



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: US Defense Systems, Inc.

File: B-248845

Date: September 23, 1992

Thomas D. Boyatt for the protester.
Kathleen D. Martin, Esq., Department of State, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitation is impermissibly vague is denied where specification at issue is reasonably intended to permit offerors discretion to propose details of performance to reflect their particular approach to providing an emergency reaction force to be used to meet one aspect of the agency's security needs.

DECISION

US Defense Systems, Inc. (USDS), protests the requirements under request for proposals (RFP) No. State-92-001, issued by the Department of State for guard services in Port Moresby, Papua New Guinea. USDS contends that: (1) the closing date for receipt of proposals did not allow adequate time for submission of proposals; and (2) the RFP's requirements for a reaction force are impermissibly vague.

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

The RFP was issued by the U.S. Embassy in Port Moresby on April 22, 1992, for provision of guard services for the protection of the local embassy staff. The RFP covers a base year with 4 option years. The Department of State has designated Port Moresby as posing a "critical threat" level due to the crime situation in the city. Contractor guard services are needed because the host government is unable to provide adequate security for embassy personnel. The embassy has no professional resident security officer or U.S. Marines as security guards.

The RFP sets out the addresses and description of five buildings in Port Moresby where regular guards are to be posted. The RFP requires a specified number of guards to serve during fixed hours, for which the contractor will be paid a firm, fixed price.

In addition, as part of its emergency action plan, the embassy requires the contractor to establish a "reaction force." To satisfy this need, in addition to the more particularized contractor duties and responsibilities, the RFP calls for the following:

"C.1.5.7. Provide Reaction Force.

C.1.5.7.1. In response to emergencies, the sound of alarms, criminal activity, or as requested by the Post Security Officer, the Contractor shall provide a mobile reaction force to provide back up for contracted guards and Embassy staff. Approximately six buildings located in Port Moresby are to be included in the Reaction Force range. The Reaction Force shall be available 24 hours a day, 7 days a week, and be capable of responding to any criminal or potentially dangerous situation. The response time should be less than 10 minutes and will not exceed 15 minutes."

The contractor is paid for the reaction force services on an hourly basis, the rate for which is to be fixed in the contract. The RFP states that the agency estimates 200 hours of reaction force services will be needed during each year of the contract.

Proposals were initially due on June 1, 1992, extended to June 17 by amendment 1, issued on May 18, 1992. An announcement concerning the procurement was published in the Commerce Business Daily on May 8, 1992. USDS requested a copy of the RFP on May 13, which it received on May 21. The RFP was apparently sent to USDS before amendment 1 was issued, so that USDS' copy indicated a June 1 closing date. Upon receipt of the RFP, USDS protested to our Office that the June 1 closing date allowed insufficient time for submission of proposals.

USDS' protest also challenges the RFP provisions related to the reaction force. The protest contends that those provisions are "so vague and conflictive that bidders cannot be expected reasonably to respond thereto." Specifically, USDS claims that the RFP fails to state the number and capabilities of persons that are to comprise the reaction force; the location of the approximately six buildings to be covered by the reaction force; and the kind of vehicles

needed to reach those buildings. USDS also alleges that the RFP fails to make clear whether the estimate of 200 hours refers to the number of hours that the entire reaction force will serve (so that a reaction force of 10 might serve for 200 hours, requiring a total of 2,000 labor hours) or the total number of labor hours (so that the 200-hour estimate would cover only 20 hours of the work of a 10-person reaction force). USDS also criticizes the RFP's silence concerning how the members of the reaction force are to be paid for the time that they are "at the ready" but not activated by the agency. Finally, USDS explains its allegation that the RFP is "conflictive" by stating that the security concerns in Port Moresby which explain the need for a reaction force are inconsistent with the agency estimate that the force will be needed only 200 hours per year.

We dismiss the protest ground concerning the amount of time allowed for submission of proposals because the agency has taken prompt corrective action. The agency had already, apparently on its own initiative, extended the date for receipt of proposals by more than 2 weeks, thus allowing USDS 4 weeks from the date of its receipt of the RFP. In addition, within 2 weeks of USDS' protest, the agency extended the date for receipt of proposals by a further 6 weeks. USDS does not contend that this amount of time was inadequate.

In sum, both on its own initiative and in response to the protest, the agency took action which eliminated the protester's concern, thus rendering this protest ground academic. Since it is not our practice to consider academic questions, we dismiss this protest ground. See East West Research, Inc.--Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379.¹

¹USDS contends that it is entitled to the cost of filing and pursuing this protest ground because the agency took corrective action only in response to the protest. We find that USDS is not entitled to those costs. As noted above, the agency took action allowing USDS 4 weeks to submit its proposal even before the protest was filed; the further corrective action was taken promptly after the protest was filed. Protesters are not entitled to costs in every instance in which an agency takes corrective action in response to a protest; instead, costs are awarded where, based on the circumstances of each case, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Alban Engine Power Sys.--Request for Declaration of Entitlement to Costs, B-247614.2, Apr. 8, 1992, 92-1 CPD ¶ 354. Here, the agency acted on its own initiative and, once a protest was filed, promptly took

(continued...)

As to USDS' contention that the RFP's requirements for the reaction force are vague and conflictive, we find this protest ground without merit. The RFP simply is not as vague as USDS asserts; thus, for example, the RFP specifically identifies the addresses of five of the buildings that are to be protected by the reaction force.

Even in those areas where the RFP's language is open-ended, we do not see any basis to find the requirements impermissibly vague. For example, although the RFP would permit the agency to require the contractor to use the reaction force in one or two additional sites (to reach the RFP's total of approximately six), USDS offers no explanation for why it is unreasonable for the agency to call for protection for one or two additional sites within Port Moresby, or why offerors cannot reasonably be expected to provide occasional emergency coverage for one or two additional locations in the same town without being provided the exact address before contract award.

Similarly, there is nothing improper in the RFP's silence concerning the number and capabilities of the members of the reaction force or the number and kind of vehicles the force will need. The agency is not required to direct offerors to include a particular number of persons or a pre-determined mix of skills in the reaction force, nor does it have an obligation to direct offerors to use a specific kind or number of vehicles with that force. Instead, it is reasonable and permissible for the agency to allow each offeror the discretion to propose whatever combination of personnel and vehicles that offeror deems appropriate, in order to devise an approach that, in the offeror's judgment, will best meet the government's performance requirements. See Pitney Bowes, B-233100, Feb. 15, 1989, 89-1 CPD ¶ 157.

USDS' claim that the RFP reference to 200 hours is ambiguous is similarly without merit. The 200 hours cannot reasonably be interpreted to refer to the total number of labor hours of all individual members of the reaction force, so that, in the hypothetical situation mentioned above, 200 hours would cover only 20 hours for a 10-person force. The very fact that the agency does not define the number of reaction force members makes such an interpretation unreasonable, since it would mean that the estimated number of hours when emergencies were expected to occur would be a function of the number of members of the force: a 20-member force would be "needed" only 10 hours a year, while a 1-person force would be "needed" 200 hours a year--an unreasonable reading

¹(...continued)

further corrective action. In these circumstances, the award of protest costs would be inappropriate.

of the RFP's 200-hour estimate of the agency's needs. The only reasonable interpretation of the provision is that 200 hours refers to the amount of time that the reaction force--however many members it contains--is expected to be needed.

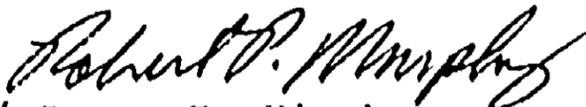
The last alleged area of vagueness concerns the RFP's failure to explain how offerors are to pay for the reaction force during the time when it is not used, and therefore not paid for, by the agency. Because the agency will pay only for the number of hours that it actually orders the reaction force's services, it is clear that the contractor will not be reimbursed for other time. USDS may not be satisfied with this arrangement, but it cannot reasonably contend that the RFP is vague or ambiguous in this regard.

Although not clearly articulated, USDS' real concern may be the RFP's lack of a fixed number of hours for which the agency will pay for the reaction force. Without such a firm number, offerors bear a risk that the government may use the reaction force very little and that the contractor will be able to bill the government for only that small number of hours of the force's services. If that risk did not fall on the contractor, the government would bear it: that is, either there is no specified number of hours, in which case the contractor risks incurring costs for the reaction force which may be difficult to recoup; or there is such a number, in which case the government risks paying for the reaction force's services, for hours in excess of the actual time that force is called upon to perform.

It is proper for agencies to impose reasonable risks on contractors in order to limit the burdens on the government. International Creative and Training, Ltd., B-245379, Jan. 6, 1992, 92-1 CPD ¶ 26. We see the agency's refraining from setting a fixed number of annual hours it will need the reaction force as reasonable, in light of the unforeseeable nature of crises, which makes a degree of unpredictability inevitable. Here, the agency has imposed the burden of the associated risk on the contractor. However, risk is inherent in any contract, and offerors are reasonably required to use their expertise and business judgment to assess the risk's magnitude and possible cost in computing their offers. Id. Thus, the RFP is not defective merely because it imposes on the contractor the risk arising from the uncertainty about how many hours the reaction force will be used each year. Moreover, USDS, based on its expertise and judgment, believes that the associated risk is quite small, since it has expressed the view that the reaction force will probably be needed more, not less than the RFP's estimate of 200 hours per year.

Finally, we turn to USDS' contention that the RFP is "conflictive" because it indicates that a reaction force is necessitated by the problematic security situation in Port Moresby but then estimates that the force will be used only 200 hours a year. There is no conflict between the two statements: the one establishes that a reaction force may be needed and the other sets out the estimated amount of need. USDS' argument merely reflects its disagreement with the agency's estimate of the number of annual hours when the force will be needed. Disagreement with the agency's judgment in such technical areas does not, however, form a valid basis of protest. Realty Executives, B-237537, Feb. 16, 1990, 90-1 CPD ¶ 288.

The protest is dismissed in part and denied in part.


for James F. Hinchman
General Counsel