

A. Benejam



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: DJ's Services, Inc.

File: B-240623

Date: December 5, 1990

Donna J. Findley for the protester.
Nancy O. Dix, Esq., Gray, Cary, Ames & Frye, for Balantine's South Bay Caterers, Inc., an interested party.
Lynn P. Kentfield, Immigration and Naturalization Service, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Bidder whose direct economic interest would be affected by award to only other bidder is an interested party under General Accounting Office's Bid Protest Regulations entitled to protest the terms of invitation for bids, where it is an ongoing business concern with access to equipment necessary to provide the required food services, and is willing and capable of providing the required services if it were awarded the contract.
2. Protest that specifications in invitation for bids (IFB) concerning the type of container used to deliver temperature-controlled food items create an ambiguity in the IFB is denied where, when read as a whole, the only reasonable interpretation of the IFB is that it allows bidders to submit bids based on the use of alternative types of containers to deliver the required food items, so long as the container selected is capable of maintaining temperatures established in the IFB.
3. There is no requirement that a solicitation be so detailed as to completely eliminate all performance uncertainties and risks, and lack of some detail does not render the solicitation defective where information provided is adequate to enable bidders to compete intelligently and on an equal basis.
4. Failure of invitation for bids (IFB) to incorporate applicable Department of Labor (DOL) wage determinations does not render the IFB defective where, due to the urgency of the procurement, the agency could not wait for DOL to issue the

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applicable wage determinations before releasing the IFB, and complied with the requirements in the applicable regulations to notify DOL of its intent to enter into a service contract and to advise bidders that the applicable wage determination would be incorporated upon receipt from DOL.

DECISION

DJ's Services, Inc. protests the terms of invitation for bids (IFB) No. WRO 31-B-90, issued by the Western Regional Office of the Immigration and Naturalization Service for food services at the agency's San Diego sector staging facility for alien detainees. DJ's Services contends that the IFB's specifications concerning the packaging and delivery of hot food items are ambiguous and that the IFB improperly failed to incorporate applicable Department of Labor (DOL) wage determinations.

We deny the protest.

BACKGROUND

Prior to issuing the challenged solicitation, food services at the facility had been provided by Americorp, Inc., whose contract was terminated for default on June 4, 1990. Subsequent to the termination, DJ's Services began providing the food services at the facility on a purchase order basis, until an interim contract could be awarded under the protested IFB. The IFB was issued on July 12 as a total small business set-aside. The competition was limited to only six potential sources based on the agency's determination of unusual and compelling urgency. The IFB contemplated the award of a fixed-price requirements contract for an interim 6-month period, from September 1, 1990 to March 2, 1991, to assure uninterrupted food services at the facility until a full-term contract is awarded.

The IFB requires the successful contractor to provide meals based on a 7-day rotational menu specified in the IFB. Attachment A to the Statement of Work (SOW) sets forth the required menu for each breakfast, lunch, and dinner, specifying the minimum individual portions of each food item, including beverage and condiments to be served during each meal.^{1/} Attachment B specifies the required sack lunch menu

^{1/} To illustrate, Attachment A specified the following breakfast menu to be served on Mondays, Wednesdays, and Fridays: cereal (1-1/2 oz.) "individual serving bowls, (include 2 pkg. of sugar if unsweetened)"; whole wheat english muffin (1 ea.); hard-boiled egg (1 ea.); American
(continued...)

to be provided with 2 hours' advance notice. Attachment C sets forth a special holiday dinner menu to be served on Thanksgiving, Christmas, Easter, and Cinco de Mayo, a Mexican holiday. The IFB also requires the contractor to provide special meals for detainees whose diets are restricted by medical or religious reasons.

Of the six sources solicited, the protester and Balantine's South Bay Caterers, Inc. submitted the only two bids by bid opening on August 6. Balantine's submitted the low bid.^{2/}

INTERESTED PARTY STATUS

Balantine's requests that we dismiss the protest, arguing that since the protester has gone out of business and has closed its food services operations, DJ's Services is not an "interested party" to maintain the protest.

Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3551(2) (1988), and our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1990), a protest may be filed only by an "interested party," defined as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. Determining whether a party is sufficiently interested involves consideration of a party's status vis a vis the procurement, Seals Servs., Inc., B-235523, June 20, 1989, 89-1 CPD ¶ 581, and the nature of the issues protested. Free State Reporting, Inc. et al., B-225531 et al., Jan. 13, 1987, 87-1 CPD ¶ 54.

Despite Balantine's assertions that DJ's Services is no longer in the food services business, the protester states that it is an ongoing business concern;^{3/} that it has access to equipment necessary to provide the required services; and that it is willing and capable of providing the services required under the IFB, once its terms are clarified. If its

^{1/}(...continued)

style cheese (1 oz.); medium size banana (1 ea.); 2% milk (8 oz.); decaffeinated coffee (8 oz.); sugar (2 pkt.); margarine (1 pat); salt (1 pkt.); pepper (1 pkt.).

^{2/} Pursuant to Federal Acquisition Regulation (FAR) § 33.104(b), the agency determined that it would proceed with award to Balantine's notwithstanding the protest in our Office.

^{3/} While the California Secretary of State has no filing on record for DJ's Services, the Secretary of State for Idaho informed our Office that DJ's Services is a corporation in good standing in Idaho.

protest were sustained, the remedy would be a resolicitation under which the protester could compete. Accordingly, since DJ's Services is interested in being awarded the contract, and since it is an actual bidder whose direct economic interest is affected by the award to Balantine's, the only other bidder, DJ's Services is an interested party to maintain the protest.

AMBIGUOUS SPECIFICATIONS

DJ's Services maintains that the IFB's specifications concerning the packaging and delivery of hot food items are ambiguous and misleading. The protester specifically argues that the IFB's requirement for a thermal container in which hot food is to be delivered to the facility is unclear since the IFB refers to both "thermal containers," and to "one-time use" disposable containers, suggesting that different types of containers are acceptable.

The IFB requires the contractor to prepare all specified meals off-site and to deliver to the facility "freshly prepared food ready for immediate consumption." Agency personnel at the facility then distribute the meals to the detainees. With respect to the delivery of hot food items, the IFB contained the following provision (paragraph 1, p. C-2), the interpretation of which is at issue:

"1. Scope:

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"All meals will be prepared off-site, and all meals will be delivered in suitable carts capable of maintaining appropriate temperatures.

"SAN DIEGO STAGING:

"In San Diego ten or more such carts will be needed for the four dormitories and the juvenile holding area with a minimum capacity of 50 trays per cart. The carts must be mobile in design and allow for easy transport to and within the dormitories by one individual. The carts will be capable of handling the trays of approximately 2" x 13" x 15". Carts should not exceed 2'6" in width to allow passage through dormitory doorway. The contractor will have one extra cart as backup.

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"To facilitate the feeding of detainees in the dormitories, individual meals will be delivered in a maximum of two separate increments; a thermal

container for temperature controlled food and a paper sack or other suitable container for beverages, condiments, utensils, coffee cups and other individually wrapped items.

"1. The thermal container will be capable of holding temperatures for a minimum of thirty (30) minutes. Each container will consist of sufficient individual compartments to prevent the mixing of menu items.

"2. Each item delivered in the optional paper sack or other suitable container must be individually wrapped in a plastic wrap which will not impact (sic) any disagreeable flavor. Cold beverages included in the paper sack will have an individual wrap-around cover to prevent moisture from penetrating the paper sack."

Regarding the one-time use disposable container, the IFB contains the following provision (paragraph 3, p. C-4):

"3. Food during transport must be covered in order to provide physical protection of the food. Food containers must be impervious and nonabsorbent to eliminate the possibility of their being a source of contamination. One (1) time use disposable containers are acceptable if capable of maintaining temperature requirements."

According to the protester, one interpretation of these provisions is that the IFB requires the use of thermal food trays similar to the ones currently used to deliver hot food items to the facility. Another, presumably contradictory interpretation, according to DJ's Services, is that the IFB calls for the use of styrofoam containers placed inside a transportable warming oven. DJ's Services argues that the agency's minimum needs cannot be met without a clarification of the alleged ambiguities with respect to the type of containers required for the delivery of hot food items, and maintains that the alleged ambiguity places bidders on an uneven competitive level.

The agency asserts that the challenged provisions are not ambiguous or misleading since, by the clear language of the provisions, the IFB merely requires that the containers used to deliver temperature-controlled food items be capable of maintaining required temperatures established in the IFB. The agency states that the containers currently used to provide the food services, consisting of stackable, compartmentalized, thermal food trays, are acceptable but not required. Further, the agency states that the "thermal

containers" referred to in the IFB may be constructed from any commercial material which is normally used to provide temperature-controlled food items, including disposable styrofoam containers, since the IFB does not call for the containers to be made from any particular material.

A solicitation requirement is ambiguous when it is susceptible to two or more reasonable interpretations. Energy Maintenance Corp., B-223328, Aug. 27, 1986, 86-2 CPD ¶ 234. Although a bidder's particular interpretation need not be the most reasonable one for a finding of ambiguity, that bidder's interpretation of the language of the solicitation at issue must be reasonable. TUMI Int'l, Inc., B-235348, Aug. 24, 1989, 89-2 CPD ¶ 174. To be reasonable, an interpretation must be consistent with the solicitation, read as a whole and in a reasonable manner. Vitro Servs. Corp., B-233040, Feb. 9, 1989, 89-1 CPD ¶ 136. When a dispute exists as to the actual meaning of a solicitation requirement, we will resolve the dispute by reading the solicitation as a whole and in a manner that gives effect to all its provisions. TUMI Int'l, Inc., B-235348, supra.

We find that the specifications concerning the delivery of temperature-controlled food items do not create an ambiguity in the IFB such that bidders are placed on an uneven competitive level. From our reading of the IFB as a whole, we conclude that the only reasonable interpretation of the IFB is as the agency intended, with the provisions of paragraphs 1 and 3 merely allowing bidders to submit bids based on the use of containers of any construction,^{4/} including styrofoam, or other containers such as the thermal food trays currently used to deliver temperature-controlled foods to the facility, so long as the container selected is capable of maintaining required temperatures. This is a logical interpretation that gives effect to both provisions.

DJ's Services next contends that the IFB's specifications concerning the required food temperatures are unclear. Specifically, the protester objects to the requirement in paragraph 1.1 at page C-3 of the SOW that "the thermal containers be capable of holding temperatures for a minimum of thirty (30) minutes." According to the protester, the provision does not state to what temperatures it applies or specify whether preparation, transportation or delivery of the required food triggers the 30-minute period.

Regarding the required food temperatures, paragraph 2 at page C-4 of the SOW states:

4/ The only exception is metal trays, which the protester acknowledges are not allowed in the facility.

"2. Temperature Definitions as per the Retail Food Store Sanitation Code, 1982, U.S. Department of Health and Human Services [HHS Code] apply to the site of preparation, during transport, and storage at the [detention facility]. (Emphasis added.)

"Potentially hazardous food to be transported shall be held at a temperature of 140 degrees fahrenheit (60 degrees Celsius) or above unless maintained in accordance with the refrigerated storage requirements of this code."

Paragraph 6 on page C-5 of the SOW further provides minimum requirements for preparing foods, including special conditions for preparing poultry, pork, and beef. For example, regarding potentially hazardous foods, that provision states:

"6. Food preparation off-site:

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"Potentially hazardous foods being processed within the retail food store by cooking shall be cooked to heat all parts of the food to a temperature of at least 140 degrees fahrenheit except that:

"Poultry shall be cooked to heat all parts of the food to at least 175 degrees fahrenheit with no interruption of the cooking process.

"Pork and pork products shall be cooked to heat all parts of the food to at least 150 degrees fahrenheit."

With regard to DJ's Services allegation that the specifications for the packaging and delivery of hot food items are unclear, as a general rule, a procuring agency must give sufficient information in its IFB to enable bidders to compete on a relatively equal basis. DSP, Inc., B-220062, Jan. 15, 1986, 86-1 CPD ¶ 43. While specifications must be free from ambiguities and must describe the minimum needs of the procuring activity accurately, there is no legal requirement that an IFB be so detailed as to completely eliminate all performance uncertainties and risks. T&A Painting, Inc., B-229655.2, May 4, 1988, 88-1 CPD ¶ 435. Here, we find that the information in the IFB concerning the temperature control of the food items was adequate for bidders to compete intelligently and on an equal basis.

The IFB clearly sets out the required food temperatures applicable during preparation, transport and storage. It

specifies temperatures for preparing potentially hazardous foods such as poultry and beef, and even prescribes temperatures for preheating ovens when cooking beef roasts of differing weights (e.g., beef roasts under 10 pounds in weight are to be cooked in a still dry heat oven, and the oven shall be preheated to and held at an air temperature of at least 350 degrees Fahrenheit throughout the process). In addition to referencing the HHS Code and specific temperatures applicable to hot food items, the IFB also specifies temperatures for cold food storage, stating that foods requiring refrigeration after preparation be cooled to an internal temperature of 45 degrees Fahrenheit. Given the clarity and level of specificity of the IFB's requirements regarding temperature control, the protester's allegation that the IFB is unclear as to the applicable food temperatures is simply not supported by the record.

With regard to the requirement that the containers be capable of holding temperatures for at least 30 minutes, since the IFB specifies the points at which required food temperatures must be maintained when the foods are in the possession of the contractor (i.e., preparation, transport, and delivery), the only reasonable interpretation of the 30-minute provision is that the period commences with delivery of the meals to the facility, when the contractor relinquishes control of the foods. By specifying that the thermal containers be capable of maintaining the required temperatures for a minimum of 30 minutes, the IFB allows sufficient time for agency personnel to distribute the food items to the detainees, without risking significant change to food temperatures. The protester has not articulated and we fail to see any other reasonable interpretation of the provision.

WAGE DETERMINATION

DJ's Services argues that the IFB improperly failed to incorporate any DOL wage determinations. According to the protester, a DOL wage determination for the San Diego area covering the classes of employees to be employed under the proposed contract was issued for the last full-term contract for the identical requirement. DJ's Services alleges that the failure of the IFB to include the applicable DOL wage determination will confuse and mislead the bidders as to the basic wages required to be paid under the resultant contract, and that without the wage determinations bidders cannot compete on an equal basis.

The Service Contract Act of 1965, 41 U.S.C. §§ 351-358 (1988), requires federal contractors to pay minimum wages and fringe benefits as determined by the Secretary of Labor to employees under service contracts exceeding \$2,500. When the Act applies to a particular contract, that contract must

contain certain provisions specifying the minimum level of wages to be paid, 41 U.S.C. § 351(a)(1), and the minimum level of fringe benefits to be provided. 41 U.S.C. § 351(a)(2). Regulations implementing the Act require that agencies notify DOL of their intent to enter into such contracts and to list the classes of workers they expect to employ. See 29 C.F.R. Part 4.

On June 26, 1990, in accordance with DOL regulations, the agency submitted to DOL standard form (SF) 98, "Notice of Intention to Make a Service Contract and Response to Notice," which included a list of the classes of prospective service employees. The agency states that due to the urgency of the procurement, it was unable to wait for DOL to issue the applicable wage determination before releasing the IFB, and in fact, had not received a response from DOL as of the date of its report on the protest to our Office.

We think that since the IFB was issued under urgent circumstances, it was reasonable for the agency to release the solicitation without waiting for DOL to issue the wage determination. Generally, where the contract action is for a nonrecurring or unknown requirement for which advance planning is not feasible, FAR § 22.108-7(b) requires the contracting officer to submit the Notice to DOL not later than 30 days before issuing the IFB. However, recognizing that, where as here, exceptional circumstances do not permit the timely submission of the Notice to DOL, the FAR authorizes the contracting officer to submit the Notice to DOL "as soon as practicable," FAR § 22.1008-6(c), and requires that the wage determination be incorporated into the contract upon receipt. See FAR § 22.1012-1. In accordance with these provisions, the agency notified DOL of its intent to enter into a service contract as soon as possible prior to issuing the solicitation, and the IFB informs bidders that the applicable wage determination will be incorporated upon its

receipt from DOL.5/ Since the agency acted properly under the applicable regulations, we see no basis to object to issuance of the IFB without a wage determination.

The protest is denied.


for James F. Hinchman
General Counsel

5/ The agency informed our Office that it awarded the contract on September 24; received the wage determination on September 25; and incorporated the determination into the contract on September 26.