Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sletager, Inc.

File: B-237676

Date: March 15, 1990

Ralph Sletager, for the protester.
Col. Herman A. Peguese, Department of the Air Force, for the agency.
Barbara Timmerman, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that painting services can not be procured through the use of an indefinite quantity contract because those services do not constitute a commercial product is denied, where Federal Acquisition Regulation (FAR) does not prohibit the use of indefinite quantity type contracts for the acquisition of other than commercial items. Further, the painting services are sold to the general public in the course of normal business operations based on market prices and thus would constitute a commercial product as defined in FAR.

2. Failure of agency to include Variation in Estimated Quantities clause in the solicitation does not provide a basis for disturbing procurement where the award would meet government's needs and there is no evidence that the competition was prejudiced by the omission.

3. Protest that bonds for indefinite quantity contracts should be based on estimated value of contract is denied as Federal Acquisition Regulation provides that the penal sum of payment and performance bonds for such contracts should be based on the price payable for the specified minimum quantity.

DECISION

Sletager, Inc., protests the terms of invitation for bids (IFB) No. F65503-90-B-001, issued by the Department of the

Air Force for interior and exterior painting at Eielson Air Force Base, Alaska.

We deny the protest.

The IFB was issued September 20, 1989. It set forth 25 different line items representing different types of painting and surface preparation work. Each line item contained a single estimate of the amount of work to be done, usually on the basis of square or linear feet and spaces for the insertion of unit and extended prices. The solicitation stated that the contractor is guaranteed $100,000 worth of work and specified that since an indefinite quantity contract was contemplated that the quantities in the schedule were estimates only and "are not purchased by this contract." The maximum value of the contract was stated as $1 million.

By letter dated October 4, Sletager complained to the Air Force about its proposed use of an indefinite quantity type contract. Sletager contended that the services could not be procured under an indefinite quantity contract because they are not commercial in nature. It also asserted that the IFB should contain the Variation in Estimated Quantity clause (Variation clause) set forth at FAR § 52.212-11, which permits price adjustments in fixed-price construction contracts in the event actual quantities vary from estimated quantities by more than 15 percent. Sletager also argued that the solicitation's bonding requirement should be 20 percent of the estimated value of the contract, $697,250, and not 20 percent of the $100,000 minimum order guarantee. The agency responded to Sletager by letter dated October 11 which, according to the protester, it did not receive until "after October 20." In that letter the agency replied that the contract type and bonding requirements were correct and that the use of the Variation clause was not required in this solicitation. Bid opening occurred on October 27. The agency received ten bids with Sletager submitting the fourth-low bid. Sletager filed its protest with our Office on November 3. This protest raises the same arguments as were raised in the agency-level protest.

Sletager contends that FAR § 16.504(a)(3)(b) does not permit the use of an indefinite quantity contract for this procurement. That regulation provides, in part, "An indefinite quantity contract should be used only for items

or services that are commercial products or commercial-type products (see 11.001) and when a recurring need is anticipated." Sletager asserts that the services being procured here are neither commercial nor commercial-type. The protester states that no contract in the private sector would contain terms like those included in the Air Force solicitation, i.e., an undetermined number of buildings to be painted where wages are fixed and payment is based on square footage.

We disagree. First, in our view, the use of the word "should" in FAR § 16.504(a)(3)(b) indicates that the regulation does not impose a mandatory prohibition against the use of indefinite quantity type contracts for other than commercial items or services and that provision does not impose any rights upon offerors. See Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. Therefore, even if we were to agree with the protester--which we do not--that the service did not constitute "commercial products," the agency is not prohibited from soliciting for an indefinite quantity contract.

Moreover, we find the services being procured to be within the FAR definition of commercial product. The regulation defines "commercial product" as one sold or traded to the general public in the course of normal business operations at prices based on established catalog or market prices. FAR § 11.0001.1/ Exterior and interior preparation and painting, even in large quantities, are not services provided only to the government. Although the protester asserts that various aspects of this proposed contract such as payment on a square footage basis and possible large variations in the amount of painting required are not found in the private sector, the FAR definition focuses on the commercial availability of the items or services being procured, not on the manner in which they are provided. Further, even accepting the protester's claim that there are no similar contracts in the private sector, we do not think the commercial product definition should be read so narrowly as to require that the exact services be provided in the exact manner in a commercial setting.

The protester also argues that even if the Air Force used the proper contract type, the solicitation was defective because it failed to include the Variation clause.

1/ There does not appear to be any separate definition of commercial services but we do not think the underlying principals governing supplies differ.

The regulations provide that the contracting officer shall insert the Variation clause in solicitations and contracts when a fixed-price construction contract is contemplated that authorizes a variation in the estimated quantity of unit-priced items. FAR § 12.403(c). The solicitation here was for construction services on a fixed-price basis. (An indefinite quantity contract where bids are received on a unit-price basis is a fixed-price contract. See FAR §§ 16.202-1 and 16.501(c).) The solicitation also included a large number of line items of work to be ordered each with a single estimate expressed in terms of quantity, i.e., square feet etc., which were subject to variation during performance. Therefore, the solicitation fits within the terms of FAR § 12.403(c).

The Air Force nevertheless argues that since it contemplated an indefinite quantity contract with a guaranteed minimum order of $100,000, the Variation clause was unnecessary because bidders could rely on that minimum in calculating their bids and not be at risk of receiving less than $100,000 worth of work.

Whatever the merits of the agency's position, FAR § 12.403(c) still requires the use of the Variation clause without exception in all solicitations of this type. Moreover, we do not agree with the agency that the clause would not have a purpose in this solicitation. We think that the $100,000 minimum order guarantee supplies the consideration necessary for a binding indefinite quantity contract, FAR § 16.504(a)(2), but it does not, under the circumstances here, act as a substitute for the required Variation clause which concerns the increase or decrease between the actual and the estimated quantities under each of the 25 line items. See AMERICORP, Inc., B-222119, May 12, 1986, 86-1 CPD ¶ 451.

The absence of the Variation clause here, however, is not dispositive of the protest. A defective solicitation does not preclude a valid award if the award would meet the government's needs and not prejudice the competition. A to Z Typewriter Co.; Allen Typewriter Co., B-215830.2; B-215830.3, Feb. 14, 1985, 85-1 CPD ¶ 198. There is no suggestion in the record that award under this solicitation will not meet the agency's needs. Further, it does not appear that any bidder will be prejudiced by an award under the solicitation. The protester and all other bidders completed their bids based on an IFB that did not contain a Variation clause. Sletager has submitted the fourth lowest bid at $988,050. The lower bids were $960,000, $924,500 and $901,860. The protester does not argue that it would have been other than fourth low but for the omission of the

clause and we see no reason why that would be so, or why the relative standing of the other nine bidders would have changed. Under the circumstances, given that 10 firms responded to the solicitation, that bid prices have been exposed, and that it seems highly unlikely that the protester would have been low had the clause been included in the solicitation, we do not believe that disturbing the procurement is warranted. See Safemasters Co., Inc., 58 Comp. Gen. 225 (1979), 79-1 CPD ¶ 38.

Finally, we reject Sletager's contention that the agency must require payment and performance bonds in the amount of 20 percent of the estimated value of the contract instead of 20 percent of the minimum guarantee. The regulations provide that for determining the penal sum of bonds for indefinite quantity contracts the price payable for the specified minimum guarantee shall be considered the contract price. FAR § 28.102-2(c)(2).

The protest is denied.

for James F. Hinchman
General Counsel