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Decision

Matter of: WorldWide Language Resources, Inc.

File: B-420900

Date: October 21, 2022

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Major Nhu T. Tran and Lieutenant Colonel Seth B. Ritzman, Department of the Army, for the agency.

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DIGEST

1. Protest challenging the terms of the solicitation as ambiguous or inadequately detailed is denied where the solicitation provides sufficient information to allow offerors to intelligently draft proposals.
 2. Protest that the solicitation's evaluation scheme improperly fails to consider the cost of Defense Base Act insurance in the total evaluated price is denied where the agency reasonably believes that initial costs would not be reflective of true costs over the life of the contract.
 3. Protest that the solicitation unreasonably fails to consider offerors' past performance is denied where agency reasonably exercised its discretion in not examining offerors' past performance at the task-order level.
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DECISION

WorldWide Language Resources, Inc., of Fayetteville, North Carolina, protests the terms of request for task order proposals (RTOP) No. W911W4-22-R-CENT2, issued by the Department of the Army, for foreign language interpretation, translation, and transcription services. The protester contends the solicitation is ambiguous and inconsistent, does not allow all offerors to compete on an equal basis or otherwise intelligently prepare proposals, impermissibly excludes certain insurance costs in the cost/price evaluation, and unreasonably fails to consider past performance.

We deny the protest.

BACKGROUND

On June 21, 2022, the Army issued the RTOP under the Defense Language Interpretation and Translation Enterprise II (DLITE II) indefinite-delivery, indefinite-quantity (IDIQ) contract, pursuant to the procedures of Federal Acquisition Regulation (FAR) subpart 16.5.¹ Agency Report (AR), Tab 9, RTOP amend. 003 at 1-2, 67; Contracting Officer's Statement (COS) at 1-3; Memorandum of Law (MOL) at 1. The solicitation contemplates the issuance of a single task order, with labor-hour and cost-reimbursement contract line items, with a 1-year base period of performance and four, 1-year option periods, for management and linguist support services. RTOP at 3. Specifically, the Army sought contractor support in the areas of language interpretation, translation, and transcription services in the U.S. Central Command's area of operations, which includes 19 countries. COS at 1.

The solicitation advises that award will be made on best-value tradeoff basis, considering two factors: (1) technical; and (2) cost/price. RTOP at 83. The technical factor has three subfactors: (a) project management; (b) human capital; and (c) transition plan. *Id.* at 84. Under the project management subfactor, the Army will evaluate an "offeror's approach and understanding, including risk of unsuccessful performance to management and non-linguist personnel staffing including organizational structure, roles, responsibilities, and lines of communication for supporting linguist, monitoring performance, maintaining quality, managing risk, and interfacing with the Government." *Id.* Under the human capital subfactor, an offeror will be evaluated based on its "proposed approach and understanding, including risk of unsuccessful performance, to recruiting, vetting, hiring and retaining qualified linguist staffing[.]" *Id.* For the third technical subfactor, transition plan, the agency will evaluate an offerors' approach for a 90-day phase-in period. *Id.* at 85. Cost/price will be evaluated for reasonableness, completeness, and balanced pricing. *Id.* at 86.

As a preliminary matter, WorldWide submitted a proposal and filed the instant protest prior to the established due date for submissions. COS at 4. Following the production of the agency report, and after an additional round of briefing, our Office, on October 7, held an outcome prediction alternative dispute resolution (ADR) teleconference call with the parties. See 4 C.F.R. § 21.10(e). During this call, the GAO attorney assigned to the protest advised that the protest would likely be sustained, in part, with respect to a single allegation--that the solicitation did not provide sufficient information to allow offerors to intelligently calculate their labor rates with respect to meal and lodging costs. The GAO attorney further explained that he would likely deny the remainder of WorldWide's protest allegations.

On October 11, the agency asked our Office to dismiss the protest as academic, based on the agency's intention to take corrective action. Req. for Dismissal, Oct. 11, 2022.

¹ The RTOP was amended three times. Unless stated otherwise, all citations are to the final version of the solicitation, using the Adobe PDF document page numbers.

The Army provided that it intends “to issue an amendment to the [solicitation] to provide more detail on performance location regarding which locations provided government lodging and access to dining facilities [and] will allow proposal revisions based on the amendment.” *Id.* at 1. The protester responded that the agency’s intended corrective action does not render the entire protest academic because “there are other challenges to the sufficiency of the solicitation that are not addressed by the corrective action.” Resp. to Req. for Dismissal, Oct. 12, 2022, at 1.

We dismiss the protest allegation addressed by the agency through its voluntary corrective action--whether the solicitation provides sufficient information to allow offeror’s to intelligently calculate their labor rates with respect to meal and lodging costs--as the corrective action renders this protest ground academic. See e.g., *Dyna-Air Eng’g Corp.*, B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132. Notwithstanding the predicted outcome explained by the GAO attorney during the ADR teleconference call, however, WorldWide elected not to withdraw its remaining protest grounds.² See Resp. to Req. for Dismissal, Oct. 12, 2022, at 1.

DISCUSSION

The protester raises several allegations challenging the terms of the solicitation. WorldWide contends the RTOP fails to provide relevant information, and contains various ambiguities and inconsistencies, which prevent offerors from intelligently preparing proposals. Protest at 9-16; Comments at 2-12. Additionally, WorldWide argues the solicitation is contrary to law and regulation where it fails to consider Defense Base Act (DBA) insurance costs in the cost/price evaluation. Protest at 16-19; Comments at 12-15. Finally, the protester argues the solicitation unreasonably fails to consider past performance. Protest at 19-20; Comments at 15-17. For the reasons that follow, we find no basis to sustain the protest.³

² Because the estimated value of the issued task order is over \$25 million, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award IDIQ contracts awarded under the authority granted in title 10 of the United States Code. 10 U.S.C. § 3406(f).

³ WorldWide raises other collateral allegations. Although our decision does not specifically address all of the protester’s arguments, we have considered each argument and find that none provides a basis on which to sustain the protest. For example, the protester alleges that incumbent contractors have an unfair competitive advantage by virtue of their current or historical performance on task orders for similar services. See e.g., Protest at 14 (arguing that incumbent firms will use their knowledge of historical performance locations to achieve an unfair competitive advantage when proposing on-site managers).

However, while it may be the case that other potential offerors (including several incumbent contractors) may possess information gained through the performance of prior contracts (e.g., the location of prior linguist performance), such a natural

As a general rule, a solicitation must be drafted in a fashion that enables offerors to intelligently prepare their proposals and must be sufficiently free from ambiguity so that offerors may compete on a common basis. *Raymond Express Int'l*, B-409872.2, Nov. 6, 2014, 2014 CPD ¶ 317 at 9. However, there is no requirement that a competition be based on specifications drafted in such detail as to completely eliminate all risk or remove every uncertainty from the mind of every prospective offeror; to the contrary, an agency may provide for a competition that imposes maximum risks on the contractor and minimum burdens on the agency, provided the solicitation contains sufficient information for offerors to compete intelligently and on equal terms. *Phoenix Env'tl. Design, Inc.*, B-411746, Oct. 14, 2015, 2015 CPD ¶ 319 at 3.

The protester first argues the solicitation lacks sufficient information to allow WorldWide to draft its proposal intelligently, with respect to proposing on-site management. Protest at 11; Comments at 4-6. The solicitation required offerors to “provide on-site management to supervise contractor personnel throughout the period of performance of this task order.” RTOP at 29. Under the project management subfactor, the Army would evaluate an offeror’s management approach and its non-linguist personnel staffing. *Id.* at 84. In the protester’s view, the RTOP does not provide adequate information, with respect to expected performance locations, for WorldWide to intelligently propose on-site managers. As one example, the protester notes that the awardee may be required to provide as many as 304 linguists in Iraq, yet, the RTOP does not provide any specific information as to where in that country the linguists are likely to be located. Comments at 4. In response, the agency explains that due to the fluid nature of the Army’s requirement, it is not feasible to provide expected performance locations. COS at 4-5. Moreover, the Army provides that the solicitation placed the burden on offerors to determine the appropriate management structure, but did not require offerors to propose where, specifically, managers would be located. MOL at 11. In this regard, the Army asserts the RTOP encourages novel and creative management structures, rather than a single rigid approach. *Id.* at 11-12.

We do not agree with the protester that the RTOP provides insufficient information for offerors to propose on-site managers. In this regard, the solicitation provides the

incumbent advantage does not require the agency to take any action to provide comparable information to a non-incumbent offeror. There is simply no requirement that an agency equalize a competition to compensate for the advantage an offeror may possess based on unique information, advantages, and capabilities obtained through its prior experience under a government contract (either as an incumbent contractor or otherwise), absent evidence of preferential treatment or other improper action. *Millenium Corp., Inc.*, B-412866, B-412866.2, June 14, 2016, 2016 CPD ¶ 168 at 10; see FAR 9.505.2(a)(3). WorldWide presents no evidence or argument to suggest that the existence of a perceived incumbent advantage, in this case, rests on anything more than a naturally occurring advantage achieved through performance of government contracts. Accordingly, this protest allegation is denied.

number of linguists required (per language category) for a given country, and does not mandate that an offeror identify the exact location within each respective country to place its management team. See AR, Tab, 8a, RTOP Tech. Exh., Tech. Summary; RTOP at 29. Indeed, while the protester may be correct in asserting that without information concerning specific performance locations (via either historical information or a forward-looking estimate) it will be “difficult” to know the “best” locations to place its on-site managers (Comments at 4), the information in the RTOP provides, in our view, offerors with a sufficient basis to propose an approach to providing on-site management teams.⁴

Similarly, the record does not demonstrate that offerors are deprived of an opportunity to intelligently prepare their proposals with respect to contractor travel from the Army’s Continental United States Replacement Center (CRC). The RTOP advised that contractors travelling from the United States to deployed areas of operations would embark from the CRC. RTOP at 39. WorldWide contends that a lack of historical data or a schedule of CRC deployments “negatively affects the ability for prospective contractors to accurately draft their transition approaches[.]” Protest at 15. However, the protester does not articulate any rationale for why historical information is necessary for WorldWide to prepare its proposal. Rather, it argues that more information would help it prepare its proposal to “avoid prior pitfalls.” Comments at 10. We have long recognized there is no legal requirement that a solicitation remove every potential uncertainty from each offeror. *Phoenix Env’tl. Design, Inc., supra* at 3. On this record, we find no basis to sustain this protest allegation.⁵

The protester also challenges the cost/price evaluation criteria, and specifically, the agency’s decision not to include DBA insurance costs in assessing an offeror’s total

⁴ We note that this argument is nearly identical to one raised by Worldwide in a protest to our Office in 2016. See *WorldWide Language Resources, Inc.*, B-412495.2, Mar. 23, 2016, 2016 CPD ¶ 97 at 4. Worldwide argued because the solicitation did not provide offerors with the locations where linguists would be required, or had been historically located, offerors would not know how to properly distribute management personnel. *Id.* In that decision, as here, our Office concluded the solicitation provided sufficient information (to include the number of linguists required by language, and the location of the Army commands they would service) for offerors to propose management personnel, given that the solicitation did not require offerors to propose a location for those managers. *Id.*

⁵ The protester also argues the solicitation is ambiguous with respect to what performance work statement (PWS) sections offerors should address in their technical proposals. Protest at 15-16; Comments at 11-12; Supp. Comments at 5. Based on our review of the record, we agree with the Army that the solicitation is not ambiguous, in this regard, but instead, sufficiently identifies which particular PWS sections should be addressed. See RTOP Sections L, M.

evaluated price.⁶ Protest at 16-19; Comments at 12-15; Supp. Comments at 5-6. The RTOP explained that while DBA insurance costs were to be reimbursed by the Army, “for evaluation purposes, this DBA Insurance Amount will not be included in the Total Evaluated Price.” RTOP at 77. The Army explained that it decided to exclude DBA costs from its cost/price evaluation because it believes (a) initial rates were mostly consistent, due to limited competition of providers, and (b) initial DBA rates may fluctuate over time and are uncertain over the life of the contract. COS at 14-15; AR, Tab 13, Agency Email to WorldWide Regarding DBA Costs at 1. WorldWide argues that if the Army includes “DBA rates in its cost evaluation, then it could be more certain that it is considering the true costs to the Government of the competing proposals.” Comments at 15.

Our Office addressed a materially similar allegation raised by the protester in 2016. In *WorldWide Language Resources, Inc.*, *supra*, we concluded that the Army’s decision to exclude DBA insurance costs from the total evaluated price was reasonable “[g]iven the agency’s uncertainty about the cost of DBA insurance over the life of the contract, and its desire to promote a fair competition[.]” *Id.* at 6. As was the case in that protest, here, the contracting officer explains that “the Army is uncertain as to the cost of DBA costs over the entire contract and has elected to accept that risk[.]” COS at 15. The protester advances no persuasive challenge to suggest the Army’s decision, in this regard, is unreasonable, but instead, only marshals an alternative evaluation scheme under which, the protester suggests, the Army “could be more certain” that it was considering the true cost to the government.⁷ Comments at 14. Such disagreement, without more, provides no basis to sustain the protest. *Chenega Fed. Sys., LLC*, B-414478, June 26, 2017, 2017 CPD ¶ 196 at 3; *see also Onèsimus Defense, LLC*, B-411123.3, B-411123.4, July 24, 2015, 2015 CPD ¶ 224 at 5 (agency may eliminate costs from consideration where, due to potentially fluctuating costs, the agency cannot accurately determine what offer will be the least expensive over the life of a contract).

Finally, WorldWide argues that the agency’s decision not to consider past performance as an evaluation factor is unreasonable because two potential offerors were not the original awardees under the DLITE II IDIQ, but instead, acquired firms that held these contracts. Protest at 19-20; Comments at 15-17; Supp. Comments at 6. In this regard,

⁶ The Defense Base Act of 1941, 42 U.S.C. §§ 1651-1654, mandates a broad form of workers’ compensation insurance coverage for non-U.S. government contractor personnel working on certain government contracts outside the United States. *See AIU N. Am., Inc.*, B-283743.2, Feb. 16, 2000, 2000 CPD ¶ 39 at 2.

⁷ We have explained that “[d]isregarding our prior decisions interpreting identical legal issues--without intervening changes in controlling or persuasive authority or compelling, distinguishing legal or factual circumstances--is [] antithetical to the Competition in Contracting Act’s mandate that our bid protest forum provide for the inexpensive and expeditious resolution of protests.” *Leeward Constr. Corp.*, B-420504, Mar. 3, 2022, 2022 CPD ¶ 75 at 5 (providing that we “will [not] cast aside prior decisions made with respect to identical legal issues”).

the protester argues the agency abused its discretion by not including past performance as an evaluation factor in light of FAR section 16.505(b)(1)(v)(A)(1), which provides that the contracting officer “should consider . . . past performance on earlier orders under the contract, including quality, timeliness and cost control.” For the reasons that follow, we do not agree with the premise underlying the protester’s argument that the regulation establishes a preference for agencies to include past performance as an evaluation factor in a solicitation for a proposed task or delivery order under a multiple award IDIQ contract.

Pursuant to FAR section 16.505(b)(1)(ii), contracting officers “may exercise broad discretion in developing appropriate order placement procedures.” *See also id.* (providing that “[t]he contracting officer should keep submission requirements to a minimum”). In light of this broad discretion afforded to the agency, there is simply no requirement that an agency consider past performance as an evaluation factor at the order level. To the extent the protester suggests that FAR section 16.505(b)(1)(v)(A)(1) imposes a presumption (as opposed to a requirement) that the agency will evaluate past performance at the order level, we disagree. Indeed, the FAR section at issue addresses matters that the contracting agency should consider when developing ordering procedures, as opposed to proscribing specific evaluation criteria that should be used at the order level. Specifically, the provision in question states that “[t]he contracting officer should consider the following *when developing* [fair opportunity ordering] *procedures*,” and then enumerates a number of considerations including past performance on prior orders. *Id.* (emphasis added).

Because the FAR section in question does not reasonably support the protester’s argument, we have no basis to question the agency’s exercise of its broad discretion in deciding what factors to evaluate in issuing this task order, which includes its discretion not to evaluate past performance. WorldWide’s mere disagreement and speculation concerning other potential offerors performance history, or its suggestion that “it remains unclear” whether the current IDIQ holders are successors-in-interest of the acquired IDIQ holders, provide no basis to conclude that the Army abused its discretion in failing to consider past performance. *Cf.* COS at 16 (“[The protester] is inaccurate in alleging that [the named firms] never underwent a past performance evaluation. [The named firms] are current DLITE II task order holders.”).

The protest is denied.

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