



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Satellite Services, Inc.

File: B-280945; B-280945.2; B-280945.3

Date: December 4, 1998

Laurence Schor, Esq., and Susan L. Schor, Esq., McManus, Schor, Asmar & Darden, for the protester.

Kenneth W. Dodds, Esq., for the Small Business Administration.

Capt. Steven H. Levin, Department of the Army, for the agency.

C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Award under solicitation for construction services would not result in a binding requirements contract, where the solicitation does not obligate the agency to order any work at all from any individual contractor, and where, despite government promise to allow awardees to enter into limited competition for future task orders, the contracting officer can deny contractors the right to compete if it is "in the best interest of the government"; a party may not reserve to itself a method of unlimited exculpation without rendering the promises illusory and the contract void.

2. Award under solicitation for construction services would not result in a binding indefinite-quantity contract where it contains no obligatory minimum quantity, rendering the government's obligations illusory and, therefore, unenforceable.

DECISION

Satellite Services, Inc. (SSI) protests the terms of request for proposals (RFP) No. DAHA23-98-R-0002, for construction work at various National Guard installations. Satellite asserts that the RFP is flawed because the agency is committing itself neither to order a stated minimum quantity of services nor to order all of its requirements from a successful offeror, rendering illusory the consideration necessary for an enforceable contract.

We sustain the protest.

On August 5, 1998, the United States Property and Fiscal Officer for Missouri issued the RFP for a "multiple-award, multiple-year task order contract" for maintenance, repair, and construction work at Rosecrans Memorial Airport in St. Joseph, Missouri, Jefferson Barracks and Lambert Field in St. Louis, and Canon Range at Fort Leonard Wood for 1 year, with four 1-year options. RFP, Standard Form

(SF) 1442, block 10, and § B.1.a. The solicitation allows potential offerors to specify at which of the four locations, and in which dollar ranges,¹ they would like to compete for task orders if they are selected for award of a task order contract. The RFP provides for no guaranteed minimum per contractor; a contractor can receive a maximum of \$20 million over the 5-year term of the contract. RFP § B.6.a. A contractor may request release from the contract at any time after the base year. RFP § B.4.

Section C of the RFP contains a statement of work and an explanation of how the contract would be administered. Each contractor promises to maintain an office within 100 miles of the project locations and to attend, within 24 hours of notice, preproposal site visits. RFP § C.1.g. The agency will issue an oral or electronic (facsimile or e-mail) "Notice of Proposed Task Order Project Request for Proposal," with a brief synopsis of the project including required performance period, details of the preproposal conference, and "best value requirements"--that is, whether award will be based on price or a price/technical tradeoff. RFP § C.5.a. Based on competitive proposals received "exclusively" from task order contractors, the agency will select one of those contractors, to which it will issue the task order. RFP § C.1.c. Pursuant to RFP § C.7.a the contractors will be given "a fair opportunity to compete for each . . . proposed project" at the locations and in the price ranges included in their contracts.

While the RFP states that the agency will offer all construction acquisition projects from \$2,000 to \$3 million in value at the installations covered, for competition among the contractors, the RFP also allows the government to exclude projects "unique" in nature. RFP § C.1.b. The RFP also provides that the contracting officer will not have to provide the contractors with the opportunity to compete where there is an urgent need; where he determines that only one contractor can provide the services because of their unique or highly specialized nature; where a project is a "logical follow-on to an order already issued under the contract"; or "when otherwise determined to be in the best interest of the Government." RFP § C.3. Further, the government reserves the right to contract for work outside the task order contract if the contracting officer determines that the price obtained through competition among the contractors is not fair and reasonable. RFP § C.7.b.

SSI essentially contends that the RFP is ambiguous and raises a number of questions relating to interpretation both of the RFP and any resultant contract. The protester argues that, although it is unclear what kind of contractual vehicle the

¹The RFP sets out six dollar ranges, beginning at \$2,000, as follows: up to \$100,000; up to \$250,000; up to \$500,000; up to \$1 million; up to \$2 million; and up to \$3 million. RFP § B.1.b.

agency intends, that contract will lack the consideration required by the Federal Acquisition Regulation (FAR) and applicable legal principles to result in an enforceable contract.

In response to the protest, the agency contends that an award under the solicitation will give rise to a valid requirements contract based on the agency's promise, under section C.1.b of the RFP, to allow all task order contractors to participate in a limited competition for all of its future requirements for construction services, between \$2,000 and \$3 million at the four installations covered. We disagree.

A requirements contract provides for filling all actual purchase requirements of designated government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor. FAR § 16.503(a). The promise by the buyer to purchase the subject matter of the contract exclusively from the seller is an essential element of a requirements contract. Modern Sys. Tech. Corp. v. United States, 979 F.2d 200, 205 (Fed. Cir. 1992). A solicitation will not result in the award of an enforceable requirements contract where a solicitation provision disclaims the government's obligation to order its requirements from the contractor and therefore renders illusory the consideration necessary to enforce the contract. See Sea-Land Serv., Inc., B-266238, Feb. 8, 1996, 96-1 CPD ¶ 49 at 5.

As pointed out by the protester, the agency's position essentially relies upon the concept that the individual contracts with the task order contractors as a group constitute the "contract" under which the agency agrees to satisfy its requirements. With regard to any individual contractor, however, there is no obligation to procure all of the agency's needs from that contractor, or to procure all of its needs within a designated price range or at a designated location from that contractor, or even to order any work at all from the contractor. Further, the agency's obligations to the contractors as a whole are limited by the RFP provisions allowing the contracting officer to exclude "unique" projects--and, more important, allowing the contracting officer to deny the task order contractors the right to compete--the very right that the agency argues they have bargained for--"when otherwise determined to be in the best interest of the Government." A party may not by such means reserve to itself a method of unlimited exculpation without rendering the promises illusory and the contract void. Torncello v. United States, 681 F.2d 756, 760 (Ct. Cl. 1982). As the court stated in Torncello, it is specious to argue that the agency's power to avoid its obligations is limited by requiring that it can only do so in the best interest of the government or in the exercise of its discretion. Id. at 770 ("it seems hardly sufficient for the government to promise not to do anything that would be against its own interest. This merely is promising only to do whatever suits it.").

In other words, an obligation that is avoidable in the government's discretion, or whenever it is in the government's interest, is no limit on the agency's actions. Where the agency has such discretion, it is impossible to ascertain any definite

amount of work to which a contractor is entitled, no guidance for a court or board to determine if and when a breach has occurred, and no means of enforcing the contract against the government. See Modern Sys. Tech. Corp. v. United States, supra, at 206.

Further, the essence of a requirements contract is not only that the government agrees to satisfy all its requirements from one contractor, but that the contractor agrees to fill all those requirements. Media Press, Inc., 215 Ct. Cl. 985, 986 (1977); Sea-Land Serv., Inc., supra. The contract contemplated here lacks this element as well. As originally issued, the RFP § B.1.c required the contractors to submit proposals for task orders on all the locations and in all the dollar ranges specified in their offers. By amendment No. 0003, however, the agency deleted that requirement.² In sum, both parties to the contract here would retain the right to avoid performing; neither will have agreed to be bound in any meaningful way. The absence of valid mutual promises renders the contract unenforceable. Sea-Land Serv., Inc., supra.

In responding to other issues raised by the protester, the agency suggests that the contract may be regarded not as a requirements contract, but as an indefinite-quantity contract.³ Assuming this is an alternative argument by the agency, the contract nevertheless does not qualify as an indefinite-quantity contract. Specifically, FAR § 16.504 expressly states that an indefinite-quantity contract shall require the government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. FAR § 16.504(a)(1). To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity. FAR § 16.504(a)(2). The FAR reflects the rule that, without an obligatory minimum quantity, the government-buyer under an indefinite-quantity contract would be allowed to order nothing, rendering its obligations illusory and, therefore, unenforceable. Rice Lake Contracting, Inc. v. United States, 33 Fed.Cl. 144, 153 (1995); Aalco Forwarding, Inc., et al., B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 at 6. Since the RFP here contains no stated minimum, it does not meet the test for formation of a valid indefinite-quantity contract.

²In this regard, amendment No. 0003, block 14.b stated: "Contractors that are awarded a Task Order 'Ticket' will not be required to submit a bid on EVERY project." The agency and protester agree that the effect of the amendment was to delete the requirement for task order contractors to submit offers on all task orders in their designated locations and dollar ranges.

³For example, the agency's response to the protester's argument that the agency is improperly "bundling" its requirements is that it followed FAR § 16.504, which applies to indefinite-quantity contracts.

Given our finding that, however interpreted, award under the solicitation would not give rise to an enforceable contract, we sustain the protest. We recommend that the agency cancel the RFP and reissue it in a legally sufficient form.⁴ We also recommend that SSI recover its costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1998). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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⁴While the protester raises other challenges to the solicitation, this recommendation to cancel the solicitation renders them academic, and we need not consider these issues further.