



Comptroller General
of the United States
Washington, D.C. 20548

Perry
144901

Decision

Matter of: Logistical Support, Inc.

File: B-244285

Date: September 23, 1991

Donald E. Barnhill, Esq., and Joan K. Fiorino, Esq., East & Barnhill, for the protester.
Eric Lile, Esq., and Robert C. Peterson, Esq., Department of the Navy, for the agency.
Anne B. Perry, Esq., Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. General Accounting Office will not consider protest involving alleged violation of policy letter issued by the Office of Federal Procurement Policy which establishes executive branch policy regarding the definition of contract requirements.
2. Solicitation statement of minimum manning levels does not restrict competition where solicitation permits offerors to deviate from the stated levels and explain the basis for the deviation.
3. Protest that solicitation's minimum manning levels exceed the agency's minimum needs is denied where agency estimate is reasonably based on agency's past contract experience.

DECISION

Logistical Support, Inc. (LSI) protests the minimum manning requirements of request for proposals (RFP) No. N00612-91-R-0249, issued by the Department of the Navy for mess attendant services at the Memphis, Tennessee Naval Air Station. LSI protests that: (1) the minimum manhour requirement in the solicitation violates Office of Federal Procurement Policy (OFPP) policy letter 91-2, which requires agencies to use performance-based contracting methods when contracting for services; and (2) the number of manhours stated in the solicitation exceeds the agency's needs.

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

The solicitation, issued on May 15, 1991, sought proposals for a firm, fixed-price contract, for a base year and 4 option years. The solicitation included a minimum manning clause which stated, in relevant part:

"As an addendum to the proposal, offers [sic] are requested to submit a breakdown of manhours per day showing the number of personnel proposed in each space each half hour of a day. Failure to provide this data will be cause for rejection of offers. The Government has established the minimum required manhours per month as 14000. Proposals more than 2 percent less than the minimum will be rejected, unless the offeror proposes a detailed alternate method of performing the services." (Emphasis added.)^{1/}

LSI first challenges any inclusion of minimum manhours in the RFP on the grounds that it "flies in the face of" OFPP policy letter 91-2. LSI notes that the OFPP policy letter establishes that agencies should draft solicitations that tell offerors "what" is required, not "how" the work is to be performed.^{2/} Essentially, LSI argues that the minimum manning

^{1/} By an RFP amendment issued approximately 1 month after the protest was filed, the level of manhours required was reduced to 386 hours per week day and 184 hours per weekend day. After reviewing this reduction in manhours, LSI's counsel submitted a request for costs on the grounds that the agency took corrective action due to the protest. See 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.6(e)). An agency's corrective action, taken early in the protest process, is precisely the kind of prompt action our regulations are designed to encourage. See Oklahoma Indian Corp.--Claim for Costs, B-243785.2, June 10, 1991, 70 Comp. Gen. _____, 91-1 CPD ¶ 558. Here, the agency's prompt action in amending the RFP does not warrant awarding LSI its protest costs. See Leslie Controls, Inc.--Claim for Costs, B-243979.2, July 12, 1991, 91-2 CPD ¶ _____.

^{2/} OFPP policy letter 91-2 provides in pertinent part:

"It is the policy of the Federal Government that (1) agencies use performance-based contracting methods to the maximum extent practicable when acquiring services. . . . Performance-based contracting methods consist

(continued...)

requirement in this RFP violates OFPP policy letter 91-2 in that it tells contractors "how" to staff its job, rather than "what" to perform.

OFPP policy letter 91-2 was issued on April 9, 1991, and was effective 30 days after issuance. The policy letter provided that the Federal Acquisition Regulatory Council should promulgate implementing regulations in the first Federal Acquisition Circular issued 120 days after the effective date of the policy letter. Implementing regulations have not yet been promulgated.^{3/}

The Competition in Contracting Act of 1984 (CICA) authorizes this Office to consider a protest concerning "an alleged violation of procurement statute or regulation," 31 U.S.C. § 3552 (1988). Executive branch policy directives are not statutes or regulations and therefore questions regarding compliance with such directives are not within our bid protest jurisdiction. See, e.g., Services Alliance Sys., Inc., B-243306, Mar. 18, 1991, 91-1 CPD ¶ 297; American Council of Indep. Laboratories, Inc., B-223820, Aug. 7, 1986, 86-2 CPD ¶ 169; Kramer Assocs., Inc., B-197178, July 16, 1980, 80-2 CPD ¶ 33. Since OFPP policy letter 91-2 merely establishes executive branch policy regarding the use of performance requirements in defining contract requirements, an alleged violation of that policy letter is not for review by our Office. Thus, to the extent LSI's protest is based on an alleged violation of the OFPP policy letter, it is dismissed.

LSI also protests that the RFP's minimum manning requirement restricts competition because it "takes away all incentive for contractors to be innovative, efficient or cost-effective." In this regard, LSI's argument is inconsistent with the express terms of the RFP. The RFP specifically permits offerors to submit proposals based on manning levels lower

2/ (...continued)

of the following: . . . when preparing statements of work, agencies shall, to the maximum extent practicable, describe the work in terms of 'what' is to be the required output rather than 'how' the work is to be accomplished." (Emphasis added.)

3/ In the supplementary material accompanying publication of the policy letter in the Federal Register, OFPP acknowledged that "premature agency implementation may result in confusion and duplicative effort" and, accordingly, stated that the policy letter was intended to "encourage, rather than require immediate implementation by agencies." 56 Fed. Reg. 15110 (1991).

than those stated in the RFP, provided the offeror "proposes a detailed alternative method of performing the services." This opportunity to propose an alternative method of performing the services appears to be precisely what LSI seeks by requesting that the minimum manning levels be deleted.

LSI further argues that the statement of minimum manhours restricts competition because all offerors will propose nearly the same number of manhours and the only basis for distinguishing between proposals will be the offerors' differing general and administrative expenses (G&A) and proposed profits. As discussed above, offerors are not required to propose the stated minimum manhours. Thus, competition does exist on more than just G&A and profits. Under these circumstances, we find no merit in LSI's assertion that the solicitation restricts competition.

Finally, LSI protests that the number of manhours contained in the RFP is "considerably in excess of the manhours required to perform the contract work." However, LSI does not explain what it believes the proper staffing level to be, stating: "LSI does not offer any [alternative] proposed manning as the same is inconsistent with LSI's protest. The relief sought by LSI is to have minimum manning completely removed from the solicitation."

The responsibility for drafting specifications that reflect the minimum needs of the government is primarily that of the contracting agency, and we will not question specifications in the absence of a showing that they do not reflect the agency's minimum needs. Robertson & Penn, Inc., B-223945, Oct. 30, 1986, 86-2 CPD ¶ 497. In the absence of evidence establishing an adverse impact on competition, our Office has specifically found the use of minimum manning requirements permissible. Id.

The agency explains that it based its estimate of the minimum manhours in this solicitation on its prior experience with these services, and specifically states that its experience with these types of solicitations has demonstrated that contractors have a tendency to understaff the contracts. Based on this past experience, the agency determined that a statement of the minimum manning levels it expected was necessary.

Other than disagreeing with the government's estimate of the minimum staffing necessary, LSI has not demonstrated that the staffing level is unreasonable. Further, as discussed above, if LSI believes that the number of manhours can be reduced, the RFP expressly permits it to submit a proposal describing an alternative method for providing the services. Since LSI has failed to show that the RFP provisions regarding staffing

levels are unreasonable, its protest that the requirements exceed the agency's actual needs is denied. See John F. Kenefick Photogrammetric Consultant, Inc., B-238384, May 4, 1990, 90-1 CPD ¶ 452.

The protest is dismissed in part and denied in part.


for James F. Hinchman
General Counsel