

Vodraska 148366



Comptroller General
of the United States
Washington, D.C. 20434

Decision

Matter of: James Foos & Associates

File: B-249496.2

Date: January 6, 1993

James Foos for the protester.

Nora A. Huey, Esq., and Michelle Harrell, Esq., General Services Administration, for the agency.

Adam Vodraska, Esq., and Barbara Timmerman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency should not use requirements contract to procure instructional services is denied where protester did not show agency's choice of contract type to be unreasonable. The contracting agency has the primary responsibility for determining its needs and the method of accommodating them.
2. Solicitation that required offerors to provide a single unit price for an instruction session and that grouped several sessions together for purposes of award did not unreasonably restrict competition. The solicitation structure was necessary to meet the agency's needs for flexibility, uniformity and administrative simplicity.
3. Protest that agency should use termination for convenience clause relating to fixed-price contracts instead of clause used for service contracts is denied. The service contract clause is proper since a successful offeror will not incur substantial charges in preparing for and carrying out the contract.

DECISION

James Foos & Associates protests the terms of request for proposals (RFP) No. FCXA-S4-92-0005-N, issued by the General Services Administration (GSA) as a small business set-aside for instruction services. The protester principally contends that the choice of contract type was erroneous, that the agency's method of grouping courses is unduly restrictive of competition, and that the provisions related to the termination for convenience of the government are in violation of Federal Acquisition Regulation (FAR) guidelines. We deny the protest.

The RFP contemplates the award of firm fixed-price requirements contracts. It requests technical and price proposals for five "award groups," each group consisting of several sessions of one of three courses. The course "Introduction to Contracting" is divided into three separate award groups by geographical area. There is one award group for the course "Procurement Planning" and one for "Contracting by Sealed Bidding." Those award groups cover all locations within the United States. Award will be made on a group-by-group basis and thus as few as one or as many as five contracts will be awarded.

Award is to be made to the offeror whose proposal is most advantageous to the government, technical factors and price considered. The solicitation ranks technical quality, including the qualification of instructors, the offeror's management plan, past performance, experience, and training, higher than price. Offerors were to provide a per session price. Price is then evaluated by multiplying the price per session by the estimated number of sessions per award group. For evaluation purposes only, the government estimates there will be one additional session ordered per group, although this does not obligate the government to order additional sessions.

CONTRACT TYPE

The protestor believes GSA's choice of a requirements contract to be inappropriate because GSA's needs are "highly predictable." The protester asserts that GSA should solicit for a firm fixed-price contract to include travel, with any additional course sessions handled through the changes clause in the contract or with later separate procurements.

According to the agency, in determining contract type it considered numerous factors, among them the fact that it does not know exactly how many course sessions it will need, when it will need them and where they will be needed. Based on these considerations the contracting officer determined that a firm fixed-price requirements contract would be the most suitable to meet recurring needs for unspecified amounts of instructional services. GSA asserts that a requirements contract provides greater flexibility in ordering sessions and results in a savings in both administrative costs and managerial time.

Contracting agencies have broad discretion in identifying their needs and determining what characteristics will satisfy those needs. We will not disturb an agency's determination as to the best method of accommodating its needs, including contract type, absent a clear showing by the protester that the decision was unreasonable.

Professional Services Unlimited, Inc., B-245453, Dec. 30, 1991, 91-2 CPD ¶ 18.

FAR § 16.503(b) authorizes the use of requirements contracts when, as here, an agency anticipates recurring requirements but cannot determine the precise quantity of services it will need during a definite period. Foos has not demonstrated that GSA's choice of contract type was clearly unreasonable. Although Foos asserts that GSA's needs are predictable, it has not offered any evidence to support this assertion. GSA states that while historically its estimates have a 90 percent accuracy rate, it is not possible to extend this accuracy rate to any specific session. Nothing in the record contradicts this assertion. A mere difference of opinion between the protester and the agency concerning the agency's needs is not sufficient to upset an agency's determination. Mills Manufacturing Corp., B-224004; B-224005, Dec. 18, 1986, 86-2 CPD ¶ 679.

PRICE STRUCTURE

The protester next objects to being required to offer a single unit price regardless of the location of course sessions, given the prospect of uncertain numbers of future orders. The solicitation provides that the government may order additional sessions of any of the courses, or cancel any session, upon 21 days advance notice. According to the protester, adding or canceling courses could result in significant losses to the contractor, depending on the location of the contractor and the session. Since travel expenses can range from nothing to more than half the total price of the session, the protester maintains that competition is unduly limited to offerors with many locations, or who are willing to take substantial risks.

Where a protester alleges that a requirement is unduly restrictive, we review the record to determine whether the requirement has been justified as necessary to satisfy the agency's needs. Sunbelt Industries, Inc., B-246850, Mar. 31, 1992, 92-1 CPD ¶ 325. Section C.11 provides that contractors are responsible for all costs associated with performance including travel, and these costs are to be included in the offered per session price. GSA states that this "one price, per session, per award group" enables the agency to price potential additional sessions of the courses, allowing sessions on short notice and resulting in cost savings from administrative simplicity. GSA states that it considered making travel reimbursable but determined that this option did not best meet its needs.

While travel costs could vary considerably depending on location and course additions and cancellations, we do not

find this risk to be unreasonable.¹ The protester himself states that past history indicates GSA does not order many additional course sessions and that those that are ordered are often at major regional centers. GSA provided historical data and anticipated session locations in the RFP to assist offerors in determining price. GSA also established maximum order numbers over which the contractor is not obligated to perform and the solicitation provides for 21-day advance notice to the contractor if a scheduled session is to be canceled or if an additional session is ordered. Risk is inherent in any contract, and offerors must use their expertise and business judgment to assess the risk's magnitude and possible cost in computing their offers. Further, it is within the agency's administrative discretion to solicit a proposed contract which maximizes risks on the contractor and minimizes administrative burdens on the government. Jewett-Cameron Lumber Corp., et al., B-229582, Mar. 15, 1988, 88-1 CPD ¶ 265.

The protester also asserts that GSA has failed to comply with the instruction in FAR § 19.202-1 that contracting officers shall "divide proposed acquisitions of supplies and services (except construction) into reasonable small lots (not less than economic production runs) to permit offers on quantities less than the total requirement." The purpose of this provision is to provide an equitable opportunity for small businesses to compete to the extent consistent with the government's needs. Schnorr-Stafford Construction, Inc., B-227323, Aug. 12, 1987, 87-2 CPD ¶ 153. GSA has taken steps to assure small business participation here. GSA divided its requirements into five separate award groups in order to facilitate the ability of small businesses to respond and the agency in fact received numerous proposals from small businesses. Further, the contract for instructional services is itself a small business set-aside, and there is no suggestion that the contract will be awarded to other than a small business.

¹See International Technology Corp., B-233772.2, May 24, 1989, 89-1 CPD ¶ 497, in which we upheld a solicitation requirement as reasonable where it was not possible to estimate in advance the costs of providing travel and support costs within a large geographic area. We have also allowed an agency to exclude evaluation of travel and transportation costs when it was impracticable to predict where performance will be required. Danoff & Donnelly; Kensington Associates, B-243368; B-243368.2, July 26, 1991. 91-2 CPD ¶ 95. While both these cases involved indefinite-quantity, fixed-price contracts, we think the analogy is appropriate.

TERMINATION FOR CONVENIENCE CLAUSE

The protester asserts that the RFP should contain FAR S 52.249-2, Termination for Convenience of the Government (Fixed-Price) rather than FAR S 52.249-4, Termination for Convenience of the Government (Services) (Short Form). The protester takes issue with the use of the short form services clause because under that provision the government is only liable for services rendered. The protester also objects to the RFP clauses C.10 and C.11 which limit reimbursement of contractor expenses.

According to FAR §§ 52.249-2 and 49.502(c), FAR S 52.249-2 shall not be used when FAR S 52.249-4 is appropriate. The contracting officer determined that FAR S 52.249-4 was appropriate because, based on solicitation sections C.10 and C.11, the successful offeror will not incur substantial charges in preparing for and carrying out the contract. The agency states that other than incurring travel costs in accord with C.10 and C.11, the contractor's preparation is essentially limited to staying abreast of procurement issues and reviewing the government-provided materials prior to class since course materials and classroom facilities are provided by GSA.

Section C.10 provides that, for administrative convenience, the government will issue a delivery order for all scheduled sessions at the time of award. GSA may, without charge, cancel any session scheduled to be delivered by giving the contractor 21-days advance notice. Clause C.11 notifies the contractor that it will not be reimbursed for airline tickets purchased more than 21-days in advance if GSA properly cancels a class in accordance with C.10. GSA states that C.10 and C.11 are necessary because the agency will not know that a session needs to be ordered until enough students are enrolled.

We find the contracting officer's determination reasonable. The contractor is on notice that expenses incurred in preparing for a session will not be reimbursed if GSA gives the contractor 21-days advance notice of a cancellation.² Consequently, a prudent offeror should figure possible

²The contractor appears concerned that GSA will cancel with less than 21-days notice. Any failure by the agency to adhere to the terms of the contract is a matter of contract administration.

expenses associated with a cancellation into the price and, if successful, should not incur expenses related to a session prior to the 21-day deadline.

The protest is denied.

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General Counsel

B-249496.2