Comptroller General
of the United States

Washington, D.C. 20548

559296

Decision

Matter of: Integrity Management International, Inc.

File: B-260595; B-260595.2

Date: June 27, 1995

John W. Lipscomb, Integrity Management International, Inc., and Anna M. Rossi, Esq., Rogers, Joseph, O'Donnell & Quinn, for the protester.
Theodore M. Bailey, Esq., for Speedy Food Service, Inc., an interested party.
P.E. Zanfagna, George N. Brezna, Esq., Theresa M. Young, Esq., and Richard J. Huber, Esq., Department of the Navy, United States Marine Corps, for the agency.
Glenn G. Wolcott, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Maximum payment/deduction schedule in solicitation which provides for deduction of various percentages of the total contract price for defective performance of required services does not constitute improper penalty where the amounts to be deducted are based on the agency's estimate of the percentage of total labor that will be required to perform each required service.

2. Agency may reasonably require one level of performance for a particular service where the agency is responsible for the overall operation of a mess hall, and a slightly different level of performance for a similar service where the contractor is responsible for overall operation of the mess hall.

3. Solicitation is not ambiguous with respect to the definition of defective performance where solicitation contains detailed performance requirements and defines defective performance as failure to comply with those requirements.

4. Solicitation may reasonably establish varying lots sizes to be used for purposes of inspection, depending on the type of service and the frequency with which it is performed.

DECISION

Integrity Management International, Inc. (IMI) protests the terms of invitation for bids (IFB) No. M00681-95-B-0003, issued by the United States Marine Corps, for services associated with the operation of various mess halls at Camp Pendleton, California. IMI protests that: the deduction schedule for defective performance constitutes a penalty; the acceptable performance levels have been established arbitrarily; defective performance is inadequately defined; and there is insufficient information regarding agency inspections of contractor performance.

We deny the protest.

BACKGROUND

On December 27, 1994, the Marine Corps issued this IFB, seeking bids for services that IMI is currently performing.[1] The solicitation was divided into two parts: part I sought bids to provide full food service at a single mess hall; part II sought bids to provide mess attendant services at eight other mess halls. The solicitation contained a "Performance Requirement Summary" (PRS) which summarized the requirements contained in the statement of work (SOW).[2] The PRS grouped the primary tasks contained in the SOW into 14 services under part I and 11 services under part II.[3] For each required service, the PRS listed

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[1]IMI is the incumbent contractor for the services being solicited and has been performing those services since 1989.

[2]The list of contract requirements summarized in the PRS reflected the services which the agency considered necessary for acceptable contract performance. For each required service, the PRS identified the specific SOW sections which contained the more detailed tasking requirements that were grouped under that particular required service.

[3]The PRS listed the following required services under part I: menu planning, food preparation, food serving, provide self service items, meals away from mess hall, meal verification recorder/cashier service, administration requirements, dining area preparation, floor cleaning, dishwashing, equipment cleaning, pot and pan cleaning, trash and garbage service, and restroom/head and handwashing station service. The PRS listed the following required services under part II: receiving and storage, food serving, service of self-service areas, cashier/headcount service, dining area preparation, floor cleaning,

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an "acceptable quality level" (AQL), and provided that contract performance would be monitored on the basis of random inspections.[4] Finally, the PRS established a "maximum payment" for each of the required services; the maximum payment applicable to each service was expressed as a percentage of the total contract price for part I or part II, respectively. If a contractor's performance of a required service was determined to be below acceptable levels, a portion of the maximum payment applicable to that service would be deducted.

IMI's protest challenges the validity of the maximum payment/deduction schedule and acceptable quality levels; the definition of defective performance; and the basis for performing inspections of contract performance. In short, IMI challenges the propriety of the solicitation provisions designed to assess whether the contractor's performance is considered acceptable or defective and to permit appropriate reductions in payments under the contract when warranted.

DISCUSSION

Uniformity of Maximum Payment/Deduction Schedules and Acceptable Quality Levels

IMI first protests that there is no relationship between the maximum payment/deduction schedule and the costs to the government caused by defective performance, asserting that the maximum payment/deduction schedule constitutes an unallowable penalty, not a legitimate liquidated damages clause. To support this assertion, IMI notes that the description of some of the required services under part I appears essentially the same as some of the services in part II, but the maximum payment percentages applicable to these similar services are not uniform in parts I and II.[5] Based

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[3](...continued)
dishwashing, equipment cleaning, pot and pan cleaning, trash and garbage service, and restroom/head and handwashing service.

[4]The definitions section of the IFB defined "acceptable quality level" as "the maximum percent defective (or the number of defects per hundred units) that, for purposes of sampling inspection, can be considered satisfactory as a process average."

[5]For example, both parts I and II listed meal recorder/cashier services, dining area preparation, floor cleaning, dishwashing, equipment cleaning, pot and pan cleaning, trash and garbage service, and restroom/head and
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on the lack of uniformity in the maximum payment/deduction schedule for apparently similar services, IMI asserts that there is no relationship between the amount of deductions established for each required service and the damage to the government caused by defective performance.

Similarly, IMI protests that the AQLs established for each required service are arbitrary. Echoing the arguments raised above, IMI asserts that because the AQL levels are not uniform for similar required services in parts I and II, the AQLs are necessarily arbitrary.[6]

The agency first points out that although some of the required services carry the same label under both parts of the contract, the actual tasks and subtasks included under the labels are not identical.[7] The agency further explains that the maximum payment percentages applicable to the required services in each part of the contract are based on the agency's estimation of the amount of labor that will be required to perform each service in comparison to the total labor to be expended for that part of the contract.[8] Because the total labor necessary for performing parts I and II of the contract differ substantially, the percentage of labor assigned to each required service within parts I and II necessarily differ.

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[5](...continued)
handwashing station service as required services. In part I, the maximum payments applicable to these services were 10 percent, 7 percent, 8 percent, 8 percent, 7 percent, 5 percent, 4 percent, and 3 percent, respectively; in part II, the maximum payments were 8 percent, 13 percent, 13 percent, 12 percent, 7 percent, 12 percent, 3 percent, and 3 percent, respectively.

[6]With regard to the similar required services listed in footnote 5 above, part I established AQLs of 2.5 percent, 10 percent, 10 percent, 6.5 percent, 10 percent, 6.5 percent, 10 percent, and 10 percent, respectively; part II established AQLs of .40 percent, 6.5 percent, 6.5 percent, 6.5 percent, 6.5 percent, 6.5 percent, 6.5 percent, and 6.5 percent, respectively.

[7]We have reviewed the solicitation provisions in this regard; while many of the tasks and subtasks have the same or similar labels, they are not identical.

[8]Thus, the sum of the maximum payment percentages for each of the parts totals 100 percent.

Finally, the agency points out that the environment in which the two parts of the contract will be performed is not the same. Under part I, the contractor will be responsible for the entire mess hall operation; under part II, the contractor provides only mess attendant services. Thus, for the services performed under part II, agency personnel will be on-site performing associated tasks in conjunction with the contractor, and the agency ultimately will be held responsible for the manner in which the mess hall is operated. The agency explains that it has a more lenient performance standard for part I because agency personnel will not be available to assist the contractor's quality control efforts.

In short, the agency asserts that the required services which carry the same label in parts I and II of the contract actually require differing tasks and subtasks; the total effort to be expended under parts I and II is different; and the reasonable expectations of the agency with regard to the quality of performance differs between parts I and II. Accordingly, the agency maintains there is a reasonable basis for the nonuniformity between parts I and II with regard to both the maximum payment/deduction schedule and the AQLs. We agree.

Federal Acquisition Regulation (FAR) § 12.202 specifically authorizes the use of liquidated damages provisions where the government reasonably expects to suffer damages if the contract is improperly performed and the extent of such damages would be difficult to ascertain. The rate of liquidated damages imposed must be reasonable and bear some relationship to the losses contemplated. FAR § 12.202(b). In considering the liquidated damages to be assessed, agencies may properly consider losses beyond the reduced value of the services performed, since the impact of deficient performance may extend beyond the mere loss of the services to be provided. See H H & K Builders, B-237885, Mar. 30, 1990, 90-1 CPD ¶ 349; W.M.P Sec. Serv., Co., B-238542, June 13, 1990, 90-1 CPD ¶ 553. Where a protester contends that a liquidated damages provision is improper, the protester must show that there is no possible relationship between the liquidated damages to be assessed and the reasonable contemplated losses. R Squared Scan Sys., Inc., B-249917 et al., Dec. 23, 1992, 92-2 CPD ¶ 437.

Here, IMI has not demonstrated the absence of any relationship between the liquidated damages to be assessed and the impact on the government. As the agency notes, the required services that carry similar summary labels in parts I and II actually have differing task requirements. Further, since the scope of the tasks required under parts I

and II of the contract differ, the percentages assigned to individual services based on their relationship to the total requirements must necessarily differ.

IMI does not dispute the agency's assertion that the maximum payment/deduction schedules are based on the agency's estimate of the labor required for each required service in comparison to the total effort required for each part of the contract. Rather, IMI merely asserts that a deduction schedule established on this basis is inappropriate since it is not directly related to the government's damages. However, where amounts deducted for defective performance reflect the relationship of the price for that particular requirement to the overall price of the contract, the deduction formula constitutes a reasonable measure of damages. C&H Management, Inc., B-221316.2, Sept. 9, 1986, 86-2 CPD ¶ 275; see also Starlite Servs., Inc., B-219418, Oct. 15, 1985, 85-2 CPD ¶ 410 (government's deduction schedule need not establish a measure of damages for each divisible task or be so detailed as to eliminate all performance risk). On the record here, we find no merit in IMI's assertion that the deduction schedule constitutes an improper penalty.

Similarly, we find without merit IMI's protest that the AQLs are arbitrary because they are not uniform for the similar requirements in parts I and II of the solicitation. As discussed above, the actual tasks to be performed pursuant to the similarly labeled services are not identical in parts I and II of the solicitation. Further, we find unobjectionable the agency's explanation that it is willing to accept a slightly lower level of contract performance with regard to part I of the contract because it is the contractor, not the agency, that is responsible for operating the overall operation of the mess hall.

The determination of an agency's minimum needs and the best method of accommodating those needs are primarily matters within the agency's discretion. Canon U.S.A., Inc., B-232262, Nov. 30, 1988, 88-2 CPD ¶ 538. Where, as here, a protester challenges a solicitation's performance standards designed to meet an agency's needs, we will not question the requirements unless the record clearly shows they lack a reasonable basis. Dynateria, Inc., B-222773, Aug. 5, 1986, 86-2 CPD ¶ 157.

As discussed above, the agency has provided a reasonable explanation regarding the differing AQLs. IMI has not shown that any particular AQL is improper; rather, it simply asserts that the standards should be identical where there are similar requirements under parts I and II of the solicitation. In view of the agency's explanation for the differing AQL levels, the record provides no basis to find

them unreasonable. Accordingly, this portion of IMI's protest is denied.

DEFINITION OF DEFECTIVE PERFORMANCE

IMI next protests that the solicitation is ambiguous regarding the level of service that will be considered defective under each of the required services. IMI complains that the IFB fails to identify in precise detail the type of performance that will be considered defective for each of the required services.

The definitions section of the IFB unambiguously defines defective performance as "nonconformance with specified requirements." Our Office has held that offerors are reasonably on notice regarding what constitutes defective performance where, as here, the solicitation equates defective performance with tasks that are not performed in accordance with the specifications or within the scheduled work shift. C&H Management, Inc., supra. Here, section C of the solicitation contains more than 90 pages of detailed description regarding the particular requirements with which offerors must comply. On this record, we find no merit in IMI's assertion that the IFB is ambiguous regarding the type of performance that will be considered defective.

Inspections

Finally, IMI protests that the solicitation fails to disclose when inspections will occur or adequately advise offerors as to the lot size which will be subject to inspections. IMI complains that absent such specific information, offerors are unable to accurately assess the risks associated with contract performance.

Agencies may properly rely on random sampling as a method of monitoring contract performance since it is clearly unreasonable to expect an agency to inspect all units of performance 100 percent of the time. C&H Management, Inc., supra. To the extent IMI is protesting that it believes the agency will perform the contract monitoring process in an unfair manner, the protest raises matters of contract administration which are not for consideration in the context of a bid protest. See, e.g., United Food Servs., Inc., B-215538, Oct. 23, 1984, 84-2 CPD ¶ 450.

Regarding lot size, the IFB initially provided that the lot size would be the number of operational days per month at the facility or facilities being inspected. IMI's first

protest challenged reliance on operational days as the lot size, stating:

> "Under this scheme, all RSs [required services] to be performed in an operational day (i.e. all RSs) would be sampled . . . . Although a task may be successfully completed when initially performed, over the passage of time the state of the initial performance deteriorates from an acceptable performance to a deficient one."

In response, the agency issued IFB amendment No. 10, which altered the lot size that would be subject to inspection, stating:

> "For purposes of inspecting particular tasks as set forth in the PRS table, the [agency's] Quality Assurance Evaluator shall determine an appropriate lot, sample, and unit of measure prior to conducting each inspection. For certain tasks . . . such as those performed multiple times within the operational day . . . the sample may be a certain number of minutes out of the total number of minutes within the serving period."

Notwithstanding amendment No. 10, IMI continues to assert that the solicitation is unacceptably vague because it fails to define what lot size will be inspected in all instances. We disagree.

The establishment of inspection procedures to ensure that services performed will meet the government's needs is a matter of specification preparation which is primarily the responsibility of the contracting agency. Kleen-Rite Corp., B-212743, Jan. 16, 1984, 84-1 CPD ¶ 73. The mere presence of risk in a solicitation does not make a solicitation improper, since bidders are expected to exercise business judgment and to take risk into account when developing their bids. Sunrise Maintenance Sys., B-219763.2, Nov. 26, 1985, 85-2 CPD ¶ 603.

Here, the IFB reasonably advises offerors that contract performance will be monitored through random inspections, and further provides that the agency will rely on various lot sizes for sampling purposes, depending on the nature of the task being inspected. We find nothing improper in the IFB provisions in this regard; rather, the agency appears to have done everything reasonably possible to address IMI's asserted concern that inspections will be performed in an inequitable manner. To the extent IMI is suggesting that

the agency will implement its inspection procedures in an inequitable manner, IMI again raises an issue of contract administration which is not for consideration. United Food Servs., Inc., supra.

The protest is denied.

\s\ Ronald Berger
for Robert P. Murphy
General Counsel