



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Instrument Control Service, Inc.; Science & Management Resources, Inc.

File: B-289660; B-289660.2

Date: April 15, 2002

Larry E. McKee for Instrument Control Service, Inc., and Eleanor L. Frommel for Science & Management Resources, Inc., the protesters.
Capt. Christopher L. McMahon and Bradley S. Adams, Esq., Department of the Air Force, for the agency.
Louis A. Chiarella, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency is not required to include in a solicitation a wage conformance from the prior service contract for employee classes not included in the applicable Service Contract Act wage determination.
 2. Protests that solicitation requirement that items be calibrated within 5 workdays is unnecessary and unattainable are denied where the agency has reasonably explained its need for the requirement and why it is not unattainable, and the protesters have not shown the requirement is unnecessary or unattainable.
-

DECISION

Instrument Control Service, Inc. (ICS) and Science & Management Resources, Inc. (SMR) protest the terms of request for proposals (RFP) No. F09650-01-R-0256, issued by the Department of the Air Force, for calibration and repair services of test, measurement, and diagnostic equipment (TMDE) at the Precision Measurement Equipment Laboratory (PMEL), Warner Robins Air Logistics Center (WR-ALC), Robins Air Force Base, Georgia. ICS contends that the solicitation is defective in that it does not include conformed wage determinations available from the previous contract. ICS and SMR both contend that the solicitation is defective in that the 5-workday turnaround time for each TMDE item serviced is an unnecessary and unattainable requirement.

We deny the protests.

WR-ALC performs inspections and depot maintenance for certain types of Air Force aircraft. The WR-ALC PMEL calibrates, repairs, and certifies the TMDE used by the agency to accomplish these aircraft maintenance and inspection functions. On December 7, 2001, the agency issued a solicitation for the requirement to operate the WR-ALC PMEL and to service all assigned TMDE equipment.

The RFP contemplates the award of a fixed-price contract for a 2-year base period, with two 1-year options and two 1-year incentive options. The solicitation provides offerors with the agency's best estimated quantity (BEQ) of 160 TMDE items input each workday for the base period.¹ RFP attach. 2, Workload Estimates. The basic contract prices are based upon this BEQ plus 15 TMDE items; the RFP provides for separate pricing for TMDE items input each workday "over and above" the agency's BEQ plus 15 TMDE items. RFP § B.

The RFP's performance work statement establishes turnaround times for the TMDE items input to the contractor, based on an item's priority as determined by the agency. For routine items, the required turnaround time is 5 workdays.² RFP amend. 1, attach. 1, § C.5.3.7.1.1. For TMDE items designated by the Air Force as priority and emergency, the turnaround times are 2 workdays and 8 hours, respectively.³ RFP §§ C.5.3.7.1.2-3. The RFP also contains a penalty provision for delinquent performance by the successful contractor beyond the required turnaround times, using a payment deduction formula set forth in the RFP, in which a percentage of the line item price, as submitted by the contractor in its proposal, is to be deducted for each day an TMDE item is delinquent. RFP attach. 8, Service Delivery Summary, at 2.

Because the procurement is for services, it is subject to the Service Contract Act of 1965 (SCA), as amended, 41 U.S.C. §§ 351-358 (1994). The RFP advises that offerors must pay non-exempt employees at least the minimum wages and fringe benefits set

¹ The RFP's workload estimate also informs offerors that there are 250 workdays per year, thereby resulting in an annual BEQ of 40,000 TMDE items input for the base period. RFP attach. 2, Workload Estimates.

² The turnaround time starts as "day zero" with the contractor's receipt of the TMDE item to be serviced. The 5-workday turnaround time is in addition to any time incurred by the contractor awaiting parts, technical data, facilities, equipment, or standards. The turnaround time also does not include government final inspection and acceptance time. If items are not accepted, and are returned to the contractor for rework, the contractor's turnaround time continues, and the time the items were under the government's control is not counted. RFP amend. 1, attach. 1, § C.5.3.7.1.1.

³ The Air Force informed offerors that the average input of priority items is 60 per month, and that the anticipated number of emergency items input is 10 or fewer per year. Agency Report, Tab 23, RFP Questions & Answers, Jan. 14, 2002, at 1.

forth in the Department of Labor (DOL) area wage determination for the Macon, Georgia area, which is incorporated into the RFP. RFP amend. 1, § H-906; attach. 9, Wage Determination No. 94-2140 rev. 17 (May 23, 2001). The RFP also incorporates a clause providing standards and procedures by which the wages for any class of employees subject to the SCA, but omitted from the wage determination, can be “conformed” to establish the applicable wage rates for those employees. Federal Acquisition Regulation (FAR) § 52.222-41.⁴ The Air Force informed offerors that while there had been wage conformances initiated under the previous contract for employee classes not listed in the DOL wage determination, “no conformed wage classifications are being carried forward to this follow on acquisition.”⁵ Agency Report, Tab 22, PMEL Site Visit Questions and Answers, Dec. 4, 2001, at 2.

Prior to the amended RFP’s closing date for receipt of proposals, ICS and SMR each protested various aspects of the solicitation.

ICS first complains that the solicitation fails to include certain wage conformances for classes of expected service employees not listed on the RFP’s wage determination, notwithstanding that the Air Force possesses this information from the previous contract. ICS does not argue that the absence of the wage conformances precludes it from adequately preparing its proposal: as the incumbent contractor, ICS knows of the prior contract’s wage conformances. Instead, ICS contends that the agency’s failure to inform other potential offerors of the prior contract’s wage conformances places it at a competitive disadvantage. ICS essentially argues that the prior contract’s wage conformances, although not binding

⁴ Generally, under the wage conformance procedures, the contractor is to establish wages that are reasonably related to those of workers in classifications listed in an applicable wage determination with the same knowledge and skill level. The “conformed” wage rate must be reviewed by the contracting officer and finally approved by DOL, and the contractor must pay at a minimum the wage rate ultimately set or approved by DOL. In the case where a contractor succeeds a contract under which any classification in question was previously conformed, the contractor may elect without DOL approval to adopt and “index” (i.e., adjust for inflation using a specified formula) the previous wage rate conformance instead of initiating a new wage conformance action. 29 C.F.R. § 4.6(b)(2); FAR §§ 22.1019, 52.222-41(c). A contractor is not entitled to a price adjustment as part of a wage conformance action if the conformed wage is higher than the wage estimated when submitting its proposal. See FAR § 52.222-44; Spectrum Sciences & Software, Inc., ASBCA No. 49769, Nov. 15, 1999, 1999-1 BCA ¶ 30,663; Johnson Controls World Services, Inc., ASBCA Nos. 40233, 47885, July 31, 1996, 96-2 BCA ¶ 28,458.

⁵ The agency’s stated reason was that DOL had not made a final determination on the wage conformance matter. Agency Report, Tab 22, PMEL Site Visit Questions and Answers, Dec. 4, 2001, at 2.

on offerors, are most probably the minimum wages that DOL would approve for those classes of employees omitted from the area wage determination. Without being informed of the prior contract's wage conformances, other prospective offerors may underestimate the cost of those employees and underbid ICS because of their lack of knowledge.

The FAR generally requires a contracting agency to include a wage determination in a solicitation for services. FAR § 22.1012-1. This is because the SCA mandates that employees normally be paid at least the minimum hourly wages set forth in the applicable wage determinations. 41 U.S.C. § 351(a)(1). There is no similar obligation on the agency to include wage conformances in the solicitation. See Harris Sys. Int'l, Inc., B-228096, Oct. 14, 1987, 87-2 CPD ¶ 357 at 2. Unlike wage determinations, a previous contract's wage conformances are not binding on a successor contractor (including the incumbent). See FAR § 52.222-41(c). Instead, a successor contractor has the discretion to either make use of the previous wage conformances, or initiate new wage conformance actions at rates higher or lower than the previous wage conformances, subject to DOL approval. Id.

With regard to ICS's claimed competitive disadvantage because of its knowledge of the previous contract's wage conformance, it is true that a procuring agency must provide sufficient detail in a solicitation to enable offerors to compete intelligently and on an equal basis. See Braswell Servs. Group, Inc., B-276694, July 15, 1997, 97-2 CPD ¶ 18 at 2. However, we have recognized that the procedures set forth in the solicitation for contractors to establish wage and fringe benefits for omitted classes of employees provide a reasonable basis for all offerors to estimate labor costs and to compete on an equal basis. PacOrd, Inc., B-253690, Oct. 8, 1993, 93-2 CPD ¶ 211 at 11. Here, as ICS is already aware of the prior contract's wage conformances, and as the agency has informed all offerors that the information could be obtained pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000), the fact that the RFP here fails to include the prior wage conformances does not mean the offerors are being treated in a prejudicially unequal manner. See PacOrd, Inc., supra, at 8-9; The Fred B. DeBra Co., B-250395.2, Dec. 3, 1992, 93-1 CPD ¶ 52 at 14-18.

ICS nevertheless argues that the Air Force has not complied with its own price adjustment guide, which counsels:

If a labor classification was conformed in the previous contract and still does not appear on the [wage determination] provided for the successor contract solicitation, the conformed classification and the current "indexed" wage rate should be included in the solicitation as an attachment to the [wage determination].

Agency Report, Tab 28, Fair Labor Standards Act and Service Contract Act Price Adjustment Guide (Aug. 2000), at 14. We note that the price adjustment guide is not binding on the contracting officer and that the statement relevant here is merely hortatory. In any case, we do not review a protest alleging violation of an internal

agency policy, but only allegations of violation of a statute or regulation. Modern Techs. Corp. et al., B-278695 et al., Mar. 4, 1998, 98-1 CPD ¶ 81 at 15.

We fail, however, to understand the Air Force's decision not to include the prior wage conformances in the solicitation, notwithstanding the absence of a statutory or regulatory obligation to do so. The agency acknowledges that all offerors can obtain the previous wage conformances under FOIA, so there would seem to be no reason not to make them more freely available. Moreover, inasmuch as a contractor is not entitled to a price adjustment as part of a wage conformance action, providing offerors with what is essentially a baseline for unlisted classes of employees may diminish an offeror's risk in estimating its costs, which may thereby allow for a better price competition. While the agency may be concerned that offerors could somehow be misled by this information, because DOL had not finally resolved the matter, as noted inclusion of the previous contract's wage conformances in the RFP does not mean that they are required to be used--a fact that the agency could emphasize in providing this information.

ICS and SMR also protest the RFP requirement establishing a 5-workday turnaround time for each routine TMDE item serviced. The protesters contend that the agency has no need for the 5-workday turnaround requirement, noting that the Air Force lacks a uniform turnaround time standard and that other contractor-operated PMELs have less stringent requirements. The protesters also contend that the 5-workday turnaround time requirement is unattainable and unrealistic, particularly given other solicitation requirements.⁶ The protesters argue that the penalties resulting from delinquent performance "pose formidable and unnecessary risks" for the successful contractor.⁷

In response, the Air Force maintains that the 5-workday turnaround requirement here is reasonable. The agency argues that in order for WR-ALC to perform programmed maintenance schedules in support of airlift missions, it is necessary that its mechanics have properly calibrated tools and equipment on hand. The Air

⁶ The protesters allege that several interrelated factors--most importantly, the item priority system, the fact that TMDE daily inputs often regularly exceed the BEQ amount, the "first in/first out" requirement for routine items, and delays associated with the agency-provided computer system--together cause the 5-workday turnaround time requirement for the service of routine items to be unworkable.

⁷ ICS notes that while it had the best turnaround time among Air Force PMELs during November 2000, the agency still deducted \$23,455.95 during that month for the contractor's failure to meet the 5-workday turnaround time requirement. ICS also notes that although its average turnaround time for the entire contract to date is 4.49 workdays, the Air Force has still deducted a total of \$416,012.84 as a result of delinquencies from October 2000 to September 2001. ICS's Comments at 4-5.

Force explains that WR-ALC has “sized” its inventory of tools and equipment that require calibration based on a 5-workday turnaround time for these services, and that its customers rely upon this short turnaround time to fulfill their missions. Agency Report, Tab 18, Declaration of Director of WR-ALC Technology & Industrial Support Directorate. The agency also contends that the requirement here is not unattainable, arguing that historical performance data shows its feasibility. In addition, the agency maintains that past contractors have not utilized the PMEL’s total available capacity, which may have contributed to any difficulties they had in meeting this requirement.⁸ The Air Force also notes that the RFP generally allows offerors to separately price the additional costs that would be incurred as a result of TMDE items input “over and above” the daily BEQ amount, which mitigates the price risk of the contractor.⁹

The responsibility for drafting proper specifications that reflect the government’s needs is the contracting agency’s. California Inflatables Co., Inc., B-249348, Nov. 9, 1992, 92-2 CPD ¶ 331 at 2. Our Office will not sustain a protest challenging an agency’s judgment in a situation such as this unless the protester presents clear and convincing evidence that the specifications are in fact impossible to meet or unduly restrict competition. Clifford La Tourelle, B-271505, June 5, 1996, 96-1 CPD ¶ 270 at 2-3. A protester’s mere disagreement with an agency’s judgment concerning the agency’s needs and how to accommodate them does not demonstrate that specifications are unduly restrictive or defective. See AT&T Corp., B-270841 et al., May 1, 1996, 96-1 CPD ¶ 237 at 7-8.

Here, while the protesters have offered evidence that the Air Force employs different turnaround times at other PMEL locations, they have not shown that the 5-workday turnaround requirement does not represent the agency’s minimum needs, given the agency’s detailed explanation. It is well established that each procurement stands on its own; the fact that the Air Force’s judgment as to the required turnaround time may have been different under the circumstances of other procurements does not invalidate an otherwise reasonable requirement. See T&S Prods., Inc., B-272291, Sept. 13, 1996, 96-2 CPD ¶ 117 at 2; Commercial Energies, Inc., B-238208, Apr. 5, 1990, 90-1 CPD ¶ 368 at 2-3.

⁸ The Air Force informed offerors that the contractor would generally have access to the WR-ALC PMEL 24 hours per day, 7 days per week. Agency Report, Tab 22, PMEL Site Visit Questions and Answers, Dec. 4, 2001, at 2.

⁹ The agency also states that the solicitation requirement that the contractor perform calibration and repair services of routine items on a “first in/first out” basis does not accurately represent the agency’s intention. The Air Force plans to amend the RFP here and require that the contractor perform work on a “first in/first placed into work” basis. Agency Report (SMR Protest) at 4 n.1.

Nor have ICS and SMR shown the turnaround time for servicing TMDEs is unrealistic or unattainable. In this regard, we note that ICS's average turnaround time for the previous contract was less than the 5-workday turnaround requirement. Moreover, as the WR-ALC PMEL facility is generally available for use at all times of the day, a contractor can employ additional shifts and/or overtime in order to meet the turnaround time requirement. While this may prove more costly, it is not impossible, and an offeror can account for the increased performance costs, as well as for quantities in excess of the designated daily BEQ, in its price proposal. Even though a contractor may not achieve the 5-working day turnaround time for every piece of equipment serviced, we find that the failure to do so does not make the requirement an unattainable one.

Regarding the protesters' contentions that the penalties associated with delinquent performance impose formidable and unnecessary levels of risk on the contractor, the mere presence of risk in a solicitation does not make the solicitation inappropriate or improper. Keystone Ship Berthing, Inc., B-289233, Jan. 10, 2002, 2002 CPD ¶ 4 at 5. It is within the ambit of administrative discretion for an agency to offer for competition a proposed contract that imposes maximum risks on the contractor and minimum burdens on the agency, and an offeror should account for this in formulating its proposal. Clifford La Tourelle, *supra*. Moreover, the provision that ICS and SMR are protesting affect all potential offerors equally, and, in our view, the fact that offerors may respond differently in calculating their prices is a matter of business judgment that does not preclude a fair competition. Wheeler Bros., Inc., B-223263.2, Nov. 18, 1986, 86-2 CPD ¶ 575 at 7-8.

The protests are denied.

Anthony H. Gamboa
General Counsel