



Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

Matter of: Sletager, Inc.  
File: B-244710  
Date: November 13, 1991

Ralph Sletager for the protester.  
Lt. Col. William H. Spindle, Department of the Air Force,  
for the agency.  
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of  
the General Counsel, GAO, participated in the preparation of  
the decision.

### DIGEST

Protest is sustained where fixed-price solicitation for construction services did not include a clause for equitable adjustments for ordered amounts varying from estimated amounts, as required by regulation.

### DECISION

Sletager, Inc. protests the terms of invitation for bids (IFB) No. F45603-91-B-8018, issued by the Department of the Air Force for painting at McChord Air Force Base in Washington State. The protester principally<sup>1</sup> contends that Federal Acquisition Regulation (FAR) § 12.403(c) requires the agency to include a "Variation in Estimated Quantity" clause (Variation clause) as set forth at FAR § 52.212-11 in the IFB for fixed-price construction services, and argues that since the Air Force did not include the clause, the firm was effectively precluded from submitting a bid.

We sustain the protest.

<sup>1</sup>The protester also alleges that the Air Force is precluded from contracting for painting on an indefinite quantity basis because such services are not "commercial" in nature. We recently denied a protest filed by that firm which was based, in part, upon the same allegation. Sletager, Inc., B-237636, Mar. 15, 1990, 90-1 CPD ¶ 298, aff'd, Sletager, Inc.--Recon., B-237636.2, Aug. 3, 1990, 90-2 CPD ¶ 98. The arguments here are virtually the same; thus, we will not consider them again. See APMCO, Inc., B-237746, Jan. 29, 1990, 90-1 CPD ¶ 126.

The IFB was issued May 10, 1991, contemplating a fixed-price, indefinite quantity construction contract. The schedule contained 10 line items representing different types of painting and surface preparation work. Each line item contained a single work estimate, usually based on the amount of square or linear feet involved, and spaces for the insertion of unit and extended prices. The solicitation stated that the contractor was guaranteed a minimum \$5,000 worth of work for the entire contract and specified that, since an indefinite quantity contract was contemplated, the quantities in the schedule were estimates only and were "not purchased by this contract." The maximum value of the contract was stated as \$500,000. Bids were opened on July 2. The agency reports that seven bids were received; no award has been made pending the issuance of this decision.

Sletager states that it did not submit a bid because, in its view, the combination of a low minimum guarantee of \$5,000 with the absence of the Variation clause, which authorizes equitable adjustments when ordered amounts vary 15 percent from estimated amounts, placed undue risk on its firm as a small business.

In a prior decision involving the same parties and a similar solicitation for painting services, we found that on its face FAR § 12.403(c) requires the use of the Variation clause in indefinite quantity construction contracts. Sletager, Inc., B-237636, supra. In that decision, we recognized that the language of FAR § 12.403(c) mandates the use of the clause in all fixed-price construction contracts that authorize a variation in the estimated quantity of unit-priced items. FAR § 12.403(c) states as follows:

"The contracting officer shall insert the clause at 52.212-11, Variation in Estimated Quantity, in solicitations and contracts when a fixed-price construction contract is contemplated that authorizes a variation in the estimated quantities of unit-priced items."

Emphasis supplied.

Briefly, the agency argues that FAR § 12.403(c) was not intended to require that the Variation clause be included in indefinite quantity contracts. The agency states that the Variation clause is intended for fixed-price construction contracts where the line items containing the estimates are incidental to a major portion of the work, and where a variation in the quantity of the incidental work would likely have an impact upon the time needed for completion of the project. According to the agency, neither of these conditions apply here.

We see no reason to change the views expressed in our prior decision. The language of FAR § 12.403(c) does not exclude indefinite quantity contracts from its scope. While the Air Force contends that the clause should not be applicable here, it has not explained how this would be consistent with the language of the FAR, or why the interests of the government compel a different policy. We think that the Variation clause could have a valid purpose in contracts of this type as it reduces the risk to construction contractors when ordered quantities under line items vary significantly from solicitation estimates; the guaranteed minimum clause, which only pertains to the contract as a whole, exists to ensure necessary legal consideration for a binding indefinite quantity contract. Sletager, Inc., B-237636, supra. If, as the agency argues, it is not in the government's interest to include the clause in a contract such as the one solicited here, the contracting activity should have sought a deviation from the regulation pursuant to FAR § 1.400.

The Air Force argues that even if the solicitation should have included the Variation clause, the omission should not prevent an award to the low bidder under the solicitation. The agency maintains that a defective solicitation does not preclude a valid award if the award would meet the agency's needs and not prejudice the competition. The agency points out that such was the case in our earlier decision where we did not disturb the solicitation.

We stated in the prior case that an award under a defective solicitation is not objectionable unless such an award was either inconsistent with the government's needs or prejudiced the competition. See MTS Sys. Corp., B-238137, Apr. 27, 1990, 90-1 CPD ¶ 434. Under this standard, any award here would be improper. In the prior case, the protester was the fourth lowest bidder and it did not argue that its standing would have changed but for the omission of the clause. Here, the protester argues that it could not submit a viable bid because the absence of the Variation clause presented too great an uncertainty for it to calculate its prices for the work, which could vary in total amount between \$5,000 and \$500,000. The FAR requirement was evidently intended to have an effect on competition by reducing the risks bidders assume. While it does appear that a number of other firms were willing to submit bids, we do not find unreasonable the protester's argument that omission of the Variation clause was prejudicial to it.

This prejudicial effect was compounded by the failure of the solicitation to comply with other requirements for indefinite quantity contracts. An indefinite quantity contract is one which provides for an indefinite quantity, within stated limits, of supplies or services to be furnished during a fixed period with deliveries by placing orders with the

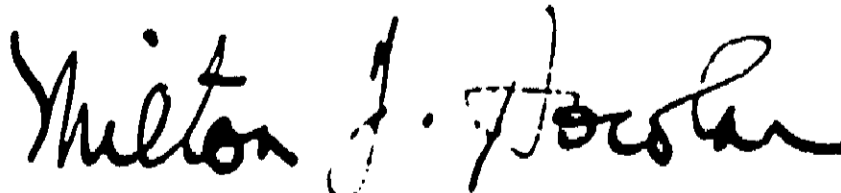
contractor, FAR § 16.502. The contract must contain a minimum quantity which is more than nominal and a maximum quantity which is realistic and based upon the most current information available. Also, the solicitation must contain estimates of future requirements or some reasonable alternative so that where, as here, fixed prices are solicited bidders are able to calculate their risks and to compete on a reasonable basis. When estimates are used, they must be established in good faith and be based upon the best available information. Fabrics Plus, Inc., B-218546, July 11, 1985, 85-2 CPD ¶ 46.

Here, the minimum and maximum amounts of work to be ordered under the entire contract were stated to be \$5,000 and \$500,000. Also, the solicitation, as initially issued, contained quantities which it termed "estimates" for each of the 10 line items. The solicitation was subsequently amended so that the identical quantities were termed "maximum" quantities.

Given the extremely wide range between the figures for minimum and maximum orders, it is difficult for us to conclude that both the requirements that the minimum figure be more than nominal and that the maximum figure be realistic were met. Similarly, we question how the line item quantities met the requirement that the probable quantities set forth in the solicitation be based upon the best information available. Here they have been changed from representing an estimate of the quantity of the service needed to representing the maximum quantity that can be ordered without an explanation or a change in the numbers.

Under the circumstances here, we find that the solicitation deficiency had a prejudicial impact on the competitive system. Accordingly, we sustain the protest and, since no award has been made, we recommend that the solicitation be canceled and the agency's requirements resolicited in a manner consistent with the applicable regulation. We also find that Sletager is entitled to recover its reasonable costs of filing and pursuing this protest. Cf. IBI Sec. Serv., Inc., 69 Comp. Gen. 707 (1990), 90-2 CPD ¶ 205.

The protest is sustained.

*for*   
Comptroller General  
of the United States