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DECISION

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

FILE: B-217218 **DATE:** May 22, 1985

MATTER OF: Ray Service Company

DIGEST:

1. Protest that specifications are in excess of contracting agency's minimum needs and unduly restrictive of competition is denied where there is no showing that agency lacked a reasonable basis for requiring contractor (1) to respond to request for emergency service on refrigeration equipment at commissary store within 3 hours, and with the tools the agency considered minimally necessary for prompt and efficient service, in order to avoid spoilage of perishable refrigerated food items, and (2) to schedule routine preventive maintenance when the commissary store is closed so as to minimize disruption of commissary operations.

2. That requirement for contractor to respond to emergency service calls within 3 hours and agency refusal to pay travel expenses to and from the place of performance may leave some potential bidders at a competitive disadvantage vis-a-vis competitors located closer to the place of performance does not in itself render the solicitation unduly restrictive of competition. A contracting agency is under no obligation to compensate for the advantages enjoyed by some firms, advantages which are not the result of preferential or unfair government action, in order to equalize the competitive position of all potential bidders.

3. Section 13.107(c) of the Federal Acquisition Regulation, 48 C.F.R. § 13.107(c) (1984), which requires contracting officers to evaluate requests for quotations inclusive of transportation charges, does not require contracting agency to provide in a formally advertised invitation for bids for the payment of travel expenses to and from the place of performance.

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4. Allegation that solicitation will create an illegal personal services contract is denied where protester fails to demonstrate that government employees will actually supervise the contractor's personnel so as to create an employer-employee relationship between the government and contracting personnel.

5. Protest of solicitation provision limiting reimbursement for spare parts under a time-and-materials maintenance contract to the "actual cost invoiced to" the contractor is denied where protester fails to demonstrate that contracting officials abused their discretion when they determined that it would be more appropriate for a contractor to recover its material handling costs and any profit on the parts under its fixed labor rate rather than on a cost reimbursement basis.

6. Protest in which protester argues for more restrictive specifications--that a safety observer be present whenever maintenance or repair work is performed on refrigeration equipment--is denied where protester fails either to present evidence of fraud or willful misconduct by government officials or to point to a particular regulation which clearly requires the presence of a safety observer under the circumstances.

Ray Service Company (Ray) protests as unduly restrictive and otherwise defective the specifications in invitation for bids No. FO8651-84-B-0105, issued by the Department of the Air Force (Air Force) for the maintenance and repair of refrigeration equipment at the commissary store at Eglin Air Force Base, Florida. We deny the protest.

The Air Force solicited bids for award of a time-and-materials contract under which the contractor would be paid (1) a fixed price for scheduled initial, monthly and yearly preventive maintenance on the refrigeration equipment, (2) an hourly labor rate for nonscheduled, emergency service work calls, and (3) the "actual cost invoiced to" the contractor for any required parts and materials.

Prior to bid opening, Ray protested that a number of the specifications unduly restricted competition, exceeded the agency's minimum needs, tended to create a personal services contract, or failed sufficiently to protect the interests of the government and the safety of those servicing the refrigeration equipment. Although the Air Force amended certain solicitation provisions in response to the protest, it refused to make all the changes requested. Ray thereupon filed this protest with our Office.

Ray initially alleges that the solicitation provisions requiring the contractor to respond to a request for a service work call within 3 hours and denying the contractor reimbursement under the hourly labor rate for travel time to and from the base, except when travel to the nearest parts supply source has been authorized, are unduly restrictive of competition in that they give bidders located adjacent to the base a distinct competitive advantage over bidders, such as Ray, located further away.

Ray, moreover, questions the necessity for any required response time of less than 4 hours, alleging that Air Force contracts for servicing air-conditioning equipment at certain types of radar sites only require a 4-hour response time. Ray also questions the necessity for the requirement in the solicitation that the contractor provide certain refrigeration service instruments during service work calls or preventive maintenance, arguing that a competent contractor will have the necessary equipment available and that contracting officials need only concern themselves with whether the job is done. In addition, Ray both questions the necessity for the solicitation requirement that scheduled monthly and yearly preventive maintenance commence on the morning of the first Monday of every month, and expresses concern that adverse weather may prevent a contractor from meeting this schedule.

In response, the Air Force points out that it has already amended the solicitation to increase the required maximum response time from 2 to 3 hours and insists that it can relax this requirement no further. It argues that the response time is critical to the preservation of the refrigerated and frozen foods stored at the commissary because temperatures sufficient to avert spoilage can be maintained only for a short period after failure of the refrigeration equipment. The Air Force disputes the relevance of the 4-hour response time allegedly permitted in contracts to maintain air-conditioning equipment at certain radar sites,

stating that substantially more time would be required for damage to occur as a result of the failure of the air-conditioning equipment at radar sites than for deterioration of food items to occur as a result of the failure of the refrigeration equipment at the commissary.

The Air Force also defends the other solicitation provisions to which Ray objects. The agency argues that it has neither the obligation nor the authority to pay travel expenses to and from the commissary in order to redress the cost disadvantage suffered by Ray vis-a-vis its competitors located closer to the base. It contends that the tools and test equipment required under the solicitation are the minimum necessary for properly repairing and maintaining the refrigeration equipment. The Air Force justifies restricting the times at which preventive maintenance may be undertaken as necessary in order to minimize the disruption of commissary operations. It notes that since the commissary is closed on Monday, scheduling routine work for that day enables the store to avoid the loss of business likely to result from shutting down the refrigerated display cases on other days. Moreover, the Air Force denies that the contractor is at risk from adverse weather, stating that servicing the equipment occurs indoors and that, in any case, delays caused by adverse weather may be excused under the contract.

Finally, the Air Force questions the extent to which any of the contested provisions in fact restricted competition, noting that three other firms submitted bids under the solicitation.

The determination of the government's minimum needs and the best method of accommodating those needs are primarily the responsibility of the contracting agencies. We have recognized that government procurement officials, since they are the ones most familiar with the conditions under which supplies, equipment or services have been used in the past and how they are to be used in the future, are generally in the best position to know the government's actual needs. Consequently, we will not question an agency's determination of its actual minimum needs unless there is a clear showing that the determination has no reasonable basis. Sunbelt Industries, Inc., B-214414.2, Jan. 29, 1985, 85-1 C.P.D. ¶ 113.

When a protester challenges a specification as unduly restrictive of competition, the burden initially is on the procuring agency to establish prima facie support for its

contention that the restrictions it imposes are needed to meet its minimum needs. But, once the agency establishes this prima facie support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable. See Sunbelt Industries, Inc., B-214414.2, supra, at 5-6.

Ray has failed to rebut the agency's justification for the specifications in question. It has not demonstrated that the Air Force lacked a reasonable basis for requiring the contractor to arrive within 3 hours after the request for a service call, with the tools which the Air Force deemed minimally necessary for prompt and efficient service, in order to avoid the spoilage of perishable refrigerated food items. Nor has it demonstrated that the Air Force lacked a reasonable basis for requiring the contractor to commence routine, preventive maintenance at the time most likely to prove least disruptive to the operation of the commissary.

That some of the solicitation provisions, such as the required response time and the refusal to pay the hourly labor rate for travel to and from the base, may leave Ray at a competitive disadvantage vis-a-vis other firms because of Ray's greater distance from the base does not in itself render those provisions unduly restrictive of competition. A contracting agency is under no obligation to compensate for the advantages enjoyed by some firms, advantages which are not the result of preferential or unfair government action, in order to equalize the competitive position of all potential bidders. See Superior Boiler Works, Inc.; Conservco, Inc., B-215836; B-215836.3, Dec. 6, 1984, 84-2 C.P.D. ¶ 633 (specifications which express the agency's minimum needs are not unduly restrictive because some bidders are unable to meet them); Emerson-Sack-Warner Corporation, B-206123, Nov. 30, 1982, 82-2 C.P.D. ¶ 488 (no entitlement to reimbursement for travel costs to and from the place of performance in order to equalize the competitive position of all bidders); cf. Stayfresh Processing Corporation, B-181116, Nov. 7, 1974, 74-2 C.P.D. ¶ 243 (requirement for delivery of milk within 72 hours after pasteurization).

We note that Ray further objects to the Air Force's refusal to pay travel expenses to and from the commissary on the ground that it is in violation of Federal Acquisition Regulation (FAR), § 13.107(c), 48 C.F.R. § 13.107(c) (1984). That section provides that:

> "Contracting officers shall evaluate quotations inclusive of transportation charges from the shipping point of the supplier to the delivery destination."

However, nothing in that section, which concerns quotations received in response to a request for quotations for supplies, requires an agency to provide in a formally advertised invitation for bids for services that it will pay travel expenses to and from the place of performance.

Ray next argues that the solicitation provisions requiring the contractor to provide certain tools and equipment, specifying the time at which the contractor must commence preventive maintenance, and limiting reimbursement for parts provided under the contract to the "actual cost invoiced to" the contractor tend to "put the contract in a quasi personal services status."

The general rule, established by decisions of our Office and the former Civil Service Commission, is that personal services may not be obtained on a contractual basis, but, rather, must be performed by personnel employed in accordance with the civil service and classification laws. Contracts for services are proscribed if they establish an employer-employee relationship between the government and contracting personnel. The critical factor in determining whether an employer-employee relationship exists is the presence of actual supervision of contractor personnel by government officers and employees. See Computer Sciences Corp., B-210800, Apr. 17, 1984, 84-1 C.P.D. ¶ 422.

Ray has failed to demonstrate the existence of factors creating a prohibited relationship. While the solicitation provided for government quality assurance evaluators to evaluate the contractor's performance, nothing in the solicitation, or otherwise brought to our attention, indicates that government employees will actually supervise the contractor's personnel so as to create an employer-employee relationship. On the contrary, the solicitation required the contractor to furnish "all management, personnel, equipment" necessary to perform the preventive maintenance and service work calls.

Ray further argues that the limitation of reimbursement for parts to the "actual cost invoiced to" the contractor forces a bidder either to "'load profit' into the labor rate," thereby rendering its bid noncompetitive, or to

forego a reasonable profit. In addition, Ray argues that by forcing the contractor to finance the costs of maintaining a stock of spare parts, the limitation is likely to result in a smaller spare parts inventory and, accordingly, more government financed trips to the nearest parts supply source.

The Air Force, on the other hand, views the supply of spare parts as merely incidental to the supply of the services and maintains that overhead and profit should be included in the pricing of the other items. It questions whether any bidder suffered competitive prejudice since all bidders bid on the same basis, ie. supplying parts at cost. Moreover, it believes that any contractor in the refrigeration business will already stock the parts normally required here.

The Department of Defense FAR Supplement, § 16.601, 48 C.F.R. § 216.601 (1984), provides that a time-and-materials contract may be used in the procurement of repair, maintenance or overhaul services. While FAR, § 16.601(b)(3), permits agencies, under certain circumstances, to enter into a time-and-materials contract which provides for charging materials on a basis other than cost, we have recognized that the option of doing so is within the discretion of the contracting agency. See Advanced Business Systems, et al., B-195117, et al., Nov. 6, 1979, 79-2 C.P.D. ¶ 329. Ray has not demonstrated that contracting officials abused this discretion by choosing to reimburse for parts on a cost basis, without provision for the contractor to include in the reimbursement for the materials a profit on the materials.

As for the Air Force's decision to reimburse the contractor only for the "actual cost invoiced to him," with no provision for the direct reimbursement of the costs incurred by the contractor in handling the parts, we note that FAR, § 16.601(a), describes a time-and-materials contract as providing for the acquisition of supplies or services on the basis of "materials at cost, including, if appropriate, material handling costs as part of material costs" (emphasis added). That the cost of materials to be reimbursed by an agency under a time-and-materials contract need not include material handling costs is further suggested by FAR, § 16.601(b)(2), which states that "[w]hen included as part of material costs, material handling costs shall include only costs clearly excluded from the labor-hour rate" (emphasis added).

We also note that in a prior decision, Advanced Business Systems et al., B-195117, et al., supra, at 4-5, where the protester argued that overhead costs directly related to parts should be added to the contractor's cost for the parts, we recognized the force of the agency's justification for the cost limitation, that the government had previously been overcharged for parts on time-and-materials contracts and that parts-related overhead could be anticipated and, thus, covered in the hourly labor rates, and we therefore denied the protest. Under these circumstances, in particular given the risk of the government being overcharged for parts, we do not believe that Ray has demonstrated that contracting officials abused their discretion by determining that it would be more appropriate for the contractor to recover its material handling costs under its fixed labor rate than on a cost reimbursement basis.

Finally, Ray questions the refusal of the Air Force to require that a safety observer, a second "technician," be present whenever work is performed on the refrigeration equipment, noting that a safety observer could obtain rapid assistance for an injured coworker. Ray argues that the failure to require a safety observer violates Occupational Safety and Health Administration (OSHA) and Air Force regulations and may expose the government to liability in the event of an accident.

The solicitation as issued provided that the contractor would be paid the hourly labor rate for no more than one refrigeration journeyman for each service work call unless the contractor requested and received written authorization from contracting officials for an additional journeyman. No specific provision was made with respect to the number of journeymen authorized for preventive maintenance work, for which, as previously indicated, the contractor was to be paid the predetermined fixed price set forth in the contract. In response to the above concerns expressed by Ray, the Air Force amended the solicitation to provide that the contractor could request verbal authorization from contracting officials for an additional journeyman. Payment for the additional journeyman, however, was contingent upon receipt of subsequent written confirmation of the oral authorization.

As a general rule, we will not consider the merits of an allegation that a more restrictive specification is necessary to serve the government's interest. The purpose of our role in resolving bid protests is to ensure that the

statutory requirements for free and open competition are met; a protester's presumable interest as a beneficiary of more restrictive specifications is not protectable under our bid protest function. Procurement officials and the user activities are responsible for ensuring that solicitations utilize sufficiently rigorous specifications to meet the government's legitimate needs and to protect the government's interest, since they suffer the consequences of obtaining inadequate services or supplies. Therefore, absent evidence of possible fraud or willful misconduct by government officials, evidence which Ray has not presented here, we consistently have refused to review allegations that a contracting agency should have used more restrictive specifications. See Olson and Associates Engineering, Inc., B-215742, July 30, 1984, 84-2 C.P.D. ¶ 129.

Moreover, even where a protester has alleged that OSHA or other regulations require more restrictive specifications, our Office has held that absent a specific regulation which clearly requires an agency to tailor its specifications in a particular way, there is nothing for us to enforce. See King-Fisher Company--Request for Reconsideration, B-209097.2, Sept. 2, 1983, 83-2 C.P.D. ¶ 289.

The solicitation included Department of the Air Force FAR Supplement § 52.223-9004, subsection (b) of which provides that if the contract is to be performed on an Air Force installation, then Air Force Occupational Safety and Health Standards (AFOSH) shall apply. The Air Force reports that although AFOSH require the presence of a safety observer where work is to be done on energized equipment with a voltage of 600 volts or greater, there is no requirement under AFOSH for a safety observer where, as here, the work is to be done on equipment with a maximum voltage of only 110/208 volts and while the power is off. In addition, the Air Force reports that it was informed by OSHA that there was no OSHA requirement for a safety observer under these circumstances. We note in this regard that OSHA has reserved sections 1910.331-1910.398 of its regulations in 29 C.F.R. (1984) for the future issuance of regulations pertaining to Safety-Related Work Practices, Safety-Related Maintenance and Safety Requirements for Special Equipment.

Since Ray has neither presented evidence of fraud or willful misconduct by government officials, nor shown us particular regulations which clearly require the presence of

a safety observer under these circumstances, we will not consider the merits of its contention that more restrictive specifications, a requirement for a safety observer, were necessary to serve the government's interest and conform to applicable regulations.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel