Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Coyle's Pest Control, Inc.

File: B-275692

Date: March 14, 1997

Charles G. Coyle for the protester.
Mary C. Merchant, Esq., Department of Housing and Urban Development, for the agency.
Wm. David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Provision which imposes liability for termite damage after spot or partial treatment is unobjectionable where it reasonably relates to agency's need to ensure treatment is effective and where potential risk of liability can be addressed by bidders in their prices.

DECISION

Coyle's Pest Control, Inc. protests the terms of invitation for bids (IFB) No. H06S96051100000, issued by the Department of Housing and Urban Development (HUD) for subterranean termite protection of single family homes owned by HUD within the jurisdiction of its Houston office. We deny the protest.

HUD issued this IFB on October 21, 1996, with a bid opening of December 10. Bidders were required to submit prices for a base year and for two 1-year options for spot (25-39 linear feet), partial (40-199 linear feet), and full (200 or greater linear feet) treatments. Under the contract, a HUD government technical representative (GTR) initially would review the termite inspection report furnished by the future or current homeowner and decide what type of treatment would be required. The contractor would be provided with the inspection report and the GTR's treatment instructions. If spot or partial treatment were ordered by the GTR, the contractor would be allowed to inspect the property to confirm the degree of infestation and the treatment required. Based on the findings of the contractor's inspection, the GTR would decide whether to modify the original treatment requested. Also, under the contract, the contractor is liable for a maximum of $5,000 for the cost of repairs should any subterranean termite damage occur during the first year after any treatment. Thirteen bids were received and opened. Award has been withheld pending resolution of the protest.

Coyle contends that, while the liability provision is reasonable where the contractor performs a full treatment, it is unreasonable to impose the same maximum amount of liability for spot or partial treatments since termites can avoid the spot or partial treatment area or their colonies can be located in areas not near or adjacent to the treatment area, and any damage occurring after a spot or partial treatment may not be the contractor's fault. Further, the protester asserts that it is not industry practice to provide such a warranty and that this provision only increases the cost to HUD of obtaining termite protection. Coyle also objects to permitting the GTR--absent a showing that the person in the position will always have appropriate qualifications for making the necessary decisions--to determine the extent of termite damage and the type of treatment necessary.

An agency is responsible for drafting proper specifications to meet the government's minimum needs. In preparing for a procurement, the agency must develop specifications in such a manner as is necessary to achieve full and open competition in accordance with the nature of the property or services to be acquired. 41 U.S.C. § 253a(a)(1)(A) (1994); Sunbelt Properties, Inc., B-249469 et al., Nov. 17, 1992, 92-2 CPD ¶ 353, at 4. Nonetheless, there is no legal requirement that the government entirely eliminate risk from those specifications, and bidders are simply expected to exercise business judgment in preparing their bids in such cases. Sunbelt Properties, Inc., supra.

Coyle protests the imposition of contractor liability for termite damage which occurs after a spot or partial treatment and argues this liability should apply to full treatments only. However, the agency has determined that a full treatment is not needed in every case, and that the imposition of liability during the first year after contractor treatment is a reasonable approach to ensure that the treatment is effective by exposing the contractor to liability for the damage which could result from ineffective treatment. HUD states that it is possible that it could "incur $5,000 in damages due to defective partial or spot treatment."

We have no basis to question the reasonableness of this requirement on this record. The $5,000 liability is intended to effectively provide the agency with a 1-year warranty on the treatment. As the agency points out, the $5,000 is the maximum amount the contractor is liable for and bidders can calculate their bids based on providing this warranty. The protester speculates that HUD intends to claim the $5,000 for damages from termite infestation whether of not the damage results from termite infestation in an area treated by the contractor. However, as we understand HUD's position, as articulated in the agency report, HUD intends to hold the contractor liable for damage which results from the failure of the contractor's treatment. As previously stated, there is no legal requirement that in developing specifications the government eliminate all risk to the contractor. Further, all bidders are on notice of this liability and are free to include the potential cost of repairs if their treatment should prove defective into their prices.

Coyle also questions whether the GTR is properly qualified to decide which type of treatment is required. Coyle is concerned that it will be held liable for an erroneous judgment by the GTR as to the treatment necessary. In response, the agency advises that the current GTR has extensive experience in the real estate and construction industry and 15 years experience with termite treatments. In any event, as stated above, the contractor has the right under the contract to review the initial inspection report and the GTR's proposed approach to treatment, to inspect the premises to be treated prior to performing the work, and to seek modification of the GTR's proposed treatment if the contractor, for example, believes a larger area needs to be treated. Further, if a dispute should arise during performance of the contract concerning whether Coyle properly can be held liable for termite damage, the mater can be resolved under the Disputes Clause, Federal Acquisition Regulation § 52.233-1, included in the contract.

The protest is denied.

Comptroller General
of the United States