



## Decision

**Matter of:** WingGate Travel, Inc.; AirTrak Travel; and Alamo Travel Group

**File:** B-405007.9

**Date:** November 29, 2011

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Josephine Ursini, Esq., for the protesters.  
Heather J. LoPresti, Esq., Department of Defence, Defense Human Resources Activity, for the agency.  
Kenneth Kilgour, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that solicitation provision, which precludes prospective contractors' from obtaining equitable price adjustments based on variance from numbers of orders issued as compared to estimated quantities stated in solicitation, places undue risk on prospective contractors is denied; an agency has discretion to offer for competition a proposed contract that imposes maximum risks on the contractor and minimum burdens on the agency.

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### DECISION

WingGate Travel, Inc., et al., protest the terms of request for proposals (RFP) No. H98210-10-R-0006 issued by the Defense Human Resources Activity (DHRA) on behalf of the Defense Travel Management Office (DTMO) for travel management services to support the commercial travel office (CTO). The protesters allege that the terms of the RFP impose undue risk of significant variations in workload on prospective small-business contractors.

We deny the protest.

The RFP contemplates the award of up to six contracts to provide travel management services to support official travel activities of authorized Department of Defense travelers for six separate travel areas within the continental United States--one award per travel area. The RFP requires offerors to submit separate proposals

for each travel area, each with separate fixed-price transaction fees<sup>1</sup> for two types of transactions—DTS and CTO Assist—that would be charged to the government at the “point of sale.” DTS transactions would require minimal CTO labor costs and result in lower transaction fees than would CTO Assist transactions, which require travel agent interaction with the traveler. Protest at 3.

As it relates to the protest, the solicitation included “Workload Data Sheets,” which contained estimated quantities for each of the six travel areas for DTS and CTO Assist transactions. As amended, the solicitation established that the estimates were based on 2009 fiscal year data.

A prior protest of this solicitation was dismissed after DRHA notified this Office that it would take corrective action. See Wingate Travel, Inc., et al., B-405007.1 et al., July 15, 2011. At issue in the prior protest was the allegedly inaccurate mix of DTS and CTO Assist transactions; the agency’s projections seemed not to reasonably reflect the historical ratio of the two types of transactions. As part of the agency’s corrective action, it revised the estimated quantities in the RFP and issued amendment 6, which included the following:

#### **Additional Notes to Offerors**

Absent an out of scope change to this contract, transaction fees are fixed-price and will not be adjusted if actual quantities of transactions vary from the estimated quantities provided in the pricing spreadsheets. As such, offerors must price this risk accordingly. Offerors are cautioned that its fixed-price must account for the risk of emergency and surge requirements as described in the Performance of Work Statement (PWS) at paragraph 8. Any post award contract disputes will be processed in accordance with contract clause 52.212-4, “Contract Terms and Conditions – Commercial Items,” which incorporates the Disputes clause, [Federal Acquisition Regulation (FAR) §] 52.233-1, at paragraph (d). In addition, the solicitation contains clause 252.243-7002, “Requests for Equitable Adjustment,” which provides the procedures for submitting requests for equitable adjustment. Submission of a request for equitable price adjustment does not guarantee that such a request will be granted by the Contracting Officer.

RFP, Amend. 6 at 5-6.

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<sup>1</sup> As the agency explains, transaction fees are analogous to fixed unit prices; the contractor will be paid a fixed fee each time that it completes one of the applicable transactions that is a contract line item. Contracting Officer’s Statement of Facts at 4.

Prior to the August 24, 2011 deadline for submitting proposals, the protesters filed this protest.

The protesters specifically challenge the RFP provision, establishing that fixed transaction fees will not be adjusted as a consequence of variations from the solicitation's estimated workload quantities absent a determination that the variation constitutes an "out of scope" change. According to the protesters, this provision, which was not included in prior contracts, puts undue risk on prospective small business contractors.<sup>2</sup> Protest at 5. In this regard, the crux of the protesters' challenge to the reasonableness of this provision is that prior contracts for the same services imposed less risk on the contractors. Protest at 7-10. The protesters argue that

[t]he fact that ALL existing DTS contracts, whether for small or large businesses, currently acknowledge that workloads can and will vary, and that equitable adjustments would be considered so that offerors would NOT have to include contingency pricing that would increase the costs to the Government and taxpayers, should be prima facie if not conclusive evidence that the current DHRA position that ALL risk of future variations in workload will fall on the shoulders of these small businesses is unwarranted and unnecessary.

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<sup>2</sup> In its response to the agency report, the protesters for the first time argued that "the Army is attempting to essentially wipe out the impact of the Changes clause by limiting its applicability to 'out of scope' work only." Protesters' Response to Agency Report (AR), Sept. 26, 2011 at 4. This new basis for challenging the terms of the solicitation, filed after the deadline for receipt of proposals, is untimely. See Bid Protest Regulations 4 C.F.R. § 21.2(a)(1). In any event, we see no merit to the protesters' argument. See Protesters' Response to AR, Sept. 26, 2011 at 4. The solicitation language at issue merely precludes contractors from seeking equitable adjustments associated with variations in the estimated quantities established by the solicitation. This limitation does not, however, as the protesters suggest, constitute a wholesale abandonment of the "Changes clause," such that the only compensable changes under the contract are for those determined to be outside the scope of the contract. The estimated quantities established by the solicitation reflect only one aspect of contract performance--the procedures established under the Changes clause would fully apply to all other contractual liabilities. Moreover, we note that the solicitation language at issue is consistent with Federal Acquisition Regulation (FAR) Clause 52.216-21, Requirements, which the solicitation incorporated by reference. See RFP at 44. This clause establishes the contracts to be awarded as "requirements" contracts and expressly advises that "if the Government requirements do not result in orders in the quantities described as estimated . . . that fact shall not constitute a basis for an equitable price adjustment."

Id. at 7 (emphasis in original).

As a general rule, the contracting agency must give offerors sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis. AirTrak Travel et al., B-292101 et al., June 30, 2003, 2003 CPD ¶ 117 at 13-14. However, the contracting agency has the primary responsibility for determining its needs and the method of accommodating them, including the choice of the appropriate contracting format. Id. We will not question an agency's choice of procurement approach, absent clear evidence that its decision is arbitrary or unreasonable, or in violation of statute or regulation. Id. It is within the administrative discretion of an agency to offer for competition a proposed contract that imposes maximum risks on the contractor and minimum burdens on the agency, and an offeror should account for this in formulating its proposal. JRS Mgmt., B-402650.2, June 25, 2010, 2010 CPD ¶ 147 at 5. Risk is inherent in most types of contracts, particularly fixed-price contracts, and firms must use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. AirTrak Travel et al., supra at 14. A mere difference of opinion between the protester and the agency concerning what will best suit the agency does not establish that the agency's determination as to its requirements placed undue risk on the contractor. Id.

The agency acknowledges that prior procurements for these services have included equitable adjustment provisions based on specified variations in estimated volumes of transactions. It explains, however, that this was done because the agency lacked historical data that would assist offerors in responding to the solicitation and in assessing risk. Agency Report at 2-3. Having now provided that historical data in this procurement, the agency chose the current solicitation method to ensure that it would pay fixed rates for only those travel services that it required and only as they were required. Contracting agencies are not required to conduct present procurements in a certain manner simply because they conducted past procurements in that manner. Chicago City Wide College, B-218433, B-218434, Aug. 6, 1985, 85-2 CPD ¶ 133 at 3. Given the agency's inclusion of extensive historical data in the current solicitation, information that was not available under prior solicitations, the protesters' challenge, based on the agency's deviation from former practice, lacks merit.

In addition, the protesters argue, at length, that our decision in BMAR & Assocs., Inc., B-281664, Mar. 18, 1999, 99-1 CPD ¶ 62, requires a different outcome. See Protest at 2, 7-11, Comments on AR, Sept. 26, 2011, at 4-5. In BMAR, we sustained a protest on the basis that the solicitation at issue subjected contractors to unreasonable risk because it required fixed lump sum pricing for largely undefined civil engineering services. In quite different circumstances here, the agency is procuring specific types of services on a fixed-price, transaction fee basis; the more transactions a prospective contractor performs, the more fee revenue it will earn. Moreover, the solicitation in BMAR had been issued in connection with a public/private competition under Office

of Management and Budget Circular A-76. In the unique context of that competition we found that the lump sum pricing arrangement put private sector offerors at a competitive disadvantage in relation to the public sector competitor because the public sector competitor, unlike the private sector competitor, would not need to account for contingencies in its pricing. The solicitation here was not issued in connection with OMB Circular A-76. Our holding in BMAR is simply not relevant to the protesters' allegations. As noted above, agencies may impose maximum risks on the contractor and minimum burdens on the agency. JRS Mgmt., supra. While the protesters may ultimately prefer a solicitation that imposes less risk on the contractor, given that the contract provides for transactional fee based pricing for specifically defined tasks, and the agency has provided detailed estimates of the transactional volumes based on historical data, we have no basis to conclude that the solicitation imposes a level of pricing risk on contractors that is outside the bounds of the agency's reasonable exercise of its discretion.

The protest is denied.

Lynn H. Gibson  
General Counsel