



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: T&A Painting, Inc.

File: B-229655.2

Date: May 4, 1988

DIGEST

1. Where protester alleges that solicitation provisions are ambiguous but provides no alternative interpretations or further explanations, these allegations are dismissed for failure to state a basis for protest.
2. Even if a provision in a solicitation's specifications and a term used in the schedule of work are ambiguous, argument that the ambiguities require the requirement to be resolicited is without merit where the protester does not show that it was prejudiced by the defects.
3. There is no requirement that a solicitation be so detailed as to completely eliminate all performance uncertainties and risks. Protester has not shown that information provided in solicitation lacks sufficient detail as to be defective, where information provided is adequate to prepare a bid.
4. Protest concerning a solicitation impropriety is untimely where not raised until the protester's comments on the agency report.
5. Contracting officer's decision not to delay bid opening, despite bidder's lengthy request for clarification, is not legally objectionable where bidder waits until last working day before bid opening to request such clarification even though it was apparently aware of grounds for request upon issuance of the solicitation due to relationships it had with the incumbent.

DECISION

T&A Painting, Inc., protests several defects it perceives in invitation for bids (IFB) No. N62766-86-B-2298, issued by the Department of the Navy for repair and maintenance of 3,139 family housing units at the Naval Air Station, Guam. T&A contends that the IFB is ambiguous and lacking in

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sufficient information regarding the services to be performed to enable bidders to prepare their bids. T&A also complains that the Navy should not be permitted to require option year prices to be identical to the base year prices.^{1/}

We dismiss the protest in part and deny it in part.

The IFB was issued on November 25, 1987, with a bid opening date of December 28. The IFB called for award of an indefinite quantity contract for repair and maintenance services for a period of 12 months, with an option to extend the contract up to 36 months. Unit prices for the option years were required to be the same as for the base year. The solicitation's schedule of indefinite quantity work contained a total of 261 line items, with award to be based on the lowest aggregate price for all line items listed in the schedule. On December 7, an amendment was issued making changes to the general requirements and painting sections of the IFB's specifications.

On Thursday, December 24, T&A hand delivered a letter to the Navy requesting clarification of three of the changes made by the amendment, as well as of three paragraphs in the general requirements sections of the specifications and 68 line items in the schedule of work. On Monday, December 28, the next working day and the day of bid opening, when he received the letter, the contracting officer responded with a telephone call and a letter stating that T&A "should bid the contract according to your best interpretation of the plans, specifications, and amendments." The contracting officer added that there was not sufficient time for providing a response to T&A's technical questions and distributing that information to all potential bidders given the bid opening scheduled for that afternoon. Bids were then opened as scheduled and T&A was found to be second low bidder.

T&A then filed a protest in our Office on January 11, complaining that the Navy's refusal to adequately reply to its request for clarification of the 74 alleged ambiguous

^{1/} T&A shares some common officers and stockholders with Service Alliance Systems, Inc. (SASI), the incumbent contractor for this requirement who did not bid on the new solicitation. The two companies share the same president, and T&A states that the same person who prepared SASI's bid under the prior contract also prepared T&A's bid under the new solicitation. T&A also states that it was because of this familiarity with the work under the prior contract that the "ambiguities in the solicitation" were identified.

IFB provisions impaired its ability to submit the low bid. T&A also complains that the Navy should not be permitted to require option year prices to be the same as the base year prices.^{2/} According to the Navy, award to the low bidder was authorized on January 19, 1988, by the Commander, Naval Facilities Engineering Command, due to the urgency of the procurement.^{3/} As a remedy, T&A asks that the contract be terminated and the requirement resolicited.

An ambiguity exists where two or more reasonable interpretations of a solicitation requirement are possible. Freedom Elevator Corp., B-228887, Dec. 7, 1987, 87-2 CPD ¶ 561. Although a party's particular interpretation need not be the most reasonable one for a finding of ambiguity, the party is nonetheless required to show that its interpretation of the language in issue is reasonable and susceptible of the understanding it reached. See Energy Maintenance Corp., B-223328, Aug. 27, 1986, 86-2 CPD ¶ 234. When a dispute exists as to the actual meaning of a solicitation requirement, this Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Id.

For the most part, neither in its agency-level protest nor in the one filed with our Office did T&A provide any alternative interpretations of specifications it claimed to be ambiguous and in need of clarification. Not until its

^{2/} Although T&A did not denominate its December 24, pre-bid opening letter as a "protest," the Navy has treated it as such. We therefore regard the firm's subsequent protest to us as a timely appeal from the initial adverse agency action of proceeding with the bid opening as scheduled without amending the IFB. 4 C.F.R. § 21.2(a)(3) (1987).

^{3/} In its comments on the agency report, T&A complains that it was not given an opportunity to "answer or argue against" the Navy's finding of urgent and compelling circumstances. However, where an agency makes a determination to award a contract while a protest is pending, the agency's only obligation is to inform our Office of that decision, as the Navy has done here. See 31 U.S.C. § 3553(c) (Supp. III 1985); Federal Acquisition Regulation (FAR) § 33.104(b) (FAC 84-9). There is no requirement that a protester be allowed to rebut the agency's finding nor does this Office review such a determination. See, e.g., Dock Express Contractors, Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23.

comments on the agency report does T&A attempt to provide any alternative interpretations. With regard to 67 of the 74 alleged ambiguous provisions, the protester merely states that these provisions require clarification because they are ambiguous, but it provides no further explanation. We dismiss T&A's allegations of ambiguity concerning these 67 provisions for failure to state a basis for protest since T&A has not demonstrated that any of these provisions is susceptible to more than one reasonable interpretation. See Sunrise Maintenance Systems, B-219763.2, Nov. 26, 1985, 85-2 CPD ¶ 603; 4 C.F.R. § 21.3(f).

In its comments on the agency report, T&A does provide alternative interpretations for two of the remaining seven alleged ambiguous provisions. With regard to these two provisions, T&A argues that 1) a provision in paragraph 3.6 of the painting specifications, apparently requiring one coat of stain over "previously painted wood surfaces," is impossible to perform as a practical matter because stain does not penetrate paint, and 2) the use of the term "texcoat" in the schedule of work can apply to either a brand name product or a generic wall texture material.

The original paragraph 3.6 of the IFB specifications covered painting and finishing work, which included priming and painting of all new work and the repainting of existing interior surfaces. The paragraph referred to these surfaces as either "new" or "existing" and as either "pigmented" (latex coated) or "natural finish" (stained and varnished). It was clear from the specification that more coats were to be applied to "new" surfaces than to "existing" ones. For example, "new" natural finished wood surfaces required three coats of varnish while "existing" surfaces required only two.

Through the amendment, this paragraph was replaced by a new one in which the description of the surfaces to be treated was changed from "new" or "existing" to "unpainted" or "previously painted." As a result, one provision applicable to "existing" natural finish wood surfaces which called for the application of "one coat stain to match existing and two coats of spar varnish" was changed by the amendment to apply to "previously painted" instead of "existing" surfaces. In all other respects the requirement remained the same, including the language quoted above.

The Navy states with regard to these provisions that they were amended only to clarify the terms used in describing the work surface to be treated, but not to alter the work schedule used by bidders, and not to arrive at the obviously unreasonable procedure suggested by the protester.

The protester also refers to item 0003 of the "Schedule of Indefinite Quantity Work," which was for the application of "texcoat on ceiling of quarters." In its December 24 letter to the contracting agency, T&A simply asked for a "clarification" of the term "texcoat," and in its subsequent protest to our Office T&A objected to the contracting officer's refusal to do so, in neither instance indicating what possible different meanings the protester thought that term could have.

The Navy's position is that it is not necessary to clarify "texcoat" as it is a term commonly used in the painting industry. In reply, the protester concedes that the term could apply "to a coating of wall texture material applied over new or repaired [wall or ceiling] surfaces." It argues, however, that it also could apply to a specific brand of such material manufactured by Texcote of America, which the protester alleges is more expensive than "generic" material.

We think the protester's interpretation of paragraph 3.6 of the painting specifications, as requiring stain to be applied over paint, is unreasonable. The specifications define the terms paint, painting and coating in a general sense as "sealers, primers, stains, oils, alkyd, latex, polyurethane, epoxy and enamel-type paint and coatings, and application of these materials." Also, the specifications' "Preparation of Surfaces" section requires contractors to "[s]andpaper the entire area of previously painted interior wood surfaces; scrape as necessary to remove loose coatings." In the case of existing varnished surfaces, contractors are required to stain to match surrounding areas when repairing or patching those areas. In our view, the only reasonable interpretation of paragraph 3.6 in light of both the other specifications and common sense is that the term "painted" is used in a general sense to refer to stained and varnished. The provision reasonably can only be read, then, as requiring contractors to apply stain to match existing surrounding varnished surfaces after the old varnish has been removed with sandpaper and scraping, and not as requiring the application of stain to old paint.

With regard to the "texcoat" requirement, we simply are not persuaded by the protester's argument. The protester concedes that the term has a "generic" application, and we see no reason to interpret it as referring to a differently spelled brand name product.

In any event, even if these provisions were ambiguous, we fail to see how T&A's position was prejudiced. The standard of review necessary for a showing of prejudice is that the

protester must demonstrate there was a reasonable possibility it was displaced due to the unfair competitive advantage afforded another firm as a result of the defect. See Energy Maintenance Corp., B-223328, supra, 86-2 CPD ¶ 234 at 5. T&A has not met that burden here. T&A has made no showing that it would have been the low bidder if these items had been clarified, or even that it increased its bid price because it actually thought the contemplated contract would require it to apply stain over previously painted surfaces. Also, T&A has made no showing how its bid price would have been affected if the term "texcoat" had been further defined. In fact, T&A admits in its comments on the agency report that "a third of the bid items upon which clarification was requested could have gone unanswered without serious financial impact." We, therefore, find no showing of prejudice to T&A's position because of any ambiguities present in the above items.

With regard to the remaining five disputed provisions, T&A does not argue that they are ambiguous but merely complains that the provisions do not provide what it considers to be sufficient detailed information so as to allow it to derive an exact cost estimation upon which to base its bid price. As a general rule, a procuring agency must give sufficient detailed information in its IFB to enable bidders to compete intelligently and on a relatively equal basis. DSP, Inc., B-220062, Jan 15, 1986, 86-1 CPD ¶ 43. Specifications must be free from ambiguities and must describe the minimum needs of the procuring activity accurately. There is no legal requirement, however, that an IFB be so detailed as to completely eliminate all performance uncertainties and risks. Hero, Inc., 63 Comp. Gen. 117 (1983), 83-2 CPD ¶ 687. We have stated that such perfection, while desirable, is manifestly impracticable in some procurements. Id. As explained below, we find the information provided in the IFB was adequate for preparation of a bid.

The amendment to the IFB added an "Access to Housing Units" provision advising contractors that keys needed for entry into vacant housing units were to be obtained through the Public Works Center Housing Office, in contrast to occupied housing units where the contractor was responsible for scheduling the work with the occupant. Although T&A is critical of the contracting officer for not clarifying this provision prior to bid opening, we note that neither in its pre-bid opening letter to the contracting agency nor in its protest to our Office did T&A explain in what respect clarification was needed. In its comments on the agency report, however, T&A argues that this provision should explain whether the keys obtained for an unoccupied unit must be turned in by work crews at the end of each work day or may be kept until the work on that unit is complete. T&A

asserts it saw this as a potential problem because of SASI's performance as the incumbent, although what that experience had been is not made clear by the protester, who does not explicitly say that SASI was required to return keys daily. In its report to our Office--written before the protester had articulated its specific objection to this provision--the Navy takes the position that the contracting officer acted properly because the meaning of this informational provision was obvious and no further clarification was necessary.

We would agree with the Navy that the protester's criticism of the contracting officer seems misplaced since the protester had asked only in general terms that this provision be clarified and did not focus upon the policy as to return of keys as its concern. In any event, we fail to see why this particular lack of specificity, in the context of the entire work for which the contractor is responsible, involves anything more than a minor area of uncertainty or risk that should be taken into account during bid formulation.

Second, T&A argues that the "canceled work items" provision, allowing the contracting officer to cancel any work item given certain conditions, does not provide an estimate of the amount of items to be canceled. Although this provision does not include an estimate of the amount of items expected to be canceled, the IFB specifications do state elsewhere that "during the term of this contract, a guaranteed minimum amount of work which equals 60% of the successful contractor's total bid dollar amount will be ordered."

Third, T&A alleges that the IFB does not provide a paint schedule advising bidders how many coats would be required. Contrary to T&A's assertion, however, the IFB's specifications do include a section, labeled "Painting of Buildings (Field Painting)," which contains detailed instructions setting forth the required number of coats and the minimum dry film thickness.

Fourth, T&A complains that there is no separate priced line item in the schedule of work for the requirement that while performing maintenance construction work the contractor is to "check" for deterioration to determine if problems exist. Although there is no separate line item for this general requirement for which a bidder can submit a separate price, a bidder can easily incorporate the cost of "checking" for deterioration into its other unit prices since the IFB requires "checking" to be done while performing the maintenance construction work reflected in the 261 line items in the schedule of indefinite quantity work.

Fifth, T&A complains that the location of work provision of the specifications, which states that "[w]ork will be mostly in unoccupied quarters and will include occupied quarters periodically," is too indefinite. Although the provision states only that a substantial portion of the work will take place in unoccupied quarters and does not provide any exact estimates, the IFB does include an otherwise detailed description of the work to be performed and the location where it would be performed by providing an estimated quantity for each line item as well as floor plans of all the different types of housing units where the work was to be performed. We, thus, do not consider this provision to be so uncertain as to impose an unreasonable risk on bidders exercising business judgment in preparing their bids.

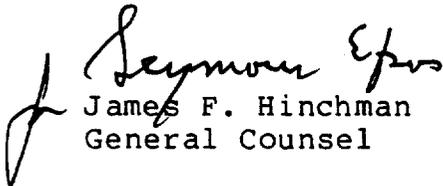
Next, T&A objects to the IFB's requirement that "unit prices for option years . . . be the same as for the base year." The Bidding Schedule consisted of 261 line items of indefinite quantity work which unit prices, when extended by the estimated quantities and totaled, represented the total price for performing the work during a contract period of 12 months. Although there was no provision for separately pricing the work for option years, the government did reserve to itself the option of extending the term of the contract for a total contract duration not to exceed 36 months.

As with the "Access to Housing Units" provision, the protester did not articulate to the contracting officer its concern with this provision, which it explained in its protest to our Office was with the fact that a bidder either must absorb the cost of inflation during the option periods or build those anticipated cost increases into its first year's price. In response, the Navy argued that the level-pricing provision was legally permissible. In its comments on the Navy report the protester did not really rebut the Navy's position but argued, for the first time, that the IFB's level-pricing provision was defective in that it did not contain certain statements prescribed by FAR § 17.203 (g)(1) and (2) (FAC 84-5). This argument is made too late to be timely, 4 C.F.R. § 21.2(a)(1), and we will not consider the matter further.

Finally, T&A appears to argue that the contracting officer should have postponed bid opening in order to provide a full response to T&A's request for clarification. We find this argument without merit. Contracting agencies are to allow a reasonable period of time for prospective bidders to prepare and submit their bids. A bidding time (the time between the issuance of the solicitation and the opening of bids) of at least 30 calendar days is to be provided. FAR § 14.202-1 (FAC 84-12). The IFB was issued on November 25 with a bid

opening date of December 28, a sufficient period of bidding time. T&A waited until December 24, to hand deliver its lengthy request for clarification. The IFB specifically warned that bidders "desiring an explanation or interpretation of the solicitation, drawings, specifications, etc. must request it in writing soon enough to allow a reply to reach all prospective bidders before the submission of their bids." Given T&A's familiarity with the incumbent's performance because of the personnel they have in common and its statement that it was this familiarity that caused it to identify the alleged "ambiguities in the solicitation," we see no reason why T&A had to wait so late to file its request for clarification, which by reason of misdelivery, did not actually reach the contracting officer until the day of bid opening. As discussed above, none of the IFB provisions disputed by T&A as shown to be so deficient as to cause T&A's position to be prejudiced. Thus, we do not find that the contracting officer's failure to delay bid opening provides a basis for legal objection to the procurement.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel