



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: DGS Contract Services, Inc.

File: B-261879

Date: October 31, 1995

Richard D. Lieberman, Esq., Sullivan & Worcester, for the protester.
Sharon K. Gipson, Esq., Department of the Treasury, for the agency.
M. Penny Ahearn, Esq., and David A. Ashen, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Protest that firm, fixed-price contract format imposes undue risk on the contractor is denied where protester has not shown that choice of format was unreasonable; the majority of the required contract effort consisted of requirements for services of certain quantities and delivery times, and the solicitation provided a mechanism for adjusting the contract price to reflect any changes in actual requirements.
2. Solicitation provision for single price to be used in pricing both permanent increases and decreases in guard service hours of up to 25 percent is not improper; the provision affects all potential offerors equally and offerors are expected to determine their prices taking into consideration amount of risk involved.

DECISION

DGS Contract Services, Inc. protests the terms of request for proposals (RFP) No. IRS-95-SE-17, issued by the Department of Treasury, Internal Revenue Service (IRS), for security guard services. The protester objects to the contract format and argues that the solicitation's method of pricing changed requirements imposes undue risk on the contractor.

We deny the protest.

BACKGROUND

The solicitation provides that award will be made on the basis of the best value. The RFP requests firm, fixed prices for basic services, additional services and changed requirements for a base and 4 option years. (A total contract price is to be calculated from the sum of the extended offered prices for all contract periods.) For basic services, the solicitation furnishes an estimate of the overall yearly productive (*i.e.*, guard) staff-hour requirements (26,684.57 hours), as well as

estimates of guard post hours for designated locations and other additional required supervisory and management hours; the solicitation requests monthly and 12-month extended prices. For the additional services, described as temporary increased guard services ordered for a period of less than 30 consecutive days, the RFP requests per staff-hour and 2,000-hour (estimated quantity) extended prices.

The RFP also includes provisions for changed requirements, which are described as permanent increased or decreased guard services ordered for a period of more than 30 consecutive days. The solicitation explains that "[t]he government anticipates that during the term of the contract, guard post orders may be amended, modified, or reissued on a permanent basis." The RFP requests per staff-hour and 6,000-hour (estimated quantity) extended prices for the changed requirements, and provides that in the event of up to a 25-percent increase or decrease in the contract's total productive staff-hour requirements, the contract price for the basic services shall be adjusted "by using the applicable hourly rate set forth in the price schedule for changed requirements. . . ."

Although DGS's protest was filed prior to the closing time for receipt of proposals, the agency did not delay the closing. The agency reports that it received multiple offers.

CONTRACT FORMAT

DGS objects to use of a firm, fixed-price contract format on the basis that, given the potential for up to a 25-percent reduction in contract productive hours, the agency has improperly shifted the risk of uncertain requirements to the offeror. The protester asserts that an indefinite delivery requirements contract would more appropriately reflect the agency's minimum needs, or that changed requirements could be better handled during contract administration by termination for the convenience of the government.¹

The IRS reports that it based its selection of a firm, fixed-price contract format on its determination that: (1) adequate competition and fair and reasonable prices were received on the agency's prior security guard services contracts (which did not, however, contain the specific changed requirements provisions used here); and (2) the small number of changes made to the fixed annual productive staff-hour

¹The protester also suggests that the agency's needs could be met by eliminating the RFP provision for possible reductions in requirements and instead requesting offers for a base requirement of 20,013.4 hours, plus options for increases in requirements. We see nothing improper, however, in the agency's soliciting offers for a base quantity of 26,684.57 hours, since this was its best estimate of its likely requirement for guard services.

requirements specified in the prior contracts did not warrant the use of an indefinite delivery contract, nor the costs associated with administering it (such as issuance of separate delivery orders and tracking hours and contract billings). In this latter regard, the agency explains that its rationale for the changed requirements provision was to allow the government to unilaterally change productive hours and adjust contract pricing based on the awarded contract price for changed requirements, without the administrative cost and burden of renegotiating contract pricing.

The contracting agency has the primary responsibility for determining its minimum needs and the method of accommodating them, including the choice of the appropriate contracting format. Jewett-Cameron Lumber Corp. et al., B-229582 et al., Mar. 15, 1988, 88-1 CPD ¶ 265. We will not question the agency's choice of contract format absent clear evidence that its decision is arbitrary or unreasonable, id., or in violation of statute or regulation. A mere difference of opinion between the protester and the agency concerning which format will best suit the agency does not establish that the agency's choice was improper. Id.

IRS's decision to use a firm, fixed-price contract format was not unreasonable or in violation of statute or regulation. While the Federal Acquisition Regulation (FAR) provides that an indefinite delivery requirements contract may be used when the government anticipates recurring requirements, but cannot predetermine the precise quantities of supplies or services needed, FAR § 16.503(b), it also provides that a firm, fixed-price contract is suitable for acquiring supplies or services on the basis of reasonably definite specifications where the contracting officer can establish fair and reasonable prices, such as when there is adequate price competition. FAR § 16.202-2. (Indeed, where the risks involved are minimal or can be predicted with an acceptable degree of certainty, FAR § 16.103(b) generally requires the use of a firm, fixed-price contract.) While the contemplated contract effort here involves some degree of uncertainty as to the extent of the guard services that will be needed, the uncertainties appear no greater than those which exist in other circumstances where the agency's requirements must be expressed in terms of an estimate rather than a fixed amount. The uncertainty here is mitigated by the fact that the majority of the required effort consists of requirements for services of certain quantities and delivery times; the solicitation provides a mechanism for adjusting the contract price to reflect changes in requirements; and there is no indication in the record that any uncertainty cannot be accounted for in offerors' pricing.

The mere fact that the solicitation provides for the possibility of limited staff-hour reductions and as a result may impose risk on offerors does not make it improper. See Jewett-Cameron Lumber Corp. et al., supra. It is within the ambit of an agency's administrative discretion to solicit a proposed contract imposing maximum risk upon the contractor and minimum administrative burdens upon the

government. Id. That is precisely what the IRS has done here, and there is no basis for finding it improper.

CHANGED REQUIREMENTS RATE

DGS objects to the RFP provision for pricing permanent reductions in guard services hours at the same rate as increases; given the potential for up to a 25-percent reduction in quantity, DGS argues this imposes an unreasonable burden on offerors. In this regard, DGS argues, that "it is more costly (on a per hour basis) for offerors to decrease permanent hours than for an offeror to increase permanent hours." This presumably is because reducing the number of units of work performed generally may be expected to result in an increase in the fixed overhead costs incurred per unit of work performed. See Old Atlantic Servs., Inc., ASBCA No. 18108, Feb. 21, 1974, 74-1 BCA ¶ 10,494.

The provision is legally unobjectionable. While there may be some risk that DGS will incur increased unit costs as a result of decreases in requirements, this would seem to be a contingency that all offerors can readily account for in preparing their proposals; DGS has not shown why offerors could not account for this risk and, again, the mere presence of risk in a solicitation does not render the solicitation legally flawed. We note that we previously have found unobjectionable a solicitation applying a single unit price (rather than an equitable adjustment) to quantify increases of up to 30 percent and decreases of as much as 25 percent. See AMERICORP, Inc., B-222119, May 12, 1986, 86-1 CPD ¶ 451. The pricing provision here affects all potential offerors equally; the fact that offerors may respond to the risk differently in calculating their prices is a matter of business judgment that does not preclude a fair competition.²

The protest is denied.

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²DGS contends that the solicitation was also defective because it failed to specify the relative importance of the technical and cost factors in the evaluation. However, as DGS itself apparently recognized when it protested (by citing the relevant caselaw), it is well established that where an RFP does not explicitly indicate the relevant weights of price and technical considerations, they are to be accorded weight and importance in the evaluation. See Meridian Corp., B-246330.3, July 19, 1993, 93-2 CPD ¶ 29.