

19921

Mr. Golden

DECISION

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

FILE: B-202572

DATE: October 29, 1981

MATTER OF: Crown Transfer Company

DIGEST:

1. Protester who files timely protest alleging that the solicitation specifications are defective and preclude the firm from properly preparing its bid is an interested party under GAO Bid Protest Procedures. The failure of the protester to attend the prebid conference does not alter the protester's interested party status under the Bid Protest Procedures.
2. Where the identical issue was raised by the protester in a prior case, was decided adversely to the protester by the GAO, and no new relevant information has been submitted, the issue is without merit.
3. Protester's allegation that solicitation is ambiguous is denied where agency amended solicitation to clarify allegedly ambiguous provisions and the solicitation in other instances is reasonably clear.

Crown Transfer Company (Crown) protests that Department of the Army invitation for bids (IFB) DAHC30-81-B-0023, covering the preparation (containerization) of personal property, household goods and unaccompanied baggage for movement or storage, drayage and related services, is defective.

The IFB is one of two issued under a service test of new procurement methods relating to containerization, movement and storage of household goods and unaccompanied baggage. The containerization services are to be solicited separately from the movement and storage services. The Defense Acquisition Regulation (DAR) provides that these services be combined in one solicitation. The

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purpose of the service test, by dividing the tasks into separate IFB's, was to increase competition. The Army states that it found that few contractors are capable of performing the combined tasks and that contract management could be simplified and improved by separating the requirements. We previously denied Crown's protest against IFB DAHC30-81-B-0021 for the movement and storage of the shipments. Crown Transfer Co., 60 Comp. Gen. ____ (B-201918, June 2, 1981), 81-1 CPD 441.

Crown alleges that the immediate IFB contains clauses which deviate from those specified by the DAR and that proper authority for use of those deviating provisions has not been obtained from the DAR Council as required by DAR § 1-109 (1976 ed.). Also, Crown alleges that the IFB contains a number of ambiguities.

The Army disagrees with Crown. Also, the Army contends that Crown may not be an interested party with standing to protest under GAO Bid Protest Procedures.

While, in our view, Crown is an interested party, the protest is without merit.

In support of its contention that Crown is not an interested party, the Army states that Crown did not formally request a copy of the IFB and did not attend the prebid conference during which all interested parties were given the opportunity to raise questions concerning the IFB. Further, the Army states that Crown has not provided the solicited service to the Army for the past 5 years and, based on prior history, probably cannot perform the contract and would be found nonresponsible.

Crown states that it requested a copy of the IFB from the Army, but never received it. Crown obtained its copy of the IFB from another source, but not until after the prebid conference. It states that it is "ready, willing and able to perform" the duties required under the IFB.

Crown is timely protesting prior to bid opening that the IFB specifications are defective and preclude the firm from properly preparing a bid. In similar circumstances, we have held a protester sufficiently affected to warrant our Office's consideration of the

protest. Fred Anderson, B-196025, February 11, 1980, 80-1 CPD 120. While the Army questions Crown's responsibility, this has, as the Army concedes, no bearing on Crown's eligibility to bid on the contract. Furthermore, the fact that Crown did not attend the prebid conference does not alter its interested party status for a protest. Engine and Equipment Company, Inc., B-199480, May 7, 1981, 81-1 CPD 359.

As to the issue of whether the Army has proper authority to use IFB provisions which deviate from the standard DAR clauses, our Office considered the identical issue in Crown Transfer Co., supra, in connection with the IFB for the movement and storage of household goods. We found that the record demonstrated that the review and approval envisioned by the DAR for the deviations in these IFB's were obtained and that the fact that the changes were approved as a service test rather than a deviation had no legal significance.

Crown attempts to reargue this issue on the grounds that the DAR Council did not consider all the specific deviations. We considered this same argument in our prior decision and stated that the record showed that the DAR Council thoroughly considered the service test prior to approving it.

Accordingly, since Crown has not submitted any relevant additional information which was not considered in deciding the previous case, we find that this issue is without merit. Niedermeyer-Martin Co., B-203855, July 17, 1981, 81-2 CPD 48.

In asserting IFB ambiguities, Crown has specified that provisions in the IFB require the use or sale of commercial containers which are contrary to applicable Department of Defense (DOD) regulations. In addition, Crown lists these provisions as deviations from DAR which are impermissible without DOD authorization. Crown also questions the use of a stowage factor standard of 6.4 net pounds per gross cubic foot of container cube as being contrary to DAR § 7-1601.9 (1976 ed.), which requires use of 5.7 net pounds per gross cubic foot.

In our view, these deviations were authorized under the service test approval by the DAR Council and we need not consider these issues further.

As to the issue of whether the IFB is ambiguous, we have recognized that the mere allegation that something is ambiguous does not make it so. Some factors in a writing may be somewhat confusing without constituting an ambiguity, provided that an application of reason would serve to remove the doubt. Thus, an ambiguity exists only if two or more reasonable interpretations are possible. 48 Comp. Gen. 757 (1969); JVAN, Inc., B-202357, August 28, 1981, 81-2 CPD 184.

We have also held that solicitations must be interpreted by reading them as a whole and construing them in a reasonable manner and, whenever possible, effect must be given to each word, clause, or sentence. Panuzio/Rees Associates, B-197516, November 26, 1980, 80-2 CPD 395.

There are three separate schedules for the performance of containerization services in the immediate IFB. Schedule I covers outbound services, or, simply, the preparation of household goods or unaccompanied baggage for shipment at the owner's residence or at the contractor's facility. These services include, where requested, packing the goods in containers, storage of the containerized goods prior to shipment, and loading on the carriers' equipment. Schedule II covers inbound services which include receiving and unloading personal effects from the delivering carrier, temporary storage of the containerized goods, and removal of packing materials after unpacking. Schedule III, entitled "Other Services," covers a variety of miscellaneous services the contractor may be asked to perform in connection with his other contract responsibilities. Examples of these services include remarking of shipments for reconsignment or diversion and repairing of containers and reweighing shipments. Each of the three schedules contains a number of specific items (responsibilities) which are part of the performance. Bidders may bid on these schedules for seven geographical areas in the Washington, D.C., area. For each item, the IFB provides the Government's estimated maximum daily requirement by weight and the Government's minimum acceptable daily capability. The bidder's guaranteed daily capability must equal or exceed the Government's minimum daily needs for all items within an area for which it bids. Bidders also must submit unit prices and a total price for each item bid.

Crown alleges that the IFB does not make clear how many contracts will or could be awarded for each area.

It points to IFB language which indicates enough contracts will be let to cover the Government's maximum needs. As an example, Crown states that in one area, which lists the maximum daily needs for certain outbound services as 150 GCWT (Gross Hundredweight) and the minimum daily acceptable capability as 10 GCWT, as many as 15 contracts would be let if each contractor offered only the required daily minimum. Crown states the IFB appears only to permit letting of one primary, one secondary and one tertiary contract for each area.

Crown also points out that in some instances, for example, area 2 inbound baggage shipment services under Schedule II, the maximum requirement is 50 GCWT, but the daily minimum required capability is 25 GCWT. Thus, the primary and secondary contractors, each meeting the 25-GCWT capability, would satisfy the requirement without the need for a tertiary contractor.

The Army agreed that Crown's concern was well founded and amended the IFB. The amended IFB states that the Government intends to make no more than three awards for each area (primary, secondary and tertiary) based on the minimum daily requirements (the Government-anticipated needs).

With respect to the maximum daily requirement, which is the anticipated maximum need for 3 days during a peak moving period in the month of June, the amended IFB states:

"* * * in the event the combined guaranteed
* * * daily capability of firms receiving
an award cannot accommodate the Government's
daily requirement, the Government, whether it
be attributed to an overflow or the peak
moving period, reserves the right in accord-
ance with Special Provision, H-28 of the
solicitation, entitled 'Requirements' to
acquire the services from another source."

The H-28 provision states that the Government is not required to purchase from the contractor requirements in excess of the limit on total orders under the contract if any excess occurs. It also advises bidders that a contractor may not receive orders equalling the estimated or maximum amount of quantities and, if this is the case, the contractor may not claim an equitable price adjustment.

We also point out that, under L-26, the ordering limitation provision, orders will be placed with the primary contractor to the extent of his daily guaranteed maximum daily capability. Additional orders would be placed and performed by the secondary contractor and then the tertiary contractor. If the Government's needs are still not completely fulfilled, orders may be offered under the contract to contractors without regard to guaranteed maximum daily capability; however, this procedure is discretionary. Thus, the Army specifically reserved to its discretion the right to acquire the excess requirements from sources other than the three contractors.

Therefore, under the amended IFB, only three contracts will be awarded in each area. When needs exceed the combined guaranteed contractor daily capabilities, the Army may acquire the additional requirements from the three contractors or acquire them from other sources. Also, a contractor is specifically informed in the IFB that he may not receive any orders under a particular requirement. In our view, the revised IFB is adequately clarified.

Crown states that it is unclear under the IFB how to bill for different services on one shipment, for example, for a 200-pound shipment comprised of 100 pounds serviced under item 1 and 100 pounds serviced under item 4. We disagree.

According to the item 1 IFB provision, services provided thereunder are subject to a minimum charge for shipments weighing less than 300 pounds. In Crown's example, 100 pounds would be subject to the minimum rate charge. The 100 pounds ordered under item 4 would be assessed in accordance with the item 4 bid prices.

The same method of charging for services would be applicable when item 2 and item 4 services are ordered for the same shipment.

Crown also objects to a single rate when the preparation of shipments outbound from storage to residence requires that goods be picked up from two separate pickup points, for example, a warehouse and a residence. Crown states that since the services for these two types of pickups are dissimilar because of differences in average draying, loading facilities and the carrying distances of the pieces, application of one rate for the combined service does not permit prudent bidding. However, a single rate for the combined service is not required.

As the Army points out, item 29-5 and -6, additional services, provides rates for extra pickups ordered by the Government. Where there are two separate pickups for the same service member--one from the residence and one from storage--the extra pickup charge would be applicable.

Crown also contends that it is unclear whether items 1 and 2 allow for split billing of a shipment where, for example, one shipment requires services ordered under both items 1 and 2. In our view, and as the Army points out, the reasonable conclusion from the IFB is that the contractor invoices all items of services ordered. The Army states that, by its internal administrative procedures, it is generally required to specify the item number under which orders are made. Section H-27, covering ordering, states that supplies or services to be furnished shall be ordered by issuance of delivery orders. The contractor would bill for the services ordered. We find nothing in the IFB which would prohibit split billing.

Crown alleges that, while item 2 states that new containers shall be paid for under item 4, the latter item has no provision for selling or pricing new containers.

In response, the Army points out that the IFB specifically states that the contractor shall provide "new Government-approved, contractor-provided containers," and that bid prices under item 4 should contain the cost of a new contractor-provided container and all related tasks necessary to provide services covered under item 4.

Item 4 of the solicitation states:

"Service shall be the same as Item 0001 or Item 0002, except that the loose articles may be drayed to Contractor's facility when ordered by the Contracting Officer for containerization in new Government-approved contractor-provided containers."

The item requests bids on three types of contractor-provided containers. Although the language in item 4 does not specifically state that the services requested include new containers, in our view, item 2, which states that, "when Government-owned containers are not available for overflow and oversize articles under this item, the

contractor shall be paid for new containers under Item 0004," when read together with item 4, is sufficiently clear with respect to the Army's intent that bidders include pricing of new containers under item 4.

Crown correctly pointed out that item 9 contains the wrong unit of measure for unaccompanied baggage. However, this was corrected from net hundredweight to gross hundredweight by amendment.

Crown asserts that item 24 is unclear in several respects. Crown objects to the fact that the IFB merely states that warehouse handling charges are to be included in the storage rate. The IFB also provides for a period of free storage. Crown asks how it can assess for warehouse handling charges during this free storage period if the goods are moved from storage during this period of free storage.

We find no deficiency in this section. Where there are no storage charges during the free storage period, the warehouse handling charges should be included under the inbound service price. Section C-4a of the IFB, entitled "Allied Tasks," states regarding inbound services:

"* * * prices bid by [bidders] for each item on the Inbound Schedule, respectively, shall include any and all allied or related tasks or duties necessary for the performance of the various Schedule items."

The charge for moving into the contractor's warehouse is given as an example of an "allied task." Thus, the bidder must include the cost in the bid price for inbound schedule items.

Also, Crown objects that item 24 is not clear with respect to how storage charges are assessed.

In our view, the provision is clear. Item 24 states that storage charges shall be charged on a monthly basis. It further states that storage charges for less than any 1-month period shall be prorated on the basis of one-thirtieth (1/30) of the monthly rate for each day of storage. The written prebid conference minutes included in an amendment to the IFB emphasized the method

of assessment of storage. The agency report provides a further example based on 45 calendar days:

"* * * weight of shipment times the monthly storage rates times the number of days in storage divided by 30 equal storage charges. $5557 \times 12.50 \times 45$ days (divided by) 30 = \$1,041.93."

In our view, it is reasonable to infer from the IFB that the prorating would be used for storage beyond 1 month.

The "Recapitulation of Schedule II" provision objected to by Crown has been revised by amendment to indicate the Army's intent that each bidder provide his totals for areas 1 and 3 and areas 2 and 3, which was not clear in the unamended version.

Crown states it cannot determine from the IFB whether bid evaluation will include consideration of its bid for "other services" and "additional services." Section M-1, "Evaluation of Bids," paragraph "a," states that bids will be evaluated on the basis of the total aggregate prices of Schedule I, outbound services, Schedule II, inbound services, and schedule III, other services. Paragraph "c" provides that, when "additional services" are added to any schedule, such "additional services" items will not be considered in the evaluation of bids.

Crown also states it is unclear whether the item 27 "remarking and cooperating services" items under "Schedule III-other services" are ancillary (supplemental) services to items listed in Schedules I and II. The pre-bid-opening minutes amendment states:

"* * * Remarking and Coopering Service.
This service has been placed in Schedule III as a new bid item. * * * There is no remarking or cooperating services in Schedule I or II."

The IFB scope of work states that the contractor shall perform all work in accomplishing containerization including stenciling and cooperating services. This service is a separate bid item to be performed when ordered by the contracting officer and is a service included in the general scope of the contract which includes Schedules I,

II and III. In addition, both the remarking and cooperating sections under item 27 provide for bidder's prices for each service according to geographical area. Thus, these services could be ordered separately.

The provision for "Round Robin" pickup in areas I and II of outbound unaccompanied baggage and airport pickups which Crown objected to because neither provision explains how the tonnage was to be shared by the three contractors was revised by amendment to indicate that the primary contractor is required to make the pickups.

Crown states that this amendment conflicts with the solicitation ordering provision, L-26, which states that the primary contractor receives orders only to his ordering limitation. Under this provision, if the Government's needs are not fulfilled by the primary contractor, the secondary contractor fills the need to his ordering limitation. The tertiary contractor receives any remaining orders to its ordering limitation.

In our view, the round-robin and airport pickup requirements can be read together with the ordering provision to the effect that the primary contractor is responsible for pickups to the extent of his ordering limitation under the three schedules. Where the primary contractor reports to the ordering office that it has met its daily ordering limit in the course of its pickups under the airport or round-robin provisions, the Government would then order from the secondary contractor.

Crown argues that the allied tasks-inbound services provision prohibits billing of any two items on the inbound schedule for any one shipment, for example, complete inbound service-household goods and inbound storage, or complete inbound service-unaccompanied baggage and cooperating.

The allied tasks-inbound services provision contains the following provision:

"Bidders are cautioned that the prices bid by them for each item on the Inbound Schedule, respectively, shall include any and all allied or related tasks or duties necessary for the performance of the various Schedule items, regardless of whether such tasks or duties precede or follow performance of the Schedule item(s). Examples of such allied or related

tasks or duties include but are not limited to the following: receiving a shipment, unloading it from carrier's equipment, moving it into Contractor's warehouse, accepting liability for the shipment, providing temporary storage, preparation of records or reports, loading onto carrier's equipment, assembly of disassembled articles, etc."

Nothing in this provision prohibits billing for two items on the inbound schedule for one shipment. The provision states that tasks necessary to the performance of an inbound item which are not specifically listed as required under the item are expected to be performed and included in the item price. In the first of Crown's examples, complete inbound service covers storage for the first 15 days; storage over 15 days is billed under the inbound storage item. The contractor's bill would include charges for services under both items. Similarly, in the other example, if cooperating service is required, it is billed as a separate item in addition to inbound service-unaccompanied package which does not appear to include, explicitly or implicitly, cooperating as an allied task.

Crown states that it is not clear that the requirement for areas 1 and 2 to install direct line telephones to the Government personal property shipping office applies to all three contractors. We disagree.

The provision requires that the contractor for these areas provide the service. The amended IFB states that a maximum of three awards will be made. In our view, any contractors for those areas would be required to provide the direct line service.

Crown alleges that the stowage factor incentives provisions intended to encourage efficient packing of shipping containers constitute an improper deviation from DAR. However, these incentive provisions were approved as part of the service test and, therefore, were authorized.

Crown also challenges the need for the incentive and penalty provisions. We have stated that we will not question an agency's determination of what its minimum needs are unless there is a clear showing that the

determination has no reasonable basis. Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181.

Here, the Army reports that the stowage incentives would result in reduced ocean transportation costs and increased utilization of Government-owned containers. It also states the provision was adapted from those currently used in the commercial industry. Based on these considerations, which the protester does not refute, we have no basis to object to the provision's inclusion in the IFB.

Crown also argues, in essence, that the provision is unworkable. The IFB provides for increases in the unit prices paid for better than standard performance and disincentives, decreases in the unit prices paid, for a contractor's below-standard performance. Given that this provision is untested, in our view, it is not unreasonable to provide the Army an opportunity to test the procedure. Crown's speculative allegations do not persuade us that the provision is unworkable.

Crown also objects to the provision for determining the carrier's or contractor's liability in the event of a shipment's loss and damage. It argues it is ambiguous because it does not resolve which party is responsible for damage in certain situations hypothesized by Crown. Allegedly, it also is not consistent with other Army contracts with respect to responsibility for loss and damage. These contracts allow for sharing of damages equally between origin and destination contractor. In our view, the liability provision is clear. It states, in pertinent part:

"* * * in the absence of any supporting documentation which places liability on a carrier or another contractor, the destination contractor will be presumed to be liable for loss or damage."

We note that this liability clause was required by procurement acquisition letter 80-17, July 12, 1980, for use in this type of transportation and shipping solicitation after July 30, 1980. The IFB language is also consistent with Comptroller General opinions concerning liability for loss and damage. For example, in McNamara-Lunz Vans and Warehouses, Inc., 57 Comp. Gen. 416 (1978), this Office stated:

"Loss of or damage to goods which pass through the hands of several custodians is presumed at common law to occur in the custody of the last custodian."

Crown alleges that the requirement that the contractor agree to repair damage to containers on every shipment is an infeasible demand.

Crown has misstated this IFB requirement. Under the provision for recovery and control of Government-owned containers for areas 1 and 2, the IFB provides for Government inspection of the condition of all containers as they arrive and approval of repair of serviceable containers or the discarding of unserviceable containers. For the other service areas, periodic Government inspections will be made to provide container disposition instructions. Other provisions discuss disposal of unserviceable containers and use of parts of these containers for repair of other containers subject to Government instructions. Furthermore, the container inspection report language referred to by Crown does not require that all containers on every shipment be repaired, but that the contractor agrees to responsibility, including repair for loss and damage incurred during delivery and handling subsequent to inspection. Thus, Crown's allegation has no merit.

Crown also argues that the provisions concerning disposition of the containers require mutually inconsistent action be taken with respect to the damaged containers, that is, that they be disposed of, repaired and cannibalized. This misstates the requirement.

The solicitation states that any of these dispositions may result when ordered by the Government inspector. Thus, the Government will determine the use of the damaged container depending on the container's condition.

Crown questions the IFB requirement that contractors be capable of storing up to 300 empty Government-owned containers. Crown argues that the provision does not specify which of the three contractors for each area must satisfy this requirement. Once again, the provision appears self-explanatory. Schedule I and Schedule II contractor(s) will be required to store up to 300 containers at any

given time. Under the amended IFB, this provision, including the repositioning requirement, is applicable to all three awardees of contracts.

The protest is denied.

for *Milton F. Acker*
Comptroller General
of the United States