



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: URS Federal Support Services, Inc.

File: B-407573

Date: January 14, 2013

Thomas O. Mason, Esq., Francis E. Purcell, Jr., Esq., and Christopher J. Kimball, Esq., Cooley LLP, and Thomas C. Papson, Esq., and Jason A. Carey, Esq., McKenna Long & Aldridge LLP, for the protester.
Marvin K. Gibbs, Esq., COL Barbara E. Shestko, and Sharon A. Jenks, Esq., Department of the Air Force, for the agency.
Louis A. Chiarella, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that solicitation which anticipates the issuance of a task order that contains a mixture of fixed-price, time-and-materials, and cost reimbursement contract line items is defective because it improperly creates a de facto fixed-price, level-of-effort contract in violation of the Federal Acquisition Regulation (FAR) guidance applicable to such contracts at FAR § 16.207 is denied where the protester does not show that the agency's choice of contract type is impermissible or in violation of FAR guidance; contracting agencies have the primary responsibility for determining their needs and the most appropriate methods for procuring them.

DECISION

URS Federal Support Services, Inc., of Austin, Texas, protests the terms of task order fair opportunity notice (FON) No. 13-DA-012, issued by the Department of the Air Force for contract field team (CFT) logistics support services at the Tobyhanna Army Depot (TYAD), Tobyhanna, Pennsylvania. URS asserts that the FON's stated requirements, including the chosen contract type, are improper.

We deny the protest.

BACKGROUND

In 2008, the Air Force awarded indefinite-delivery, indefinite-quantity (ID/IQ) type contracts for CFT logistics support services to six contractors. The CFT contracts,

awarded for a 2-year base period together with three (1- or 2-year) option periods, are designed to provide supplemental, on-site organization, intermediate, and depot-level maintenance support for various kinds of military equipment at locations worldwide. Agency Report (AR), Tab 3, CFT Performance Work Statement (PWS), at 1-4. The CFT contracts also permit the issuance of subsequent task orders on a fixed-price, time-and-materials (T&M), and/or cost-reimbursement (CR) basis. Id., CFT Contract, at 2-25.

The FON, issued on August 29, 2012, contemplates the issuance of a task order with fixed-price, T&M, and CR-type contract line items (CLIN) for a 1-year base period (including a 1-month transition) with a 1-year option period under the successful offeror's CFT contract.¹ The solicitation includes a PWS, instructions to offerors regarding submission of task order proposals, and the evaluation criteria on which task order issuance will be determined. FON amend. 2, at 1-5.

The PWS, in general terms, requires the contractor to provide qualified labor in support of the TYAD maintenance mission and perform tasks ranging from minor repair to depot-level overhaul of various electronic systems and support equipment. AR, Tab 8, PWS, at 2-4. The PWS includes various metrics (e.g., reject rate, communication) by which to measure the quality of the contractor's performance.² Relevant to the protest here, the PWS also includes a minimum number of full-time employees (FTE)--referred to as the "minimum team complement"--that the contractor is to propose and provide during performance: at least 107 FTEs under the fixed-price CLIN.³ Id. at 36-41.

The FON provides additional explanation regarding the solicitation's minimum team complement concept as follows:

¹ The total estimated value of the task order being issued is approximately \$50 million. AR, 12, T&M Determination and Findings, at 9. As the value of the task order is in excess of \$10 million, our Office has jurisdiction to review this protest. See 10 U.S.C. § 2304c(e)(1).

² The performance metric results would not affect the task order award here, or the amount the contractor would be paid, but the results are to be considered as part of the evaluation of the contractor's performance for further work under the CFT program. AR, Tab 8, PWS, at 7.

³ The PWS does not also create a minimum team complement under the T&M CLIN, but does establish anticipated and maximum staffing levels of 315 FTEs and 421 FTEs, respectively. The PWS also set forth the various labor categories (i.e., skill qualifications) and minimum annual hours (1840) for each minimum team complement FTE. Further, to the extent the PWS provides offerors with anticipated and historic workload estimates, they are stated in terms of FTEs. AR, Tab 9, Questions and Answers with Offerors, at 6.

The Government is establishing the “minimum team complement” on this requirement to be in accordance with the skills listed in section 8.0 of the attached PWS. Offerors shall NOT propose less than the “minimum team complement,” or provide less than the specified skills/quantities at any time after award. Offerors can propose more than the “minimum team complement” as illustrated in the attached pricing sheets. Any proposal that does not meet the minimum manning levels will be ineligible for award.

FON amend. 2, at 3.

The agency also provided additional clarification of the FON’s staffing requirements to offerors as follows:

The current Tobyhanna task order has 315 [fixed-price] personnel and 188 T&M personnel on-board. The upcoming Tobyhanna task order is requesting 107 [fixed-price] personnel with the ability to surge up to 421 T&M personnel [during the base period] The T&M personnel can fluctuate according to Government requirements throughout the period of performance. . . . The contractor shall man the entire [fixed-price] Minimum Team Complement (107) from day 1 of the period of performance.

AR, Tab 9, Questions and Answers with Offerors, at 6.

Likewise, the FON establishes that offerors’ prices for both the fixed-price and T&M CLINs are to be derived from staffing levels and labor rates. AR, Tab 10, TYAD Pricing Sheets, at 1-5.

Prior to the October 5 closing date for receipt of task order proposals, URS filed this protest.

DISCUSSION

URS raises various challenges to the solicitation. URS claims that, notwithstanding the agency’s characterization, the FON actually creates an improper fixed-price, level-of-effort CLIN.⁴ The protester also argues that the Air Force failed to reasonably consider the risk allocation in its selection of a fixed-price, level-of-effort CLIN. URS also claims that the FON does not provide for competition on an equal

⁴ A fixed-price, level-of-effort contract requires the approval of the chief of the contracting office if the price is over \$150,000. Federal Acquisition Regulation (FAR) § 16.207-3(d).

basis and is contrary to the task orders contemplated by the CFT contract.⁵ We have fully considered all of URS's arguments and, although we do not address them all, we find no basis on which to sustain the protest.

Contracting agencies have broad discretion to determine their needs and the best way to meet them. Crewzers Fire Crew Transport, Inc., B-402530, B-402530.2, May 17, 2010, 2010 CPD ¶ 117 at 3; USA Fabrics, Inc., B-295737, B-295737.2, Apr. 19, 2005, 2005 CPD ¶ 82 at 4. Additionally, the selection of a contract type is the responsibility of the contracting agency; our role is not to substitute our judgment for the contracting agency's, but instead to review whether the agency's exercise of discretion was reasonable and consistent with applicable statutes and regulations.⁶ See Diversified Tech. & Servs. of VA, Inc., B-282497, July 19, 1999, 99-2 CPD ¶ 16 at 5; Hadson Def. Sys., Inc.--Recon., B-244522.3, Sept. 24, 1992, 92-2 CPD ¶ 201 at 2.

Under a fixed-price contract, the price is not subject to any adjustments on the basis of the contractor's cost experience in performing the required work. Under this contract type, maximum risk and full responsibility for all costs and resulting profit and loss associated with performing the required work is placed on the contractor. FAR §§ 16.202-1, 16.202-2. By contrast, under a fixed-price, level-of-effort contract, the government pays a fixed price for, and the contractor is obligated to provide, only a specified level of effort, identified and agreed upon in advance, over a specified time. FAR § 16.207-1. A fixed-price, level-of-effort contract is generally intended for use in contracts for studies in research and development areas where the work required cannot be clearly defined. The FAR explains that the product of a fixed-price, level-of-effort contract is usually a report showing the results achieved through application of the required level of effort; payment, however, is based on

⁵ URS also alleged that the hiring efficiency metric included in the FON was improper under a fixed-price contract. Protest, Oct. 5, 2012, at 21-23. As the agency report provided a detailed response to the protester's assertion (AR, Oct. 22, 2012, at 24-25), and URS did not respond to the agency's position (see Comments, Nov. 15, 2012, at 6-21), we deem this argument abandoned. See Citrus College; KEI Pearson, Inc., B-293543 et al., Apr. 9, 2004, 2004 CPD ¶ 104 at 8 n.4. URS subsequently also protested that the FON improperly uses a fixed-price CLIN (given that the agency cannot define the expected volume of work with reasonable specificity). Comments, Nov. 15, 2012, at 14-19. We find this protest ground to be untimely. 4 C.F.R. § 21.2(a)(1) (2012).

⁶ The proper allocation of cost risk between the government and the contractor is something to be determined on a case-by-case basis, and the FAR sets forth various factors a contracting officer should consider in selecting the appropriate contract type, including the type and complexity of contract requirements and the availability of adequate price competition. FAR § 16.104.

the effort expended by the contractor rather than the results achieved. FAR §§ 16.207-2, 16.207-3; Multi Servs. Assistance, Inc., B-232082, Oct. 28, 1988, 88-2 CPD ¶ 407 at 2.

As set forth above, the PWS requires the contractor to provide augmentation labor to support the TYAD maintenance mission. In addition to certain performance metrics, the PWS includes minimum staffing levels--the minimum team complement--that the contractor is to both propose and provide during task order performance. Quite simply, the Air Force has decided to define its requirements here in both performance and staffing terms. We find this to be reasonably within the broad discretion afforded contracting agencies, and to the extent URS challenges how the Air Force has defined its needs, we find this challenge to be without merit.

With regard to URS's disagreement with the agency's choice of contract type, we note that the decision as to the appropriate pricing format was also within the discretion of the agency, and we believe that the agency's exercise of that discretion here was reasonable. As detailed above, the Air Force is essentially buying qualified staffing, with the base/minimum level of at least 107 FTEs being procured in lump-sum format under the fixed-price CLIN and the balance of the required staffing being procured under the T&M CLIN. The FON, however, also allows offerors to propose more than the minimum team complement under the fixed-price CLIN. As the required level of effort is not identified and agreed upon in advance, but left up to the discretion of each offeror, we find that the CLIN here does not represent a fixed-price, level-of-effort contract as the protester claims.⁷ See FAR § 16.207-3(b). In addition, as the agency explains, the work required is clearly defined insofar as it describes the types of tasks that the contractor's personnel are to perform. See FAR § 16.207-3(a). In short, we see nothing in the FAR guidance about permissible contract types that suggests that the agency is acting improperly here.

URS also claims that once the TYAD task order is awarded, "performance will be based on a 'hybrid' of [fixed-price] and T&M work," and "[t]his type of 'hybrid' task order is not contemplated by the underlying CFT contract." Protest, Oct. 5, 2012, at 17. We disagree. The CFT contracts permit the issuance of fixed-price, T&M, and CR-type task orders. We find no merit in URS's assertion that different types of CLINs cannot be employed in the same task order, or its assertion that the task orders must be "all or nothing" in their approach.

⁷ As the Air Force is not using a fixed-price, level of effort CLIN, we need not address URS's related assertion that the agency failed to reasonably consider the associated risk allocation.

Lastly, URS alleges that the FON's PWS does not provide a definitized scope of work upon which to propose, or the basis on which offerors can determine the hours required to perform the scope of work and, as a result, offerors will not be competing on an equal basis. Protest, Oct. 5, 2012, at 1720. The protester's argument here reflects a fundamental misunderstanding of the PWS requirements. The PWS simply does not require the CFT contractor to perform a defined number and type of tasks (nor does the FON establish pricing by task completion). Rather, the scope of work on which all offerors are to propose (and on which the fixed-pricing is based) is staffing levels. Although, as the protester states, the fixed-price CLIN is based here on input rather than output, we find no merit in URS's assertion that offerors will thus be competing on different scopes of work and an unequal basis.

The protest is denied.

Susan A. Poling
General Counsel