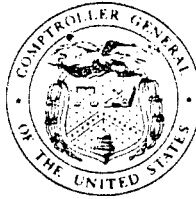


DECISION



15500 PLI *Fitzmaurice*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-197488

DATE: November 24, 1980

MATTER OF: Logistical Support, Inc.

DIGEST:

[Protest Alleging Solicitation Was Defective]

Novel procurement format which seeks to guarantee adequate performance under mess attendant services contract is not defective for requiring each bidder to bid identical price for labor costs since bidders were allowed to make necessary adjustments in bids under only item to be priced by bidders--management and support.

Logistical Support, Inc. (LSI), protests the award of a contract to Industrial Maintenance Services, Inc. (IMS), under invitation for bids (IFB) No. N00612-80-B0003 issued by the Naval Supply Center (Navy), Charleston, South Carolina.

LSI argues that this solicitation is defective. However, we find no basis to disturb the award made in this instance.

The IFB solicited bids for mess attendant services for the Naval Air Station, Memphis, Tennessee, during the period April 1 through September 30, 1980, with two 1-year options. In the past, the Navy has encountered problems with formally advertised fixed-price mess attendant contracts because, after receiving an award, a contractor would often reduce staff in order to minimize costs and maximize profit. The result, according to the Navy, is poor quality service, excessive Government supervision, and high contract administration costs.

In an effort to overcome these problems, the Navy has employed a novel solicitation format with the objective of tailoring the present IFB to the specific needs of the Memphis Naval Air Station. It established an estimated maximum quantity of service

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units (241,800 mess attendant man-hours) needed to perform the contract. This quantity was then multiplied by a minimum service unit rate (\$4.84) which was based on the applicable Department of Labor Wage Determination and other factors estimated by the Navy to be part of a contractor's labor expense. This service unit rate is the Navy's billing rate. After these two numbers have been multiplied together, the figure reached (\$1,170,312) fixes the Navy's maximum obligation for labor costs under the contract. Each bidder was required to use this figure in its bid.

In the Navy's opinion, by using a maximum number of manning hours plus a fixed service unit rate, it could ensure that any successful bidder would meet the minimum acceptable performance standards required for the contract as well as comply with the wage provisions of the Service Contract Act. If a bidder should want to pay its employees higher wages or fringe benefits than those required by the appropriate Department of Labor Wage Determination, the Navy intended the increased costs to be incorporated in the bidder's "Management and Support Price." The purpose of the management and support price is to allow bidders an opportunity to include in their bids a sum to cover their management costs, overhead, and profit. Thus, it was the Navy's intention that the price competition would occur only under this particular bid item.

In addition to the price that the contractor would receive for labor and management and support, the IFB also provided that during the base contract period, the contractor could earn a maximum "Award Amount" (fee) of \$60,000. The IFB established criteria for a quarterly evaluation of the successful contractor's performance. If the contractor should be evaluated "excellent," it would receive the maximum award amount available for the quarter. But if the contractor receives an evaluation of less than "excellent," yet remains within an acceptable range of performance, it would then receive a percentage of the maximum award amount based on the numerical rating it had received under the evaluation process. However, if the contractor's evaluation falls within the "minimum"

or "submarginal" range, it would not be entitled to any part of the available award amount. A similar procedure would apply to the two-option periods.

The successful bidder, IMS, bid "\$0.00" for the management and support price for both the base and option periods. Thus, it appears that IMS intends to recover all its administrative costs and profit under the award amount provision.

At the outset, we note that our Office previously considered the concept of a formally advertised contract with award fee in Palmetto Enterprises, 57 Comp. Gen. 271 (1978), 78-1 CPD 116. That decision raises the threshold question whether it is proper to use an award fee provision in a formally advertised procurement.

In Palmetto Enterprises, the Navy, pursuant to Defense Acquisition Regulation (DAR) § 1-109.2 (1976 ed.), obtained a one-time deviation in order to "test an innovative new approach to contracting for mess attendant services," that is, an advertised procurement with an award amount provision. The protester in that case had argued that an award amount provision was not authorized for use in an advertised procurement. We agreed, but pointed out that the one-time deviation specifically granted the Navy the authority to conduct the experimental procurement.

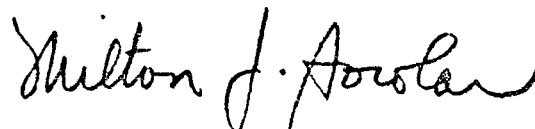
Initially, the Navy did not obtain a deviation from DAR to conduct this procurement. We have been notified, however, that the Navy now has a deviation for this solicitation issued by the appropriate authority and has taken steps to have this procurement format recognized by DAR. In light of this, we do not believe it necessary to consider this question further.

LSI's protest challenges at length the imposition of a mandatory service unit rate on bidders as well as the particular rate used in the IFB. The substance of LSI's protest in this regard reflects the mistaken belief that the bidders are required to bid and, thereby, to be paid at the specific prices dictated by the Navy. LSI's contentions do not recognize that, as indicated above, bidders are given sufficient flexibility to price the item for management and support to adjust bids to fit particular needs. Therefore, we find no merit to the protest in this regard.

LSI also argues that the solicitation format precludes the use of a prompt payment discount since to utilize such a discount will mean that the contractor will be paying less than the applicable Department of Labor Wage Determination in violation of the Service Contract Act. However, there is no reason to conclude that a prompt payment discount cannot be offered under this procurement format. LSI points to IMS's "\$0.00" bid for management and support and asks how IMS can offer a discount which LSI calculates will result in IMS losing money on the contract and paying below the minimum wage. Even assuming that LSI's statement is correct, we have held that the possibility of a "buy in" or the submission of a below-cost bid is not a proper basis upon which to challenge an award. See, e.g., Harris Management Company, Inc., B-193049, May 30, 1979, 79-1 CPD 382. To properly reject a bid as being unreasonably low would require a determination that the bidder is nonresponsible; however, no such determination was made here. Further, the contractor is obligated to pay the minimum wage irrespective of any offered discounts. Cf. G.W. Galloway Company, B-193940, January 30, 1979, 79-1 CPD 74.

Finally, LSI argues that the solicitation is structured so that a service contract is transformed into one for personal services. We find no basis to conclude that this procurement format establishes an employer-employee relationship between the Government and the contractor's employees so as to create an unauthorized personal services type contract. In order for such a situation to occur, the solicitation must provide for detailed Government direction or supervision of the contractor's employees. See, e.g., American Federation of Government Employees Local No. 3347, AFL-CIO, B-183487, April 25, 1977, 77-1 CPD 326. However, while the IFB calls for routine inspection of the contractor's work and an evaluation process for the award fee, it contains nothing to indicate that the Navy would give detailed direction or supervision to the contractor's employees.

Protest denied.



For the Comptroller General
of the United States