



Decision

Matter of: Fairwater Associates

File: B-414751.2

Date: September 11, 2017

Kip Pagach for the protester.

Andrew N. Christopher, Esq., James E. Vaiden, Esq., Department of the Navy, for the agency.

Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the terms of the solicitation failed to adequately define requirements and lacked information needed to prepare competitive proposals is denied where the agency responded to a significant number of offeror questions, and the solicitation was adequate for offerors to compete intelligently and on a relatively equal basis.

DECISION

Fairwater Associates, of Norfolk, Virginia, protests the terms of solicitation No. N00189-17-R-0050, issued by the Department of the Navy, Navy Supply Systems Command, for the procurement of a user-friendly web-enabled reverse auction tool. Fairwater alleges that the solicitation's requirements are insufficiently defined, and inadequate to promote a uniform and fair competition between non-incumbent contractors and the incumbent firm.

We deny the protest.

BACKGROUND

The agency issued the solicitation on April 12, 2017, for the purpose of awarding a follow-on contract to fulfil the agency's web-enabled reverse auction tool requirement, currently provided under a task order held by FedBid, Inc. The resultant contract is expected to be a no-cost contract, under which the contractor will be compensated through transaction fees paid directly by vendors that receive awards in procurements conducted through the reverse auction tool. The solicitation provided that the award

would be made on a best-value basis considering three evaluation factors: (1) technical; (2) past performance; and (3) price.

The solicitation included a performance work statement (PWS) describing the operational requirements of the reverse auction tool. In addition to the operational requirements, the PWS requires that the contractor provide training on the tool to 600 users across 50 worksites, and provide technical and customer help desk support from “Monday through Friday, except Federal holidays, between the hours of 8:00 AM and 8:00 PM.” Agency Report (AR), Tab 3, Solicitation, at 55. The PWS reinforced that the contract was to be a no-cost contract, and that “the government shall not be liable for any payment arising under the contract.” Id. at 54. The solicitation also included historic transaction data from the incumbent contract, which identified the total number of transactions and total value of transactions from fiscal year 2011 through fiscal year 2016.

On April 26, potential offerors submitted questions concerning the solicitation to the agency. The agency provided answers to the questions, and issued four amendments to the solicitation, which detailed the questions asked and the agency’s answers, provided additional historical data, and updated the PWS and the solicitation’s instructions and evaluation criteria. As relevant, multiple questions requested supplemental information on various PWS sections, and requested additional historic data from the incumbent contract.

For example, question 6 requested that the agency provide information concerning historic invoicing issues, such as monthly and annual late payment or default rates, and government support for recovery in the event of non-payment of reverse auction fees. In response to question 6, the agency reiterated that all fees to be paid are matters between the vendors and the reverse auction provider, and that no payments would be made by the Navy. Questions 7 through 9 concerned the agency’s training requirements. In response to these questions, the agency provided an overview of information concerning training requirements, objectives, locations, and system user types. In addition, the agency advised that it was the contractor’s responsibility to train Navy contracting personnel with various level of experience to understand and know how to conduct a reverse auction using the contractor’s reverse auction tool. Finally, question 10 concerned a request for historical data on technical support and customer service help desk demand. The Navy indicated that this information was not available.

Also in response to the questions, the agency provided more comprehensive historical transactional data, which showed the total dollar amount and total number of transactions for approximately 90 federal supply classifications and product service codes. The data also provided the total number of transactions by dollar value range, for fiscal years 2013 through 2016.

Subsequent to the publication of the questions and answers, on May 26, Fairwater advised the agency that it had additional questions related to help desk demand, invoicing, and training requirements, and requested that the deadline for questions and

for the submission of proposals be extended. Fairwater expressed its concern that “without additional details in response to questions regarding the invoicing process with awarded vendors and the demand on the help desk . . . non-incumbent bidders will be at a severe competitive disadvantage to the incumbent contract holder since only the incumbent will have key solicitation details that have a significant impact on the cost and profitability for delivering the required services.” AR, Tab 6, Fairwater Email, May 26, 2017, at 1. The agency responded that:

[T]he Government does not intend to extend the solicitation question deadline or entertain face to face questions. Per your reference to Question 6 regarding invoicing, the Government has addressed your questions through the answers provided in the Question and Answer document and Sections 1.2 and 1.2.1 of the Performance Work Statement. No further information is available. The Government has also fully answered Questions 8 & 10 and does not have any additional information to provide.

AR, Tab 8, Agency Email, May 31, 2017, at 1.

On June 2, Fairwater again submitted additional questions to the agency, concerning help desk demand, invoicing processes, and training requirements. It also repeated its request that the deadline for questions be extended, and requested that the deadline for submission of proposals be extended for 4 months.

On June 6, the agency issued amendment 0004 to the solicitation, to make administrative changes to the contract line item numbers. The agency also published, “for informational purposes only,” answers to Fairwater’s June 2 questions. AR, Tab 10, Amendment 0004 Q&A, at 6. Concerning the request for an extension of time, the agency advised that “[t]he Government is unable to further extend the solicitation closing date due to the time needed for evaluation and to allow sufficient time for the awardee to make preparations for full performance.” Id. Concerning Fairwater’s remaining questions, the agency responded that:

The Government cannot disclose the requested data, because it does not possess or have access to such information. The Government has established the minimum standards for training and help desk requirements in the solicitation’s performance work statement. Because this is a no-cost contract, all vendor invoicing for transaction fees takes place between the reverse auction service provider and the contractors using the site; as such, the Government has no stated requirements for vendor invoicing, no privity of vendor-to-vendor invoicing, or any visibility of this process.

Id. Fairwater then filed this protest on June 7.

DISCUSSION

Fairwater alleges that the solicitation is inadequate, and fails to provide sufficient information concerning training requirements, help desk requirements, and invoicing, to permit a non-incumbent contractor to prepare a competitive proposal. Specifically, Fairwater asserts that the information on training requirements is inadequate, because without more detailed information on user types and skill levels, specific training capabilities, and training performance metrics, offerors will not be able to fairly estimate both the amount and level of training required. Fairwater argues that without this information, only the incumbent contractor will know the specific resources required, and non-incumbent offerors will have to make broad assumptions in order to estimate the cost to provide training services.

Concerning the help desk requirements, Fairwater alleges that the provided data is insufficient, and that offerors require detailed information on the volume of help desk demand, the substance and nature of assistance required, and the length and final outcome of calls. Fairwater asserts that, since the incumbent has exact detail in these areas, the agency should provide standards on those details to all offerors to ensure that the agency receives proposals based on uniform information.

Finally, concerning vendor invoicing, Fairwater asserts that the agency should not be permitted to claim that it does not have access to information concerning the late and non-payment rates for invoices, because it can request that information from the incumbent or establish a representative rate for the purposes of preparing proposals. According to Fairwater, these details are needed so that offerors may understand the full effort and cost required to generate revenue for delivering the required reverse auction services.

In assessing a protester's claim that a solicitation is inadequate, our Office will review the solicitation to determine whether it provides sufficient information for offerors to compete intelligently and on a relatively equal basis. Meridian Mgmt. Corp., B-285127, July 19, 2000, 2000 CPD ¶ 121 at 6. The same principles apply with respect to a solicitation for commercial items or services, such as the reverse auctioning services solicited here. Harmonia Holdings, LLC, B-407186.2, B-407186.3, March 5, 2013, 2013 CPD ¶ 66 at 4. A solicitation for commercial services generally should describe the type of service and explain how the agency intends to use it "in terms of function to be performed, performance requirements, or essential physical characteristics." Federal Acquisition Regulation (FAR) § 12.202(b). There is no legal requirement that a solicitation be drafted so as to eliminate all performance uncertainties. Northrop Grumman Tech. Servs., Inc., B-406523, June 22, 2012, 2012 CPD ¶ 197 at 12.

Based on our review of the record here, we conclude that the agency has adequately defined its requirements and provided sufficient information in the solicitation and in subsequent amendments, which included answers to questions posed by potential offerors, to permit offerors to compete intelligently and on a relatively equal basis. As reviewed above, the solicitation described the operational requirements and the training

and help desk support services requirements, and advised that the contract was to be a no cost contract under which “the government shall not be liable for any payment.” AR, Tab 3, Solicitation, at 54. In addition, the agency responded to nearly 50 questions or sub-questions concerning the requirements, and has provided historical transaction data within the agency’s possession.

Specifically, concerning the training requirements, the solicitation mandated that the offeror shall provide training to approximately 600 users across 50 sites. Subsequently, the agency provided extensive additional detail with regard to the training locations, timing and duration, technical and logistical considerations, and training objectives. AR, Tab 5, Amendment 0002 Q&A, at 12-14. Concerning the help desk requirements, the solicitation requires the offeror to provide technical and customer help desk support from Monday through Friday, except Federal holidays, between the hours of 8:00 AM and 8:00 PM. Subsequently, the agency explained that the help desk service level should be adequate to provide “timely and effective” service, but that information concerning historic help desk demand levels was not available. Id. at 14. Finally, with respect to vendor invoicing, the solicitation advised the contract was to be a no-cost contract, and that “the government shall not be liable for any payment arising under the contract.” AR, Tab 3, Solicitation, at 54. Subsequently, the agency advised that “[b]ecause this is a no-cost contract, all vendor invoicing for transaction fees takes place between the reverse auction service provider and the contractors using the site; as such, the Government has no stated requirements for vendor invoicing, no privity of vendor-to-vendor invoicing, or any visibility of this process.” AR, Tab 10, Amendment 0004 Q&A, at 6.

Notwithstanding Fairwater’s requests for additional information, the record shows that the agency has adequately defined its requirements and provided sufficient information to offerors. Although the selected contractor will require additional information to perform the contract, Fairwater has not shown that offerors need additional detail in the solicitation in order to prepare proposals. There is no requirement that the specifications in a solicitation be so detailed that they completely eliminate all risk, or remove every uncertainty from the mind of every prospective offeror. AirTrak Travel et al., B-292101 et al., June 30, 2003, 2003 CPD ¶ 117 at 14. Rather, firms must use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. JRS Mgmt., B-402650.2, June 25, 2010, 2010 CPD ¶ 147 at 5. Even though we agree with Fairwater that there is uncertainty concerning, for example, the volume of help desk support required under the contract, and agree that the contractor bears risk in pricing the requirements, that fact alone does not demonstrate that the solicitation is defective. Harmonia Holdings, LLC, supra, at 6. In sum, Fairwater has not shown that the solicitation is inadequate to allow offerors to compete intelligently and on a relatively equal basis in this procurement for commercial services.

With respect to Fairwater’s allegations that without access to information known to the incumbent contractor the incumbent will have an unfair competitive advantage, an incumbent contractor’s acquired technical expertise and functional knowledge of the

costs related to a requirement's complexity are not generally considered to constitute unfair advantages that the procurement agency must eliminate. Katmai Information Techs., LLC, B-406885, Sept. 20, 2012, 2012 CPD ¶ 277 at 5-6; Navarro Research and Eng'g, Inc., B-299981, B-299981.3, Sept. 28, 2007, 2007 CPD ¶ 195 at 4. We have consistently explained that an offeror may possess unique information, advantages, and capabilities due to its prior experience under a government contract and that the government is not necessarily required to equalize competition to compensate for such an advantage, unless there is evidence of preferential treatment or other improper action (which Fairwater did not allege here). Harmonia Holdings, LLC, supra, at 9. Thus, the existence of an advantage in and of itself does not constitute preferential treatment by the agency, nor is such a normally occurring advantage necessarily unfair. Id. at 9-10; Council for Adult & Experiential Learning, B-299798.2, Aug. 28, 2007, 2007 CPD ¶ 151 at 6. Here, Fairwater has not alleged that the incumbent contractor has anything more than the normally occurring advantage that any incumbent may possess, which the agency is not required to neutralize.

The protest is denied.

Susan A. Poling
General Counsel