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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Information Ventures, Inc.

File: B-299255

Date: March 19, 2007

Bruce H. Kleinstein, Esq., for the protester.

Scott C. Briles, Esq., Department of Health and Human Services, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that sample task to be used for cost evaluation under solicitation contemplating award of multiple cost-reimbursement contracts is not representative of the contract work is denied where the record fails to support the protester's position.
 2. Protest that solicitation is inconsistent with Federal Acquisition Regulation § 16.504(a)(4)(iv), which requires that a solicitation for an indefinite quantity that contemplates multiple awards state the procedures and selection criteria that the government will use to provide awardees a fair opportunity to be considered for each order, is denied where solicitation identifies the procedures and selection criteria the agency will use in evaluating contractor responses to requests for task order proposals.
 3. Under solicitation contemplating the award of multiple task order contracts, where it is impossible to determine the amount of work that will ultimately be awarded to each contractor at the time of award, minimum guaranteed amount of \$1,000 per contract is reasonable.
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DECISION

Information Ventures, Inc. (IVI) protests the terms of request for proposals (RFP) No. 2006-N-09172, issued by the Department of Health and Human Services, Centers for Disease Control and Prevention (CDC), for health marketing training and consultation services. IVI complains that the RFP does not include a rational cost evaluation scheme and that it contains other improprieties.

We deny the protest.

The RFP, which was issued on October 26, 2006 as a small business set-aside, contemplates the award of multiple indefinite-delivery/indefinite-quantity (ID/IQ) cost-plus-award-fee contracts to furnish assistance to the CDC in the area of health marketing communications. The solicitation provides for a base contract period of 12 months, with three 2-year options. The RFP defines six categories of assistance to be furnished: information and referral; communications meeting and conference support; database development/management; website design and maintenance; project management; and technical assistance and training. Offerors are to demonstrate in their proposals the ability to perform tasks in all six areas.

The RFP provides for award to the offerors whose proposals are determined to represent the best value to the government, with technical merit and other non-cost factors of greater importance in the evaluation than cost/price. Technical proposals are to be evaluated on the basis of technical approach/understanding of requirements; staff management and approach; corporate capabilities/similar experience; and the offeror's approach to the following sample task:

The offeror is to provide a draft training plan not to exceed an 18-month period of performance that would support an educational campaign intended to increase the awareness of and prevent the spread of avian influenza among working adults. . . . The plan should include the offeror's: 1) technical assistance that would be offered to the government, which includes but is not limited to consultation about project area(s), needs assessment, and communication planning; 2).development of curricula and training materials for staff and partner organizations that would be collaborating on the project; 3) strategies for offering the training to dispersed sites (i.e. would the training be offered at a public health conference, via the Web, or another way? Explain the rationale for the selection); and 4) recommended training methods to support outreach to the media. The offeror can select any pandemic stage but please begin the sample task by stating which stage will be addressed. The offeror should also include other relevant elements to the plan as appropriate and a proposed budget, which focuses on labor categories and associated labor hours it will take to perform the proposed task. Government estimate is \$550,000. The budget is to be included in the sample task narrative and is to reflect costs for the full implementation of the proposed project.

RFP at 61.¹ Offerors' cost proposals are to consist of labor rates, indirect costs, and award fee for the staff proposed for the sample task, plus any additional key

¹ Amendment No. 00002 amended the foregoing paragraph to include the following language:

(continued...)

personnel. RFP amend. 3, at 2. The RFP provides that the offerors' cost data will be used "to establish the reasonableness of the proposed amounts as well as to perform any required cost realism analysis." RFP amend. 2, at 2. The RFP also provides that past performance will be the deciding factor for award if "offerors are considered essentially equal for both technical and cost factors." RFP at 62.

The RFP explains that after contracts are awarded, task orders for services will be competed among the awardees in accordance with procedures intended to ensure that each contractor is given a fair opportunity to be considered for each order. These procedures provide for the issuance to each contractor of a written request for task order proposal (RFTOP) for each requirement. Each RFTOP is to contain a statement of work, instructions to the contractors for responding to the RFTOP, and evaluation and award factors. Contractors choosing to respond are to furnish a technical proposal containing a "person loading" chart and a cost proposal, and the responses are to be evaluated on a best value basis. The RFP provides that the cost information furnished in response to an RFTOP may "be analyzed and evaluated to determine validity, realism and reasonableness of each cost proposed, and to determine the cost risk and most probable cost to the Government." RFP at 36. In addition, the RFP provides that the procedures for ensuring contractors a fair opportunity to be considered for an order do not apply in specified circumstances, such as where "[t]he need for the services is of such urgency that providing such opportunity would result in an unacceptable delay." Id. at 37.

On December 11, 1 day prior to the closing date for receipt of proposals, IVI filed a protest with our Office objecting to various terms of the solicitation. We address these arguments in turn below.

Alleged Improprieties Pertaining to the Sample Task

IVI contends that the sample task set forth in the RFP is not representative of the work that will be required during contract performance and that it does not provide a common basis for the evaluation of technical approaches. As a consequence, the protester asserts, it does not provide a rational basis for evaluating the cost differences between proposals.

(...continued)

The budget, i.e. cost breakdown, is to be submitted as part of the cost/business proposal. (See clause L.11.) Offerors shall submit the labor categories and number of hours with the technical proposals, but no costs. Offerors should propose costs based upon their technical approach to the Sample Task.

RFP amend. 2, at 5.

Cost or price to the government must be included in every RFP as an evaluation factor, and agencies must consider cost or price to the government in evaluating competitive proposals. 41 U.S.C. § 253a(c)(1)(B) (2000). While it is up to the agency to decide upon the appropriate method for evaluation of cost or price in a given procurement, an agency must use an evaluation method that provides a basis for a reasonable assessment of the cost of performance under the competing proposals. S.J. Thomas Co., Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73 at 3. Where estimates for various types of required services are not reasonably available, an agency may establish a reasonable hypothetical consistent with the RFP requirements to provide a common basis for comparing the relative costs of proposals. Aalco Forwarding, Inc. et al., B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 at 11. A reasonable sample task is one that is representative of the contract work.² Metro Mach. Corp., B-297879.2, May 3, 2006, 2006 CPD ¶ 80 at 15.

The agency argues that the sample task here is “fairly representative” of the contract work because it “includes many of the [statement of work’s] technical requirements,” Contracting Officer’s Statement at 3; that is, it encompasses requirements pertaining to project management, technical assistance, conference planning, and website design/maintenance. In this regard, the agency contends that the subject matter of the sample task “mirrors many of the CDC’s current activities, and was thus designed to be reflective of the potential [RFTOP] statements of work that will originate from the CDC’s Centers, Institutes, and Offices.” *Id.* at 4. The protester, on the other hand, asserts that the sample task is flawed because it does not adequately reflect the work the agency will order from the contractors. We disagree. Although the sample task here is not reflective of the full range of services that the agency may order under the contracts to be awarded, we are not persuaded that it is not sufficiently typical of the work to be performed to furnish a meaningful basis for a comparison of costs.

The protester further argues that basing the evaluation of costs on offerors’ responses to the sample task increases the likelihood of the agency’s issuing task orders on a sole-source basis. IVI contends that since the solicitation requests cost data only for the sample task and the sample task does not encompass many of the labor categories that contractors will offer in response to the RFTOPs, “the agency will not have determined that the rates for services offered at hourly rates under

² We recognize that a sample task is of more limited utility in performing a cost evaluation of a cost-reimbursement contract than in performing a price evaluation under a fixed-price contract given that the cost information furnished is not binding, see CW Gov’t Travel, Inc.—Recon. et al., B-295530.2 *et al.*, July 25, 2005, 2005 CPD ¶ 139 at 5; we nonetheless think that there are circumstances in which, due to the absence of a viable alternative approach for evaluating the cost differences between proposals, use of a sample task is unobjectionable.

many RFTOPs are fair and reasonable." According to IVI, this means that the agency "will be required to make a separate determination of fair and reasonable pricing," which will take time, thereby increasing the likelihood of the agency issuing task orders on a sole-source basis. Protest at 6. The protester's conclusion—that a desire to avoid reviewing contractors' proposed costs in connection with competitive offers under an RFTOP will encourage the agency to issue task orders on a sole-source basis—is utterly speculative and provides no basis to object to the RFP.

Next, IVI argues that the RFP does not clearly indicate whether a cost realism analysis of the costs associated with the sample task will be performed. The solicitation requires offerors to submit cost data for the sample task and provides that this data will be used "to establish the reasonableness of the proposed amounts as well as to perform any required cost realism analysis." RFP amend. 2, at 2. As noted by the agency, Federal Acquisition Regulation (FAR) § 15.305(a)(1) requires a cost realism analysis for all cost-reimbursement contracts. Since the solicitation here contemplates the award of cost-reimbursement contracts, for which cost realism analyses are required, and the sample task cost data is the only cost data on which such analysis may be performed, we think that it is reasonably clear that the solicitation contemplates a cost realism analysis of the costs associated with the sample task.

IVI's complaint that the sample task does not provide a common basis for the evaluation of offerors' technical approaches focuses on the RFP's lack of specificity as to the pandemic stage to be addressed and the required duration of the training plan. The protester argues that because offerors are free to elect any period of performance (up to 18 months) for their training plans and to address any pandemic stage, offerors' draft training plans and their associated costs will not be comparable. The protester's argument appears to be that variations in offerors' sample training plans attributable to the above factors will preclude a reasonable evaluation of the proposed plans. We fail to see how variations among offerors in the pandemic stage addressed and duration of the training plan will prevent the agency from evaluating offerors' technical approaches to the sample task.

IVI also argues that the RFP fails to specify the technical and cost criteria that will be used to evaluate contractors' responses to RFTOPs, as required by FAR § 16.504(a)(4)(iv). The protester alleges that the failure to furnish notice in the solicitation of the evaluation criteria that will be used to evaluate responses under RFTOPs will allow the agency to manipulate the task order competitions by improperly tailoring the evaluation criteria to favor preferred sources.

FAR § 16.504(a)(4)(iv) requires that a solicitation for an indefinite quantity that contemplates multiple awards "state the procedures and selection criteria that the Government will use to provide awardees a fair opportunity to be considered for each order." The solicitation here explains that to provide all contractors a fair opportunity to be considered for each order, the agency will issue an RFTOP for each requirement to each contractor. RFP at 35. The RFTOP is to contain

information comparable to a competitive solicitation, including a statement of work, instructions to the contractors for responding to the RFTOP, and evaluation and award factors. Id. Each proposal received in response to an RFTOP is to be evaluated on both technical and cost, and, at the agency's discretion, on the basis of past performance and cost control on previous projects. Id. at 36. The evaluation criteria will be specified in the RFTOP and may vary depending on the emphasis of the project. Id. The government is to issue the order to the contractor whose proposal it determines to represent the best value. Id.

We do not think that FAR § 16.504(a)(4)(iv) requires the agency to specify in the RFP the precise evaluation factors that it will use in evaluating responses to each future RFTOP; what is required is that the agency explain to offerors the process and selection criteria that it will use to ensure that all awardees are given a fair opportunity to be selected, which the RFP here did. Further, we will not consider the protester's complaint that the failure to furnish notice in the solicitation of the evaluation criteria that will be used to evaluate offers under RFTOPs allows the agency to manipulate the task order competitions by improperly tailoring the evaluation criteria to favor preferred sources because it merely anticipates improper agency action, and thus is speculative. We will not question the process and selection criteria identified in the RFP as defective on the basis of such speculation. Sun Chem. Corp., B-288466 et al., Oct. 17, 2001, 2001 CPD ¶ 185 at 13.

Minimum Quantity Guarantee

IVI takes issue with the RFP's minimum guaranteed amount of \$1,000 to be ordered from each contractor. The protester contends that the amount is "unrealistic and not reasonably related to the agency's solicitation requirements" and that "it impedes ongoing participation by small business concerns." Protest at 8.

An ID/IQ contract must require the government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. FAR § 16.504(a)(1). To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the government is fairly certain to order. FAR § 16.504(a)(2).

Here, the guaranteed minimum of \$1,000 per contract is clearly an attempt by the agency to satisfy both the requirement that the minimum quantity be more than nominal, *i.e.*, that it be sufficient consideration to form a binding contract, and the requirement that the minimum quantity not exceed the amount that the government is fairly certain to order from any given contractor. We note in the latter connection that since task orders for contract work are to be competed on a best value basis, the agency has no way of predicting at the time of contract award how much work will ultimately be awarded to any particular contractor. Given the tension between the requirement that the minimum quantity not be nominal and the requirement that it not exceed the amount that the government is fairly certain to order, we think that \$1,000 is a reasonable guaranteed minimum amount. Moreover, to the extent that

the protester is arguing that \$1,000 is insufficient consideration to ensure a binding contract, we have previously found a guarantee of only a few hundred dollars to be sufficient consideration to form a binding contract.³ ABF Freight Sys., Inc. et al., B-291185, Nov. 8, 2002, 2002 CPD ¶ 201 at 4.

Other Alleged Improprieties

The protester contends that the RFP is ambiguous as to the number of awards contemplated.

The solicitation here clearly contemplated the possibility of multiple awards. In this connection it incorporated by reference FAR § 52.216-27, which provides as follows:

The Government may elect to award a single delivery order contract or task order contract or to award multiple delivery order contracts or task order contracts for the same or similar supplies or services to two or more sources under this solicitation.

RFP at 52. It also included FAR § 52.215-1, which at subsection (f)(6) reserves to the government the right to make multiple awards. *Id.* at 55. To the extent that the protester is asserting that the agency was required to specify more precisely the number of awards that it expected to make, we are aware of no requirement for such a degree of specificity (and the protester has cited no authority in support of such a position). In this connection, we think that the agency reasonably responded to an offeror query as to the number of contractors to which it intended to make award by noting that “[i]t will depend upon the number and quality of proposals received.” RFP amend. 2, at 7.

Finally, the protester complains that a CDC solicitation for work related to the work solicited here provides for contractors whose performance is rated as good to receive 80 percent of the award fee and those rated as satisfactory to receive 30 percent of the award fee, whereas the instant solicitation provides for contractors rated as good to receive only 75 percent of the award fee and those rated as satisfactory to receive only 15 percent. IVI contends that this is inequitable.

Regardless of the fact that the solicitations in question are closely connected in that the work solicited under the RFP at issue here was originally solicited as part of the

³ In its comments on the agency report, filed after the RFP closing date, IVI raised the argument that the agency had violated FAR § 16.504(a)(1) and (2) by failing to document a basis for the maximum contract amount set forth in the RFP. We will not consider this argument because it was not raised until after the RFP closing date, and thus is untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2006).

other RFP, the two procurements are nonetheless separate, and thus the action taken under one is not relevant to the propriety of action taken under the other for purposes of a bid protest. Patriot Contract Servs. LLC et al., B-278276.11 et al., Sept. 22, 1998, 98-2 CPD ¶ 77 at 7 n.6.

The protest is denied.

Gary L. Kepplinger
General Counsel