



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Department of Agriculture--Reconsideration

File: B-296435.12

Date: November 3, 2005

Byron W. Waters, Esq., Department of Agriculture, for the requester.
John Lukjanowicz, Esq., Oles Morrison Rinker & Baker LLP, for the protester.
John L. Formica, Esq., and Jerold D. Cohen, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Statutory and regulatory mandate that an agency consider cost to the government in evaluating proposals applies to both requirements and indefinite-delivery/indefinite-quantity contracts; analysis addressing difficulty of doing that necessarily applies to both types of contracts, since in both the exact quantity to be delivered is unknown at contract award.

DECISION

The Department of Agriculture asks that we reconsider our decision in R&G Food Service, Inc., d/b/a Port-A-Pit Catering, B-296435.4, B-296435.9, Sept. 15, 2005, 2005 CPD ¶ ___, sustaining Port-A-Pit's protest of its nonselection for contract award under request for proposals (RFP) No. 49-05-07, issued by the National Interagency Fire Center, Forest Service, for mobile food services in various locations.

We deny the reconsideration request.

The RFP provided for multiple awards of fixed-price requirements contracts for a base year and four 1-year options. The successful contractors under the RFP will be required to provide hot and cold meals and various supplemental items at 27 field locations (referred to as designated dispatch points, or DDPs) during wildland fires and other types of activities throughout the contiguous western United States and Alaska by means of mobile food service units (MFSU). The RFP permitted offerors to propose for multiple DDPs, and provided for the award of one contract for each location.

The solicitation required offerors to submit unit prices for meal services (e.g., breakfast, sack lunch, dinner), MFSU mileage, and handwashing units, which would

form the basis of a requirements-type contract, as well as unit prices for additional refrigeration storage space, additional tents and seating, and supplemental food and beverage items, which would form the basis of a blanket purchase agreement. The solicitation did not provide estimated quantities for any of these items, including the meal services, MFSU mileage, and handwashing units, and as such did not request extended prices or total prices for the services to be provided.

The solicitation identified a number of technical evaluation factors, and informed offerors that the technical factors, when combined, were approximately equal in importance to price. Contract awards were to be made to the offerors submitting the proposals determined to meet the minimum requirements of the solicitation and to be the most advantageous to the government. Port-A-Pit received no awards because of the agency's determination that the firm's prices for MFSU mileage were not fair and reasonable.

Port-A-Pit protested that the agency's determination was improperly based upon only one component of its proposed price (i.e., its mileage price). The firm argued that given the relative proportions of the items likely to be required under the contracts (meals, mileage, handwashing units), an offer with a higher MFSU mileage price could nevertheless represent a lower overall cost to the government. Port-A-Pit further contended that the Forest Service's price evaluation was irrational because it only considered offerors' unit prices.

In sustaining the protest, we found the price evaluation fundamentally flawed because, in considering only the unit prices proposed, it did not reflect the actual cost to the government of the offerors' competing proposals.¹ Specifically, our examination of the record showed that meals were the primary cost for the services to be provided under the contract. As an example, we noted that under a predecessor contract, Port-A-Pit provided a total of [DELETED] meals and drove a total of [DELETED] miles in response to a fire in Ash, Arizona. Using the unit prices proposed by Port-A-Pit here, meal costs would have been approximately \$39,644, while mileage costs, in comparison, would have been approximately \$17,100.² We concluded that because of the substantial difference in the relative costs for meals and mileage, the agency's price evaluation, to the extent that it considered only the offerors' unit prices, failed to reflect the likely actual cost to the government of the offerors' approaches. We stated (at 7):

¹ Port-A-Pit also challenged the evaluation of other offerors' proposals, but upon review there was no basis for our Office to find such evaluations unreasonable or otherwise objectionable.

² We cited as another example a fire in Montana where meal costs to the government would have been approximately \$69,285 while mileage costs would have been approximately \$35,600.

In light of the fact that the Forest Service's price evaluation was not meaningful—because, as explained above, there is no necessary relationship between an offeror's unit prices and the likely actual cost of the contract to the government—we find the rejection of Port-A-Pit's price proposal to be unreasonable.

We recognize that the evaluation of price in the award of an indefinite-quantity contract can be challenging. Nonetheless, in our view, the way in which the agency evaluated prices here (i.e., examining only unit prices without also considering the estimated quantities of each item) does not satisfy the legal requirement to consider cost to the government.

We further stated that there appeared to be no reason why the Forest Service could not develop estimates for each of the items to be considered in the contract award determinations, since the agency had historical data on both the meals and MFSU mileage billed under prior contracts. We concluded that

[w]ithout using such estimates, the Forest Service's evaluation here failed to account for the difference in the relative proportions of the cost for meals and mileage in the total cost to the government, and, as a result, there was no direct relationship between the evaluated prices of a particular offeror and the actual price of performance by that offeror.

We recommended that the Forest Service reevaluate offerors' prices and make a new source selection decision for all locations for which Port-A-Pit submitted a proposal, employing a price evaluation method that would allow comparison of the relative cost to the government of the offerors' competing proposals.

In requesting reconsideration, Agriculture argues that the decision “was premised on the mistaken understanding that the contracts to be awarded under [the solicitation] were to be indefinite delivery/indefinite quantity contracts (‘ID/IQ’) when in fact the Solicitation clearly provided for requirements contracts.” Request for Reconsideration at 2. In support of this assertion, the agency points to the above-quoted sentence in the decision in which we acknowledged that “the evaluation of price in the award of an indefinite-quantity contract can be challenging.” The agency also argues that while certain of the decisions cited by our Office in determining that the agency had erred in its price evaluation “support the assertion that it is unreasonable to evaluate only unit prices in a solicitation for an ID/IQ contract with multiple unit prices because the result does not adequately consider total cost to the government . . . [t]hese decisions do not support the same assertion as to a requirements contract which does not contain a minimum quantity to purchase” Request for Reconsideration at 6.

We fully recognized, as noted four times in the decision, that a requirements contract was at issue in Port-A-Pit's protest, so that Agriculture is incorrect in alleging that our decision was premised on the mistaken understanding that the contracts to be awarded were ID/IQ contracts. In any event, the statutory and regulatory mandate that an agency consider cost to the government in evaluating proposals does not exempt proposals for either requirements or ID/IQ contracts. See 41 U.S.C. § 253a(b)(1)(A), (c)(1)(B) (2000); Federal Acquisition Regulation (FAR) § 15.304(c)(1). The main distinction between those two types of what FAR § 16.501-2 labels "indefinite-delivery" contracts is that in one instance the government commits to purchase from the contractor all of an uncertain quantity of goods or services (a requirements contract), while in the other the government commits to purchase from the contractor at least a stated minimum of an uncertain quantity of goods or services (an ID/IQ contract). The analysis in our decision, focused on the legal requirement to evaluate costs to the government, and the difficulty of doing that, necessarily applies to both, since in either case the exact quantity to be delivered is unknown at contract award.³

With regard to our recommendation, Agriculture complains that "requiring the Forest Service to supply more precise estimated quantities for meals and mileage in the Solicitation" "would have the consequence of increasing the risk to the Forest Service for a later contract claim for breach of contract should an unusually low activity fire season occur." Request for Reconsideration at 7; see Rumsfeld v. Applied Cos., Inc., 325 F.3rd 1328 (Fed. Cir. 2003) (inadequate or faulty estimates in a solicitation for a requirements contract can form the basis of a claim). Agriculture notes that the accuracy of any estimates, despite being prepared in good faith and with due diligence and care, may be compromised by the vagaries of whether wildland fires occur.⁴

This aspect of the request for reconsideration mischaracterizes our recommendation. We did not recommend that the Forest Service "supply more precise estimated quantities for meals and mileage in the Solicitation." Rather, we recommended that the agency "reevaluate offerors' prices and make a new source

³ The applicability of our analysis to requirements contracts can be readily demonstrated in our caselaw. We have long stated that where a solicitation provides for the award of a requirements contract, an agency generally will be unable to determine which vendor's response will result in the lowest overall cost of performance absent the development of reasonably reliable quantity estimates. Beldon Roofing & Remodeling Co., B-277651, Nov. 7, 1997, 97-2 CPD ¶ 131 at 7; Respiratory & Convalescent Specialties Inc., B-255176, Feb. 14, 1994, 94-1 CPD ¶ 101 at 4.

⁴ The agency suggests that any estimates the Forest Service may prepare would be "wholly fictitious" or "arbitrary." Request for Reconsideration at 9.

selection decision for all DDP locations for which Port-A-Pit submitted a proposal, employing a price evaluation method that allows comparison of the relative cost to the government of the offerors' competing proposals." Decision at 8. As explained below, this distinction is important.

Our recommendation was crafted so as to leave to the Forest Service the determination of the most appropriate method to evaluate the price proposals for calculating the expected overall costs of performance, and to disturb the acquisition as little as possible. As such, it is consistent with other decisions of our Office recommending a reevaluation of proposals, where a contract for an uncertain quantity is at issue, using a price evaluation methodology that considers overall costs to the government, without amending the subject solicitation or seeking revised proposals.⁵ See, e.g., Health Servs. Int'l, Inc.; Apex Envtl., Inc., B-247433, B-247433.2, June 5, 1992, 92-1 CPD ¶ 493 at 5-6. Moreover, in determining the appropriate recommendation in this case, we considered the fact that no offeror had complained or otherwise argued that the solicitation as issued (without estimated quantities) precluded the submission of intelligent and reasonable proposals, and that any such complaint raised during the pendency of the protest would have been untimely. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2005) (a protest alleging improprieties in a solicitation that are apparent prior to the time set for receipt of initial proposals shall be filed before that time); Neil R. Gross & Co., Inc., B-275066, Jan. 17, 1997, 97-1 CPD ¶ 30 at 4.

With regard to the asserted difficulty in developing reasonable estimates of meals, MFSU mileage, and handwashing units for price evaluation purposes, although the development and use of such estimates is generally both appropriate and consistent with the requirement set forth in FAR § 16.503(a)(1) that solicitations providing for award of requirements contracts include "a realistic estimated total quantity," we have found unobjectionable alternative methods of price evaluation, such as an agency's use of notional or hypothetical work orders, where the agency has demonstrated that the development of reasonable estimates is not possible. Aalco Forwarding, Inc. et al., B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 at 10-13; High-Point Schaer, B-242616, B-242616.2, May 28, 1991, 91-1 CPD ¶ 509 at 6-8. Our decision that we would not expressly recommend that the Forest Service develop estimates for price evaluation purposes--and instead to leave it to the contracting agency to determine the most appropriate method of price evaluation--reflected our recognition of the difficulty in developing estimates in the circumstances of this acquisition. Nonetheless, as noted in the decision, the Forest Service does possess

⁵ Our Office has also recommended that an agency amend a solicitation that provides for the award of such a contract to include estimated quantities in order to allow for the preparation of reasonable and intelligent bids or proposals. See, e.g., Beldon Roofing & Remodeling Co., *supra*, at 7; Respiratory & Convalescent Specialties Inc., *supra*, at 4.

historical data on both the meals and mileage billed under prior contracts for these items, and did in fact consider the relative significance of offerors' mileage costs by examining the total number of miles incurred and billed by a selected MFSU during a prior fire season.

The request for reconsideration is denied.

Anthony H. Gamboa
General Counsel