

Protest of )  
TELESEC TEMPORARY SERVICES ) Date: March 16, 1992  
Solicitation No. 104230-92-A-0007 ) P.S. Protest No. 92-05  
)

### DECISION

Telesec Temporary Services ("Telesec") timely protests the terms of Solicitation No. 104230-92-A-0007, issued by the Postal Service Office of Procurement, Headquarters, on December 20, 1991, with an initial offer due date of February 2. The solicitation envisioned house a 24-month pilot program for an on-site contractor<sup>1/</sup> to provide temporary services for the Postal Service nationwide. Telesec claims that the solicitation is unduly restrictive of competition. Although the submission of offers and their consideration has not been postponed pending resolution of this protest, Telesec did submit a proposal and the contracting officer does not anticipate that an award decision will be made before a decision is rendered.

The solicitation lists ten categories of jobs to be provided by the contractor, and the estimated number of hours of service of each job. The Statement of Work ("SOW") requires the contractor to provide temporary personnel both at Headquarters and at any of approximately 115 Headquarters field units<sup>1/</sup> throughout the nation, as needed. A list of the field units was attached. The SOW notes that, although only one "on-site contractor" was contemplated, circumstances might arise where a second one would be required at a field unit for a short term special assignment. The SOW discloses that there are currently approximately 160 temporary employees on assignment at the Postal Service, 98% in the Washington, DC, area, and 2% in the field and indicated that this requirement was unlikely to change.

The SOW requires that the offeror "demonstrate[] a minimum of three years experience in successfully managing an on-site project of similar scope and complexity." Finally,

<sup>1/</sup> The protester points out that all temporary services companies provide on-site performance and assumes that the intent of the solicitation requirement for an "on-site contractor" refers to an on-site coordinator or supervisor. We agree. The SOW defines "on-site contractor" as a "representative [of the contractor employment agency] who works full-time (or part-time) at USPS Headquarters handling [the] Contract Temporary [Employee] Program." The "on-site contractor" will be required to coordinate temporary services activities with the contracting officer's representative, a Personnel Programs Specialist, Personnel Division, Postal Service Headquarters.

<sup>2/</sup> All of the listed field locations are offices managed from Headquarters in Washington, DC, as opposed to other remote locations that come under the auspices of Postal Service Regional Offices.

the SOW states that:

The contractor may subcontract with other temporary services agencies to supplement the needs of the Postal Service. Proposed subcontracting shall be reviewed, however, in-house resources are preferable. The Contracting Office [sic] Representative reserves the right to review and approve subcontractors prior to acceptance.

Section J and Attachment 3 of the solicitation set forth instructions to the offerors. As amended, Attachment 3 states that "[a]<sup>1/</sup> offerors must provide financial statements for Prime and any proposed Subcontractors.

Section M of the solicitation provides that a contract will be awarded to "the responsible offeror whose proposal conforming to the solicitation will be most advantageous to the Postal Service, cost and price and other factors specified elsewhere in this solicitation considered." Section M.2 lists three evaluation criteria in descending order of importance: 1) the offeror's organization, administration and experience; 2) technical approach; and 3) qualification of project personnel. Attachment 2 of the solicitation further defines the criteria. The first criterion is divided into two sub-factors, only one of which is at issue here. That sub-factor states:

Performance record, financial stability, and experience in the management of temporary services and on-site programs.

All offerors must provide a financial statement, listing [] a minimum of ten (10) Contracting References names, telephone numbers, addresses of the Contracting Officer, the Contracting Officer's Representative, the Contracting Agency, the Contract Number, the period of performance, the Contract Value and a detailed description of the effort. All ten contract references must be related to the Temporary Service area.<sup>1/</sup> Specifically indicate which contracts are related to on-site temporary services work.

The solicitation stated that "cost/price will be considered in the award decision, although the award may not necessarily be made to that offeror submitting the lowest price."

The solicitation required offerors' questions regarding the solicitation to be submitted in writing no later than seven business days after the solicitation issue date. Amendment A01, issued on January 3, 1992, responded to the written questions received. Question no. 7, referring to Clause 10-2, asked: "When evaluating the bids for award, will those companies that subcontract to small woman owned minority business enterprises be scored higher than those which do not?" The contracting officer

<sup>3/</sup> The solicitation also contains clause 10-2, Small, Minority-owned, and Woman-owned Business Subcontracting Requirements, requiring the contractor to submit a subcontracting plan that addresses the offeror's intentions with respect to subcontracting with such businesses.

<sup>4/</sup> In this context, "temporary service area" refers to the business of providing temporary employees under contract to fill temporary positions.

responded, stating:

The Postal Service supports subcontracting to any minority enterprises, however, your attention is directed to the Evaluation Criteria, and the Statement of Work, page 9, paragraph c. Subcontracting shall be reviewed, however, in-house resources are preferable. The USPS will not be applying higher scores during the evaluation process to those companies subcontracting to small woman owned minority business enterprises, unless all other factors in the process are equal.

Telesec's protest, dated January 15, 1992, alleges that the solicitation as written unduly restricts competition to national companies.<sup>1/</sup> Telesec asserts that the Postal Service's stated preference for the provision of field services by the use of in-house resources instead of subcontracting will result in higher scores for national companies. In the alternative, it suggests that if local companies propose in-house Washington-based individuals to fill field positions, they will not be rated as highly as national companies with the ability to provide locally-based employees.<sup>1/</sup>

Telesec also complains that there are very few contracts in the Washington area that require an "on-site contractor" and that local or regional companies would have a difficult time meeting the requirements of the solicitation, because they may not have had the opportunity to acquire on-site supervisory experience. National companies, on the other hand, may have had more opportunities to gain on-site supervisory experience in other geographic areas.<sup>1/</sup> Telesec implies that competition, therefore, should be limited to local or regional companies.

Telesec contends that these issues could have been resolved through written questions, but the solicitation did not give offerors enough time to submit such questions. Telesec alleges that the solicitation, received by it during Christmas week, required that written questions be submitted by December 27.<sup>1/</sup>

<sup>5/</sup> We understand the protester to use the term "national company" to describe a firm which provides services nationwide (or substantially nationwide) by the use of its own employees, as contrasted with one which provides primarily local or regional services by use of its own employees, but that could provide nationwide services by subcontracting with other firms. Telesec states that, to the best of its knowledge, the companies currently providing temporary services to the Postal Service are all national companies.

<sup>6/</sup> It is unclear whether Telesec's concerns in this regard apply to all field requirements for temporary services employees, or only to the possible requirement for a second on-site administrator.

<sup>7/</sup> Telesec contends, without explaining why, that any on-site supervisory experience an offeror has acquired in other geographical areas, may not be of any value to the Postal Service. Alternatively, unlike national companies, local companies that may not have on-site supervisory experience might have useful local expertise.

<sup>8/</sup> The contracting officer points out that Telesec is mistaken in stating that written questions were due by December 27. He notes that the solicitation states that offerors questions were due seven business days after the issuance date. That date was January 2. Telesec then concedes that it was incorrect in calculating the time frame available for submitting written questions, but contends, in any event, that even the longer time period was too short. Other offerors submitted questions within the time frame and none, including Telesec, asked for an extension. Therefore, we do not think the time period was unreasonable. See e.g., IBI Security Service, Inc., Comp. Gen. Dec. B-217446, 85-1 CPD & 732, June 27, 1985 (Protester's complaint that there was insufficient time to respond to an amendment prior to the

Telesec concludes that the requirements unnecessarily prevent four to eight highly qualified local or regional companies from participating in this procurement and that any local company that does participate will be unlikely to receive award. It requests that the solicitation be amended to eliminate the preference for in-house resources to permit local companies, with the ability to subcontract for the minimal field requirements, to compete as equals.

In his report, the contracting officer states that the solicitation does not restrict offerors to national companies. He states that the Postal Service considers that "a tighter program can be performed if resources are in-house," noting that use of in- resources would facilitate filling positions when, as frequently occurs, the need for temporary personnel arises on short notice and positions must be filled quickly. However, the contracting officer states that the solicitation does not dictate how an offeror's company should be structured to meet the performance requirements and does not preclude subcontracting or teaming arrangements.

The contracting officer states that neither the SOW nor the evaluation criteria preclude an offeror from subcontracting part of the performance requirements, explaining that the only requirements in the first evaluation criterion's sub-factor are that offerors submit ten references related to contracts involving temporary services and indicate which of the ten show on-site supervisory experience.<sup>9/</sup> The contracting officer concludes that the solicitation is not biased in favor of national companies, concluding that it is not unduly restrictive and Telesec's allegations are unsupported.

Kelly Services, an interested party, submitted comments asserting that a company with a deficit in either on-site experience or industry references could receive a lower evaluation score. However, Kelly alleges that the request for references in the evaluation criteria is only one of many items listed in the RFP and that both local and national companies could offer innovative programs, resulting in higher scores in other areas. Kelly contends that, contrary to Telesec's assertion, there are several on-site programs existing in the Washington area at the present time. Kelly also disagrees that the solicitation precludes an offeror from subcontracting the small quantity of services needed outside the Washington area. It does suggest, however, that subcontracting is atypical in the industry.<sup>10/</sup>

closing date not supported by the record where most offerors acknowledged the amendment and none asked for additional time;) Creative Systems Electronics, Inc, Comp. Gen. Dec. B-235388.2, 89-2 CPD & 175, August 24, 1989 (One week was sufficient time for protester to furnish financial information for purposes of a responsibility determination.)

<sup>9/</sup> Despite Telesec's protestations to the contrary, it clearly seems to be objecting also to the requirement for three years of on-site supervisory experience. The contracting officer has established *prima facie* support for this requirement. Although Telesec contends that an "on-site contractor" is not needed to fill positions quickly, it does not rebut the other reasons given by the contracting officer and, thus, has not shown that the requirement is clearly unreasonable.

<sup>10/</sup> Several other interested parties responded to the protest by stating, in general terms, that they were in agreement with Telesec.

Telesec submitted comments responding to the contracting officer's statement, disagreeing that local companies can compete as equals with the national companies under the current circumstances. It reiterates that local and regional companies should not be precluded from award because of the requirement for field support. Telesec contends that, having spoken with other local companies, as a result of the USPS' preference for in-house resources and for "on-site contractor" experience, many local and regional companies chose not to invest the necessary time and money to prepare proposals. Telesec alleges that the solicitation will allow a national offeror to obtain a contract by submitting a proposal in which out-of-town experience and references support award of a contract with a 98% in-town requirement. It suggests that the solicitation should be amended to require that the offerors' references be local.

The contracting officer submitted rebuttal comments, expanding his earlier statement. He states that an on-site contractor is necessary in order to enable the Postal Service Human Resources Department to interface directly with the contractor. He explains that the close proximity will provide better access for the contractor and allow the Postal Service to fill temporary positions and respond to program management requirements on short notice. This resulted in requirements that offerors demonstrate a minimum of three years experience in successfully managing an on-site project of similar scope and complexity and submit ten references, one or more of which demonstrate "on-site contractor" experience. He states that, given the size of the project, the three-year experience requirement is necessary for the Postal Service to evaluate an offeror's capabilities and is not unreasonable, since on-site programs have been in existence for five to seven years. He defends the requirement for ten references as necessary and appropriate to evaluate offers for a program of this size.

At a protest conference on February 27, Telesec asserted that it does not take issue with either the requirement for an "on-site contractor," or the requirement that each offeror demonstrate a minimum of three year's experience in successfully managing a project of similar scope and complexity having an on-site supervisor. At the same time, Telesec contends that since the solicitation does not set forth required response times for the provision of temporary services, the contracting officer cannot rely on the Postal Service's need to fill positions on short notice to justify the requirement for an "on-site contractor." In any event, Telesec asserts that with or without an on-site supervisor, it could fill positions in a timely manner. Telesec reiterates, however, that the solicitation should require each offeror to provide only local references, given that 98% of the performance under a resulting contract would be in the Washington, DC area.

### Discussion

Where a protester alleges that a solicitation is unduly restrictive:

[I]t is incumbent upon the procuring agency to establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

Equipment Marketing Consultants Corporation, P.S. Protest No. 90-07, April 17, 1990, quoting Amray, Inc., Comp. Gen. Dec. B-208308, January 17, 1983, 83-1 CPD & 43.

Once the Postal Service establishes prima facie support for the allegedly restrictive requirements, the protester must present an extremely high level of proof to show that those restrictions are clearly unreasonable. Pacific Bell, P.S. Protest No. 90-51, December 21, 1990.

"The determination of what constitutes the Postal Service's minimum needs is properly to be made by the requiring activity, and is not subject to being overturned in the absence of a clear showing that the determination lacks a reasonable basis." Crown Industries, Inc., P.S. Protest No. 82-83, January 6, 1983, citations omitted. "[I]f a specification is otherwise reasonable, the fact that one or more potential offerors may be precluded from participating in the solicitation does not render its terms restrictive if they reflect the legitimate needs of the procuring activity." International Technology Corporation, P.S. Protest No. 89-21, May 8, 1989.

Telesec first contends that the Postal Service's preference for in-house resources versus subcontracting is unduly restrictive. The contracting officer has provided a rationale for the Postal Service's stated preference sufficient to establish a prima facie case in support of the alleged restriction. Furthermore, contrary to the protester's suggestion, the solicitation does not prevent an offeror from subcontracting part of the performance requirements.<sup>11/</sup> It only states a preference for in-house resources. Offerors that plan to subcontract can still submit offers and potentially receive award if they are rated higher in other evaluated areas. The fact that offerors might receive higher technical scores if they are capable of performing the entire contract without subcontracting does not render the solicitation unduly restrictive. Telesec has failed to establish that this provision is clearly unreasonable.

Next, Telesec complains that the requirement for ten contract references is unduly restrictive because it will allow a national offeror with non-local references to obtain the contract, even though 98% of the work will be done locally. It requests that the solicitation be amended to require only local references.<sup>11/</sup> Here, Telesec appears to be requesting the Postal Service to further restrict the solicitation, disallowing submissions of out-of-town references. This we decline to do. Where an agency seeks an experienced, qualified contractor with a good track record, it should do so by use of general evaluation criteria.

J & J Maintenance, Inc., Comp. Gen. Dec. B-214209, 84-2 CPD & 488, November 2, 1984. The Comptroller General has stated that where a protester argues that a less restrictive requirement be changed to a more restrictive one, the protest will not be considered, specifically stating:

In general, we will not consider such protests where as here they are based on the argument that the less restrictive requirement is contrary to the protester's business interest or contrary to the protester's view of what

<sup>11/</sup> Indeed, the solicitation specifically sets forth procedures for the offeror to follow when it does enter into subcontracts.

<sup>12/</sup> Telesec interprets this evaluation criterion to require that all ten references demonstrate "on-site contractor" experience. This reading of the solicitation is overbroad, as the criterion merely requests that offerors indicate which of the ten references submitted show "on-site contractor" experience.

is best for the agency.

Matanuska Maid, Comp. Gen. Dec. B-235607.2, 89-2 CPD & 18, June 30, 1989. Assuming that Telesec is correct in concluding that there are few contracts in the Washington area requiring an on-site supervisor, it would be against the best interests of the Postal Service for the contracting officer, having established a need for a contractor with such experience, to restrict competition to local companies that might not be able to provide it. Furthermore, Telesec does not contend that it cannot fulfill the requirement for an on-site supervisor, or that it cannot provide the required references. Finally, Telesec does not explain adequately how a requirement for local references would be of much help, as presumably, both national and local companies would be able to show local experience. The solicitation, as written, does not preclude Telesec from receiving award.

The protest is denied.

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