

DECISION



Rec'd 11/9/78
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-207949

DATE: September 29, 1982

MATTER OF: Industrial Maintenance Services, Inc.

DIGEST:

1. Contracting agency has broad discretion in determining its needs and GAO will not object as long as those needs are reasonable.
2. Solicitation provisions which require performance in accordance with established trade custom and usage are not vague.
3. Indefinite quantity contract may be used where it is impossible to determine in advance the precise quantities of supplies or services that may be needed during a definite period of time.
4. Where documents are not furnished as part of specification, but are incorporated by reference, contents of documents can be ascertained by independent examination and, therefore, specification is not vague as to contents of document.
5. Where "General Description" of services to be performed under contract includes "maintenance landscaping," there is no need for an individual "maintenance landscaping" item in bid schedule when that kind of work is generally understood to come under a number of different items in the bid schedule.
6. Where specification leaves certain requirements to the discretion of Government officers and bidders may be uncertain as to exactly what Government officers will require, bidders can take

the uncertainties into account in computing their bids and the mere presence of risk in a procurement does not make the competition improper.

7. Where one specification provision states that the Government is not obligated to order any quantity of any work item and another specification provision states that the minimum dollar amount guaranteed by the Government is 50 percent of the dollar value of the work, clear import of the two provisions is that the Government guarantee to order is based on 50 percent of the dollar value rather than on any specific quantity of work.
8. Liquidated damages stated as a definite percentage of the contract price are not illegal.
9. GAO is not aware of any legal requirement that the Government state in the contract the number of days after a deficiency that the contractor will be notified of the liquidated damages.

Industrial Maintenance Services, Inc. (IMS), protests that the specifications are defective in invitation for bids (IFB) No. N62467-82-B-2033 issued by the Naval Air Station, Pensacola, Florida, for grounds maintenance services.

Essentially, IMS contends that the specifications are defective in that they are either unnecessary, vague, conflicting or illegal.

We deny the protest.

IMS challenges the need for several of the specifications requirements.

One requirement is that no modification shall be made to any grounds maintenance equipment except as directed by the manufacturer. IMS objects to this

requirement on the basis that it sometimes modifies equipment used to improve the maximum efficiency or safety. However, the contracting agency believes that modification of the equipment creates a safety hazard unless the manufacturer directs it.

Another requirement is that reel-type or flail-type mowers shall be used in all congested family housing areas. IMS objects to this requirement on the basis that it has used rotary-type riding mowers without incident in the past, that there are no reel-type riding mowers in existence and that only two companies manufacture flail-type riding mowers. However, we note that the specification does not direct the use of riding mowers exclusively. It permits the use of "walk-behind" mowers as well. Further, the contracting agency reports that safety considerations for inhabitants in the housing units dictated the use of reel- or flail-type mowers.

Another IMS objection is that the specification requires that herbicides be applied by someone possessing a valid State certificate for herbicide application. IMS objects to the requirement on the basis that there is no requirement in Florida that a person dispensing herbicides be certified. However, the specification does not state that the applicator have a Florida certificate--only that the person have a valid State certificate. The contracting agency justifies the requirement on the basis that Federal law, 7 U.S.C. § 136 (1976), contemplates that herbicide applicators be certified. In that connection, we note that 7 U.S.C. § 136b(a)(2) provides for State certification.

IMS also objects to the requirement that the contractor's name be visible on each vehicle, since base security issues bumper or windshield stickers from which the ownership of the vehicle can be identified. However, the contracting agency indicates that the requirement is so that the vehicle will be prominently identified at all times so that it can readily be ascertained whether it is properly in restricted areas.

Further, IMS objects to the prohibition against the contractor cleaning or washing its vehicles on Government property, since Government and military personnel

vehicles are maintained there. The contracting agency justifies the restriction on the basis that Government property is for the exclusive use of the Government and its personnel.

Additionally, IMS objects to the requirement that the contractor will pay the Government for the cost of a survey where the contractor disputes the number of acres the Government states is in a designated mowing area and the survey establishes that the Government statement is correct. Since the Government is put to additional expense to establish the validity of its original statement, the contracting agency believes that the requirement is fair.

The last need that IMS challenges is the requirement that the contractor shall move portable items, such as hoses, chairs and sprinklers, from the mowing path and replace them after mowing. It does not seem unreasonable to require the contractor to move and replace the portable items.

Just because a protester disagrees with an agency's assessment of its needs does not invalidate the agency's determination. Integrated Forest Management, Inc., B-204106, B-204382, January 4, 1987, 82-1 CPD 6. A contracting agency has broad discretion in determining its needs and our Office will not object as long as those needs are reasonable. Integrated Forest Management, Inc., B-200127, March 1, 1982, 82-1 CPD 182; Integrated Forest Management, Inc., supra. In this case, as indicated above, the specification requirements are founded upon reasonable bases. Therefore, we will not object to their utilization.

The next major contention of IMS is that several of the specification requirements are vague.

In that connection, IMS objects to the requirement that certain work shall be performed consistent with "recognized horticultural practices," because the requirement does not state the practices. However, the quoted language obviously has reference to established trade custom and usage. Thus, while the specification does not state what the specific "horticultural

practices" are, there is a frame of reference from which these practices can be ascertained. The fact that an agency has not detailed every facet of how performance is to be achieved does not render the specification inadequate for competition. International Business Investments, B-203168, August 12, 1981, 81-2 CPD 133. Therefore, we do not find the requirement to be vague. To the extent that the contracting officer and the contractor may disagree during the performance of the contract as to what those practices are, the contracting agency has properly pointed out in its report that those differences can be resolved under the contract "Disputes" clause.

Next, IMS objects that, at the same time the specification sets forth a mowing schedule as to the weekly, biweekly and monthly mowing acreage, the specification states that the schedule does not obligate the Government to any quantities. IMS finds this objectionable because there is no indication as to what the actual requirements will be. The IFB in this case provides for the award of an indefinite quantity contract. Defense Acquisition Regulation § 3-409.3(b) (1976 ed.) provides that an indefinite quantity contract may be used where it is impossible to determine in advance the precise quantities of the supplies or services that will be needed during a definite period of time. In the circumstances, IMS's objection lacks merit.

IMS also objects that the specification references form DD 1532-1 and NAVFACINST 6250.3F, but that the form and the NAVFACINST are not provided with the specification. This does not make the specification vague. The documents are incorporated by reference into the specification. By making an independent examination of the documents, the bidder can ascertain what they provide.

The "General Description" of the services to be performed under the contract includes "maintenance landscaping," but IMS complains that it is not clear how this service is to be bid since there is no such item in the bid schedule. However, as the contracting agency has indicated in its report, there is no need for an individual "maintenance landscaping" item, since that kind of

work is generally understood to come under a number of different bid schedule items including "bed dressing" and "landscape edging."

A number of provisions dealing with check-in procedures, identification of employees, inspection and approval of equipment, orders for work, exemption and designation of parts of areas to be mowed, and fertilizer spreading are subject to the direction of the contracting officer or officer in charge. IMS contends that leaving these matters to the discretion of the Government officers makes the provisions vague, since the bidder cannot know with certainty exactly what will be required of him under the contract and how much to include in the bid prices to cover these contingencies. However, the specification is specific as to those matters over which the Government officers will have discretion. To the extent that there are uncertainties as to exactly what the Government officers will require, bidders can take these uncertainties into account in computing their bids and the mere presence of risk in a procurement does not make the competition improper. Applied Devices Corporation, B 199371, February 4, 1981, 81-1 CPD 65. Furthermore, the fact that, of the seven bidders on the procurement, only IMS complained leads us to believe that the risk is of the kind that is generally acceptable. Applied Devices Corporation, supra.

IMS also complains that the specification is vague because it requires the contractor to perform certain cleanup operations after a storm, but the bidder cannot foresee what the extent of the cleanup will be. In the same vein, IMS complains that the specification requires certain clearing work, but does not designate the area where the clearing will occur. However, the contract provides for the contractor being paid for the cleanup and clearing work on the unit prices bid for that work. As indicated above, the fact that there may be some uncertainty and risk in preparing a bid does not automatically render the competition improper.

Further, IMS contends the provision which requires the contractor to replace shrubs, plants and grass that fail to develop "necessary growth" as determined by the contracting officer is vague because the contractor has

no way of knowing in advance what the contracting officer will determine "necessary growth" to be. However, as with "horticultural practices," discussed above, the question of "necessary growth" must depend upon trade standards. Further, the contractor is protected from arbitrary determinations by the contracting officer by the contract "Disputes" clause.

IMS contends that the specification is conflicting in that in one place it states that the Government is not obligated to order any quantity of any work item and in another place it states that the minimum dollar amount guaranteed by the Government is 50 percent of the dollar value of the work set forth in the price schedule. However, in our view, there is no conflict. The clear import of the two provisions is that the Government guarantee to order is to be based on 50 percent of the dollar value of the work rather than on any specific quantity of work.

Finally, IMS protests that the liquidated damage provision is illegal in that it not only gives the Government the right to deduct the entire amount of the unit price for work not performed or deemed unsatisfactory, but it also provides for the Government recovering an additional 10 percent for administrative costs where the work is unsatisfactory or 20 percent where the work is not performed. Deducting from the contractor the price of the work not performed or unsatisfactorily performed does not entirely compensate the Government for its damages. Associated with the corrective work the Government must perform are administrative costs which are also damages. Just because the administrative costs are stated as a definite percentage of the contract price does not make them illegal damages. Universal American Enterprises, Inc., B-184032, March 30, 1976, 76-1 CPD 206.

As a part of the complaint against the liquidated damage provision, IMS complains that there is no indication as to when the liquidated damage provision may be invoked against the contractor after the deficiencies occur. IMS states that the liquidated damages could be imposed a week or a month later and that imposing the damages all at once could bankrupt the contractor. Of course, if the contractor performs properly, as it

should, there will be no reason to deduct liquidated damages and the contractor will not be in the predicament that IMS cites. In any event, we are not aware of any legal requirement, and IMS has cited none, that the Government state in the contract the number of days after a deficiency that the contractor will be notified of the liquidated damages.

The protest is denied.

Harry E. Can Chan
Yr. Comptroller General
of the United States