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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540**

FILE: B-189303; B-189425 **DATE:** December 15, 1977

MATTER OF: Industrial Maintenance Services, Inc;
Interstate Services, Inc;
Maintenance, Incorporated

DIGEST:

1. Post-bid opening protest in which bidder alleges that solicitation specifications were ambiguous was untimely filed. However, deficiencies in procurement warrant consideration of protest on its merits.
2. When IFB states minimum number and functions of dining hall employees but does not clearly specify hours to be worked by each, bids cannot be fairly compared and evaluated. Moreover, IFB encourages unbalanced bidding because bid evaluation is based on specified number of meals to be served without regard to prices submitted by bidders for serving greater number of meals. GAO therefore recommends cancellation of IFB and resolicitation.
3. IFB specifying minimum manning requirements does not result in illegal personal services contract unless nature of work to be performed and supervision and control by Government create employer-employee relationship between Government and contractor's employees.

Three prospective contractors have protested to this Office regarding invitation for bids (IFB) No. DAAH03-77-B-0042, issued May 19, 1977, by the Army Missile Materiel Readiness Command (MIRCOM) for dining facility services at Redstone Arsenal, Alabama.

The Army sought bids for food services in three buildings, 3438 North, 3438 South, and 3480, identified respectively as items 0001, 0002, and 0003 in the IFB. For each item, prospective contractors were asked to submit bids in two categories, A and B, defined by the number of meals to be served. Award was to be made to the bidder offering the lowest total price for all items in category A, which called for up to 17,500 meals

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per semi-month in building 3438 South and up to 15,000 meals per semi-month in each of the other two buildings. A one year contract, renewable at the option of the Government for four additional years, was contemplated. Award has been delayed pending resolution of this protest; meanwhile, the incumbent contractor has continued to perform.

The protests, by Industrial Maintenance Services, Inc. (Industrial), Interstate Services, Inc. (Interstate), and Maintenance, Incorporated (Maintenance, Inc.), all relate to the minimum manning requirements contained in Section F of the IFB. This section specified the number of cook leaders, cooks, cooks' helpers, KP leaders, and KPs required for each meal category during three shifts in building 3438 South and during two shifts in the other buildings. Hours for each of the three shifts were listed only once, however, in the paragraph dealing with building 3438 South.

Minimum requirements for managers and clerks also were listed according to building. In addition, contractors were provided with information for each building on serving hours, weekend and holiday schedules, number of serving lines, seating capacity, square feet of floor space, and average number of meals served. The IFB stated:

"The minimum manning levels and shift times are scheduled to assure performance and must be complied with. However, such schedules do not in any way minimize the contractor's obligation to use more employees or to work longer if necessary to attain satisfactory contract performance."

Bidders were advised that the procurement was subject to the Service Contract Act, as amended, and the IFB included the Department of Labor's register of wage determinations for the Redstone Arsenal area.

Before bid opening, which was June 20, 1977, Industrial objected to the solicitation on grounds that it constituted an illegal personal services contract. In such a contract, Industrial argued, the level of personnel would not necessarily be commensurate with services to be provided, because contractors could not reduce the manpower and hours even if the actual number of meals served was less than the number specified in the IFB. In addition, Industrial contended, manning requirements would deprive a contractor of the ability to rely on his experience, unfairly favor the incumbent, and increase costs to

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the Government. Industrial sought elimination of the minimum manning requirements from the IFB.

On June 20, 1977, after bid opening, Interstate protested award to any other firm on grounds that it had offered the lowest price which could satisfy the minimum manning requirements of the solicitation, making it the lowest responsive bidder. Alternatively, Interstate argued that award to any firm bidding less than raw labor costs would constitute a waiver of minimum manning requirements, which could then be regarded as unnecessary and unduly restrictive of competition.

Maintenance, Inc.'s initial protest also was dated June 20, 1977. It protested award of a contract to any bidder submitting an offer with a price less than cost, arguing that the first 11 bidders had not prepared their bids in accordance with solicitation instructions and requirements. The firm supported its protest with a detailed analysis of its own proposed costs, based upon its understanding of positions, hours, and wages specified in the IFB. In a letter dated July 13, 1977, responding to our Office's request for further details, Maintenance, Inc. stated that the solicitation might have been ambiguous or unclear. Maintenance, Inc. identified what it believed to be ambiguities in a letter of July 18, 1977, with emphasis on the fact that specific hours for each shift had not been listed in the IFB for buildings 3438 North and 3480 as they had been for building 3438 South. Thus, the firm argued, many bidders might have based their bids on far fewer hours per shift for these two buildings than Maintenance, Inc. had.

Initially, the Army argues that Maintenance, Inc.'s allegations of ambiguity are untimely under our procedures, which require that improprieties which are apparent before bid opening be protested by that date. 4 C.F.R. § 20.2(b)(1) (1976). The Army also has responded to the substance of Maintenance, Inc.'s protest by denying that the IFB was ambiguous. The contracting officer argues that by stating the shift requirement once, under that section dealing with building 3438 South, coupled with meal times which were common for all buildings, the Government clearly stated the requirement for shifts in all buildings. The only reasonable interpretation is that the same shifts were required in all buildings serving meals at the same times, the Army concludes.

We agree that Maintenance, Inc. should have protested any ambiguities in the solicitation before the bid opening, because it was apparent at that time that the IFB listed hours of the three shifts

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to be worked only once, in connection with one of the three dining halls. Maintenance, Inc., however has raised an issue which has substantial merit, and we believe that the alleged deficiency warrants consideration despite the protest having been filed after bid opening. See Federal Contracting Corporation, B-183342, June 30, 1975, 75-1 CPD 398. If the specifications did not clearly state what was required--i.e. the number of hours to be worked by stated employees in each dining facility--bidders may not have been competing on an equal basis and award of the contract would be subject to objection. See Postal Data Corporation, B-186523, January 31, 1977, 77-1 CPD 76.

We cannot be certain that the prices of the 11 below-cost bidders were due to ambiguous or unenforceable manning requirements. We note, however, that the three lowest bidders, Ira Gelber Food Services, Palmetto Enterprises, Inc., and Aseptic Services, Inc. each claimed mistakes in bid, but before these could be verified, their acceptance periods ran out. None would extend. J. T. Enterprises, the fourth-lowest bidder and apparently in line for award during the pendency of this protest, by telex received October 11, 1977, informed our Office:

" J. T. interprets the manning provision for buildings 3438 N and 3480 as requiring numbers and functions of personnel but does not require specified hours to be worked by each. *** J. T. is unwilling to assume the risk of accepting award of the contract ***."

That firm's acceptance period also has expired, and it has refused to renew its bid.

In view of the above, neither can we be certain that Lewis Management and Services Company, the fifth-low bidder to whom the Army now contemplates making award, was bidding on the same substantive basis as all other bidders. Although the detailed listing of food preparation and cleanup chores should have indicated to prospective contractors that some work was required both before and after the serving hours listed for each mess hall, under the solicitation these tasks might have been accomplished by split shifts or other flexible scheduling of the minimum number of personnel required for buildings 3438 North and 3480.

Under these circumstances, the contracting officer cannot reasonably conclude that the minimum manning requirements which the Army contends are necessary to insure proper operation

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of the dining halls will be met if an award is made under this solicitation. See Technassociates, Incorporated, Request for Reconsideration, B-185385, October 7, 1976, 76-2 CPD 319.

While the parties have focused on minimum manning requirements of the IFB, we believe there also are significant defects in the Government's evaluation procedures under this solicitation. As stated above, award was to be made to the bidder offering the lowest total price for meal category A, which called for up to 17,500 meals per semi-month in building 3438 South and up to 15,000 meals per semi-month in each of the other two buildings. Bidders also were required to submit prices for meal category B, which called for from 17,501 to 25,000 meals per semi-month in building 3438 South and from 15,501 to 25,250 meals in each of the other two buildings. Category B prices were to be considered for purposes of responsiveness only, not for evaluation and award.

This evaluation scheme may have offered an opportunity for unbalanced bidding; the abstract of bids shows what appear to be disproportionate increases in the unit prices of most bidders for meal category B. If a solicitation is structured so as to encourage unbalanced bidding, it is defective per se. No bid can be properly evaluated because there is insufficient assurance that any award will result in the lowest cost to the Government. Edward B. Friel, Inc., 55 Comp. Gen. 231, 235 (1975), 75-2 CPD 164.

In administering this contract, the Army states that it intends to pay at the lower unit price for all meals up the maximum number in meal category A, and at the higher unit price only for meals over that number. The IFB states in this regard that:

"The price to be paid for each item number listed in the schedule for any given semi-monthly period shall be that unit price in the schedule opposite that category encompassing the maximum quantity of meals actually served during that period. For example, if 15,000 meals are actually served in Mess #4, Bldg 3480 during any semi-monthly period, the unit price for that period for Item 0003 shall be the unit price amount listed opposite Category 'a' in Item 0003; similarly, if 15,500 meals are actually served in the same dining facility in any semi-monthly period, the unit price for that period shall be the amount of the unit price listed opposite Category 'b', Item 0003."

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Bidders reasonably may interpret this provision to mean that if more than 15,000 meals were served in building 3480 during a given period, for example, all meals would be paid for at the higher, category B, unit price, and may have set their prices with this in mind.

Finally, if more than the maximum number of meals in category A actually are served, the Government in any case will be contractually bound to pay for them at the category B rate, which has not been evaluated. The Army informs us that it has not previously served more than the maximum number of meals in category A and, absent some contingency, does not anticipate doing so. But if the possibility of serving the number of meals specified in category B is great enough to justify requesting bids for that category, we believe the prices should be evaluated.

Accordingly, the protest of Maintenance, Inc. is sustained. Considering the additional defects which we have noted, we recommend cancellation of this solicitation. Any resolicitation should specify the exact number of personnel and the exact hours to be worked on each shift, in each dining hall, and should include an evaluation formula for all meal categories which does not itself encourage unbalanced bidding. See generally Southeastern Services, Inc. and Worldwide Services, Inc., 56 Comp. Gen. 668 (1977), 77-1 CPD 390.

In view of our recommendation, we need not consider the protesters' arguments regarding below-cost bids; because the issue is likely to arise again, however, we will respond to Industrial's argument that the minimum manning requirements of this solicitation constitute an illegal, personal services contract.

In general, any contract which creates an employer-employee relationship between the Government and employees of the contractor violates Federal law. Criteria for recognizing personal services are set forth in Armed Services Procurement Regulation (ASPR) § 22-102.2 (1976 ed.); they include the nature of the work to be performed and the amount of supervision and control exercised by the Government. The regulations specifically state:

"***It is permissible to specify a recommended, or occasionally even a minimum number of people the contractor must employ, if this is necessary to assure performance ***." ASPR § 22-102.2 (ii)(D).

In this case, we believe the contracting officer reasonably determined that only non-personal services were called for in

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performance of this contract. See generally American Federation of Government Employees, Local No. 3347, AFL-CIO, B-183487, April 25, 1977, 77-1 CPD 326.

Accordingly, Industrial's protest on this ground is denied.

By letter of today, we are advising the Secretary of the Army of our recommendation for cancellation and resolicitation.

Because this decision contains a recommendation for corrective action, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U. S. C. § 1176 (1970), which requires the submission of written statements by the agency to the Committees concerning the action taken with respect to our recommendation.


Deputy Comptroller General
of the United States