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Decision

Matter of: Fluor Federal Solutions, LLC

File: B-414223

Date: March 29, 2017

Richard B. O’Keeffe, Jr., Esq., William A. Roberts, III, Esq., Samantha S. Lee, Esq., and Margaret E. Matavich, Esq., Wiley Rein LLP, for the protester. Robert Palmer, Esq., Department of the Navy, for the agency. Stephanie B. Magnell, Esq., and Amy B. Pereira, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the terms of the solicitation as ambiguous is denied, where the solicitation provides offerors with sufficient information to compete intelligently and on a relatively equal basis, and where the information requested, much of which is proprietary to the protester, is not necessary for offerors to be able to draft their proposals.
 2. Protest arguing that the solicitation should resolve an alleged ambiguity by including the protester’s proprietary data, after the protester waives its rights in the data, is dismissed where the protester failed to establish that it is an interested party to challenge the lack of data in the absence of any competitive prejudice.
 3. Protest challenging the agency’s choice of a fixed-price contract is denied, where the agency is not prohibited from allocating substantial financial risk to the contractor.
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DECISION

Fluor Federal Solutions, LLC, of Greenville, South Carolina, protests the terms of request for proposals (RFP) No. N69450-16-R-2113, issued by the Department of the Navy, Naval Facilities Engineering Command, for base operations support services at two locations in Florida: Pensacola Naval Regional Complex¹ and

¹ Pensacola Naval Regional Complex includes Naval Air Station Pensacola, Saufley Field, Corry Station, Bronson Field, and tenant commands. RFP, Section C at 2.

Naval Hospital Pensacola. The protester argues that the scope of the solicitation is ambiguous, such that offerors cannot meaningfully price their proposals and proposals received cannot be meaningfully compared. Fluor contends that the remedy is for the agency to release Fluor's proprietary data provided to the Navy under the current contract and provide other background material. The protester also argues that if the requested information is not released, the agency should change the reimbursement structure from fixed-price to another compensation scheme reducing the financial risk to offerors.

We deny the protest in part and dismiss the protest in part.

BACKGROUND

Fluor is the incumbent contractor on the current base operations services contract for the Pensacola Naval Regional Complex and the Naval Hospital Pensacola, which it has held since October 2007. RFP at 2. In this role, the protester records the services performed and "creates a daily flat file transmission [of this data] to load into the Government's Maximo" database. Supp. Comments, Feb. 15, 2017, at 1 (internal references and quotations removed). Fluor maintains ownership rights in the data, and "[t]he flat file Fluor transmits is, as a whole, marked proprietary." Id. Under Fluor's contract, approximately 88 percent of the work is performed on a fixed-price basis and 12 percent on an indefinite-delivery, indefinite-quantity basis. RFP at 3.

On August 19, 2016, the Navy released the RFP, anticipating the award of an indefinite-delivery, indefinite-quantity (ID/IQ) contract with a period of performance of 1 base year, seven 1-year options, and one 6-month option. RFP at 4-13. The contract scope "includes all labor, supervision, management, materials, tools, equipment, facilities, transportation, incidental engineering, and other items necessary to perform the following services: Port Operations; Facility Management; Facility Investment; Pavement Clearance; Utilities Management; Electrical; Gas; Wastewater; Steam; Water; Chiller Plant; Base Support Vehicles and Equipment, Environmental, and other related services." Id. at 2. For each performance year, offerors are required to propose a fixed price for recurring services and fixed unit prices for non-recurring services provided on an indefinite-delivery, indefinite-quantity basis. Id. at 4-13. Offerors also must complete detailed supporting spreadsheets listing number of personnel and total direct labor hours for each contract specification item. RFP, J-0200000-13 Exhibit Line Item Number Spreadsheet. Award will be made "to the offeror submitting the proposal determined to represent the best value" to the agency. RFP at 76.

The RFP includes multiple informational appendices, such as a detailed facilities list that provides the location, facility number, site description, site area, and construction date of items to be maintained under the contract. See, e.g., RFP, Section J (listing items such as a flag pole (erected in July 1943), a barbeque patio

(19 square feet, poured in July 1960), a boat storage yard (61,884 square feet, constructed in July 2006) and “giant voice @3224” speaker (1 square foot, constructed in January 2015)). Id. at 68, 79, 81. In addition, the solicitation contains details on mechanical systems; for example, for electrical generators, the RFP lists the facility location and number, generator type, generator identification number, fuel type, kilowatt, voltage, available voltage, tank capacity, transfer type, portability, and preventative maintenance frequency of each generator. Id. at 514. Similarly, for vertical transportation systems (elevators, auto lifts, and dumb waiters), the RFP specifies the location, equipment type, number of floors, capacity, manufacturer, and other information. Id. at 534. The appendices also include historical service call data with the facility identity, call description, and service date.² Id. at 102 et al.

The solicitation requires offerors to accept financial risk for the cost of performing service orders, with a limit on the cost as follows:

As part of the service order, the Contractor has full responsibility for any work up to Recurring Work limits of liability of 32 direct labor hours and/or³ \$2,500 in direct material cost per service order. Contractor is responsible for work up to Recurring Work limit of liability for both direct labor and direct material cost per service order.

RFP, Section C, at 67-68. Similarly, the solicitation requires offerors to “develop and implement a PM [preventative maintenance] program for facilities, ground structures, personal property equipment, and installed equipment and systems to ensure proper operation, to minimize breakdowns, and to maximize useful life.” Id. at 70. The contractor will assume the costs of repairs discovered during routine maintenance up to \$400 per occurrence in direct material and direct labor costs and the agency would be responsible for any excess costs if it elects to proceed with the repairs. Id. The same risk and compensation structure applies to the solicitation’s integrated maintenance program; the contractor is liable for “any individual occurrence of repair, including replacement, up to \$10,000 in direct material and direct labor costs.” RFP, Section C, at 75.

² For example, one entry provides: Facility - NASPEN-601, Service Call Description - Pastry Carousel Not Chilling, Actual Finish - 7/8/2015.

³ As illustrations in the solicitation show, “and/or” means that the agency may issue a task order for non-recurring work for any hours in excess of 32 or any direct material costs in excess of \$2,500. For example, no task order for non-recurring work would be issued for a service order requiring 32 labor hours and \$2,500 in direct material costs. RFP, Amend. 0006, Section C, at 68.

The agency responded to 364 questions posed by offerors through amendment 0008 of the solicitation. RFP, Amend. 0008, Q&A (file N6945016R2113_GPIs_0008.pdf).

The protest was timely filed on December 20, 2016. The deadline for receipt of proposals was January 5, 2017. RFP Amend. 7.

DISCUSSION

Fluor alleges that the solicitation contains a patent ambiguity by failing to provide information sufficient for offerors to compete intelligently and on a relatively equal basis. Protest at 7. In this regard, the protester argues that the agency should provide information about the components of various systems, their age, their condition, whether they have “exceeded [their] useful life expectancy,” and the service histories of the items to be maintained. Protest at 8-9, 14. The protester contends that, in large part, the remedy to this ambiguity is for the agency to include Fluor’s proprietary data in the solicitation after Fluor has waived its rights in the data. Supp. Comments at 1-2. Fluor also insists that offerors require detailed, component-level information and original equipment manufacturer (OEM) specifications. Protest at 9. If the Navy will not provide this information, Fluor requests that we recommend that the agency use a compensation scheme other than fixed-price in order to shift financial risk to the Navy. Id. at 20. For the reasons below, the protest is denied in part and dismissed in part.⁴

Completeness of the Solicitation

Fluor asserts that the solicitation does not include enough information for offerors to reasonably estimate the cost of completing the tasks described in the solicitation. Id. at 9. In this regard, the protester attests that the description provided is incomplete, and that offerors require detailed information on the components of various systems. Id. at 9-10. We disagree.

Generally, a contracting agency must provide offerors with sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis. CWTSatoTravel, B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87 at 10. A solicitation ambiguity exists where two or more reasonable interpretations of the terms of the solicitation are possible. Id. Here, however, Fluor argues that the ambiguity lies not in the possibility of alternate interpretations, but in an overall lack of information. Protest at 8. There is no legal requirement that a competition be based on specifications drafted in such detail as to eliminate completely any risk for the contractor or that the procuring agency remove all uncertainty from the mind of every

⁴ We have reviewed all of the protester’s arguments and, while not all are addressed in this decision, none provides a basis to sustain the protest.

prospective bidder. Salient Fed. Sols., Inc., B-410174, Nov. 6, 2014, 2014 CPD ¶ 350 at 2; see Analytics Inc., B-215092, Dec. 31, 1984, 85-1 CPD ¶ 3 at 4-5. Indeed, it is within the administrative discretion of an agency to offer for competition a proposed contract that imposes maximum risks on the contractor and minimum burdens on the agency. CWTSatoTravel, *supra*, at 9, citing JRS Mgmt., B-402650.2, June 25, 2010, 2010 CPD ¶ 147 at 5; TN-KY Contractors, B-291997.2, May 5, 2003, 2003 CPD ¶ 91 at 3.

Here, we conclude that the RFP provides sufficiently detailed information to allow offerors to compete intelligently and on a relatively equal basis. For example, although the protester argues that the RFP does not provide detailed information on “the ‘quantities and description of all facilities, ground structures, personal property equipment, and installed equipment and systems’ that must be maintained,” as discussed above, the solicitation contains a list of the facilities and additional detail on specific systems. *Id.* at 9, citing RFP, Amend. 0006 Q&A at 25 (question no. 103).⁵ Similarly, the protester challenges the requirement to maintain equipment according to the original equipment manufacturer specifications, “without defining the equipment, model, and OEM” specifications. Supp. Comments at 4. Yet the protester fails to articulate how this information would vary substantially between, for example, two types of auxiliary generators with the same general specifications, and how any alleged difference would impact an offeror’s cost. Overall, Fluor has failed to explain how the information provided is insufficient for offerors to draft proposals.

In contrast, the Navy provides “[a] detailed description of a process an offeror may use for estimating the cost of performing the subject contract” that uses the information in the solicitation, and not the data requested by Fluor. The agency explains that the cost of performing the work “can be estimated [. . .] using the information contained in the solicitation, industry knowledge, company internal proprietary data and algorithms, market research, publicly available data, and estimating tools.” Agency Report (AR), Tab 21, Decl. Project Mgr. 1, at 1. The estimating tools include “R.S. Means costs catalogs (commercially produced catalogs [available electronically] which contain standard unit-priced costs for individual work items . . . to forecast the costs of building construction, maintenance, renovation, and repair).” Memorandum of Law at 4. Using its independent

⁵ For example, the solicitation provides the following information on HVAC [heating, ventilation and air conditioning] and refrigeration systems: (1) specific location; (2) number of systems; (3) unit type; (4) size (tons); (6) air handler unit quantity; (7) VAV/BP/FC [variable air volume]; (8) chiller quantity; (9) chiller type; (10) type of controls; (11) condenser cooling type; (12) cooling method; (13) heating method; (14) presence of a dedicated boiler; (15) number of boilers; (15) capacity in millions of Btus [British thermal units]; (16) presence of a cooling tower; (17) CT [cooling tower] quantity; (18) building number; and (19) location description. RFP, HVAC and Refrigeration Systems Description, J-1502000-09.

government cost estimate (IGCE) as an example, the agency explains how offerors can estimate the cost to perform maintenance on auxiliary generators. Id.

First, offerors can cross-reference the detailed information in RFP Section J on auxiliary generators to a commercial cost estimation system. AR, Tab 21, Decl. Project Mgr. 1 at 1-2, citing RFP, Section J, at 514-517.⁶ The commercial cost estimation system will provide the estimated labor hours and materials costs for each specific maintenance task for that type of generator. Id. at 3. These labor hours and material cost form the basis of the final pricing of the task, after the addition of an offeror's direct equipment costs, overhead, G&A and profit. Id. at 4-5. We find that the Navy has provided a reasonable explanation of how offerors are able to use the data in the solicitation to calculate a proposed price. Given the extensive and detailed appendices in the RFP and the example provided by the agency that demonstrates how this data may be used, we find that the solicitation contains sufficient information for offerors to complete their proposals and therefore we find no basis to sustain the protest.

Release of Fluor's Proprietary Data

Next, Fluor contends that in order to remedy a portion of the alleged ambiguity the Navy is obliged to release Fluor's own proprietary data as part of the solicitation. Supp. Comments at 1. We find no obligation for the Navy to do so.

Fluor contends that offerors require the following historical information on work orders from Fluor's proprietary data file in order to complete their proposals: (1) problem description; (2) contract number; (3) priority level; (4) asset number and description; (5) related technical appendix; (6) funding reference; (7) scheduled start date and time; (8) scheduled finish date and time; (9) actual start date and time; (10) actual finish date and time; (11) work type; and (12) location. Id. at 2.

Overlooking the issue of whether the agency is obligated to release any data marked as "proprietary," Fluor has failed to articulate how this specific information--which is largely in code--is necessary for offerors to respond to the solicitation. Furthermore, the data reflects Fluor's own technical approach, and it is not immediately clear how knowing whether Fluor was able to complete tasks on schedule would assist another offeror. Finally, the solicitation already provides offerors with the date, location, and description of service calls, which allows offerors to identify which items require more frequent servicing and the nature of

⁶ The Navy uses the data in the solicitation to generate a 12-character alphanumeric code--which acts as a cross-reference between the solicitation and the commercial estimation database that was used to calculate the IGCE. AR, Tab 21, Decl. Project Mgr. 1, at 2.

those repairs. Fluor does not explain why its data provides substantively different information.

Turning to the crux of Fluor's argument, *i.e.*, whether the agency should include Fluor's data in the procurement, we have previously addressed the question of whether an agency is obligated to release proprietary information.⁷ In Richen Mgmt., the protester alleged that the agency's failure to provide information on the incumbent contractor's subcontractor, service call logs, and detailed repair history prevented it from submitting a proposal. Richen Mgmt., B-406750, B-406850, July 31, 2012, 2012 CPD ¶ 215 at 3-4. We explained that the increased risk to the protester without such information did not preclude competition or render the solicitation improper. *Id.* at 4. Furthermore, we found that the agency's decision not to release the information was reasonable based on the proprietary nature of the requested information. *Id.* at 5. Similarly, we find no obligation for the agency to release proprietary information here.⁸

Fluor also argues that the absence of its proprietary data in the solicitation creates an unreasonable degree of uncertainty for purposes of preparing and evaluating offers. We conclude that the protester is not an interested party to raise these concerns. Under the bid protest provisions of the Competition in Contracting Act of 1984, only an interested party may protest a federal procurement. 31 U.S.C. §§ 3551, 3553. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's

⁷ Fluor has not clarified why it asks the agency to release its own proprietary data--and with it some of the incumbent's advantage--to other offerors. Furthermore, Fluor does not address the Navy's obligation in the instance that Fluor declined to waive the rights in its data.

⁸ After asserting in its protest that the solicitation is ambiguous and does not provide sufficient detail, Fluor--relying on our decision in Inframap Corp.--asserted that the agency has an obligation to provide offerors with "the 'best information available' when soliciting requirements on a firm-fixed-price basis." Supp. Comments at 3, citing Inframap Corp., B-405167.6, Feb. 6, 2012, 2012 CPD ¶ 66. However, in that decision, our Office sustained the protest because the agency's workload estimate in a requirements contract was clearly flawed and not based on the "best information available" to the agency. *Id.* at 5. Fluor errs by applying the "best information available" standard to the release of raw historical data. Therefore, consistent with our prior decisions, we review the solicitation to determine whether it provides offerors with sufficient detail to enable intelligent competition on a relatively equal basis. CWTSatoTravel, *supra*, at 10.

status in relation to the procurement. RELM Wireless Corp., B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. Whether a protester is an interested party is determined by the nature of the issues raised and the direct or indirect benefit or relief sought. Id.

Here, we find that Fluor is not an interested party to challenge the alleged uncertainty in the solicitation because we discern no competitive prejudice to Fluor. Competitive prejudice is an essential element of every viable protest, and where none is shown or otherwise evident, we will not sustain a protest, even where a protester may have shown that an agency's actions arguably were improper. DNC Parks & Resorts at Yosemite, Inc., B-410998, Apr. 14, 2015, 2015 CPD ¶ 127 at 12; Interfor US, Inc., B-410622, Dec. 30, 2014, 2015 CPD ¶ 19 at 7. The protester argues that, in essence, it has been harmed by the Navy's failure to provide its own proprietary data to the industry and the Navy should have sought Fluor's permission to include Fluor's proprietary data in the solicitation. Yet, given that Fluor is in possession of the requested data, we fail to see how the protester is disadvantaged in any respect. Even if we were to find that the other offerors needed Fluor's data, Fluor would not. We have previously explained that a protester was not an interested party to challenge an "alleged 'uncertainty'" in a solicitation "because we discern[ed] no competitive prejudice to" the protester. DNC Parks & Resorts, supra, at 12. Fluor, the incumbent, is the only challenger to the terms of the solicitation. Here, no other offerors have challenged the terms of the solicitation, and the agency advises that it received [DELETED] proposals. Contracting Officer's Statement of Facts, Jan. 18, 2017, at 11. Fluor has the data it allegedly needs, and on this basis we find no harm to the protester and dismiss this protest allegation.

Use of a Fixed-Price Contract

Lastly, Fluor challenges the agency's decision to solicit for a fixed-price contract, arguing that "the agency asks offerors to take on an unreasonably high level of risk," which will unduly restrict competition. Protest at 11. The protester contends that the compensation structure of the contract should change if we do not recommend the release of Fluor's proprietary data, OEM specifications and component-level information, in order to shift the financial risk back to the agency. Id. We find no merit to this argument.

The mere presence of risk in a solicitation does not make the solicitation inappropriate or improper. CWTSatoTravel, supra, at 9; Pacific Consol. Indus., B-250136.5, Mar. 22, 1994, 94-1 CPD ¶ 206 at 6 (an agency may properly impose substantial risk on the contractor and minimal risk on itself). Risk is inherent in most type of contracts, especially fixed-price contracts, and firms must use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. JRS Mgmt., supra; AirTrak Travel et al., B-292101 et al., June 30, 2003, 2003 CPD ¶ 117 at 14.

For example, in CWTSatoTravel, the protester challenged the fixed-price nature of the contract, alleging that it was required to perform “an unlimited number of unknown updates and refreshments to the [subject software system] at a fixed price” over a 15-year period. CWTSatoTravel, supra, at 7. We explained that offerors were not exposed to unacceptable or undue risk because there were methods of reducing the risk and there were limitations on the risk to be assumed. Id. at 10.

Here, the solicitation obligates the contractor to assume the base costs of labor and material for maintenance, repairs, and investment, and places significant financial obligation on the contractor. However, in terms of risk, as the Navy notes, offerors can mitigate their risk. For example, “if the offeror estimated maximum labor [32 hours] and material costs [\$2500] for every service order, it would have no risk at all.” Navy Supp. Briefing, Feb. 15, 2017, at 2. The same principle applies to preventative maintenance and integrated maintenance. Offerors may choose to shoulder additional risk and propose lower prices, based on their own risk tolerance, but that choice is the contractor’s. Id. There is no prohibition on shifting risk to the contractor in this manner. See CWTSatoTravel, supra.

Fluor also alleges that the limitations of liability for this contract are illusory and that the agency could improperly obtain wholesale replacement of an entire system by piecemeal service order on its component parts. Protest at 23-24 (“[T]he Contractor could be forced to replace, at its own expense, each and every air conditioning unit for over 2000 barracks residents” or “Pensacola’s entire underground pipe system, 100 feet at a time.”). We see no evidence that the agency intends to use the contract in this manner. Furthermore, an awardee remains free to dispute this should it occurring during the course of the contract.

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel