



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Atlantic Coast Contracting, Inc.

File: B-291893

Date: April 24, 2003

Jennifer L. Bowman, Esq., Ward and Smith, for the protester.
Philip E. Adams, Esq., Naval Supply Systems Command, for the agency.
Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that requirement in solicitation for a food services procurement for clean, available dinnerware and utensils with zero deviation unduly restricts competition is denied where the protester fails to refute agency's position that these performance standards are necessary to protect the health of its personnel.

DECISION

Atlantic Coast Contracting, Inc. protests the terms of request for proposals (RFP) No. N68836-03-R-0017, issued by the Department of the Navy for full food services at three galleys at the United States Naval Base Guantanamo Bay, Cuba. Atlantic, the incumbent contractor for the services, contends that certain requirements in the RFP are unreasonable and unduly restrictive of competition.

We deny the protest.

The RFP contemplates the award of a fixed-price contract (with incentive award fee terms) for a 6-month base period and 3 option years to the offeror whose proposal is considered the most advantageous to the government, considering technical, past performance, and price factors, where technical and past performance factors combined are more important than price.

The RFP calls for offerors to submit resumes for designated key personnel and requires that the successful offeror assign to the contract those individuals for whom resumes were submitted. Atlantic argues that these provisions effectively require an offeror to hire its proposed key personnel before contract award in order to ensure

their availability for contract performance; according to Atlantic, such hiring without assurance of contract award is not feasible for a small business like itself.

As a preliminary matter, there is no requirement in the RFP that an offeror's key personnel have been hired by the offeror before contract award. To the extent that Atlantic objects to the requirement that the contractor actually use its proposed key personnel for contract performance, the RFP in fact does contemplate substitution of these personnel, albeit under the limited circumstances of the employee's illness, death, or termination of employment. While Atlantic apparently believes that this requirement will be difficult for it to meet, it simply has not shown that the agency's rationale for the requirement--to ensure that the proposed candidates are qualified, and then to ensure that the candidates on whom the evaluation is based in fact are used for contract performance--is unreasonable. Accordingly, we see no basis to object to these provisions in the RFP.

Atlantic next challenges the RFP's provision regarding the evaluation of offerors' past performance. In this regard, the RFP advises offerors as follows:

List Performance Data on your five most recently completed Federal Government contracts (not to exceed three years since completion) for like or similar items under this RFP. (If you do not have five Federal Government contracts, then list state, local, or commercial contracts, in that order, to complete this report.)

RFP at 34. Atlantic argues that this provision is unreasonably restrictive because it favors large businesses, who, according to Atlantic, are more likely than small businesses to have five or more relevant past contracts. We disagree. Atlantic has not shown that the requirement is unduly restrictive of competition, that it unreasonably favors large businesses, or that Atlantic has been prejudiced by the challenged past performance terms. Rather, as Atlantic was told by the agency prior to the closing time,¹ the RFP limits an offeror's discussion of its past performance to

¹ In its initial protest, Atlantic makes a general assertion that the agency failed to make available to all offerors every question submitted before proposals were received, along with the agency's answers. Atlantic's only attempt at supporting this contention, first made in its comments on the agency report, concerns a communication Atlantic had with the contracting officer during which the contracting officer explained that, contrary to Atlantic's apparent interpretation, the RFP did not require an offeror to show that it had recently performed at least five similar contracts. Atlantic has not shown that this allegation is timely raised. The firm clearly knew at the time it filed its initial protest prior to the closing time (and almost 2 months before Atlantic raised the issue with our Office) what information it had received from the agency regarding the RFP's past performance terms, and what information had been distributed to all other offerors in each solicitation amendment; it should have known of any apparent impropriety in this regard prior to
(continued...)

five similar contracts, but it does not require a firm to have completed at least five similar contracts. Thus, any offeror with limited, but relevant, experience could be rated highly under the RFP's terms. Given Atlantic's highly relevant experience as the incumbent contractor for these precise services, we do not see, and Atlantic has not shown, how it was prejudiced in any way by the solicitation's past performance terms. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3 (prejudice is an essential element of a viable protest); see also Statistica, Inc., v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996).

Atlantic also challenges a provision included in the RFP's statement of work regarding a no (or zero) deviation standard related to the availability of clean eating utensils. Atlantic contends that it is unreasonable and unduly restrictive of competition for the agency to set the Maximum Allowable Defect Rate at "zero percent" for the following performance requirement: "dinnerware, utensils and trays are clean and available." RFP, Performance Work Statement § C.5.6.2.A.

The protester argues that the performance standard will result in excessive contract administration, in that a single unclean fork could show defective performance of the contract. Atlantic also generally states that food service industry standards allow less than perfect scores on sanitation requirements. The firm, however, provides no evidence showing any such industry standards governing the cleanliness of eating utensils and dinnerware. The agency, on the other hand, reports that its requirements for clean, available utensils and dinnerware are directly related to the protection of the health of its personnel, and that an effective quality assurance process by the contractor will ensure that the requirements are met.

To the extent the protester argues that administrative costs will be excessive, the agency points out that this is a fixed-price contract and that all offerors are competing on an equal basis to include quality assurance efforts to meet the required performance standards, and that, given the importance of the requirement in terms of human health, the agency is willing to pay the reasonable costs associated with meeting the requirements. As to the protester's concern that failure to meet the standard could result in negative past performance assessments that might adversely affect its competitive position in future procurements, the agency recognizes that such risk exists in the performance of all contracts. The agency reports, however, that at least five offerors have submitted proposals under the RFP and are apparently

(...continued)

the closing time, months before it first raised the matter here. See Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324 at 7. In any event, the information given to Atlantic simply clarified the RFP, and remedied a clear misinterpretation of the RFP by Atlantic; it did not change any requirement. We see no basis to conclude that this was information that was required to be shared with the other offerors.

willing to adopt appropriate quality assurance measures to limit their performance risk in this area.²

A contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition and may include restrictive provisions to the extent necessary to satisfy the agency's needs. Quality Lawn Maint., B-270690.3, June 27, 1996, 96-1 CPD ¶ 289 at 2. Generally, we will not question the agency's determination of its needs unless they are shown to be unreasonable, and with regard to solicitation provisions relating to human health and safety, we have recognized that an agency may properly set its performance requirements so as to achieve not just a reasonable result, but the highest possible reliability and effectiveness. Id. at 3; Atlantic Coast Contracting, Inc., B-270491, B-270590, Mar. 13, 1996, 96-1 CPD ¶ 147 at 3. Specifically, we have recognized that a zero deviation standard for sanitation requirements may be justified to protect human health. Crown Mgmt. Servs., Inc., B-233365.3, Sept. 20, 1989, 89-2 CPD ¶ 249 at 3. The mere fact that a solicitation may impose performance risk on a contractor does not render the solicitation defective, since risk is inherent in most types of contracts; offerors are instead expected to allow for such risk in formulating their proposals. Id.

Our review of the record reveals no persuasive basis, and the protester has not provided one, to conclude that the zero deviation standard for clean, available dinnerware and utensils is improper here. The protester has failed to refute the agency's legitimate need to protect the health and safety of its personnel, which is directly related to avoiding contact with unclean dinnerware and utensils. As the agency points out, although the performance standard will require a strong quality assurance program by the contractor, at least five offerors have submitted proposals, demonstrating a reasonable willingness in the industry to accept the contractor performance risk associated with the requirement. Accordingly, we have no reason to agree with the protester's unsupported allegations that the performance requirement challenged here exceeds the agency's needs or is unduly restrictive of competition.³

² Although the protester also generally challenges the solicitation's zero deviation standard for maintaining required temperature ranges for food items, arguing that the RFP fails to allow temperature fluctuations due to faulty equipment, the agency reports that equipment failures and other matters a contractor could not prevent would not result in a finding of failure to meet the temperature maintenance requirement.

³ In its comments on the agency report, the protester does not mention its initial allegation that the RFP's zero deviation standard for the provision of menus and nutritional information is unreasonably restrictive. The agency report pointed out that the challenged information requirement could be easily met by using computer software that would allow retrieval and production of the information as needed. Since Atlantic does not continue to challenge the matter, we consider its protest

(continued...)

Finally, in its initial protest Atlantic contended that insufficient time was given for offerors to respond to certain amendments to the RFP. That challenge was rendered academic by the agency's decision after the protest was filed to further extend the scheduled closing time. See East West Research, Inc.-Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379 at 2. To the extent Atlantic, in its comments on the agency report, challenges the sufficiency of that further extension to the closing time, the challenge is untimely, since it was not filed prior to the amended closing time. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (2003); see NASCO Aircraft Brake, Inc., B-237860, Mar. 26, 1990, 90-1 CPD ¶ 330 at 3-4.

The protest is denied.

Anthony H. Gamboa
General Counsel

(...continued)

allegation in this regard to be abandoned and we do not address it further. The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218 at 5.