

DECISION



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

FILE: B-221661.2

DATE: May 5, 1986

MATTER OF: Jones Refrigeration Service

DIGEST:

1. Protest that solicitation's quality control provisions impose unfair monetary deductions for unsatisfactory performance and that certain historical data contained in the solicitation is inaccurate is untimely where filed after bid opening.
2. Protest that change of occupancy maintenance on vacant housing cannot be performed in 1-1/2 days is denied where record indicates that change of occupancy maintenance services reasonably can be expected to be performed within this time period.
3. Protest against requirement for 2-hour service call response time for "urgent" maintenance jobs is denied where service call response time is consistent with agency's need to improve military family living conditions. Further, protest against requirement for 1-hour "emergency" maintenance service call response time is denied where failure to provide emergency repairs will potentially increase the ultimate cost of repairs.
4. Protest that solicitation is defective because it does not include sufficient information for bidders to determine their costs for materials for maintenance service calls is denied where solicitation limits the contractor's liability for materials to \$50 per item per job order

- and provides daily and monthly service call estimates as well as estimates for various types of repairs to enable bidders to calculate their costs.
5. Protest by incumbent contractor that agency has understated number of service calls for military family housing maintenance is denied where agency reasonably determined that number of service calls would decrease from previous years because substantial improvements have been made to many housing units which should result in a decreased need for servicing.
 6. General Accounting Office does not review accuracy of wage rate determinations issued by Department of Labor in connection with the Service Contract Act.
 7. Protest issue raised more than 10 working days after basis of protest should have been known is untimely.

Jones Refrigeration Service (Jones) protests the terms of invitation for bids (IFB) No. F01600-86-B0009 issued by the Air Force for military family housing maintenance services at Maxwell Air Force Base, Maxwell Air Force Base Annex, and Gunter Air Force Station in Montgomery, Alabama.^{1/}

We dismiss the protest in part and deny it in part.

The IFB requires that bidders provide a fixed monthly price for the services and materials necessary for maintaining the housing units. The actual work to be performed under this contract is divided into several categories including change of occupancy maintenance, service calls, management, recurring equipment maintenance and recurring facilities maintenance. In addition, the IFB specifies job response times for various types of service calls and for change of occupancy maintenance and penalties for failure to complete the work within the time required for these categories.

^{1/} In K-II Construction, Inc., B-221661, Mar. 18, 1986, 86-1 C.P.D. ¶ ____; we dismissed as untimely K-II Construction's protest that certain estimates contained in this solicitation were understated.

Jones, the incumbent contractor, protests that: (1) the solicitation's quality control provisions impose unfair monetary deductions for failure to complete work within the time required; (2) the information concerning replacement of door locks is inadequate; (3) certain historical data contained in the solicitation is incorrect; (4) the solicitation unreasonably requires the contractor to perform change of occupancy maintenance in 1-1/2 days; (5) certain service call response times set forth in the solicitation are too short; and (6) the solicitation improperly fails to limit the contractor's liability for materials where housing damage resulted from occupant abuse.

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), require that protests such as these based on alleged solicitation improprieties apparent in a solicitation be filed (with either the contracting agency or this Office) prior to bid opening. Since Jones did not protest issues one through three until after bid opening, they are untimely filed and will not be considered on the merits. K-II Construction, Inc., B-221661, supra.

However, Jones did initially timely protest issues four through six to the Air Force prior to bid opening. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3), provide that where, as here, a protest has been timely filed with the contracting agency, any subsequent protest to this Office must be filed within 10 working days after the protester knew or should have known of initial adverse agency action on the agency-level protest. Jones protested these issues to this Office on January 27, 1986, within 10 working days of its receipt of the Air Force's January 10, 1986, denial of the agency-level protest. Therefore, we will consider these bases of protest on the merits. See Pacific Northwest Bell Telephone Co., B-219782.2, July 26, 1985, 85-2 C.P.D. ¶ 99.

Jones protests that change of occupancy maintenance on vacant units cannot be adequately performed in 1-1/2 days as required by the solicitation. Jones points out that change of occupancy maintenance requires painting and that the 1-1/2 days allowed for these services is not enough time for certain oil base paints to dry.

The Air Force states that delays in completing the change of occupancy maintenance could result in the agency's not being able to meet its housing needs. The Air Force further explains that in response to this protest, it requested local paint stores to verify the drying times for the paints specified for use in this procurement. The stores confirmed that the drying times for the paints specified are between 30 minutes and 8 hours. Based upon this information, the Air Force maintains that with proper staff and equipment, the contractor can use these paints and meet the 1-1/2 day requirement.

The determination of the government's minimum needs and the best method of accommodating those needs are primarily the responsibility of 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 needs unless there is a clear showing that the determination has no reasonable basis. Cardion Electronics, B-218566, Aug. 15, 1985, 85-2 C.P.D. ¶ 172; Ray Service Co., 64 Comp. Gen. 528 (1985), 85-1 C.P.D. ¶ 582.

Here, the Air Force determined that change of occupancy maintenance must be performed expeditiously in order to meet the agency's military family housing needs. Jones does not question this requirement. Instead, Jones contends that the 1-1/2 day time period allowed for change of occupancy maintenance is not enough time for freshly painted quarters to dry. The record shows that the Air Force, after verifying the drying times for the paints specified for use in this contract, determined Jones' contention to be incorrect and Jones has provided no evidence to show otherwise. Therefore, we cannot conclude this requirement to be unreasonable. Cardion Electronics, B-218566, supra.

Jones also contends that the 2-hour service call response time for maintenance jobs categorized as "urgent" jobs in the solicitation is unnecessary because in prior contracts for housing maintenance services, the response time for urgent maintenance jobs was 8 hours.^{2/} Jones

^{2/} Examples of maintenance jobs categorized as urgent include roof leaks and plugged bathroom drains where there is only one bathroom in the house.

maintains that the additional cost to the government to meet the shorter 2-hour response time is wasteful. Also, Jones argues that certain maintenance jobs categorized as "emergency" maintenance jobs in the solicitation, which require a 1-hour service call response time, are not actual emergencies and, therefore, should not be so categorized. For instance, Jones believes that the solicitation improperly categorized a breakdown in air-conditioning equipment as an emergency maintenance job.

In response, the Air Force explains that adequate, well-maintained housing is an incentive in recruiting qualified personnel and while under prior contracts the response time for urgent jobs was 8 hours, the present solicitation requires a 2-hour response time in support of the agency's effort to improve military family living conditions. Further, since procurement records indicate that in the past the response time for most urgent service calls was only 2.8 hours, the Air Force believes a 2-hour response time is not unreasonable.

Concerning Jones' challenge to the designation of emergency maintenance jobs, the Air Force explains that the determination whether to designate certain maintenance problems as emergencies is based on factors such as occupant safety and the extent of damage to equipment where repairs are delayed. The Air Force asserts that the shorter 1-hour service call response time is necessary since prompt servicing will minimize equipment damage and save the government equipment replacement costs.

As noted above, we will not question an agency's determination of its minimum needs unless the determination is shown to be clearly unreasonable. Ray Service Co., 64 Comp. Gen. 528, supra. We find that Jones has failed to rebut the agency's justifications for the requirements in question. Jones has not demonstrated that the Air Force lacked a reasonable basis for requiring a service call response time of 2-hours for urgent jobs which the Air Force deems necessary in order to provide improved employee morale and enhance the quality of living conditions on military bases. In our view, it is not unreasonable to assume that the faster service call response time will assist the Air Force in achieving this goal. Jones also has not rebutted

the Air Force's explanation that the jobs designated by the Air Force as emergencies are the type of jobs which, if not performed on an emergency basis, will potentially increase the ultimate amount and cost of repairs.

Jones also complains that the solicitation is defective because it fails to limit the contractor's liability for materials where damage to quarters resulted from occupant abuse.

The Air Force points out that under the terms of the solicitation, the contractor is required to pay for all materials up to \$50 per item per job regardless of the reason for the service call. Therefore, the agency maintains that it is irrelevant whether damage resulted from occupant abuse or some other cause. In this regard, the Air Force also maintains that bidders should be able to calculate their costs for materials based upon the information provided in the solicitation which includes daily and monthly service call estimates as well as estimates for various types of repairs such as appliance, air-conditioning and heating system, and general maintenance repairs.

Initially, we do not see how the failure to provide a ceiling on the contractor's liability for materials for occupant abuse service calls impacts its ability to intelligently bid. The Air Force has limited the contractor's liability to \$50 per item per job order for all service calls regardless of the reason for the service call. In our view, therefore, the key issue is whether the Air Force provided sufficient information to permit bidders to estimate the number of service calls in a given time period and type of repairs involved so that bidders can calculate manpower and material costs.

We have held that a procuring activity must give sufficient detail in the IFB to enable bidders to compete intelligently and on a relatively equal basis. Dynalectron Corp., B-220518, Feb. 11, 1986, 65 Comp. Gen. ___, 86-1 C.P.D. ¶ 151; DSP, Inc., B-220062, Jan. 15, 1986, 86-1 C.P.D. ¶ 43. Where estimates are provided in a solicitation, there is no requirement that they be absolutely correct. Rather, they must be based on the best information available and present a reasonably accurate representation

of the agency's anticipated needs. DPS, Inc., B-220062, supra. It is the protester's burden to establish that the stated estimates are not based on the best information available or otherwise deficient. DPS, Inc., B-220062, supra.

Here, while we recognize that there are some performance uncertainties in a contract of this type, we cannot say that the information provided does not give bidders an adequate basis for intelligently preparing their bids. The IFB provides service call estimates on a daily and monthly basis and further breakdowns the estimates by types of repair such as appliance repairs. Thus, the type of information provided in the IFB appears adequate for bidders to estimate their labor and material costs. See, e.g., Dynalectron Corp., B-220518, 65 Comp. Gen. _____, supra. While Jones disputes the service call estimates as understated, the Air Force has provided a logical explanation for projected reduction in service calls. The Air Force states that during 1984 and 1985, the buildings subject to this contract underwent extensive improvements and renovations. Because of the extensive work done on these building, the Air Force reasonably concluded that the number of service calls would decrease. Based upon this, we cannot say that the solicitation's service call estimates were understated. See, e.g., The Big Picture Show, B-220859.2, Mar. 4, 1986, 86-1 C.P.D. ¶ ____.

Jones also protests the Service Contract Act wage determination incorporated in the solicitation, asserting that it does not reflect the prevailing rates in the area. Since the courts have held that the correctness of the prevailing wage rate determination made by the Secretary of Labor is not subject to judicial review, this Office does not review the accuracy of wage rate determinations issued by the Department of Labor. A challenge to a Service Contract Act wage determination should be processed through the administrative procedures established by the Department of Labor. Professional Carpet Service, B-203287, June 3, 1981, 81-1 C.P.D. ¶ 445.

Finally, Jones, the sixth low bidder, protests that the five lower priced bids submitted in response to this solicitation are unbalanced and should be rejected as nonresponsive. Jones' protest concerning this issue was raised for the first time on March 4, 1986, in the firm's comments to

the agency report. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), require that protests other than those based upon alleged solicitation improprieties be filed within 10 working days after the basis of protest is known or should have been known, whichever is earlier. Since Jones had an opportunity to examine its competitors' bids after bid opening on January 10, 1986, Jones' protest that its competitors' bids are unbalanced, filed on March 4, is untimely.

The protest is dismissed in part and denied in part.

for Seymour S. Friedman
Harry R. Van Cleve
General Counsel