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DECISION

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

FILE: B-215979 **DATE:** February 27, 1985

MATTER OF: Kime-Plus

DIGEST:

GAO finds no merit to protest against terms in solicitation for mess attendant services that provide for inspection by random sampling, payment deductions for defective services, and limitations on reperformance, since the protester has not shown that these terms are unreasonable or unnecessary.

Kime-Plus protests that various provisions of invitation for bids No. F08602-83-B-0052, issued by the Department of the Air Force to obtain mess attendant services at MacDill Air Force Base and Avon Park Range, Florida, are defective and should be revised. The protester objects to the solicitation's terms providing for inspection based on random sampling, and to those terms providing for predetermined deductions from the payments to the contractor where inspection reveals unsatisfactory performance. The protester also complains that the solicitation fails to state clearly whether defective services may be reperformed, and if so, whether the contractor will receive payment for reperformance.

We deny the protest.

The solicitation incorporates by reference the standard clause "Inspection of Services--Fixed-Price," which provides that the government may inspect and test all services required by the contract "to the extent practicable at all times and places" during the contract's term. The clause also provides that if any of the services do not meet contract requirements, the government may require the contractor to perform the services in conformity with the contract at no increase in price; when defects cannot be corrected by reperformance, the government may "reduce the contract price to reflect the reduced value of the services performed." Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.246-4 (1984).

In addition, the solicitation contains provisions under the heading "Performance Requirements Summary" (PRS) stating that the government may use a variety of surveillance methods to evaluate the contractor's performance, but will use only one method at a time to evaluate a "listed service" (for example, preparing beverages) during a given payment period. Those methods of inspection are random sampling (where the inspector examines a representative group or lot of a listed service), periodic surveillance of an entire service, and customer complaints.

Regarding services found to be defective, the PRS states that except where the government determines that a defect can be cured by reperformance, all services are of such a time-sensitive nature that they are not subject to correction by reperformance, and unsatisfactory performance therefore may result in deductions from the contractor's payments. Where the government determines services may be corrected by reperformance or late performance, it may require the contractor to so perform and, upon reinspection, the government may credit the contractor for satisfactory performance or hold it liable for any damages sustained by the government.

For the purpose of determining the amounts of deductions, the PRS categorizes services required by the solicitation and apportions to each service a percentage of the contractor's monthly total price (the solicitation requires bidders to offer only monthly prices to perform all services). A part of that apportioned amount will be deducted in the same proportion as the defective performance bears to the inspected lot, in the case of random surveillance, or to the entire service in other cases. For most services, however, the PRS provides an allowable deviation--that is, a permissible number of defects--for which no deductions will be taken.

The protester principally complains that: 1) random sampling is not appropriate for inspecting mess attendant services since there is no rational basis, in the protester's view, to think that the number of defects in a particular lot is indicative of the extent of defects for the entire service; 2) the PRS's apportionment of the

contractor's total monthly price to the several services violates a bidder's right to determine the price for various services in accordance with the contractor's own capabilities and judgment; and 3) the solicitation fails to disclose which services are correctable, and fails to state clearly whether the contractor will receive payment based upon satisfactory reperformance. The protester also objects to certain details in the PRS and to the solicitation's failure to include certain instructions to the Air Force's quality evaluator.

We find no bases for the protester's complaints. Regarding the appropriateness of random sampling, we agree that such a method of surveillance does not guarantee complete accuracy, but it does provide a reasonably accurate surveillance method, based on principles of statistics, which has been endorsed by the Office of Federal Procurement Policy (OFPP) for use in service contracts. See OFPP Pamphlet No. 4 (1980). Aside from a self-serving statement that the random-sampling method is not accurate, the protester has submitted no statistical analysis to challenge the method, described in detail by the solicitation and its exhibits. The protester therefore has failed to meet its burden of proof. TM Systems, Inc., B-214543.2, Sept. 18, 1984, 84-2 C.P.D. ¶ 313.

Further, to the extent that the random-sampling method imposes a risk that sampled work will not be precisely indicative of the contractor's performance of the entire service, we believe that simply is a risk any prospective contractor must consider in preparing its bid price. See Saxon Corp., B-214977, Aug. 21, 1984, 84-2 C.P.D. ¶ 205. Moreover, the fact that bidders may respond differently in factoring that risk into their bid prices is a matter of business judgment that does not preclude a fair competition. Id.

With regard to the protester's second complaint, we point out that the PRS's apportionment of the contractor's total monthly price to several services does not affect the bidder's right to determine its price or prices, but establishes a measure of damages in the event individual services are defectively performed. See Environmental Aseptic Services Administration and Larson Building Care Inc., 62 Comp. Gen. 219 (1983), 83-1 C.P.D. ¶ 194. Predetermined amounts of damages fixed in advanced of any damages

actually sustained are known as "liquidated damages," and only must be reasonable in light of the procurement's requirements. The protester has submitted no evidence to show that the PRS's measure of damages is unreasonable. We therefore have no basis to question the provisions. Larson Building Care Inc., B-209837, B-209761, June 20, 1983, 83-1 C.P.D. ¶ 671.

In making its third complaint, concerning reperformance, the protester contends that the Air Force has an obligation to identify which services are correctable by reperformance. First, we are aware of no such legal obligation, and second, the solicitation does inform bidders that, because of the time-sensitive nature of all services, generally no services are correctable by reperformance. Consistent with applicable procurement regulations requiring that contractors ordinarily be given an opportunity to correct nonconforming services when this can be accomplished within the required delivery schedule, FAR, 48 C.F.R § 46.407(b), the solicitation further provides that where the government determines that defective services can be cured by reperformance or late performance, the contractor shall be required to so perform the work and may receive credit for its performance.

The protester apparently is confused by the PRS's additional statement that "The contractor shall not be entitled to reperform, perform late or otherwise correct defective services for the purpose of avoiding payment of less than the full contract price." The protester interprets this language as possibly prohibiting reperformance or payment for it. We believe this language only serves to inform bidders that the contractor does not have a unilateral and unbridled entitlement or right to correct defective services in order to obtain full payment. This is consistent with FAR, 48 C.F.R. § 46.407(b) and with the other terms of the solicitation permitting reperformance or late performance only where the government determines that such performance can cure the originally defective performance. The language thus does not detract from the other solicitation's provisions permitting reperformance in appropriate cases and providing that the contractor may be credited with satisfactory reperformance for the purpose of payment.

The protester also objects that the PRS contains examples of how deductions will be computed that are defective because they utilize apportioned amounts for the cited service or amounts for the acceptable deviations that are not contained in the actual PRS. We believe that such discrepancies are immaterial since the examples are intended to demonstrate the methodology or formula for computing deductions regardless of whether the selected amounts for the formula's variables actually appear in the PRS.

The protester also argues that the PRS's terms regarding one service inconsistently impose a standard of 95 percent satisfactory performance for the entire service while providing an acceptable deviation for random-sampling purposes of 6.5 percent for the sampled lot. The protester argues that the terms are therefore ambiguous. We disagree, since an acceptable deviation of 6.5 percent may simply reflect an anticipated amount of variance or statistical uncertainty between sampled performance and the entire service. In other words, a greater than 5 percent acceptable deviation may be necessary to avoid the likelihood of imposing a stricter standard than the 95 percent one.

Finally, Kime-Plus protests the exclusion of the quality-assurance evaluator's Quality Assurance Surveillance Plan from the solicitation and objects to certain of the Plan's terms. The Plan instructs the evaluator how to conduct inspections and establish a schedule of inspections. We believe the solicitation sets out the inspection procedures in sufficient detail that the Air Force's instructions to the evaluator for implementing those procedures are not material. In this regard, the protester fails to cite any authority for its position that the Plan should be a part of the solicitation. We therefore find no basis for legal objection to the Plan's exclusion from the solicitation. Since the Plan properly was excluded, its contents merely reflect the agency's internal inspection policies, which provide no basis for protest. See Environmental Aseptic Services Administration and Larson Building Care Inc., supra.

The protest is denied.

for Harry R. Van Cleve
General Counsel