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

Decision

Matter of: McNamara-Lunz Vans and Warehouses, Inc.

File: B-250426

Date: January 22, 1993

James H. Lunz for the protester.
Major Paul J. Coelus, Esq., for the agency.
Ann H. Finley, Esq., and Lynn H. Gibson, Esq., Office of the General Counsel, GAO, participated in the preparation of the decison.

DIGEST

Protest that government's minimum acceptable daily capability requirements under solicitation for moving services exceed agency's minimum needs and are restrictive is denied where agency demonstrates reasonable basis for the requirements.

DECISION

McNamara-Lunz protests invitation for bids (IFB) F41691-92-B-0033 issued by Randolph Air Force Base, Texas. The solicitation, issued on September 4, 1992, is for packing, crating, and local moving services in the San Antonio and Houston areas. McNamara, the incumbent contractor for the San Antonio area,[1] asserts that the requirements in the solicitation exceed the agency's true minimum needs.

We deny the protest.

The solicitation, set aside 100 percent for small business, is for shipping the household goods of military members. The relevant portion of the solicitation covers packing and crating of outbound shipments, local delivery and unpacking of inbound shipments, and complete door-to-door shipment of intra-area moves. These three services are to be performed in each of three geographical areas in the San Antonio region. The solicitation allows for split awards.

[1]This protest is limited to the portion of the solicitation relating to the San Antonio area only.

Bid opening was originally set for October 5, 1992. By letter dated September 17, 1992, McNamara-Lunz protested the solicitation, claiming that the "minimum acceptable daily capability" requirements (MADCs)[2] are unrealistically high as compared to historical workload data and exceed the agency's true minimum needs. The protester contends that by setting unrealistically high MADCs the government will incur unnecessary costs and has effectively precluded small businesses from competing for the contract. McNamara also disagrees with the definition of MADC as set forth in the solicitation.

Following McNamara's protest, the Air Force issued several amendments to the solicitation. Among other things, these amendments revised some of the MADCs and estimated quantities and extended the bid opening date indefinitely. By letter dated October 7, 1992, McNamara-Lunz amended its protest to reflect the revised MADCs and to complain about the addition of a paragraph to the performance work statement relating to contractor liability for loss or damages.

The solicitation, as revised, identifies the MADCs for outbound (Schedule I), inbound (Schedule II), and intra-city (Schedule III) services for each of the three geographic areas in the San Antonio region. Bidders are required to state for each service in each area their "guaranteed daily capability," which must equal or exceed the MADC. The proposed MADCs, and those under the current contract (in pounds) are as follows:

		Proposed	Current
Outbound:	Area I	20,000	8,000
	Area II	18,000	500
	Area III	18,000	500
	Total	56,000	9,000
Inbound:	Area I	40,000	8,000
	Area II	20,000	500
	Area III	20,000	500
	Total	80,000	9,000

[2]The MADC is the total weight of shipments the contractor is obligated to handle each day if the agency calls for such services. The agency may place orders for less.

Intra-City:	Area I	115,000	60,000
	Area II	20,000	*
	Area III	18,000	*
	Total	153,000	60,000[1]

McNamara claims that the proposed MADCs do not reflect the actual workload under the current contract and has provided data showing that the annual tonnage and average daily workload for 1991 were far below the workload contemplated by the proposed MADCs. For example, the protester states that in 1991 it handled 2,198,770 pounds of inbound shipments, for a daily average of 8,691 pounds; in contrast, the new MADC for this service, 80,000 pounds, represents an annual tonnage of 20,240,000 pounds. While the protester recognizes that there may be justification for a "slight increase" to some MADCs, such as those relating to inbound shipments, it maintains that there is no basis for the significant increases proposed by the Air Force.

Further, the protester contends that the Air Force has set MADCs that can be handled only with a large workforce, and therefore has effectively excluded small businesses from competition in violation of Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 247.271-2(c)(2). This provision states that a contracting officer shall ensure that MADCs will at least equal the maximum individual weight allowance authorized by the Joint Federal Travel Regulations (JFTR) and "will not preclude bidding by small business firms."

Agencies are required to specify their needs in a manner designed to promote full and open competition and to include restrictive requirements only to the extent necessary to satisfy their minimum needs. Barrier-Wear, B-240563, Nov. 23, 1990, 90-2 CPD ¶ 421. The contracting agency, which is most familiar with its needs and how best to fulfill them, must make the determination as to what its minimum needs are in the first instance, and we will not question that determination unless it had no reasonable basis. Corbin Superior Composites, Inc., B-242394, Apr. 19, 1991, 91-1 CPD ¶ 389.

The Air Force explains that, contrary to the protester's understanding, the MADCs are not intended to represent the agency's estimate of the average daily workload or the total annual workload required under the contract. Rather, according to the agency, the proposed MADCs represent the peak workload the successful offeror will be contractually

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[1]Under the current contract, the protester/incumbent contractor does not handle intra-city moves in Areas II and III in the San Antonio region.

obligated to perform on any given day if called upon to do so by the government.

The Air Force further explains that it calculated the new MADCs based on anticipated peak workload rather than expected daily averages partly to remedy serious difficulties the agency encountered under the current contract. Specifically, the agency notes that the incumbent contractor frequently refused shipments under the current MADCs, which are based on expected daily averages, on the ground that the contractual limit had been exceeded. For example, according to affidavits furnished by Air Force personnel who manage the current contract, the incumbent contractor has refused inbound shipments as exceeding the MADC on approximately 83 occasions. Because of these refusals, in some instances military members have had to wait up to 3 weeks for moving services and the Air Force has had to contract with alternate, more expensive sources to meet its needs. In the Air Force's view, the new MADCs accurately reflect the need for the agency, rather than the contractor, to have control over when shipments will be handled.

Furthermore, the Air Force points out that under DFARS § 247.271-2(c)(2), cited by the protester, the agency is required to set MADCs at a level that will at least equal the maximum individual weight allowance authorized by the JFTR. Since the maximum weight allowance under the JFTR is 18,000 pounds per member (depending on rank), the MADC for each service for each area must be at least 18,000 pounds. According to the Air Force, an MADC reflecting the 18,000-pound allowance ensures that any shipment can be handled in a single day, and avoids the inconvenience the member might suffer if the contractor could rely on, for instance, a 5,000-pound MADC to justify delivering a 15,000-pound shipment over the course of 3 days.

We believe that the agency has demonstrated a reasonable basis for the new MADCs. Although McNamara disputes the agency's description of current contract problems, contending among other things that during the past year it hasn't refused to handle any outbound shipments, the protester concedes that it has had to delay some inbound and intra-city shipments. While the protester relies on historical, daily averages to suggest that the problems with these services can be resolved through "slight" increases in the MADCs, it has not furnished any evidence to show that the peak workload demands projected by the agency are unreasonable. Rather, the protester merely speculates that the high MADC figures will be used to require the contractor to handle a large number of small shipments, which in the protester's view are more common and will take a larger workforce to handle than several large shipments.

In a similar vein, McNamara contends that it is inappropriate to base MADCs on the JFTR weight allowance of 18,000 pounds because it is unlikely that single shipments under the contract will be that large. While the agency recognizes that many inbound and outbound shipments weigh substantially less than 18,000 pounds, it states that shipments of 10,000 pounds or more are not uncommon and that intra-city moves tend to involve even larger shipments. In view of the agency's explanation, and the fact that DFARS § 247.271-2(c)(2) clearly requires that MADCs equal or exceed the 18,000-pound allowance, we have no basis for questioning the agency's determination to set the MADCs for each service and each area at or above 18,000 pounds.[4]

Nor do we find merit to McNamara's contention that the new MADCs violate DFARS § 247.271-2(c)(2) because they fail to take into account the capabilities of small businesses. While the DFARS provision requires that MADCs be set at a level that will not preclude bidding by small businesses, it also, as discussed above, establishes an 18,000-pound minimum which the Air Force adhered to in developing the new MADCs.

Furthermore, we note that the Air Force revised the original solicitation to provide contractors some flexibility in meeting the higher requirements attributable to the heavy demand for moving services in Area I. Specifically, the Air Force revised the MADCs for inbound services to make the aggregate MADC for inbound services in San Antonio equal to the Area I MADC. Thus, when the agency orders services in Areas II or III, the MADC for Area I on that day will be reduced by the combined weight of shipments handled in Areas II and III.[5] These circumstances illustrate that the Air Force did take the capabilities of smaller businesses into account in setting the new MADCs.

McNamara next objects to the definition of MADC that originally appeared as a footnote to the solicitation and

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[4]The agency explains that some rates for Area I are substantially higher because there is a heavy demand for moving services in that area and a need to accommodate multiple 18,000-pound shipments on any given day.

[5]For example, the MADCs for inbound shipments will be 40,000, 20,000, and 20,000 pounds for Areas I, II, and III, respectively, but if the agency orders 14,000 pounds of services in Area III, the contractor will only be obligated to provide 26,000 pounds of inbound services in Area I that day.

was later expanded and incorporated into a separate clause. This definition, which applies both to outbound and intra-city services, provides that the MADC is to be calculated by including "the total weight of shipments scheduled . . .for pick-up that day, without regard to the weight of other shipments being packed but not picked-up that same day."

While McNamara contends that this definition of MADC is unreasonable because it excludes from the MADC shipments that are being packed but not loaded on any given day, imposing an unlimited packing requirement on the contractor, the agency explains that the definition is necessary to prevent the recurrence of problems experienced under the current contract. Specifically, the agency states that contrary to its view of current contract requirements the incumbent contractor calculated amounts handled under the MADCs by counting the weight of shipments being packed but not picked up on a given day. As a result, the contractor was able to refuse to provide moving services because of the amount of packing in progress, and the agency had to obtain moving services from alternate and more expensive sources. In light of the problems identified by the agency, and the fact that the definition of MADC clearly is designed to address such problems, we have no basis for finding the definition to be objectionable.

Finally, the protester objects to a paragraph in the performance work statement providing that, in order for an inbound contractor to rebut the presumption of liability for loss of or damage to goods, the contractor must demonstrate by a preponderance of the evidence that another contractor or carrier caused the loss or damage. The protester contends that this statement of liability on the part of the inbound contractor is more stringent than that contained in the DFARS and will encourage negligence by contractors and carriers handling goods prior to their delivery to the inbound contractor.

The agency correctly maintains, however, that the statement on inbound contractor liability is no more than a reiteration of the rules stated in the DFARS liability clause and established case law. In this regard, the liability clause prescribed by section 252.247-7110(b)(3) of the DFARS establishes a presumption of liability on the part of the inbound contractor which can only be overcome by evidence that loss or damage was caused by another contractor or carrier, and the relevant case law makes clear that such evidence must be sufficient to establish the specific cause of the loss or damage. See McNamara-Lunz Vans & Warehouses, Inc., ASBCA Nos. 44101, 44167, and 44173, 92-3 BCA ¶ ___ (Sept. 30, 1992). See also McNamara-Lunz Vans & Warehouses, Inc., 57 Comp. Gen. 415 at 418-419 (1978).

The protest is denied.

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for James F. Hinchman
General Counsel