HOW MUCH RISK CAN THE GOVERNMENT IMPOSE ON A BIDDER?

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Ft. Bragg, home of the 82nd Airborne Division (90,000 soldiers) and other major Army Commands, sought to award a contract for "full food services," to a Historically Underutilized Business Zone ("HUBZone") small business. The solicitation did not provide any estimate of the expected number of meals to be served, but only listed historical data, which might be wildly inaccurate with the wars in Afghanistan and Iraq winding down, and troops coming home. The expected "headcount" at each meal was unpredictable, and required the offerors to bid a price per meal without knowing the headcount. Accordingly, the contractors who bid had to take a significant risk. *State of North Carolina Bus. Enterprises Program v. United States*, No. 12-459C (Fed. Cl. April 5, 2013). (Hereafter "NC").

NC protested that offerors had to bid a price per meal without knowing what the actual headcount could be. If headcount turned out unexpectedly high, the contractor who bid a low price per meal could be ruined. However, the contractor who bid a high price per meal might never be awarded the contract. NC protested the solicitation, arguing that the Army's pricing methodology that required offerors to assume all the risk of a fluctuating headcount was so onerous that it was arbitrary and irrational as a matter of law. Furthermore, the Army's pricing methodology did not enable offerors to bid intelligently.

During the course of the protest, one contractor suggested using a "headcount range" (different prices for different numbers of meals) in the solicitation, so that less risk would be imposed on he bidders. But the Army refused to use that method, and the Court agreed that no statute or regulation required them to do so. The Court noted that, as a general rule, offerors must be give sufficient detail in a solicitation so they can compete intelligently and on a relatively equal basis. However, when the agency lacks sufficient information to provide realistic estimated quantities, it is OK to base the solicitation on the best available information and rely on the professional judgment of the bidders to fill in the information themselves. The court concluded that even though the Army *could* have selected a pricing method that was better (from the NC's perspective), the issue was whether the method selected by Army was arbitrary, capricious or otherwise contrary to law. And the Court's answer was that no statute or regulation required use of the "headcount range" or any other method.

In denying the protest, the Court concluded that the Army's chosen pricing methodology was risky for offerors because of the uncertainty of the headcount. The Army might have chosen a different methodology that was less burdensome for offerors, but it didn't choose it, and it was not required to do so. If the offerors believed the contract would be too risky, they could have chosen not to bid.

TIPS: (1) There is no "correct" method of writing a solicitation and conducting a procurement. There probably are numerous ways to accomplish the same purpose, and each method imposes a different degree of risk on offerors.

(2) Unless it can be shown that the method selected by the agency is arbitrary, capricious or otherwise unlawful, the agency's selection of a highly risky solicitation method will not be set aside by the courts. For example, an arbitrary or capricious method might be one where the agency explicitly *ignores* historical experience where there is a great deal of fluctuation in the requirements. It could only ignore the experience numbers if there were a logical reason to do so ("we transferred half the people out last year, so we reduced the experience numbers by 50%").