Therefore, the Air Force was not required to state the minimum quantity of services it intended to order.

Accordingly, these protest grounds are denied.

S.F.A.'s contention that the Air Force's estimates are not accurate concerns an impropriety in the solicitation which was apparent prior to bid opening and was required to be raised prior to bid opening. 4 C.F.R. § 21.2(b)(1) (1983). Although S.F.A.'s initial protest was filed before bid opening, this particular allegation was raised after bid opening in S.F.A.'s comments on the Air Force report. As a new protest ground, this allegation was required to meet independently the timeliness requirements of our Bid Protest Procedures. Thus, it is untimely and we will not consider it on the merits. See Tracor Jitco Inc., B-208476, January 31, 1983, 83-1 CPD 98. This protest ground is dismissed.

for 
Comptroller General
of the United States