



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ameriko Maintenance Co.
File: B-230994
Date: July 22, 1988

DIGEST

1. Protest that compensation rate set out in cleaning services solicitation for up to 200 additional hours of unspecified service is too low to cover the contractor's costs is denied, since the services are very limited in the context of the contract, and since the contractor clearly can cover any risk of undercompensation in its overall bid price.
2. Protest that solicitation contains inadequate data is denied where the solicitation in fact includes the data the protester requests. In any event, solicitations need not be drafted to eliminate all uncertainties and risks of performance.
3. Liquidated damages rates are not improper just because they are based on the costs of reperforming the unsatisfactory services with government employees where such costs reasonably reflect the measure of damages.

DECISION

Ameriko Maintenance Co. protests that there are a number of defects in solicitation No. GS-07P-88-HTC-0102/7ADB, issued by the General Services Administration (GSA) for custodial services for two federal buildings in Denver, Colorado. Ameriko asserts that the solicitation establishes inadequate compensation for certain required tasks, includes an improper liquidated damages provision, and does not provide sufficient information for bidders to formulate their bids.

We deny the protest.

The solicitation requests a bidder to quote a monthly rate to provide specific custodial and related services for a base year and 2 option years. The solicitation also requires the contractor to provide, at the request of the Building Manager, up to a maximum of 200 hours per year of additional, unspecified services. The solicitation provides

0-42785

that payment for the additional services will be 130 percent of the applicable minimum hourly wage, including health and welfare benefits established by the Secretary of Labor.

Ameriko first protests that the labor rate for the additional services is not sufficient to compensate Ameriko for the expense it would incur in providing those services. Specifically, Ameriko asserts that labor rate should be the minimum wage rate plus the following percentages of the minimum wage rate, which total 64.96: labor burden--17.26, equipment and supplies--20.00, general and administrative (G&A)--10.00, profit--10.00, and, for any needed temporary employees, holiday and vacation--7.70. Ameriko concludes that compensation for additional services thus should be raised to 165 percent of the minimum wage rate.

GSA disputes Ameriko's position, arguing that 30 percent above the minimum wage rate is sufficient to cover the labor burden, equipment and supplies, G&A, and profit. GSA contends that the additional service hours will not add any cost for holidays and vacation because these costs already will be included for employees assigned to the contract.

A solicitation is not improper because it imposes a risk that the contractor will not be able to recover all its costs. American Maid Maintenance, B-227909, Oct. 2, 1987, 67 Comp. Gen. ____, 87-2 CPD ¶ 326; International Business Investments, Inc., B-213723, June 26, 1984, 84-1 CPD ¶ 668. Rather, it is the bidder's responsibility to project costs and include in the basic contract price a factor concerning any otherwise uncompensated costs. Robertson & Penn, Inc., B-223945, Oct. 30, 1986, 86-2 CPD ¶ 497. Here, we think Ameriko can cover any costs it thinks will not be compensated by including a cost for projected contingencies in its bid price, especially since the solicitation limits to 200 the maximum amount of additional service hours that may be ordered. We thus do not believe Ameriko's objection to the solicitation in this respect warrants further consideration.

Ameriko next contends that the solicitation contains inaccurate building data. Exhibit 2A to the solicitation, entitled "Cleaning Work and Quality Requirements," lists the tasks the contractor will be required to perform, the frequency with which those tasks must be performed, and the quality standards the contractor must meet. For example, the exhibit provides that bathrooms must be swept and wet mopped with disinfectant daily, and present a clean appearance. Ameriko complains that the exhibit does not specify the exact square footage of, for example, the bathrooms, and the amount per square foot that will be deducted from the contractor's payment for inadequate performance. Ameriko further complains that the exhibit also does not

specify the exact number of units of each task to be performed and the deduction for inadequate performance.

GSA responds that the information provided in the solicitation was furnished by the Building Manager and is sufficient for bidders to submit intelligent bids. GSA notes that, in any event, the solicitation warns bidders that the data provided is only estimated, and urges bidders to make a site visit.

As indicated above, a solicitation must give bidders sufficient information to compete intelligently and on a relatively equal basis. There is no requirement, however, that the solicitation be so detailed as to eliminate all performance uncertainties and risks. Harris System International, Inc., B-224230, Jan. 9, 1987, 87-1 CPD ¶ 41. In this regard, we have noted that custodial services by their nature often require computing prices based on visual inspections, and that the presence of some risk does not make a solicitation improper. We thus have found that where a solicitation for custodial services provides information on the buildings to be cleaned and specifically advises bidders to perform a site visit, it is not necessary for the specifications to provide the specific numbers of items to be cleaned. Id.; Triple P Services, Inc., B-220437.3, Apr. 3, 1986, 86-1 CPD ¶ 318.

Here, solicitation exhibit 1, "Building Information," provides the number of square feet in occupiable areas, the net cleaning area, and the number of fixtures in the various rooms. In addition, solicitation figure G-1, "Criteria for Deductions," provides the amount per unit that will be deducted for inadequate performance. It thus appears that the information Ameriko is requesting is, in fact, included in the solicitation. In any event, the solicitation advises bidders to conduct a site survey to ascertain all conditions that might affect their costs and that the Building Manager would provide access to assignment drawings and blueprints. Further, Ameriko is the incumbent and thus somewhat familiar with the buildings. Given these factors, we think the building data provided is sufficient to permit Ameriko, as well as the other prospective competitors, to submit intelligent bids.

Ameriko protests that the deduction rates in figure G-1 do not reflect the actual value of the specific services to the government and thus establish an unenforceable penalty.

The solicitation reserves to the government the right to inspect all services, to the extent practicable, at all times during the term of the contract and provides that when defects cannot be corrected by reperformance, the government

may reduce the contract price to reflect the reduced value of the services performed. The solicitation also sets out the criteria under which deductions would be taken for inadequate cleaning. Figure G-1 provides the amount per unit that will be deducted for inadequate performance for specified services and 13.90 per hour as the amount to be deducted for work not otherwise covered. GSA reports that the deduction rates are based on the amount it would cost GSA to have the work performed by one of its employees. More specifically, the 13.90 per hour deduction rate for miscellaneous services is the GSA Denver Office field office labor rate, which is based on the payroll cost of wage grade employees. The other deduction rates in figure G-1 are based on Public Building Service instructions for developing the itemized deductions for custodial services solicitations. GSA argues that the established deduction rates are reasonable in light of the expected loss for defective performance and therefore are proper.

Ameriko suggests that government employees actually will not reperform inadequately performed or omitted tasks, so that GSA should not use the cost it would incur in having the services performed by government employees as a measure of damages. Ameriko further argues that it is unfair to pay the contractor \$7.50 for a service, for example, yet deduct \$13.90 from the contract price if the service is not performed satisfactorily. Ameriko points out that at the established rates there even could come a point where the amount taken for deductions would exceed the contract price and thus effectively would deprive the contractor of payment for otherwise acceptable services.

The general rule is that fixed amounts the government can recover from the contractor without proof of the damages actually sustained--liquidated damages--must be reasonable in light of the solicitation's requirements, since liquidated damages fixed without reference to probable actual damages may be held an unenforceable penalty. Before we will rule that a liquidated damages provision imposes a penalty, however, the protester must show there is no possible relation between the amounts stipulated for liquidated damages and losses contemplated by the parties at the time the contract is formed. Ameriko Maintenance Co., B-224087, Dec. 19, 1986, 86-2 CPD ¶ 686.

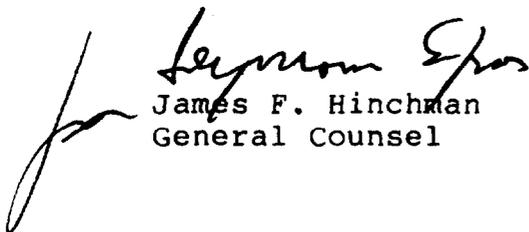
In considering whether a liquidated damages clause establishes a penalty, we have found that an agency may use a field office labor rate as a proper measure unless the contractor demonstrates that this measure is unreasonable. Kleen-Rite Corp., B-215391, Oct. 30, 1984, 84-2 CPD ¶ 479. Here, Ameriko's suggestion that government employees will not perform inadequately performed services does not, in our

view, demonstrate that using the rate of pay for government employees as the measure of damages is unreasonable. Further, it is not relevant that liquidated damages that properly reflect contemplated losses at the time the contract is executed may exceed the contract price. Universal American Enterprises, Inc., B-184832, Mar. 30, 1976, 76-1 CPD ¶ 206; Kleen-Rite Corp., B-183591, July 10, 1975, 75-2 CPD ¶ 26.

Finally, Ameriko argues that the criteria for deductions established by solicitation paragraphs 8(c) and 8(d) are ambiguous. Paragraph 8(c) establishes that if services scheduled to be performed between once a day and once every 2 weeks are not satisfactorily performed the government will subtract from money due the contractor an amount equal to the cost of service. Paragraph 8(d) provides that if work scheduled to be performed once a month or less is not satisfactorily accomplished and it is not possible to perform that work by other means a deduction will be made to reflect the reduced value of the services to the government. Ameriko argues that the solicitation does not define cost of service for paragraph 8(c) or establish a deduction rate for 8(d).

A solicitation provision will be deemed ambiguous only if it is subject to more than one reasonable interpretation. Sunnybrook, Inc., B-225642, Apr. 10, 1987, 87-1 CPD ¶ 399. Here, the disputed provisions clearly state that the unit costs shown in figure G-1 will be used to compute any amounts to be deducted. There is, therefore, no merit to Ameriko's complaint that the provisions are ambiguous. Further, insofar as Ameriko is again asserting its disagreement with GSA's measure of damages, as stated above, we think GSA properly may base the liquidated damages amounts on the cost to perform the services with government employees.

The protest is denied.


James F. Hinchman
General Counsel