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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Laidlaw Environmental Services (GS), Inc.

File: B-245587; B-245587.2

Date: January 16, 1992

John Miklich for the protester,
Jamie B. Naderi, for Moheat Environmental Services, and
Ronald B. Costello, for USPCI, interested parties.
Michele S. Pavlak, Esq., Defense Logistics Agency, for the
agency.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Agency properly required offerors on a request for proposals (RFP) for a requirements contract for hazardous waste removal and disposal services to propose as their prices a single percentage factor that the agency would apply to the RFP's agency pre-priced line items to calculate the contractor's compensation for services provided under the contract; this is a legitimate method to prevent deliberate unbalancing of prices by offerors and to assure award to the low offeror under the contract, regardless of quantities ordered.
2. Protest challenging agency price estimates for hazardous waste removal and disposal services is denied where the agency properly prepared price and quantity estimates for the line items--to which a single percentage offer would be applied--on the basis of historic information and there is no evidence indicating the prices are incorrect.
3. Protest against amended solicitation provision, that the agency materially amended because of the protester's objections to the terms of the initial provision, is untimely filed under the Bid Protest Regulations, where the amendment, issued after that closing date for submission of the proposals, did not provide for a new closing date and protester did not protest the amended provision within 10 days of its receipt of the amendment.

DECISION

Laidlaw Environmental Services (GS), Inc. protests request for proposals (RFP) No. DLA200-91-R-0025, issued by the Defense Logistics Agency (DLA), Defense Reutilization & Marketing Service, Battle Creek, Michigan, soliciting for a requirements contract for hazardous waste removal and disposal services¹ for a base year and option year. The RFP provides a DLA-stated unit price and extended price for each of the RFP's more than 200 kinds of disposal services.² Each offeror is required to propose a single percentage, plus or minus, applicable to any line item of services ordered during the contract or option period. Laidlaw objects to this requirement³ and to the RFP's proposal evaluation provision.⁴

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

DLA reports that it is using what it calls the net pricing approach to avoid unbalanced pricing of offers. The protester, seeking the more traditional line item pricing, challenges the agency's position that the RFP approach is necessary to avoid unbalanced pricing arguing that the agency has not shown that it ever experienced any unbalanced pricing problems in contracting for waste disposal services.

We have approved agency use of net or single percentage factor pricing as a prophylactic measure to avoid unbalanced bidding. See Custom Envntl. Serv., Inc., 70 Comp. Gen. 189 (1991), 91-1 CPD ¶ 38; Michael O'Connor, Inc., 56 Comp. Gen. 107 (1976), 76-2 CPD ¶ 456. Net pricing, besides preventing deliberate unbalancing of prices by a bidder who

¹The hazardous waste that is the subject of the RFP is generated by military installations in the vicinity of Camp Pendleton, California.

²The RFP schedule lists each kind of disposal service by line item number. Each line item has a description of the service (usually removal/disposal of a specific kind of waste), an estimated quantity, a unit of measure, a stated unit price and an extended amount. For example, one line item in the RFP reads: "5615--mercury--400--lb.--[\$].95--
[\$]380.00."

³Laidlaw's protest of the pricing methodology was timely filed on September 10, 1991, prior to the September 27 closing date for receipt of proposals.

⁴The protest of the proposal evaluation provision is untimely as explained below.

has reason to believe that the government's estimated quantities are substantially wrong, allows the agency to efficiently evaluate offers or bids and assures award to the offeror that will ultimately cost the least, regardless of the quantities ordered during the contract term. Id. Although it is true the agency has not cited any examples of unbalancing for this work, we think the agency's concerns about unbalanced pricing are reasonable in view of the large number of line items, for which Laidlaw admits there can be diverse pricing. Id.

Laidlaw argues that the net bidding requirement deprives the government of the benefits of a marketplace price based on each offeror's unique strengths. For example, Laidlaw argues that the government may receive a lower than market price on the disposal of a particular item from an offeror that has an efficient means of processing the waste, or owns the disposal site, or uses a disposal site located near the point where the hazardous waste is generated. However, unbalanced bidding can have an adverse impact on the government, which may cause it to pay too much for the services. Where, as here, the government is purchasing a collection of services from a single contractor, we question whether any offeror would automatically pass all savings--i.e., the difference between the offeror's cost and its competitors' higher costs as reflected in a higher market-price for a particular service--to the government as Laidlaw hypothesizes. We think it just as likely that an offeror would use the savings either to offset the cost of other services that are above the market price or to increase its profit. Thus, we are not convinced the net bidding method will not result in lowest cost to the government.

Laidlaw also contends that requiring offerors to price on a net basis unfairly allocates 100 percent of the risk to the contractor because the contractor is forced to offer a price that is divorced from its own cost experience. We disagree. There is some amount of risk inherent in any procurement and offerors are expected to use their professional expertise and business judgment in taking these risks into account in computing their offers. Neil Gardis & Assocs., Inc., B-238672, June 25, 1990, 90-1 CPD ¶ 590. This contract, like any firm, fixed-price contract, maximizes the risk on the contractor, since the contractor has full responsibility for all costs and resulting profit or loss under the contract. Federal Acquisition Regulation (FAR) § 16.201-1.

In sum, if the government's estimates of the individual services' market prices and required quantities are substantially correct, there is nothing improper in an agency soliciting its requirements on a net basis instead of

a line-item by line-item basis. Custom Env'tl. Serv., Inc., supra.⁵

Laidlaw questions the accuracy of the government's estimates of the line item services' prices. Laidlaw contends that because each offeror is unique the government's predetermined prices cannot accurately reflect each offeror's expected cost, overhead and reasonable profit for any particular service. We agree with Laidlaw's observation, but think it irrelevant since the government-furnished prices reflect the government's reasonable assessment of the current market prices of the particular services (i.e., average prices), and not any one offeror's unique cost/overhead/profit-profile for providing the services. Here, the predetermined pricing and quantity estimates are based on historic pricing information from recent solicitations in the Camp Pendleton and other California areas, and on average line item prices experienced during the last year by DLA's western, eastern, and southern regional offices. The agency adjusted these estimated prices for inflation by including a 15 percent inflation factor.

After Laidlaw raised the issue of the estimated prices' validity, the agency solicited any further information that offerors cared to provide pertaining to the accuracy of the estimated prices. Laidlaw submitted two examples of what it considers to be erroneously predetermined prices.⁶

⁵Laidlaw argues that Custom Env'tl. Serv., Inc. is distinguishable because that decision involved an indefinite quantity contract rather than a requirements contract. This contention has no merit. Both type contracts involve requirements for a multiplicity of recurring line items, and both contract types are used when the government determines that it cannot predetermine the precise quantities of recurring services it requires. See FAR §§ 16.503(b); 16.504(b) (FAC 90-4). Further, in both instances, the agencies involved had solicited the respective services using separately priced line items and were dissatisfied with the unbalanced pricing of offers resulting from that approach. See generally FAR § 15.814 (FAC 90-7). See also Michael O'Connor, Inc., supra (which permitted net pricing on a requirements contract).

⁶Laidlaw requests that its examples not be disclosed because its competitive position may be prejudiced should its competitors learn Laidlaw's transportation and disposal costs for the items in question.

However, Laidlaw cautions that these examples are only erroneous as to Laidlaw and may not be erroneous with regard to other offerors, and does not question the agency's quantity estimates.⁷ Laidlaw's examples are an insufficient basis for us to successfully question the accuracy of the agency's predetermined pricing since Laidlaw is not questioning whether the estimated price accurately reflect the current market price, but whether they reflect Laidlaw's cost of providing the services.

Based on the foregoing, we deny Laidlaw's protest of the RFP's net pricing requirements.

On September 25, 1991, Laidlaw protested the agency's use of a "best value" evaluation provision, clause M.10 "EVALUATION FACTORS FOR AWARD DRMS (JUN 1991)." Laidlaw contended that the clause was improper basically because it was "internally inconsistent, is not based on objective data and does not reflect established price analysis methods." After the September 27 closing date for receipt of proposals, the agency took corrective action in response to Laidlaw's criticism of clause M.10 by issuing amendment No. 0003 on October 7, which deleted the clause and substituted a substantially revised clause M.10 "EVALUATION FACTORS FOR AWARD DRMS (SEP 1991)," in a manner that essentially addressed Laidlaw's stated areas of concern.⁸ Laidlaw received amendment No. 0003 on October 10, but did not protest the new clause M.10 to our Office until October 29.

Normally, protests based upon alleged improprieties that have been incorporated into the solicitation must be protested no later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1991). In this case, the new evaluation factor clause was incorporated in the RFP after the receipt of proposals and Amendment No. 0003 contained no provision for a new closing date for receipt of revised proposals. In

⁷In fact Laidlaw admits that:

"The [agency] estimated quantities in [the] RFP . . . should not be unreliable since [the agency] is privy to all prior requirements at Camp Pendleton and received estimates of the quantities of waste streams anticipated during this procurement performance period from all generators at the government facility."

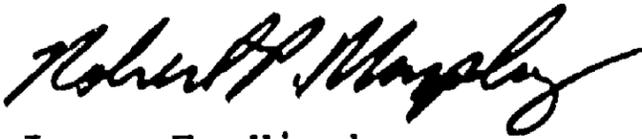
⁸Thus, Laidlaw's initial protest of this provision was rendered academic and is not for consideration for our Office. See East-West Research, Inc.--Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379.

the absence of a closing date, the timeliness of Laidlaw's objection to the new clause is governed by 4 C.F.R. § 21.2(a)(2), which states:

"In cases other than those covered in paragraph (a)(1) of this section, protests shall be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier."

Since Laidlaw protested the new clause M.10 more than 10 working days after it received amendment No. 0003, it is untimely and is dismissed.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel