

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

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FILE: B-212218; B-212219**DATE:** February 23, 1984**MATTER OF:** Logistical Support, Inc.**DIGEST:**

1. Protests contending that agency improperly used the one-time deviation authority contained in the Defense Acquisition Regulation are denied where the record shows that the contracting activities complied with the regulatory requirements for issuance of the deviations.
2. Protester has failed to show that use of the test bid format for mess attendant services which requires bidders to use specified hours and labor rates and provides for an award fee based on performance is unreasonable where protester merely disagrees with agency's position that bonding requirements contained in the solicitation were inadequate to insure satisfactory contractor performance.

Logistical Support, Inc. protests the inclusion in invitation for bids (IFB) Nos. F14614-83-B-0027 (IFB-0027) and F41687-83-B-0007 (IFB-0007) of a provision stating that contracts would be awarded on a fixed-price award fee basis. We deny the protests.

IFB-0027 solicited bids to provide food and attendant services at McConnell Air Force Base, Kansas. IFB-0007 solicited bids to provide similar services at Bergstrom Air Force Base, Texas.

Both solicitations included a "test bid format" consisting of three elements:

- (1) a fixed predetermined rate to be paid for each service unit (staff-hour) used, up to the maximum stated in the contract;
- (2) a management and support price; and
- (3) a stated award amount.

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The service unit rate is based on the Department of Labor's wage rate for food service attendants and includes fringe benefits. The management and support price is the only competitive component of the solicitation and is composed of the costs of on-site management personnel, overhead and contingencies. The award amount is a fixed annual predetermined maximum amount, which is stated in the solicitation, a percentage of which is paid to the contractor based on the quality of its performance.

The Air Force reports that, because award fee type contracts resulting from formal advertising are not authorized by the regulations, the solicitations were issued as one-time deviations pursuant to Defense Acquisition Regulation (DAR) § 1-109.2. This section, together with section 1-109.2 of the Air Force's DAR supplement, vests authority in the head of the procuring activity (the Commander, Strategic Air Command (SAC) with respect to IFB-0027; and the Commander, Tactical Air Command (TAC) with respect to IFB-0007) or his designee to authorize regulation deviations. The Air Force states that the Director of Contracting at SAC and at TAC exercised this authority in connection with the present solicitations.

Logistical contends that the solicitations here represent an improper use of the DAR deviation authority. It argues that under the Air Force's rationale--that these solicitations are based on the DAR one-time deviation authority--each Air Force facility could obtain a deviation and effectively negate the prohibition in the DAR against using this type of contract format in advertised procurements.

The regulation authorizes a head of a procuring activity to issue a one-time deviation. Obviously, this means each such individual may authorize a deviation, so that there may be several deviations authorized throughout the Air Force, albeit only one by each Commander. We note that there is no evidence in the record to indicate that more than one deviation was issued in each Command. Thus, we find no merit to this contention.

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Logistical also contends that IFB-0027 was improperly issued on June 10 because the deviation was not authorized until June 24. The agency reports that although the letter authorizing the deviation was not actually issued until after the solicitation was issued, the head of the contracting activity orally advised the contracting officer prior to the issuance of the solicitation that the deviation would be granted. In any event, since the deviation was actually issued prior to the bid opening date, we do not believe that the subsequent issuance of the deviation letter prejudiced any party or had any effect on the legality of the award. See Logistical Support Inc., B-197488, November 1, 1980, 80-2 CPD 391.

The protester further alleges that use of the deviations was improper because contracting activities within the Department of Defense were only authorized to test this contract format under a deviation issued by the Secretary of Defense which expired December 31, 1982, prior to the issuance of the subject solicitations. We disagree. While it is true that the Secretary of Defense had authorized a deviation under which this contract format was tested and that the deviation authority did expire prior to the issuance of these solicitations, we are aware of no regulation or directive that prohibits the individual heads of the procuring activities from continuing to test this contract format under the DAR § 1-109.2 deviation authority where they determine that such continued use is warranted.

Finally, Logistical contends that the Air Force's stated justification for using this bid format--to guarantee adequate contractor performance--is suspect since the solicitation already contains bonding requirements and these are sufficient to assure adequate performance. The Air Force responds that the bonding requirements have not been effective in bringing about the desired performance. Moreover, it states that it can achieve significant cost savings with this fixed-price plus award fee approach.

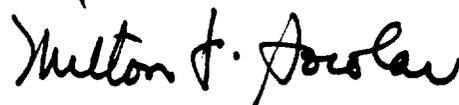
The determination of the needs of the government and the best method of accommodating such needs are

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primarily the responsibility of the contracting agency. We will not question the contracting agency's determination absent a clear showing that it is unreasonable. Maintenance Incorporated and Worldwide Services, Inc., B-208036; B-208036.2, June 9, 1983, 83-1 CPD 631.

Logistical has protested the use of this format on several different occasions; each protest has been denied. See Logistical Support, Inc., B-197488, November 24, 1980, 80-2 CPD 391; Logistical Support, Inc., B-199933, February 10, 1981, 81-1 CPD 87; Logistical Support, Inc., B-200030; B-200051; B-200052, May 5, 1981, 81-1 CPD 342; Logistical Support, Inc., B-203739; B-203782, September 15, 1981, 81-2 CPD 218; Logistical Support, Inc., B-205724, June 17, 1982, 82-1 CPD 599. While it is obvious that the protester does not agree with the agency regarding the benefits the agency believes it can derive from the format, as we have held before several times and hold here again, Logistical has not shown that the agency's use of this format is unreasonable, but only that it disagrees with the agency's minimum needs determination. Therefore, we have no basis to object to the Air Force's determination that this test bid format is the best approach to meeting its food service needs.

The protests are denied.



Acting Comptroller General
of the United States