



Comptroller General
of the United States

553146

Washington, D.C. 20548

Decision

Matter of: Special Operations Group, Inc.

File: B-256312

Date: June 6, 1994

Eugene B. Cortese, Esq., Starfield & Payne, for the protester,
Allen W. Smith, Department of Agriculture, for the agency,
Paula A. Williams, Esq., and Michael R. Golden, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Protest that solicitation for a requirements contract to furnish fire retardant subjects bidders to unreasonable financial risks because it does not include a minimum quantity is denied because there is no legal requirement that a solicitation eliminate all risks for the contractor. Moreover, a requirements contract is valid even though it contains no minimum limitation on the estimated requirements of such a contract.

DECISION

Special Operations Group, Inc. (SOG) protests the terms of invitation for bids (IFB) No. R5-17-94-11, issued by the Department of Agriculture, Forest Service, for fire retardant. SOG contends that the IFB is defective because it contains no guaranteed minimum quantity that may be ordered during the life of the contract; thus, bidders have no basis for computing a realistic bid.

We deny the protest.

The IFB contemplates the award of a fixed-price requirements contract for fire retardant mixed and loaded onto air tankers for use at the Grass Valley Air Base, Tahoe National Forest. The requirement is divided into three contract line items, each of which specified different estimated quantities of retardant; the solicitation contains no guaranteed minimum or maximum quantities. The solicitation includes historical data of retardant use at the base for the past 10 years. Bidders are required to submit unit and extended

prices on a price per gallon basis; the three extended prices will be added together to arrive at a single total bid price. The contract will be awarded to the responsible, responsive bidder who submits the lowest total bid.

On January 14, 1994, prior to bid opening, SOG filed an agency-level protest challenging various aspects of the solicitation. On January 25, after reviewing SOG's allegations, the Forest Service denied SOG's agency-level protest. The Forest Service subsequently issued two amendments which addressed one of the issues raised and extended the bid opening date. This protest to our Office followed.

SOG basically contends that it is unreasonable to expect bidders to fairly price their start-up costs and the associated costs of maintaining a ready supply of fire retardant when the solicitation fails to specify a minimum quantity that will be ordered. As support for its position, the protester asserts that if very few orders were placed under the contract because of an unusually light fire season, the successful contractor would lose its initial outlay of capital. In SOG's view, the solicitation would require bidders to "gamble" on whether they could recoup their initial investment and, to minimize that risk of loss, would have to front load their bids and risk being found nonresponsive. Under any scenario, SOG asserts that the solicitation as issued limits the number of potential bidders and unduly restricts competition.

The Forest Service states that the solicitation at issue here did not include a minimum quantity because the fire season and the subsequent need for fire retardant are entirely dependant upon weather-related factors, beyond the control or knowledge of the government. As a result, the agency cannot predict with any degree of certainty a specific quantity of fire retardant that will be required during the contract period.

An agency is required to specify its needs and select its procurement approach in a manner designed to promote full and open competition. See, s.g., Mills Mfg. Corp., B-224004 et al., Dec. 18, 1986, 86-2 CPD ¶ 679. The use of requirements contracting is authorized by Federal Acquisition Regulation § 16.503(b), which states that such

¹Notwithstanding the protest, the Forest Service proceeded with bid opening on March 18 and received two bids. The protester relies on the fact that only two bids were received as further support that the solicitation was restrictive. We do not view this fact as material to whether or not the solicitation as issued was defective.

contracts may be used when an agency anticipates recurring requirements but cannot predetermine the precise quantity of services needed during a definite period. Jewett-Cameron Lumber Corp.; et al., B-229582 et al., Mar. 15, 1988, 88-1 CPD ¶ 265. While providing a minimum quantity may reduce a contractor's risk and be appropriate in the certain circumstances, it is not legally necessary that requirement contracts place a minimum or a maximum limit upon the estimated requirements. Robertson and Penn, Inc., B-226992.2, July 13, 1987, 87-2 CPD ¶ 39. Risk is inherent in most types of contracts and bidders are expected, when computing their prices, to account for such risk. Id.; Neil Gardis & Assocs., Inc., B-238672, June 25, 1990, 90-1 CPD ¶ 590.

It is our view that the solicitation provided bidders with a reasonable indication of what to expect under the contract. While the solicitation did not provide a maximum limitation or minimum guarantee, it did contain estimated quantities of retardant that may be ordered during the base and option periods. The estimates were based upon historical trend data for the past 10 years at the same base, and this data was included in the solicitation for bidders to use in preparing their bids in lieu of minimum and maximum quantity limitations.

Given the agency's inability to predict how much retardant will be needed, we think there was nothing improper in the agency deciding, as it did here, that its needs dictate that the quantity risk be imposed on the contractor. Robertson and Penn, Inc., supra. While the protester argues that the uncertainty associated with not knowing how few gallons of retardant may be ordered might result in bidders pricing their bids higher to cover the risk that only a small amount of retardant will ultimately be purchased, there is nothing wrong per se with requiring bidders to use their expertise and business judgment to assess the magnitude of risk and possible cost of that risk in computing their bids. In short, to the extent that some unknown aspects of performance remain, bidders are free to propose pricing that covers that risk. KCA Corp., B-236260, Nov. 27, 1989, 89-2 CPD ¶ 498.

The protest is denied.

/s/ John M. Melody
for Robert P. Murphy
Acting General Counsel