Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Crown Management Services, Inc.

File: B-233365.3

Date: September 20, 1989

DIGEST

1. Where contracting agency establishes prima facie support for solicitation's performance standards and protester fails to show that solicitation's standards are clearly unreasonable, protest that requirements are unnecessarily restrictive is denied.

2. General Accounting Office will not object to deductions from monthly payments due contractor for deficient performance, where protester fails to show that there is no possible relation between stipulated deductions and losses that are contemplated by the parties.

DECISION

Crown Management Services, Inc., protests the performance requirements in invitation for bids (IFB) No. 594-88-28, issued by the Department of Veterans Affairs (VA) for laundry services for VA medical centers in Lake City and Gainesville, Florida. Crown contends that the requirements set forth in the IFB's performance requirements summary (PRS) are defective and that the deductions imposed for deficient performance are punitive in nature.

We deny the protest.

The IFB was issued on September 2, 1988, pursuant to Office of Management and Budget (OMB) Circular No. A-76 in order to provide VA with a cost comparison for determining whether it will be more economical to perform the required work in-house or by contract.1/ The IFB requires bids for a base

1/ OMB Circular No. A-76 establishes federal policy regarding the operation of commercial activities and sets forth the procedures for determining whether commercial activities should be operated under contract with commercial

(continued...)

year and four 1-year option periods for an estimated annual workload of 3,542,050 pounds of laundry. The IFB's PRS lists 19 performance requirements that are critical to contract performance; 10 performance requirements include specified acceptable quality levels (AQLs). If the number (or percentage) of units rejected exceeds the AQL for a given factor, as determined from a mandatory military standard2/ governing inspection by random sampling that is incorporated into the IFB, the government may deduct specified percentages from monthly payments due the contractor.

Crown contends that the IFB's PRS has unrealistic and unnecessarily restrictive standards. Specifically, Crown alleges that the PRS is unrealistic because 9 out of 19 requirements allow no deviation from perfect performance and 2 requirements contain AQLs permitting only a 1 percent deviation from perfect performance.3/ For example, Crown states that PRS-1, "linen is clean," has an AQL of one percent while Department of Defense contracts normally have an AQL of 5 to 7 percent for that factor.

The determination of an agency's minimum needs and the best method of accommodating those needs are primarily matters within the agency's discretion. Canon U.S.A., Inc., B-232262, Nov. 30, 1988, 88-2 CPD ¶ 538. Where, as here, a protester challenges a solicitation's performance standards designed to meet an agency's needs, the agency has the initial burden of establishing prima facie support for the standards. Once the agency establishes prima facie support, the burden shifts to the protester who must show that the protested requirements are clearly unreasonable. Dynateria, Inc., B-222773, Aug. 5, 1986, 86-2 CPD ¶ 157.

1/(...continued)
sources or in-house using government facilities and personnel.

2/ MIL-STD-105D "Sampling Procedures and Tables for Inspection by Attributes" (April 29, 1963).

3/ The nine which allow no deviations are PRS-8, "specialty item segregation;" PRS-9, "sanitization of laundry carts/trailers;" PRS-10, "provide accurate data;" PRS-13 "initial employee training;" PRS-14, "employee developmental training;" PRS-15, "compliance with JCAHCO and VA requirements;" PRS-16, "quality control program;", PRS-17, "response;" and PRS-18 "utility usage." The two standards that have 1 percent AQLs are PRS-1, "linen is clean," and PRS-12, "damage to clean linen."

VA reports that, contrary to Crown's assertion, two of the nine factors, PRS-8, "specialty item segregation," and PRS-10, "provide accurate data," do not require perfect performance before a deduction is taken from the contractor's monthly invoice, and, therefore, these two factors do not appear to be in dispute. However, VA agrees that for the remaining seven factors, no deviation from the performance requirement is allowed.

VA argues that the "no deviation" standard for the seven requirements is justified. With regard to PRS-9 (sanitization of laundry carts/trailers), VA argues that carts and trailers must be sanitized because, if clean linen is packed into an unsanitized cart or trailer, it could result in an increase of infections throughout both medical centers. Additionally, VA states, sanitization of carts and trailers is required by the Joint Commission on Accreditation of Health Care Organizations (JCAHCO) and VA requirements.

With respect to PRS-13 (initial employee training) and PRS-14 (employee developmental training), VA states that lack of initial and continuing training for employees would be hazardous to the employees and patients and to the equipment and physical plant and would not meet with JCAHCO requirements. Concerning PRS-15 (compliance with JCAHCO and VA requirements), the agency explains that there can be no deviation from the requirement to comply with JCAHCO and VA requirements, because the failure to comply would result in the loss of the medical centers' accreditation. Regarding PRS-16 (quality control program), VA states that a quality control program is required to assure that all other performance standards are met. VA further reports that the requirement that a contractor respond to a quality assurance inspector's requests within 1 hour (PRS-17, "response") is necessary because the continuation of laundry services for two active medical centers is critical to the patients' well-being. Finally, VA justifies PRS-18 (compliance with specified utility usage levels) by stating that it is required to assure that the contractor remains cost conscious and conservative in utility usage, because a wasteful contractor could drastically increase the government's overall costs.

With regard to the two factors that allow for a 1 percent deviation, VA states that PRS-1 (linen is clean) will be changed to allow for a 5 percent deviation as requested by the protester. However, the 1 percent AQL for PRS-12 (damage to clean linen) will not be changed, because the loss of clean linen would directly affect the safety of patients and personnel.

We find that the VA has established prima facie support for the IFB's performance standards. With regard to all but one of the nine factors that are in dispute, VA has shown that failure to meet the performance standards could either directly or indirectly result in loss of the medical centers' accreditation or adversely affect the patients' welfare. Beyond arguing that they are very difficult to meet, Crown has not shown that the performance standards are unreasonable as they relate to VA's underlying concerns regarding patient welfare and accreditation, or that compliance with them is so onerous that performance under the contract would be impossible. With regard to utility usage, VA has shown that the standard is consistent with the government's interest in controlling costs under the contract. Crown does not argue that the utility usage levels specified in the performance standard are unreasonable, nor has Crown shown that the standard does not reasonably reflect the government's interest in ensuring conservative utility usage. Accordingly, since VA has established prima facie support for the performance standards and Crown has not shown that they are clearly unreasonable we see no basis to object to the standards. Dynateria, Inc., B-222773, supra.

Crown also contends that the evaluation methods for the performance requirements lack statistical validity. Crown states that, with one exception, the PRS utilizes random checks rather than random sampling as the method for performance evaluation. The protester contends that the use of the term "random checks" indicates that there will be a lack of precision in the evaluation of the contractor's performance against the established standards. In this regard, Crown notes that under PRS-1 (linen is clean), the specified method of surveillance is a daily random check of no less than 25 percent of released carts, and that the PRS does not specify whether the 1 percent AQL for PRS-1 applies to the number of carts containing defective linen or to the number of pieces of defective linen in the carts that are checked.

In response to Crown's protest, VA has amended the PRS to specify random sampling rather than random checks as the method of surveillance for the 10 standards that include specified AQLs. For example, VA has amended PRS-1 (linen is clean), to specify that the method of evaluation will be a daily random sampling of linen rather than random checks of linen carts. VA states that it has changed or deleted all ambiguous language elsewhere in the PRS which would bring into question the statistical validity of the VA's evaluation methods. Since the agency has amended the PRS to meet Crown's demands, this portion of the protest is

academic. See Areawide Services, Inc., B-225253, Feb. 9, 1987, 87-1 CPD ¶ 138.

Crown further contends that the deductions from monthly payments imposed where the contractor's performance deviates from the performance standards are punitive in nature, because they do not represent a fair appraisal of the service forgone. For example, Crown contends that the damages assessed when linen is damaged by the contractor should be limited to replacement costs. Crown also argues that since this solicitation was issued for A-76 cost comparison purposes, the imposition of the deductions prejudices firms that must allow for the deductions in their cost estimates while the government estimate will not likewise be burdened because liquidated damages will not apply if the work is performed in-house by the government.

Liquidated damages are fixed amounts which the government can recover from the contractor upon proof of violation of the contract and without proof of the damages actually sustained. Environmental Aseptic Services Administration, B-221316, Mar. 18, 1986, 86-1 CPD ¶ 268. We will only object to a liquidated damages provision as imposing a penalty if a protester shows that there is no possible relation between the amount stipulated for liquidated damages and the losses that are contemplated by the parties. Environmental Aseptic Services Administration--Request for Reconsideration, B-218487.3, Jan. 2, 1986, 86-1 CPD ¶ 1. Under OMB Circular No. A-76, the amount to be deducted for non-performance must represent as nearly as possible the cost of the services not provided.

VA reports that the deduction amounts were arrived at only after considerable review and a determination by the medical center staff that the amounts represent the value of the services that would be lost if not provided by the contractor. For example, VA states that if linen is damaged, the mere replacement cost of the linen would not equate to the hardship placed on the government in the event that more than 1 percent of the linen is damaged, since the resulting delay and unavailability of critically needed linen items would have a significant impact on the medical centers. Since the protester has not shown that there is no possible relation between the stipulated deductions and the losses that are contemplated by VA, we have no basis upon which to object to the deductions.

Crown further maintains that imposition of deductions is unfair to contractors who must allow for the risks of substandard performance and resulting deductions from payment in their cost estimates. However, the mere fact

that a solicitation may impose a risk does not render the solicitation defective since some risk is inherent in most types of contract. Dynalectron Corp., 65 Comp. Gen. 92 (1985), 85-2 CPD ¶ 634. Bidders are instead expected to allow for such risk in formulating their bids. Edward E. Davis Contracting, Inc., B-211886, Nov. 8, 1983, 83-2 CPD ¶ 541. With regard to A-76 cost comparisons, we have recognized that including a price factor in a cost proposal to offset potential payments in the event of defective performance is something a commercial bidder may elect to do at its own risk as a matter of business judgment. Bay Tankers, Inc., B-227965.3, Nov. 23, 1987, 87-2 CPD ¶ 500. We have also recognized that there is no requirement that an A-76 cost comparison include a factor to equalize the competitive position of the government and commercial offerors with regard to potential deductions that may be made from a contractor's payments for defective performance. Id.

Since VA has established prima facie support for the performance standards or has otherwise amended the PRS to meet Crown's demands, and the protester has not shown that the deductions for deficient performance are, in fact, penalties, we deny the protest.

James F. Hinchman
General Counsel