



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Spectrum Technologies, Inc.
File: B-239573
Date: September 11, 1990

Peter F. Emmi for the protester.
Daniel Telep, Jr., United States Mint, Department of the Treasury, for the agency.
Anne B. Perry, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that solicitation should provide for a cost reimbursement contract is denied where there is no evidence that the agency's choice of firm, fixed-priced contract type is unreasonable.
2. Protest that travel and related expenses should be excluded from the quoted hourly rate and essentially not evaluated in the total cost is denied where the solicitation calls for a firm, fixed-price contract and it would be improper not to evaluate such costs.

DECISION

Spectrum Technologies Inc. protests the terms of request for proposal (RFP) No. USM90-39, issued by the United States Mint, Department of the Treasury. Spectrum challenges the use of a firm, fixed-price type of contract and the agency's refusal to separately reimburse offerors' travel and related costs.^{1/}

We deny the protest.

The protested solicitation is for certain services which are one component of an effort to remove or abate asbestos containing materials at the United States Mint at West Point, New York. The location, type and extent of such

^{1/} Spectrum has subsequently protested its exclusion from the competitive range for this procurement (B-239573.2). This matter will be dealt with in a separate decision.

049420 / 142199

materials at the West point facility already have been identified as a result of an asbestos hazard survey conducted under a prior contract. The survey results were included in the protested solicitation. The actual abatement of the asbestos containing materials will be accomplished under a second, separate contract. The purpose of this third, protested solicitation is to obtain the services of an industrial hygiene (IH) firm, including a certified industrial hygienist (CIH), to monitor the performance of the asbestos abatement contractor. The abatement work is to be done in 14 different areas, referred to in the RFP as "phases" or "work packages," over a 180-day period. The work to be performed by the IH contractor pursuant to this solicitation was described by a 15-page statement of work (SOW) and by drawings.

Offerors were to submit technical and price proposals. The former were to include the offeror's own estimate of the personnel and asbestos sampling requirements anticipated for the monitoring services to be performed for each phase. As for price, the solicitation's pricing schedule was divided into sections A and B. Section A reflects the fact that a major task under the contract is to collect and analyze samples for the presence of asbestos. Under section A of the pricing schedule, offerors were asked to provide unit and extended prices for certain estimated quantities of samples subdivided into specific sample types and turnaround periods. As for the other services to be performed by the IH contractor in monitoring the abatement contractor's work, section B of the pricing schedule requested offerors to provide hourly and total rates for an estimated 500 hours of weekday work, 80 hours of weekend work, and 40 hours of holiday work by the CIH. The protester has not contended that the quantities shown are not a reasonable approximation of the agency's anticipated needs.

Initially, Spectrum alleged the agency had failed to identify in the solicitation the type of contract contemplated.^{2/} The protester also noted that although the solicitation's pricing schedule requested prices on a "time and materials basis to cover the cost" of labor and sample analysis, the RFP contained clauses otherwise appropriate for a firm, fixed-price contract. If it were the agency's intention to enter into a time-and-materials contract, the protester asserted, a number of those provisions should be changed. In addition, the protester objected to the

^{2/} Our review of the original solicitation, however, shows that at clause L-6 it specifically stated that a firm, fixed-price contract was contemplated.

agency's request that travel and related expenses be included in the offered hourly rate, rather than be separately reimbursable. The protester, based in Schenectady, New York, argued that the failure to provide for separate reimbursement of such costs was prejudicial to offerors such as itself who were not local to the project.

In response to the protest, the Mint amended the solicitation to eliminate the references to a time-and-materials-type contract and to restructure the RFP for a firm, fixed-price, indefinite quantity contract. It did, however, explicitly incorporate its previous request that prices quoted include all direct and indirect costs, general and administrative expenses, and profit.

In its comments on the agency report, Spectrum stated that its protest had been directed more to what it perceived as the Mint's failure to identify what type of contract it was contemplating than necessarily to the use of a time-and-materials type contract, although the protester was not convinced that the contract requirements were suitable for a time-and-materials type contract. On the other hand, it also disagreed with the Mint that the agency was getting a firm, fixed-price contract on the basis that the contract terms entrusted too much discretion to the contractor in determining the work to be done. Spectrum asked that we determine what type of contract the Mint should use; in fact, the firm stated that was the purpose of its protest. The protester also continued to maintain that travel and related costs should be separately reimbursable.

Although Spectrum's protest can be read as expressing some preference for a cost-reimbursement type contract, the protester does not really advocate the use of any particular type of contract and, in fact, seeks for us to make an independent determination as to what "type and form" of contract the Mint should use. The selection of a contract type, however, is in the first instance the responsibility of the contracting agency; our role is not to substitute our judgment for the contracting agency's but to review its actions for compliance with applicable statutes and regulations.

The contracting officer takes the position that a firm, fixed-price type of contract is appropriate since performance uncertainties and their cost impact have been minimized by the prior asbestos hazard survey, and fair and reasonable prices can be established based not only on the competition obtained (more than a dozen proposals were received) but also through a comparison of prices offered

here with those offered on a competitive basis in prior contracts for the same services at other Mints.

Spectrum disagrees, alleging that the contract cannot be considered to be at a firm, fixed price because it will provide the contractor with the sole authority to control the number of samples and effort for the contract work. In support of this allegation, Spectrum points to a sentence in the introductory paragraph of the Inspection and Acceptance section of the solicitation which states that "[t]he monitoring frequency will be determined solely by the CIH through good professional judgment."

The protester interprets "solely" as meaning without the need for coordination with, or not subject to control by, the Mint. However, this sentence appears in the context of a paragraph that emphasizes the necessity for the monitoring contractor to be completely independent from the abatement contractor in order to avoid compromising the monitoring contractor's role of protecting the interests of the Mint as well as the health of the workers themselves. The following paragraphs in this section detail what is required of the abatement contractor to prepare an area for final inspection and testing, as well as what will be required of the IH firm under this contract in order to certify as "clean" an area presented for final inspection. Read in this context, we think the word "solely" reflects the independent relationship which is intended to exist between the abatement contractor and the CIH, i.e., that the abatement contractor is not to influence the frequency with which its own work is being monitored.

When the solicitation is read as a whole, it does not, as Spectrum argues, vest unfettered discretion in the contractor to determine the number of samples to take and the number of man hours needed. The contract provides a firm, fixed-price per hour and sample category, and the final determination of the number and type of samples and hours to be ordered during each phase of the asbestos abatement is made by the government, despite Spectrum's allegations to the contrary.

A consistent theme throughout the RFP's SOW is that the IH contractor is to coordinate its activities with, and is to be monitored by, the Mint's Contracting Officer's Technical Representative (COTR). For example, the SOW does use language similar to that of the Inspection and Acceptance clause in emphasizing the need for the monitoring contractor to be independent of the abatement contractor. In the context of the SOW, however--which is the Mint's description

of how this contract is to be performed--the relevant sentence is phrased:

"The monitoring frequency will be determined by the COTR and CIH through good professional judgment." (Emphasis added.)

Among other similar SOW provisions are the following:

"This contract should be viewed as a series of independent tasks (phases). Each task will be undertaken on an agreed to schedule."

"It shall be the function of the CIH or IH contractor's coordinator to coordinate with the Mint's coordinator the schedules and requirements of the [support services for each phase]."

"The IH contractor shall provide full cooperation and support to the COTR and abatement contractor throughout the abatement process."

In addition, we note that it is the "Mint coordinator or COTR," and not the IH contractor, who determines whether the situation requires laboratory samples to be handled under expedited procedures or normal turnaround times. Finally, if a completed work area fails to pass clearance testing procedures, the cost of retesting to meet clearance conditions is to be borne by the abatement contractor and not the Mint. All of these provisions are inconsistent with the protester's position that in its solicitation the Mint has abdicated to its contractor control over, and therefore the cost of, the work to be performed under the contract.

Spectrum also contends that the solicitation requirement that travel cost be included in the fixed labor rates is prejudicial to firms distantly located. The protester argues that travel and related expenses should be excluded from the quoted hourly rate so as to eliminate any competitive advantage possessed by local firms. In support of its argument Spectrum states that FAR § 31.204-46 makes such an action appropriate. We disagree. The FAR section to which Spectrum refers relates to the allocability and allowability of travel and related expenses to government

contracts. It does not, however, direct contracting agencies to reimburse these expenses outside of the firm, fixed-price contract offer.

Accordingly, the protest is denied.

for Robert J. Murphy
James F. Hinchman
General Counsel