



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eagle Fire Inc.

File: B-257951

Date: November 30, 1994

Harry A. Hoffon, Jr. for the protester.
Kimberly L. Frye, Esq., Navy Public Works Center, Norfolk, Virginia, and Cynthia Guill, Esq., Naval Facilities Engineering Command, for the agency.
Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Solicitation provisions for inspection and maintenance of fire protection systems reasonably describe the work to be performed, are not ambiguous, and do not place undue risk on the contractor; the mere presence of risk in a solicitation does not render it inappropriate, and bidders are expected to consider relative risk in calculating their bids.

2. Agency decision to use sealed bidding procedures instead of competitive negotiation to acquire fire prevention system inspection and maintenance services is justified where the agency reasonably concludes that technical proposals and/or discussions with offerors are unnecessary to ensure understanding of requirements.

DECISION

Eagle Fire Inc. protests the terms of invitation for bids (IFB) N62470-93-B-5579, issued by the Navy Public Works Center, Norfolk Naval Base, Virginia, for the inspection and maintenance of fire protection systems for specified buildings at the Norfolk Naval Air Station.

We deny the protest.

The IFB contains two bid schedules to be completed by the bidders. One schedule requests unit and total prices for various inspections of fire prevention equipment in each of the specified buildings. The other schedule requests unit and total prices for various items of indefinite quantity work, including the provision and installation of foam

concentrate; emergency service calls; and repair service not otherwise listed in the IFB. The Navy's requirements for each type of inspection and for the indefinite quantity items are detailed in section C of the IFB.

Prior to the date set for bid opening, Eagle Fire submitted various questions to the contracting officer seeking clarification of numerous provisions in the IFB. Notwithstanding the agency's responses, which were provided to all prospective bidders, Eagle Fire protests that the IFB is ambiguous and/or places undue risk on the contractor with regard to several technical requirements.

Generally, we will not question the contracting agency's determination of its minimum needs and the best method of accommodating those needs unless it has no reasonable basis. G.H. Harlow Co., Inc., B-254839, Jan. 21, 1994, 94-1 CPD ¶ 29. The Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2305(a) (1988), provides for a contracting agency to specify its needs and develop specifications in a manner designed to promote full and open competition with due regard for the goods or services to be acquired. See Federal Acquisition Regulation (FAR) § 10.002(a). While a solicitation must contain sufficient information to allow offerors to compete intelligently on an equal basis, the mere allegation that a solicitation is ambiguous or restrictive does not make it so. Automated Power Sys., Inc., B-256242, May 31, 1994, 94-1 CPD ¶ 329; Niedermeier-Martin Co., B-226623, July 8, 1987, 87-2 CPD ¶ 23. Moreover, a solicitation requirement is not ambiguous unless it is susceptible to two or more reasonable interpretations; when a dispute exists as to the actual meaning of a solicitation requirement, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Energy Maintenance Corp., B-223328, Aug. 27, 1986, 86-2 CPD ¶ 234.

Eagle Fire first argues that the list of fire prevention equipment at IFB Attachment J-C1 is incomplete. The protester claims that it observed during a site visit the existence of equipment not listed in the IFB. Eagle Fire expresses concern that the IFB asks the contractor to assume liability for the existing fire protection equipment on the government premises without providing a precise listing of that equipment. The agency responds that Attachment J-C1 only lists the major pieces of equipment to be inspected and that the IFB indicates that prospective bidders are expected to visit the premises to identify the precise equipment to be inspected and maintained.

As stated in the agency's response to Eagle Fire's questions provided all potential bidders, the IFB's list of fire

protection equipment for each building was not intended to be all-inclusive. The IFB unambiguously requires the contractor to inspect, maintain, and certify the operability of the fire prevention systems at the specified buildings. Section C.2.c., as modified by amendment No. 0002, defines "Fire Protection System" as:

"... the total sprinkler and foam system. The system starts with the post indicator valve, picks up where the supply water enters the building, and ends at the oscillating monitors. The system does not include the piping between the post indicator valve and the building. This includes recharging the foam system, if foam is on hand. The electric and pneumatic systems are included in this contract up to and including the alarm switch in the annunciator panel."

When the IFB is read as a whole, we think it is clear that the contractor is responsible for inspecting and maintaining the installed equipment that is part of the fire protection system, as defined in section C.2.c.¹ To this end, section L.18, Examination of Premises, states:

"Bidders are expected to satisfy themselves as to the general and local conditions that may affect the cost of the performance of the work to the extent that such information is reasonably obtainable. It is considered impractical to

¹The protester complains about the differing terminology used in the IFB: "foam fire suppression systems"; "fire protection system"; "fire suppression system"; and "list of building equipment" to be inspected. We see no inconsistencies in the agency's use of the different terminology because it all refers to the same fire prevention systems to be serviced under the contract.

²As an example of the alleged ambiguity, the protester points out that nowhere in Attachment J-C1 are oscillating monitors listed as equipment to be inspected and maintained. However, the IFB's definition of the fire protection system states that the system ends at and includes the oscillating monitors, so it is apparent that oscillating monitors are components of the fire protection system that must be inspected and maintained under the IFB. Indeed, section C.18.6., Contractor's Personnel Certification, requires that personnel involved in this contract "be experienced with water driven oscillating monitors."

determine, without inspection, the exact nature of the work and site conditions under which the work is to be performed."

Although the IFB specifications were not in the detail or format suggested by the protester, they do not conceal the characteristics of the work to be performed by the contractor and, given the bidders' responsibility to examine the systems before submitting their bids, the incomplete list of equipment in the IFB does not prevent bidders from competing intelligently or on an equal basis.

The protester also objects to section C.2.a., Certification of Systems, which provides "after inspection of the fire suppression system, and finding no defects, the contractor shall certify the system as being in accordance with all applicable laws and regulations." Eagle Fire contends that this language unfairly places liability on the contractor for equipment it did not necessarily design or install. The agency answers that it is apparent from the IFB that the contractor will not be held responsible for equipment or work previously performed by others that does not meet the requirements of the National Fire Protection Association, or the original equipment manufacturer, or other applicable laws and regulations.

We find no basis to object to this certification requirement. In this regard, we note that the inspection provided for in section C.1.1.b. admonishes the contractor to identify any unacceptable or faulty equipment or work prior to undertaking full responsibility for the fire protection system equipment.³ Also, section C.2.i. allows the contractor to make a limited certification where a fire protection system has minor defects noted by the contractor, who will not be responsible for the discrepancies it notes.

³Section C.1.1.b. provides:

"[i]t shall be the responsibility of the [c]ontractor to survey/inspect each system and report to the [g]overnment any malfunctions within 30 calendar days from the start date of this contract. . . . With the exception of any equipment noted as needing repairs on the initial condition of equipment report, after the 30 day survey and inspection period the [c]ontractor shall assume total responsibility for all the equipment as set forth under the terms of the contract. After the repairs noted on the initial condition of equipment report have been performed the [c]ontractor shall assume total responsibility for the repaired equipment. . . ."

Presumably, a company such as Eagle Fire, which specializes in inspecting and maintaining fire prevention equipment, should be knowledgeable of any laws and regulations applicable to the inspection and maintenance of such equipment, and be able to certify whether or not the serviced equipment is in compliance. Thus, we do not think that the certification places unfair risk or responsibility on the contractor.⁴ We have consistently recognized that an agency may offer for competition a proposed contract that imposes maximum risks on the contractor and minimum burdens on the agency, and this should be taken into account by a bidder in formulating its bid. Tracor Jitco, Inc., B-220139, Dec. 24, 1985, 85-2 CPD ¶ 710.

Eagle Fire next maintains that the IFB should include a separate contract subline item for cleanup and containment of fire retardant foam.⁵ Eagle Fire asserts that, without such separate pricing, it cannot intelligently price the unknown quantities of service associated with cleaning up discharges of foam without unacceptable risk because it will

⁴Eagle Fire nevertheless contends that without the agency's providing the contractor with as-built drawings, hydraulic calculations, specifications, and manufacturers' equipment data for the systems to be inspected, no contractor can certify that a system is installed in accordance with all applicable laws and regulations by mere inspection. However, while Eagle Fire's protest does not so acknowledge, the IFB generally assigns the responsibility for obtaining such information to the contractor. In this regard, the IFB requires that equipment be checked or maintained per the original manufacturer's instructions, and makes it the responsibility of the contractor to obtain from the manufacturers all maintenance service instructions; operating instructions; spare parts information; wiring diagrams; and any other information and/or technical data on the systems and equipment necessary for the performance of the contract. Operations and maintenance manuals for each type of system are required to be submitted by the contractor prior to the start of work, and section H.17 of the IFB requires the contractor to develop and maintain a technical library of all technical data related to the contract services including equipment manufacturers' spare parts lists; facility drawings; operation and maintenance procedures and manuals; technical publications and reference documentation; and other appropriate material. Eagle Fire has not shown that it is unreasonable to require the contractor to obtain the foregoing documentation.

⁵The IFB references no history of false discharges or of anticipated amounts of foam to be cleaned up and disposed of off-site.

have to guess the number and length of foam discharges that it will be expected to clean up.

As indicated above, the contractor under the IFB is expected to assume responsibility for the fire protection systems after an initial inspection. Pursuant to sections C.1.1.c. and C.9.3. of the IFB, the contractor is responsible for the containment, clean up, and disposal of foam discharges that occur as a result of the contractor's performance of its inspection and maintenance responsibilities under the contract. We think that responsible fire protection system inspection contractors should be in as good a position as the government to estimate the number and amount of foam discharges that may result from the contractor's inspection and maintenance responsibilities. Indeed, it would seem that the contractor, which has accepted responsibility for the systems, is in a better position to establish some limit on the number of foam discharges and amounts discharged; the record does not show that the agency has superior knowledge in this regard. In any event, there is no requirement that specifications be drafted in such detail as to eliminate completely any risk or remove every uncertainty from the mind of every prospective bidder, and the bidder should consider such matters in formulating its bid. Automated Power Sys., Inc., supra; Tracor Jitco, Inc., supra.

We similarly find without merit Eagle Fire's objection to section C.1.1.c., which makes it the contractor's responsibility to ensure that no fire retardant foam enters the storm or sanitary sewer system. While Eagle asserts that the contractor has no control over the location of and access to the sewer systems in the serviced buildings, a bidder must consider the necessary precautions to ensure that it complies with such applicable environmental requirements, and is expected to use its professional expertise and business judgment in anticipating such factors affecting performance costs. Id.

Eagle Fire next asserts that section C.1.1.b. creates a conflict of interest for the contractor. Section C.1.1.b. requires the contractor to inspect each fire protection system for malfunctions within 30 days of award and then to report problems and necessary corrective action, including required material and labor, to the agency. Eagle Fire argues that this may cause a disincentive to properly repair the fire protection system should the repairs exceed the contractor's quote for the repairs. The agency responds that it is willing to assume this risk to the extent that it is real, as it can properly address this problem through contract administration. In this regard, section C.1.1.b. provides that in making such repairs, the government may elect to modify the contract; competitively bid the work; have the work accomplished by government forces; or order

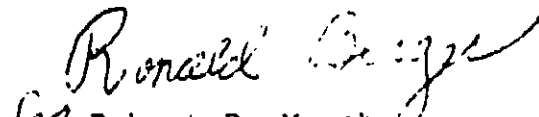
the repairs under the indefinite quantity schedule of the contract. Under the circumstances, Eagle Fire has provided no basis to object to this provision.

Eagle Fire finally asserts that technical proposals are needed and discussions required, such that the procurement should be conducted using competitive negotiation rather than sealed bidding procedures. The agency states that its requirements are sufficiently specific that neither technical proposals nor discussions are required, and that it finds no justification under the FAR to use competitive negotiation procedures here.

The previous statutory preference for a sealed bid procurement was eliminated by CICA. 10 U.S.C. § 2304(a) (1988). However, contracting officers still must solicit sealed bids if (1) time permits; (2) award will be made on the basis of price and price-related factors; (3) discussions are unnecessary; and (4) the agency reasonably expects to receive more than one sealed bid. 10 U.S.C. § 2304(a)(2)(A); FAR § 6.401(a). Negotiated procedures are only authorized if sealed bids are not appropriate under 10 U.S.C. § 2304(a)(2)(A). See 10 U.S.C. § 2304(a)(2)(B); UXB Int'l, Inc., B-241028, Jan. 16, 1991, 91-1 CPD ¶ 45. The determination of which competitive procedure is appropriate essentially involves the exercise of business judgment by the contracting officer. Tennessee Apparel Corp., B-253178.3; B-253178.4, Sept. 21, 1993, 94-1 CPD ¶ 104.

Here, Eagle Fire in essence asserts that technical proposals and discussions are required to ensure that offerors understand the technical requirements and are bidding on the same basis because the specification requirements are ambiguous and/or place undue risk on the contractor. As discussed above, we find no ambiguity or other basis to object to the specification requirements. Moreover, the Navy may conduct a pre-award survey to determine whether the low bidder is qualified and capable of performing the contract during which the bidder's technical understanding of the contract requirements can be assured. Consequently, we find no basis to object to the Navy's choice of sealed bidding rather than competitive negotiation for this procurement. UXB Int'l, Inc., supra.

The protest is denied.


for Robert P. Murphy
Acting General Counsel