Evans
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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: LBM Inc.

File: B-242664

Date: May 17, 1991

Frank Moody for the protester.
Lucie J. McDonald, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.
Catherine M. Evans, David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that firm, fixed-price solicitation for maintenance services subjects contractor to unreasonable risk of workload fluctuations is denied where the record shows that bidders can reasonably estimate the project cost given their expertise and the historical workload data provided in solicitation.

2. Protest alleging that agency's omission from solicitation of Variation in Quantity clause, which limits circumstances under which government will accept variation in quantity, subjects contractor to unreasonable risk of workload fluctuations is denied; since clause is not intended to protect the contractor in the event of workload fluctuations, omission of clause does not impose additional risk on contractor.

3. Protest of solicitation's renewal clause, which does not require agency to give contractor preliminary notice of its intent to exercise contract option by a specified time before contract expiration, is denied where applicable regulations do not require such a specific time period and the provision is otherwise reasonable.

DECISION

LBM Inc. protests the terms of invitation for bids (IFB) No. N62472-90-B-4726, issued by the Naval Facilities Engineering Command (NAVFAC) for maintenance and repair of family housing heating, ventilating, and air conditioning at the Philadelphia Naval Complex. LBM alleges several IFB deficiencies.

We deny the protest.

The IFB contemplates the award of a firm-fixed-price contract for an 8-month base period and 4 option years. For each period of the contract, the IFB instructs bidders to submit a lump-sum price for all of the required work; to this end, the IFB provides historical work load data over a 2-year period for each of the required tasks.

LBM first contends that the IFB improperly allocates the risk of work load fluctuations to the contractor. LBM particularly objects to an IFB amendment informing bidders that there will be no adjustment to the contract price if the number of service calls actually required exceeds the historical quantities listed in the IFB.

We find the IFB unobjectionable in this regard. An agency is not prohibited from offering to competition a proposed contract imposing substantial risks upon the contractor and minimum administrative burdens upon the agency. Bean Dredging Corp., B-239952, Oct. 12, 1990, 90-2 CPD ¶ 286. There is some amount of risk present in any procurement, and offerors are expected to use their professional expertise and business judgment in taking these risks into account in computing their offers. S.P.I.R.I.T. Specialist Unlimited, Inc., B-237114.2, Mar. 8, 1990, 90-1 CPD ¶ 257. Here, the agency included historical work load data for the previous 2 calendar years in the IFB so that bidders could assess the risk of work load fluctuations and account for it in their bids. While LBM objects to the agency's strategy, it has offered no evidence to establish that it cannot prepare a reasonable bid given its expertise and the extensive historical data provided.

Second, LBM alleges that the agency improperly failed to include in the solicitation Federal Acquisition Regulation (FAR) clause § 52.212-9, Variation in Quantity. LBM asserts that the clause is required in firm-fixed-price solicitations for services that involve the furnishing of supplies, and argues that the absence of this clause subjects the contractor to unreasonable risk in the event of severe work load fluctuations. The Variation in Quantity clause provides that the government will not accept a variation in the quantity of an item required under the contract except under certain circumstances; in other words, the clause is for the government's protection, not the contractor's. The clause does not, as LBM appears to argue, provide for an adjustment in the contract price in the event that the work performed under the contract substantially exceeds the historical work load figures stated in the IFB. Thus, the absence of the clause from the IFB in fact does not expose LBM to additional risk, and we deny the protest on this ground.

Finally, LBM objects to a clause in the IFB concerning the agency's right to exercise the options under the contract. Section H.15 of the solicitation, entitled "Option to Extend the Term of the Contract-Services," provides in pertinent part:

> "a. The government may extend the term of this contract for a term of one to twelve months by written notice to the contractor within the performance period specified in the schedule; provided, that the government shall give the contractor a preliminary written notice of its intent to extend before the contract expires."

LBM contends that the clause is ambiguous because it does not require that the government provide notice of its intent to extend the contract at any particular time. In this regard, the clause varies the language of FAR clause § 52.217-9, Option to Extend the Term of the Contract, which provides that the government shall give the contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. LBM argues that the absence of the 60-day provision allows the agency to wait until the last minute before exercising its unilateral right to extend the contract, thus placing unreasonable risk upon the contractor.

The determination of the government's minimum needs and the best method of accommodating them is primarily the responsibility of the contracting agency; accordingly, our Office will not question an agency's determination in these matters unless it has no reasonable basis. Bean Dredging Corp., B-239952, supra.

We conclude from our review of the record that the agency's decision to delete the 60-day limitation from the preliminary notice provision was reasonably based. NAVFAC notes that FAR § 17.208(g), which prescribes inclusion of the Option to Extend clause, provides that the agency "shall insert a clause substantially the same as" the standard clause. NAVFAC explains that it previously had used the standard FAR clause in its solicitations. However, due to unavailability of funds or other unforeseen problems, the agency often was unable to notify the contractor of its intent to exercise an option 60 days before expiration of the contract, and consequently lost the unilateral right to exercise the option. Accordingly, the agency revised the clause, deleting the reference to a specific time limit. In a letter implementing the new clause, NAVFAC instructed its contracting officers to exercise their discretion in determining how much preliminary notice to give contractors. NAVFAC points out that FAR § 1.602-2(b) requires contracting officers to treat contractors fairly and equitably, and explains that the contracting officer's

decision of how much preliminary notice is necessary in a particular case therefore would take into account such factors as the type of contract, the items being procured, the mobilization or demobilization effort required, and the availability of funds.

There are several clauses included in the regulations available for use when agencies need an option to extend contract performance. The clause set forth at FAR § 52.217-8 provides that the government may extend contract services for up to 6 months without any specified preliminary notice to the contractor.1/ FAR § 52.217-9 contains an option clause to extend contract services with three additional provisions: preliminary notice must be given of an intent to extend the contract by 60 days before contract expiration, the option clause will be included in the extended contract, and the total duration of the contract as extended is to be specified. FAR § 17.208(g) states that agencies should use a clause "substantially the same as" this latter clause (FAR § 52.217-9):

> "when the inclusion of an option is appropriate . . . and it is necessary to include in the contract a requirement that the Government shall give the contractor a preliminary written notice of its intent to extend the contract, a stipulation that an extension of the contract includes an extension of the option, and/or a specified limitation on the total duration of the contract."

The NAVFAC clause at issue contains each of the provisions in the FAR § 52.217-9 clause except the preliminary notice provision. Since the clause is provided for agency use when it is "necessary" to include a preliminary notice requirement and/or other specified additions to the basic option clause to extend contract services (in FAR § 52.217-8), we believe that an agency need only use those portions of the clause that it reasonably determines necessary, or at least provisions "substantially the same as" the necessary portions. Also, we are aware of no other reason a contract may not provide a preliminary notice period to be determined at the discretion of the contracting officer. Cf. Moore's Cafeteria Servs., Inc., Armed Services Board of Contract Appeals No. 28,441, June 17, 1985, reprinted in 85-3 B.C.A. ¶ 18,187 (CCH 1985)

1/ Other clauses, those for increased quantities set forth in FAR §§ 52.217-6 and 52.217-7, have blanks for agencies to insert the period of time in which the option may be exercised and no provisions for preliminary notice.

(parties may agree upon time period within which to exercise option).

The NAVFAC provision, as discussed above, does require the contracting officer to give the contractor preliminary notice of the agency's intent to extend the contract, subject to the FAR requirement for fair and equitable treatment of contractors. To the extent that the NAVFAC provision imposes some risk on the contractor by not stating a specific time for providing a preliminary notice, we do not believe that the risk is so high that it cannot be alleviated by building such considerations into bid prices. Neil Gardis & Assocs., Inc., B-238672, June 25, 1990, 90-1 CPD ¶ 590. Thus, we do not find the NAVFAC provision to be an unreasonable approach to satisfying the agency's need for flexibility with respect to possible extension of contemplated contract.

The protest is denied.

for James F. Hinchman
General Counsel