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DECISION



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

FILE: B-216730 **DATE:** May 31, 1985
MATTER OF: Richard M. Walsh Associates, Inc.

DIGEST:

1. While the failure of an IFB damages provision to establish varying deduction rates for late performance of work varying in importance may evidence an impermissible penalty, a provision applying a single deduction rate for late performance of different record transcription tasks does not evidence an impermissible penalty where, although different tasks were assigned time priority over others, the agency did not consider timely completion of any task more important than others.
2. A contracting agency's quantity estimates in a solicitation will be deemed reasonably accurate representations of anticipated actual needs, and thus unobjectionable, when based on the best information available.
3. Solicitation provisions are not objectionable merely because they fail to account for every eventuality during performance and thus may impose on the contractor some risk of less than full reimbursement for performance.
4. Where the solicitation is silent as to whether the contractor is required to use full-time or part-time employees in performing certain tasks, it is sufficiently clear that the contractor can use either full-time or part-time employees.

Richard M. Walsh Associates, Inc. (Walsh) protests alleged defective specifications in invitation for bids (IFB) No. N68836-84-B-0056, issued by the Department of the Navy. The IFB, a total small business set-aside, was for equipment and services in transcribing data from government documents at the Naval Air Station, Key West, Florida, to computer disk and punch card storage. Walsh, the incumbent contractor, contends that the specification deficiencies

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will reduce competition, increase the overall cost to the government, and preclude bidders from competing on an equal basis.

We deny the protest.

Damages for Late Performance

Walsh contends that the IFB's system for assessing damages for late performance through contract payment deductions establishes a penalty that bears no reasonable relationship to the actual damages or harm that might be suffered by the government in the event of delayed performance and thus constitutes an improper liquidated damages provision under Federal Acquisition Regulation (FAR), 48 C.F.R. § 12.2 (1984). As evidence of this lack of reasonable relationship, Walsh points to the fact that although certain work was given time priority over other work under the IFB, deductions for late performance of these high and low priority work items were to be calculated in exactly the same manner: 1 percent of the contract price would be deducted for every 30 minutes of late performance. Walsh also asserts that the damages provision fails to include either a maximum dollar amount of liability or a period of time for the assessment of damages, in alleged violation of the FAR.

The Navy maintains that the damages provision is entirely proper. The Navy points out that the deduction provision is based on a specified maximum allowable deviation from acceptable quality levels; quality assurance methods to be used for evaluating contractor performance were clearly set forth; and the provision was written in accordance with the Office of Federal Procurement Policy's Guide for Writing and Administering Performance Statements of Work for Service Contracts. The Navy also states, in response to the evidence on which Walsh's argument is based, that the deduction formula is the same for all work because timely completion is equally important to all the work, no matter the time priority. The Navy explains that the priorities are established not based on importance, but as a means to assure that all the work is completed in the most timely manner.

Initially, we point out that the damages provision clearly imposes what amounts to liquidated damages for late

performance. Such a damages provision will be deemed to impose liquidated damages wherever, as here, the solicitation fixes, without proof of actual damages sustained, the amounts the government can recover from the contractor for a contract violation. See Environmental Aseptic Services Administration and Larson Building Care Inc., 62 Comp. Gen. 219 (1983), 83-1 C.P.D. ¶ 194.

Before we will rule that a liquidated damages provision imposes an impermissible penalty, however, the protester must show that there is no possible relationship between the liquidated damages rate and reasonably contemplated losses. International Business Investments, Inc., B-213723, June 26, 1984, 84-1 C.P.D. ¶ 668. Walsh has not met this burden.

While the absence of different deduction rates for work of varying importance may evidence an impermissible penalty, we do not agree with Walsh's underlying premise that the assigning of time priorities necessarily indicates that work varies in importance. As Walsh suggests, quick-turnaround work may be so designated because it concerns a particularly important matter. On the other hand, a time priority designation also could reflect an administrative preference for immediately performing less important, but less time-consuming, record transcribing tasks that otherwise might be delayed inordinately while more important, more time-consuming tasks are performed. In this latter situation, time priorities do not denote importance, but rather aid in workload management.

According to the Navy, the installation involved here faces the latter situation rather than that suggested by Walsh. As indicated, the Navy reports that it considers timely record transcription equally important for all the records covered by the IFB, no matter the stated time of performance. The Navy explains that these time priorities are established solely for the purpose of managing the workload and assuring the timeliest possible performance of all the work. In light of the Navy's position and our view, expressed above, that time priority does not necessarily indicate relative importance, we cannot agree with Walsh that the use of a single deduction rate for all late performance evidences an impermissible penalty.

Walsh maintains that it has made out a prima facie case that the damages provision imposes an impermissible

penalty and that we should rule in its favor on this issue because the Navy has not responded with evidence that the provision is reasonably related to anticipated actual damages due to late performance. We have found Walsh's argument based on time priorities unpersuasive, however, and the only other portions of the protest concerning the reasonableness of the deduction rate are statements by Walsh to the effect that the deduction rate "clearly" bears no reasonable relation to the possible harm to the government. Walsh's position notwithstanding, such self-serving conclusory statements and unpersuasive arguments do not meet the protester's burden of establishing that there is no possible relationship between the specified rate and the potential harm. International Business Investments, Inc., B-213723, supra.

Walsh has not even attempted--based on its experience as the incumbent contractor--to estimate the impact of late performance and also has not explained why a 1-percent deduction cannot possibly represent the approximate harm to the Navy from 30 minutes of late performance. This rate of deduction would amount to approximately \$110 per month for 30 minutes of late performance based on the approximate \$11,000 monthly price under Walsh's prior contract. This amount does not appear unreasonable on its face and, since Walsh has not clearly established to the contrary, we conclude that the damages provision does not impose an impermissible penalty.

In presenting its case, Walsh relies to a great extent on our decisions Environmental Aseptic Services Administration, et al., supra, and Linda Vista Industries, Inc., B-214447, B-214447.2, Oct. 2, 1984, 84-2 C.P.D. ¶ 380, holding that certain deduction provisions were improper. Walsh's reliance is misplaced. Those cases, unlike Walsh's, involved maintenance contracts under which the contractor would have its payment for an entire task deducted if a subtask was unacceptably performed (e.g., deduction of payment for cleaning a room for failure to empty one ashtray in the room). We held that this failure to provide reimbursement for substantial performance constituted a penalty: the deduction amount would exceed the value of the improperly performed work. Here, the 1-percent deduction is related only to the transcription work not timely performed, and the record does not establish that the deduction rate will exceed the value of the improperly performed work.

Walsh's contention that the Navy violated the FAR by failing to include a maximum dollar amount of liability or a maximum period of time for the assessment of damages also is without merit since FAR, § 12.202(b), provides only that such limitations "may" be included in a liquidated damages clause, not that the limitations must be included.

IFB's Estimates of Government Needs

Walsh asserts that the IFB's estimated annual requirements for the data entry and transcribing services were overstated because the same estimate was listed for the base contract year and each of the 2 option years despite the fact that, as the prior incumbent contractor, Walsh experienced a significant downward trend in the government's actual requirements. Walsh maintains that at the time the Navy issued the IFB, it had in its possession delivery tickets (submitted for each work order) from Walsh reflecting this decrease in recording requirements. Walsh claims the Navy improperly ignored this "most current information available" in preparing the IFB estimates, and that the estimates therefore are defective.

Walsh is correct that when an agency solicits bids for a requirements contract on the basis of estimated quantities, the estimates must be calculated based on the best information available. There is no requirement, however, that the estimates be absolutely correct. Rather, the estimated quantities simply must be reasonably accurate representations of anticipated actual needs. Space Services International Corp., B-207888.4, et al., Dec. 13, 1982, 82-2 C.P.D. ¶ 525. It is the protester's burden to establish that the stated estimates are not based on the best information available or otherwise are deficient. JETS Services, Inc., B-190855, Mar. 31, 1978, 78-1 C.P.D. ¶ 259. We find Walsh has not met this burden.

The Navy explains that in arriving at its estimates, it took all available resources into consideration, including government historical data, new recording requirements for fiscal year 1985, and the experience of certain key data processing personnel. Although not clear from the Navy's initial report, the Navy states in subsequent submissions that it also relied on Walsh's delivery tickets, particularly in compiling its estimates for new jobs for which there were no historical data. The Navy

points out that its estimates in fact represent a decrease of five million keystrokes from the prior contract and that this decrease was not greater only because the addition of several new programs is anticipated under this contract.

As the Navy apparently relied on all available information--including Walsh's delivery tickets--in formulating its estimates, we find no basis for Walsh's claim that the Navy did not use the best information available. Further, while Walsh's performance experience might indicate a downward trend in requirements for 1984, the anticipated addition of new programs reasonably could offset this trend in 1985. Walsh has not argued or shown otherwise. We conclude that the estimates have not been proven deficient.

Deficient Statement of Work

Walsh claims the statement of work is unclear, and thus deficient, in three respects: it does not set forth criteria establishing new work priorities and new performance times in the event of equipment downtime; turnaround times are relaxed for workload increases only when less than 4 hours' notice of the increase is given; and it allows the government to increase the workload without compensating the contractor. These contentions are without merit.

The contracting agency, not our Office, is responsible for determining its needs and the best means of meeting those needs; the agency is most familiar with the conditions under which supplies, equipment or services have been used in the past and how they are to be used in the future. Rack Engineering Co., B-208615, Mar. 10, 1983, 83-1 C.P.D. ¶ 242. Furthermore, while specifications must describe the government's needs accurately enough that bidders are able to compete on a relatively equal basis, Talley Support Services, Inc., B-209232, June 27, 1983, 83-2 C.P.D. ¶ 22, there is no requirement that an IFB be so detailed as to eliminate completely all performance uncertainties or address every possible eventuality. See e.g., Operational Support Services, B-215853, Dec. 3, 1984, 84-2 C.P.D. ¶ 607. The fact that the resulting solicitation may impose some risk on the contractor does not render the IFB improper. Applied Devices Corp., B-199371, Feb. 4, 1981, 81-1 C.P.D. ¶ 65.

The establishing of any new work priorities is a matter involving numerous variables which, according to the Navy, may not become apparent until rescheduling actually becomes necessary. We do not think it unreasonable for an agency to deal with such situations when they arise rather than attempt to address each possible circumstance in an IFB. Walsh, we note, has offered no suggestions as to the criteria it believes should be included in the IFB.

We likewise find nothing improper in the turnaround time relaxation provision. Paragraph C.5.8 of the statement of work provides that the contractor will be given as much advance notice as possible if the volume of source documents for a recording job exceeds the normal volume by 25 percent, and that where at least 4 hours' notice is not given, the turnaround time will be extended "in equivalence with the number of documents over the normal submission." This provision for at least 4 hours' notice does not appear unreasonable on its face, and Walsh neither presents evidence or argument as to why 4 hours is inequitable, nor indicates the amount of notice it would consider adequate. Consequently, we cannot conclude that it was improper for the Navy to specify 4 hours as the minimum notice period before turnaround time would be adjusted.

The third alleged deficiency concerns paragraph C.5.3, which provides that the normal workload will fluctuate and is subject to change through contract modification, and that during an estimated three peak periods during the year the contractor could be required to perform recording services in excess of the estimated maximum daily requirement. In our view, this paragraph does no more than warn of a possible uneven workload. This is part of the Navy's requirement and is unobjectionable. As for the possibility of undercompensation, the contract modification procedure referenced in this provision presumably would entail corresponding price adjustments for adjustments in the workload. Further, nothing in the provision interferes with the contractor's right to claim increased reimbursement under the disputes clause (FAR, § 52.233-01) incorporated in the IFB by reference. Again, however, the mere fact that a solicitation may impose a risk that the contractor may not be able to recover fully for performance does not render the solicitation improper. International Business Investments, Inc., B-213723, supra.

Work Requirement in Building A-314

Walsh claims that the IFB misstated the work requirements for government documents in building A-314 at the Naval Air Station by failing to advise bidders clearly of the need for a full-time employee in the building. The Navy states that the status of the employees manning the building is of no concern to the government; whether full- or part-time employees are hired is purely a matter of business discretion. As the IFB was silent as to whether the contractor was required to use full-time or part-time employees to perform the work in building A-314, we think it was sufficiently clear that the contractor could use either type of employee.

The protest is denied.

for Seymour Efron
Harry R. Van Cleave
General Counsel