DECISION

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

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FILE: B-213046 DATE: December 27, 1983

MATTER OF: Duroyd Manufacturing Company

DIGEST:

1. The contracting agency has the primary responsibility for determining its minimum needs and GAO will not question the agency's decisions concerning the best methods of accommodating its needs absent clear evidence that those decisions are arbitrary or otherwise unreasonable. GAO finds that the protester has failed to establish unreasonableness of the protested solicitation provision requiring the successful offeror to furnish qualification hardware for approval testing within 90 days from the date of award.

2. GAO finds no merit in the protester's challenge to the agency's not guaranteeing a minimum order in requirements solicitation on grounds that the contractor has to assume the maximum amount of risk unless there is some assurance of receiving a minimum order. It is within the ambit of administrative discretion to offer to competition a proposed contract imposing maximum risks upon the contractor and minimum administrative burdens on the agency.

Duroyd Manufacturing Company, Inc. (Duroyd), protests the requirement for the initial delivery of qualification hardware within 90 days from the date of award in request for proposals (RFP) DAAHO1-83-R-0244 issued by the United States Army Missile Command, Redstone Arsenal, Alabama. The RFP is a total small business set-aside for an estimated quantity of radio-controlled miniature aerial targets (RCMAT). No award has been made.

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of the government. According to the Army, the RFP's delivery schedule was based on careful consideration of the needs of the government coupled with realistic, reasonable leadtime to ensure maximum competition. More specifically, the Army states that final shipment of similar RCMAT's under an existing contract is due in October 1983 and the RFP is necessary to provide a continuing supply of new RCMAT's.

A protester who objects to the requirements in a solicitation bears a heavy burden. The contracting agency has the primary responsibility for determining its minimum needs and for drafting requirements which reflect those needs. Romar Consultants, Inc., B-206489, October 15, 1982, 82-2 CPD 339; Dynalectron Corporation, B-198679, August 11, 1981, 81-2 CPD 115. It is the contracting agency which is most familiar with the conditions under which the supplies or services have been and will be used, and our standard for reviewing protests challenging agency requirements has been fashioned to take this fact into account. Specifically, our Office will not question agencies' decisions concerning the best methods of accommodating their needs absent clear evidence that those decisions are arbitrary or otherwise unreasonable. Four-Phase Systems, Inc., B-201642, July 22, 1981, 81-2 CPD 56. Furthermore, while agencies should formulate their needs so as to maximize competition, burdensome requirements which may limit competition are not unreasonable, so long as they reflect the government's legitimate minimum needs. Educational Media Division, Inc., B-193501, March 27, 1979, 79-1 CPD 204. Finally, it is also important to note that a procuring agency's technical conclusions concerning its actual needs are entitled to great weight and will be accepted unless there is a clear showing that the conclusions are arbitrary. Industrial Acoustics Company, Inc., et al., B-194517, February 19, 1980, 80-1 CPD 139.

We find Duroyd's evidence that 10 months from the date of award are needed in order to deliver the initial qualification RCMAT hardware to be unconvincing. Paragraph H-1 of the RFP, as amended, provides that the contractor shall deliver the qualification hardware within 90 calendar days from the date of contract to Redstone Arsenal for contractor demonstration and government approval tests. The contracting officer is required to furnish within 60 days following receipt of the qualification hardware written notice of approval, conditional approval, or disapproval. In the event delivery orders are issued after the contractor's hardware is approved, the RFP requires delivery at a certain maximum rate per month beginning not later than 90 days after the effective date of an order.

quantities in requirements-type solicitations makes it possible for offerors to prepare their prices properly and permits evaluation to determine the lowest cost offer. See Johnson & Wales College, B-199293, April 8, 1981, 81-1 CPD 266.

We deny Duroyd's protest.

for Harry R. Van Cleve
Comptroller General
of the United States

the Employee's expenditures, as substantiated by the evidence developed during the Air Force's investigation do not appear to be tainted by fraud and thus per diem is allowed for the period from May 28, 1974 to June 9, 1974, in accordance with the calculation below.

The evidence presented for the second period of TDY at Otis AFB, Massachusetts is of a different character. As our first decision in this matter observed: "[w]e note there is no indication in the record of any fraud in connection with his TDY in Massachusetts from October 1974 to March 1975." 60 Comp. Gen. at 361. As our second decision in this matter stated, 61 Comp. Gen. at 402, fraud cannot be established merely by showing a deviation from an average or estimated figure for cost of lodging. Since the Air Force has not presented any evidence of fraud for the second period from October 1, 1974, to March 10, 1975, the claim appears to be proper and we will allow the Employee per diem for this period.

Pursuant to the Air Force's request for specification of an exact amount, we will now calculate Employee's per diem entitlement in accord with the method set forth in our second decision in this case. 61 Comp. Gen. at 402-03.

First, from our review of the record, as explained above, we conclude that of the total number of days under consideration here for two periods of TDY (204), there were 30 tainted days and 174 untainted days. We note, however, that the number of untainted days for which per diem is allowed is only 162.5 because 11.5 days of excess travel-time, all of which were outside the tainted period, must be deducted under the regulations in effect at that time. See 2 JTR paragraph C10157 (change 103 May 1, 1974); FTR paragraph 1-4.1 et seq. (FPMR 101-7) (May 1973). This is so because Employee's travel order did not authorize use of his privately owned vehicle as advantageous to the Government, as we noted previously in 61 Comp. Gen. at 403. (We note that the figure given there of 12.5 days was based on the Air Force's recalculation and should have been 11.5 days.)

Secondly, using the expense amounts substantiated in the Air Force's submission, we obtain the following results:

(1) Average cost of lodging = $8.78

Total amount paid for lodgings ($1,422.24) divided by number of nights (162) for which lodgings were or would have been required -- excluding tainted nights.

(We exclude 11 nights due to excess traveltime and additional night of March 10, 1975 because Employee arrived at his residence at 7:30 p.m. that day.)

(2) Per Diem rate (rounded to the next whole dollar, and subject to the then maximum of $25) = $21.

Average cost of lodging ($8.78) plus allowance for meals and miscellaneous expenses ($11.80).

(3) Per diem allowance due employee = $3,412.50.

Per diem rate ($21) multiplied by number of untainted days (162.5) for which per diem is allowed.

(4) Amount to be recouped by Government = $1,125.50

Amount paid to employee ($4,538) minus per diem allowance properly due employee ($3,412.50).

Since it is our understanding that the Air Force has already recouped more than $1,125.50, the amount which has been recouped in excess of that figure should be refunded to Employee. Furthermore, since it is our understanding that Employee's original voucher which was submitted in evidence at the trial is not readily available, this decision itself constitutes authorization for the appropriate Air Force official to cease recoupment and to refund to Employee the amount which has been recouped in excess of $1,125.50.

Milton J. Socolar

for Comptroller General
of the United States