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DECISION

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

FILE: B-220139 **DATE:** December 24, 1985

MATTER OF: Tracor Jitco, Inc.

DIGEST:

1. Nonresponsive bidder is interested party to file a protest where it seeks resolicitation of procurement allegedly conducted on basis of defective specifications and would have the opportunity to rebid if requirement is resolicited.

2. Solicitation's inclusion of a clause that the contractor will save the government harmless from liability for damages caused by the contractor's fault in providing asbestos monitoring services is not a deviation from the Federal Acquisition Regulation and thus does not require prior authorization.

3. Solicitation requirement that the contractor save the government harmless from liability for damages caused by the contractor's fault in providing asbestos monitoring services is not unduly restrictive of competition where the protester complains that the clause allocates overly burdensome risks to the contractor. The contracting agency has discretion to offer for competition a proposed contract that imposes maximum risks on the contractor and minimum burdens on the agency.

4. Omission of mandatory insurance clause from solicitation may not be cured under "Christian Doctrine" since that doctrine does not permit preaward incorporation of a mandatory provision when it has been inadvertently omitted.

5. Where mandatory clause is inadvertently omitted from IFB, award still may be made if

it will meet government's actual needs, and no other bidder was prejudiced by the omission.

Tracor Jitco, Inc. (Tracor), protests an award under Federal Aviation Administration (FAA) invitation for bids (IFB) No. DTFA07-85-B-00154. The IFB requested bids for industrial hygienist services during the removal of asbestos from the Fort Worth Air Route Traffic Control Center, Texas. These services include asbestos monitoring and laboratory analyses. The protester basically contends that the IFB includes an indemnity clause that is unauthorized and allocates performance risks in such a manner as to unduly restrict competition. Notwithstanding the protest, the FAA determined the services were urgently needed and awarded a contract to Normandeau Associates, Inc.

We deny the protest.

As a preliminary matter, the agency contends that Tracor is not an interested party to raise these issues since Tracor's bid did not acknowledge a material amendment to the IFB and therefore was rejected as being nonresponsive. In addition, the bid was the seventh lowest bid submitted, so that Tracor was not in line for award even had its bid been responsive. These facts do not preclude Tracor from being considered an interested party where Tracor seeks resolicitation of the procurement on the basis of defective specifications, and would have the opportunity to rebid if the procurement were resolicited. Olympia USA, Inc., B-216509, Nov. 8, 1984, 84-2 CPD ¶ 513; Big State Enterprises, 64 Comp. Gen. 482 (1985), 85-1 CPD ¶ 459. We therefore will consider the protest's merits.

The challenged clause reads as follows:

"SAVE HARMLESS AND INDEMNITY AGREEMENT

The Contractor shall save and keep harmless and shall indemnify the Government against any and all liability, claims, demands and costs, of whatever kind and nature, for injury to or death of any person or persons and for loss or damage to any property (Government or otherwise) occurring in connection with or in any way incident to or arising out of performance of this contract which result in whole or in part

> from the fault or negligence of the Contractor, or any subcontractor, or any employee, agent, or representative of the Contractor or any subcontractor."

Tracor correctly observes that the indemnity clause is not a standard clause authorized by the Federal Acquisition Regulation (FAR), 48 C.F.R. Parts 1 through 52 (1984), and argues that the use of the clause is inconsistent with the FAR. The protester maintains that the clause significantly expands the scope of a contractor's liability under standard FAR clauses by requiring the contractor to assume the risk of liability for all damages caused in part by the contractor regardless of whether the contractor was the predominant cause. In this regard, Tracor notes that the IFB's clause "Protection of Government Buildings, Equipment, and Vegetation" (required to be included in solicitations for services at government installations) imposes liability for damage to government property only where caused by the contractor's failure to use reasonable care. FAR, 48 C.F.R. § 52.237-2. Also, the clause "Limitation of Liability--Services" (required to be included in service contracts over $25,000) ends the contractor's liability for the loss of or damage to government property when the government accepts work performed under the contract. FAR, 48 C.F.R. § 52.246-25.

Tracor contends that the indemnity clause constitutes a "deviation" from the FAR, since that term is defined by FAR, 48 C.F.R. § 1.401(a), to include the use of a solicitation provision that is inconsistent with the FAR. A deviation requires special authorization under FAR, 48 C.F.R. § 1.403 or § 1.404 (pertaining to individual and class deviations, respectively), from the head of the agency or his designee. Tracor asserts that the agency's failure to obtain such authorization therefore precludes the use of the clause.

Unlike these FAR clauses, which impose liability on the contractor where the contractor has failed to use reasonable care or up to the point of acceptance of the work, the challenged clause literally seems to impose liability for loss or damage beyond the point of acceptance and whenever the loss is due to the contractor's "fault." Whether this clause would in fact be interpreted in this way we need not decide, however, because even if the protester's interpretation is correct we are not persuaded that the clause is inconsistent with the FAR. The FAR clauses that the protester cites as establishing

limitations on a contractor's liability are mandatory clauses, applicable to a broad variety of contracts, for the purpose of protecting the government against foreseeable potential damage to government property. They reflect a stated general policy that the government will act as self-insurer by relieving contractors of liability for loss or damage to government property that results from defective services and occurs after acceptance of the services except when contractor liability can be preserved without increasing the contract price. FAR, 48 C.F.R. § 46.803. At the same time, the FAR recognizes that at times it may be appropriate to provide for greater protection to the government. For example, the FAR contemplates that the standard warranty clauses may not be appropriate for every situation, and therefore a contracting officer, in accordance with agency procedures, may use a warranty that varies from standard warranty clauses in the FAR. FAR, 48 C.F.R. subpart 46.7. We believe that the indemnity clause protecting the government against a particular harm, not generally contemplated by the FAR, is not a deviation.

Tracor also argues that the indemnity clause is overly burdensome and unduly restricts competition since it requires the bidder to assume the risk of potential liability without regard to the extent the contractor is at fault, and because insurance companies allegedly are not writing new policies providing coverage for liability related to asbestos exposure.

The determination of the needs of the government and the best method of fulfilling those needs is primarily the responsibility of the contracting agency. We will not question the agency's determination unless it is shown to be unreasonable. Logistical Support, Inc., B-212218 et al., Feb. 23, 1984, 84-1 CPD ¶ 231. We believe the protester has failed to show that the FAA's use of the indemnity clause is unreasonable.

The use of such a clause is not uncommon. While Tracor maintains that the clause requires the contractor to assume full liability where its fault or negligence contributes only 1 percent of the cause of damage and the government's fault the remaining 99 percent, the protester has presented no evidence that such an indemnity clause has been construed to impose full liability on a contractor where its fault was not the predominant cause of damage. Furthermore, as regards the risk of liability without insurance, the mere presence of risk in a solicitation does

not make the solicitation inappropriate or improper. Starlite Services, Inc., B-219418, Oct. 15, 1985, 85-2 CPD ¶ 410. It is within the agency's discretion to offer for competition a proposed contract that imposes maximum risks on the contractor and minimum burdens on the agency. Massman Constr. Co., B-204196, June 25, 1982, 82-1 CPD ¶ 624. We also note the fact that 9 other firms submitted bids, which suggests that the clause was not so burdensome as to preclude competition.

Tracor also contends that the solicitation is defective because the required clause captioned "Insurance--Work on a Government Installation," FAR, 48 C.F.R. § 52.228-5, was not included in the IFB. Tracor does not contend that it was prejudiced by the omission, but expresses concern whether the FAA, in determining the awardee responsible, considered whether the awardee was covered by adequate insurance to protect the government's rights under the indemnity clause. The agency admits that the clause is needed and requests that it be read into the contract by operation of law as in G.L. Christian and Associates v. United States, 312 F.2d 418 (Ct. Cl. 1963).

We agree that the "Christian Doctrine" calls for the incorporation of certain mandatory contract provisions into otherwise properly awarded government contracts. However, we must still consider the effect of the omission of the clause on the competition because the doctrine cannot be used to incorporate mandatory provisions into an IFB before award when they have been inadvertently omitted, Rainbow Roofing, Inc., 63 Comp. Gen. 452 (1984), 84-1 CPD ¶ 676. We conclude that the IFB was defective because it did not contain a mandatory clause. Linda Vista Industries, Inc., B-214447 et al., Oct. 2, 1984, 84-2 CPD ¶ 380. The mere fact that an IFB is defective, however, does not mean that it need be canceled. Where an award under the IFB would serve the actual needs of the government and would not prejudice other bidders, cancellation and resolicitation is inappropriate. Id. The FAA has submitted a copy of an insurance provider's statement, dated before award, indicating that the required insurance had been or would be issued to the awardee. Thus, we do not believe that the omission of the insurance clause was prejudicial to the other bidders. The protester does not even allege that it would have been able to submit a lower bid if it had to obtain insurance coverage. We therefore believe the award was proper.

The protest is denied.

for Harry R. Van Cleve
General Counsel