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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Argus Services, Inc.
File: B-234016.2; B-234017.2
Date: September 12, 1989

DIGEST

Contracting agency may properly decline to include an economic price adjustment (EPA) clause in a solicitation where agency offers reasonable justification for omission of the clause since use of an EPA clause is a matter within the agency's discretion.

DECISION

Argus Services, Inc., protests the terms of invitation for bids (IFB) Nos. N62470-89-B-3998 and N62470-89-B-3999, issued by the Department of the Navy for refuse removal services at the Marine Corps Air Station, Cherry Point, North Carolina. Argus principally argues that the IFBs are defective because they do not include a price adjustment provision for possible landfill fee increases.

We deny the protest.

The IFBs contemplate the award of firm fixed-priced contracts for the performance of trash removal and disposal services. As originally issued, the IFBs provided for the award of contracts with a base period of approximately 8 months and contained options to extend contract performance for a maximum of 52 additional months. In addition, both IFBs required the successful contractor to bear the cost of any landfill fees incurred in connection with contract performance.

Another firm, Mark Dunning Industries, Inc. (MDI), protested the terms of the IFBs as originally issued. MDI argued that the nearest practicable landfill operation intended to dramatically increase its prices during the contract term and, since not all firms were aware of this fact, it was at a competitive disadvantage because not all firms would compete on an equal basis. MDI also specifically requested that the IFBs be amended to include an economic price

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adjustment (EPA) clause in order that contractors be compensated for any substantial increase in landfill costs.

In response to that protest, the Navy issued two amendments to each solicitation. Amendment No. 0001 apprised all prospective bidders of MDI's basis of protest (that landfill fees were expected to escalate), and amendment No. 0002 eliminated all option periods under the IFBs, leaving a total contract term of 7 months. The Navy then requested dismissal of the protests on grounds that, by virtue of the amendments, the protests had become academic. We concurred in the Navy's position as to the academic nature of the protests, and dismissed them. Mark Dunning Industries, Inc., B-234016; B-234017, Mar. 7, 1989, 89-1 CPD ¶ 252.

Subsequent to our dismissal of the earlier protests, the Navy issued a series of amendments to the IFBs. Amendment No. 0003 to each IFB provided that contract performance would be for a base year with options for an additional 2 years; amendment No. 0004 provided that each IFB would be set aside for small businesses; amendment No. 0005 postponed bid opening for a short period of time; amendment No. 0006 informed all prospective bidders of the basis of the current protests; and amendment No. 0007 specifically apprised all bidders of an expected increase in landfill fees during the proposed contract term and urged bidders to contact the cognizant county manager's office for information.

The protester argues that the IFBs are defective because they again contemplate the award of longer term contracts and do not include an EPA clause. Specifically, the protester argues that potential landfill fee increases, which may not be known to all bidders, leave it at a competitive disadvantage since it will necessarily have to build a large contingency into its bid. In addition, the protester argues that the Navy's decision not to include an EPA clause in the IFBs is arbitrary and capricious since it will limit competition and will likely result in the Navy receiving higher bid prices. In this regard, Argus asserts that shifting the risk of possibly dramatic cost increases to the contractor is of particular concern here since the Navy has set the procurements aside for small businesses which will be less able to absorb any resulting loss.

The Navy responds that, with respect to its lengthening the possible contract term subsequent to the MDI protest, it did so in response to complaints of prospective bidders. Specifically, the Navy states that numerous firms complained, arguing that using a 7-month contract prevented them from competing with the current incumbent because they would be unable to amortize start-up costs during such a

short performance period. The Navy states that the 36-month contract format was a response to these concerns and was arrived at through an informal survey of prospective bidders.

As to the decision not to include an EPA clause, the Navy argues that the contracting officer, in a reasonable exercise of discretion, determined that it was in the government's best interest to require firm fixed prices from contractors. The Navy argues that it believes more realistic bids will be received in the absence of an EPA clause. The Navy also points out that the IFBs permit firms to bid separately the option years, thus allowing them to include potentially higher landfill fees. Finally, the Navy argues that none of the prospective bidders are uninformed with regard to the potential for landfill fee increases. In this connection, the Navy points to three of the IFBs' amendments which specifically apprise bidders of the protest bases alleged by MDI and Argus and apprise them of the potential landfill fee increases as well as the name of the county office to call for information about potential landfill fee increases.

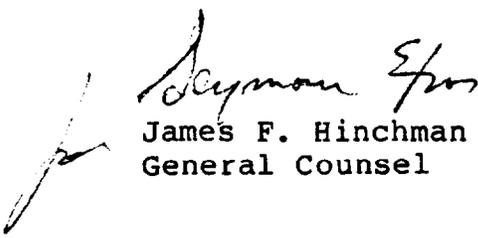
We agree with the Navy. With regard to the extension of the IFBs' period of performance, we think that the Navy has offered--and the protester has not refuted--a logical reason for the extension, namely, that enhanced competition will result since new firms will be better able to amortize their start-up costs over the life of a longer contract. Moreover, this view is supported by the record which shows that a number of firms specifically requested a longer performance period for this reason.

With respect to the inclusion of an EPA clause, our Office has recognized that its basic purpose is to protect the government in case of a decrease in contract costs and the contractor in the case of an increase. See Master Security, Inc., B-232263, Nov. 7, 1988, 88-2 CPD ¶ 449. Moreover, we have recognized that it is within a contracting agency's discretion whether or not to include an EPA clause, and we will only question the agency's decision in this regard where it is shown to be arbitrary and capricious. Master Security Inc., *supra*; Kings Point Mfg. Co., Inc., B-220224, Dec. 17, 1985, 85-2 CPD ¶ 680. In addition, we have held that it is within the ambit of administrative discretion to offer to competition a proposed contract imposing maximum risks upon the selected contractor and minimum administrative burdens upon the agency. Second Growth Forest Mgmt., Inc., B-218273; B-238273.2, Apr. 10, 1985, 85-1 CPD ¶ 410.

The agency states that the county manager where the base is located informed the agency that a landfill fee increase of approximately 22 percent (from \$6 per ton to \$7.32 per ton) was informally recommended to the county administrators for the new fiscal year. Thus, the record does not support the protester's contention that fee increases will be volatile or the fee excessively unstable even if we accept the protester's argument that another landfill in a different county in the area increased its landfill fee to \$30 per ton. While the record thus shows that some fee increases are probable, we note that the mere presence of risk in a solicitation does not make the solicitation inappropriate. Talley Support Servs., Inc., B-209232, June 27, 1983, 83-2 CPD ¶ 22. It is the bidder's responsibility to project costs and include in the contract price a factor covering any otherwise uncompensated cost increases. Here, the lack of an EPA clause affects all potential bidders equally and, in our view, does not preclude a fair competition. Id. Additionally, the IFBs provide a mechanism in the form of separate pricing for the option years which allows bidders to reduce the risk occasioned by potential landfill fee increases while at the same time offering competitive prices.

Finally, we believe that Argus' allegation with regard to the lack of information about the potential landfill fee increases to be without merit. As pointed out by the Navy, the various amendments have apprised all firms of the potential risk and have provided them with the name of the individual who may be contacted for specific information regarding possible fee increases.

We deny the protests.



James F. Hinchman
General Counsel