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Decision

Matter of: US Investigations Services, Professional Services Division, Inc.

File: B-410454.2

Date: January 15, 2015

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Robert D. English, Esq., Department of Justice, Federal Bureau of Investigation, for the agency.
Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against issuance of a task order to a vendor for support services pursuant to its General Services Administration Federal Supply Schedule contract is sustained where the record does not support contracting agency's determination that the services called for under the task order were within the scope of the vendor's contract.

DECISION

US Investigations Services, Professional Services Division, Inc. (USIS) protests the issuance of a delivery order to FCi Federal, Inc. under request for quotations (RFQ) No. DFJ-14-1700-PR-0011678, issued by the Department of Justice, Federal Bureau of Investigation (FBI), for services in connection with the agency's Name Check and Freedom of Information Act (FOIA)/Declassification programs. The Delivery Order was issued under FCi's Federal Supply Schedule (FSS) contract. USIS maintains that the services called for under the RFQ are not available under FCi's FSS contract, that the agency misevaluated FCi's price, and that the agency misevaluated USIS's past performance.

We sustain the protest in part, and deny it in part.

BACKGROUND

The RFQ contemplates the award of a fixed-price delivery order for a 12-month period of performance. RFQ at 1, 19. The successful contractor will provide personnel to perform services in connection with the agency's National Name Check Program. Under that program, the successful contractor will provide research, analytical, and reporting services for authorized federal agencies. Essentially, contractor personnel research FBI files to provide available and appropriate information within legal and policy constraints. RFQ, attach. 1, Name Check Statement of Work, at 1. The RFQ also contemplates services in connection with the agency's FOIA/Declassification program. Under that program, the successful contractor will provide services to the agency in connection with responding to FOIA requests, and also in making determinations regarding the appropriate classification of national security related information. RFQ, attach. 2, FOIA Statement of Work, at 1.

Firms were advised that the agency would evaluate quotations as technically acceptable or unacceptable based on several factors. RFQ at 14-15. Firms found technically acceptable would then be subject to a past performance evaluation and assigned an adjectival rating of superior, good, neutral, marginal or unsuccessful. Id. at 13. The RFQ also advised that the agency would evaluate prices for reasonableness. Id. at 15. The solicitation provided for award to the lowest-priced firm receiving the highest past performance rating. Id. at 13.

The agency received three quotations in response to the solicitation, including those submitted by USIS and FCi. Agency Report (AR), exh. 14, Award Determination, at 2. All three quotations were found technically acceptable, id. at 3, and all three firms also received past performance ratings of good. Id. at 7, 10, 13. FCi submitted the lowest price of \$13,298,366, followed by USIS and the third firm. Id. at 14. The agency made award to FCi because it submitted the lowest price among the three concerns that all had received the same past performance rating. After being advised of the agency's issuance of a task order to FCi, USIS filed this protest.

PROTEST

USIS raises several protest allegations, We have carefully considered all of USIS's arguments, and sustain its protest for the reason discussed below. We deny the remainder of USIS's allegations.¹

¹ USIS alleges that the agency improperly found FCi's prices reasonable. According to the protester, because FCi did not propose labor categories that were required by the RFQ, the firm's proposed hourly rates were unreasonably low.

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USIS alleges that issuance of a task order to FCI was improper because the labor categories required to perform the task order are not on FCI's FSS contract. The protester maintains that the agency erred in finding that the labor categories included on the awardee's FSS contract encompass the types of employees required to perform the requirement. We agree with the protester that the labor categories included on FCI's FSS contract do not encompass the solicited services.

As a general matter, FSS procedures provide agencies a simplified process for obtaining commonly used commercial supplies and services, Federal Acquisition Regulation (FAR) § 8.401(a), and, although streamlined, satisfy the requirement for full and open competition. 41 U.S.C. § 259(b)(3); FAR § 6.102(d)(3). However, non-FSS products and services may not be purchased using FSS procedures; their purchase requires compliance with otherwise applicable procurement laws and regulations, including those requiring the use of full competitive procedures. Symplicity Corp., B-291902, Apr. 29, 2003, 2003 CPD ¶ 89 at 4. Where an agency announces its intention to order from an existing FSS, all items quoted and ordered are required to be on the vendor's schedule contract as a precondition to its receiving the order. Science Applications Int'l Corp., B-401773, Nov. 10, 2009, 2009 CPD ¶ 229 at 2 n.1; Tarheel Specialties, Inc., B-298197, B-298197.2, July 17, 2006, 2006 CPD ¶ 140 at 4. In the case of a services task order such as the one at issue here, all of the solicited labor categories must be on the successful vendor's FSS contract. Tarheel Specialties, Inc., supra.

The RFQ here essentially included four principal labor categories: research analysts, program managers, general consultants, and legal administrative specialists. RFQ at 19-20.² For three of the four labor categories--research

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There is no merit to this aspect of USIS's protest. In a fixed-price contract setting, determinations of price reasonableness relate to whether a firm's proposed prices are too high, not too low. Lulus Ostrich Ranch, B-408993.2, Feb 21, 2014, 2014 CPD ¶ 70 at 4. An allegation that a firm's prices are too low does not provide a basis for our Office to object to the agency's price evaluation.

USIS also challenges the agency's evaluation of its past performance. We have considered this aspect of its protest and conclude that USIS's allegation amounts to no more than disagreement with the agency's evaluation findings in the area of past performance. USIS's disagreement with the agency's evaluation, without more, does not provide a basis for our Office to find the agency's evaluation unreasonable. Re-Engineered Business Solutions, Inc., B-405662.4, B-405662.5, Sept. 19, 2012, 2012 CPD ¶ 261 at 9.

² The RFQ actually included 10 contract line items representing 10 different labor categories, but several of the labor categories are duplicative or overlapping. For

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analysts, general consultants, and legal administrative specialists³--FCi proposed a single labor category from its FSS contract, program management analyst. AR, exh. 7, FCi Price Reduction Quote, at 4. FCi's FSS contract includes the following description of its program management analyst labor category:

Plans and provides analytical support for facilitation, methodology development and evaluation, business management techniques, and organizational development. Supports business process improvements and modernization projects. Key responsibilities include: Developing modern business methods, identifying best practices, and creating and assessing performance measurements.

AR, exh. 3, FCi Technical Proposal, at 79. An examination of the labor categories required under the RFQ, however, shows that the duties, responsibilities and qualifications of the types of employees solicited by the agency are not encompassed within FCi's program management analyst labor category. For example, the RFQ includes the following description of the background appropriate for the general consultants and legal administrative specialists:

Successful Contractors (General Consultants and LAS [legal administrative specialists]) have historically had experience with career fields such as paralegal, records management, declassification review, and historical research. Educational backgrounds that have been proven valuable for FOIPA [Freedom of Information and Privacy Acts] work processing Contractors include history, political science, and international relations.

RFQ, attach. 2, FOIA Statement of Work, at 6. The RFQ goes on to describe the qualifications for these two positions as follows:

Contractor Qualifications:

TOP SECRET security clearance (Mandatory)

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example, the RFQ called for four discreet research analyst labor categories, two line-level research analyst labor categories (day shift and night shift) and two lead or supervisory research analyst labor categories (day shift and night shift). RFQ at 19-20.

³ These three labor categories comprise approximately 97 percent of the total labor contemplated for contract performance. See RFQ at 19-20.

The applicant shall have completed four years of post secondary education leading to an undergraduate level education or three years specialized work experience (Mandatory)

Two years experience processing and conducting declassification reviews, Freedom of Information Act (FOIPA) or National Name Checks requested for the FBI or other Federal agency (Strongly Desired)

In-depth knowledge of FBI policy, functions, and familiarity with other government agencies' functions (Mandatory)

Familiarization with inputting production data into database management software (Strongly Desired)

Id.

Similarly, the RFQ described the requirements for research analyst positions as follows:

The Government requires appropriately skilled personnel to perform routine administrative and record keeping tasks. Analytical tasks are of moderate complexity predominately involving assessment of written documents and application of the dissemination rules and policies. Candidates must also be capable of learning, using complex records systems and computer applications.

Candidates shall have a bachelor's degree or three or more years of experience providing support to a Government program and/or acquisition organizations either directly with the Government or as a consultant. Military experience is applicable. This experience shall include providing products and services similar to those outlined in this SOW [statement of work]. The Candidates shall be skilled in evaluating and developing methods to accomplish functional objectives. The Candidates shall be competent in applying knowledge of administrative principles, practices, and techniques; organizing and maintaining files and database record keeping systems; preparing, writing, editing, and creating graphs and charts; and drafting, reviewing, evaluating, and processing technical and administrative documents.

RFQ, attach. 1, Name Check Statement of Work, at 4.

Comparing the above-quoted definitions found in FCI's FSS contract and the RFQ, we conclude that FCI's program management analyst labor category does not include many of the requirements for the labor categories identified in the RFQ. For

example, FCI's labor category description makes no mention of experience with paralegal, records management, declassification review or historical research career fields, and also makes no mention of in-depth knowledge of FBI policy, functions, and familiarity with other government agencies' functions. FCI's labor category description also makes no mention of applying knowledge of administrative principles, practices, and techniques; organizing and maintaining files and database record keeping systems; preparing, writing, editing, and creating graphs and charts; or drafting, reviewing, evaluating, and processing technical and administrative documents.

Instead of the disciplines and career fields identified in the RFQ, the principal disciplines and capabilities described in FCI's program management analyst labor category are the development of business methods, the identification of best practices, and creating and assessing performance measurements. The focus of FCI's labor category appears principally to be the development of business techniques and organizational development activities. Simply stated, none of the responsibilities or activities described in FCI's labor category description--identified as 'key' responsibilities in FCI's labor category description--is germane to the work required under the RFQ.

The contemporaneous evaluation record does not show that the agency gave any meaningful consideration to the question of whether or not FCI's FSS contract included labor categories that encompassed the requirements of the task order. In this connection, the agency's individual evaluators did not prepare any narrative materials when reviewing the proposals. AR, exh. 9, Individual Technical Evaluations. The agency's summary technical evaluation report and award determination similarly are devoid of any meaningful consideration of whether award could be made to FCI in light of the labor categories available under its FSS contract. AR, exh. 10, Determination of Technical Acceptability; exh. 14, Award Determination, at 3.

Finally, in responding to the protest, the agency states only generally that it gave consideration to whether or not FCI's FSS contract included labor categories that encompassed the requirements of the RFQ. Even in responding to USIS's specific allegations, the agency has not meaningfully or critically analyzed the question, or explained how it reasonably could reconcile the apparent divergence between FCI's labor category description quoted above and the requirements of the RFQ. Contracting Officer's Statement at 13; Legal Memorandum at 6. The agency focuses largely on the educational and experience requirements of the RFQ's and FCI's labor category descriptions, but does not explain how, substantively, the definitions can be compared. In light of these considerations, we sustain USIS's protest on this basis.

RECOMMENDATION

As noted above, the RFQ contemplates award to the firm that received the highest past performance rating that also submitted the lowest price. In evaluating the firms here, the agency assigned all three concerns the same past performance rating of good, and made award to FCI because that firm submitted the lowest price. In light of our discussion above, we conclude that FCI is ineligible for award because the labor categories required to perform are not available under FCI's FSS contract.

Ordinarily, our Office would recommend that the agency terminate the task order issued to FCI because FCI is ineligible for award. However, during the pendency of the protest, the agency elected to override the automatic stay of performance of the FCI task order based on urgent and compelling circumstances. FBI Letter to Government Accountability Office, Oct. 16, 2014. Accordingly, we recommend that the agency consider the feasibility of terminating the task order awarded to FCI. Should the agency conclude that it is not feasible to terminate FCI's task order, we recommend that USIS be reimbursed the costs associated with preparing its quotation in response to the RFQ. 4 C.F.R. § 21.8(d)(2) (2014). In addition, and regardless of whether or not the agency decides to terminate FCI's task order, we recommend that USIS be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2014).

In the alternative, if the agency determines that it is feasible to terminate FCI's task order, we recommend that the agency make award to the concern next in line for award, if otherwise proper.⁴ The protester's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision.

The protest is sustained.

Susan A. Poling
General Counsel

⁴ It would appear that USIS is the next firm in line for award. In considering whether or not award to USIS is otherwise proper, the agency will be required to find the firm responsible. In a recent decision of our Office, we specifically questioned an affirmative determination of USIS's responsibility made by the Department of Homeland Security, U.S. Citizenship and Immigration Services, because the record demonstrated that the contracting officer there failed to consider specific allegations of fraud advanced by the Department of Justice (DOJ) in a civil suit filed against USIS's parent company, USIS LLC; failed to consider the relationship between USIS and its parent concern; and applied an incorrect legal standard in determining whether USIS was responsible. FCi Federal, Inc., B-408558.4, et al., Oct. 20, 2014, 2014 CPD ¶ 308 at 11.