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Decision

Matter of: Livanta LLC

File: B-420970; B-420970.2

Date: October 28, 2022

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DIGEST

1. Protest that the solicitation unreasonably failed to include contract line item numbers for program management and information technology tasks is denied where the agency explains that these tasks are ancillary, and that adding additional line item numbers would not be feasible.
 2. Protest that the solicitation unreasonably instructed offerors to use a noncompliant accounting system in violation of applicable regulations is denied where the protester's interpretation of the solicitation was unreasonable.
 3. Protest that the solicitation was ambiguous for failing to identify all primary tasks as corresponding with particular contract line item numbers is denied where the protester's interpretation was unreasonable.
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DECISION

Livanta, LLC, of Annapolis Junction, Maryland, protests the terms of request for proposals (RFP) No. HT940222R0002, issued by the Defense Health Agency (DHA) for clinical quality monitoring support services. Livanta argues that the RFP does not contain sufficient information for offerors to properly prepare price proposals.

We deny the protest.

BACKGROUND

On June 21, 2022, DHA issued the RFP to obtain assistance in assessing and monitoring the quality of healthcare services delivered under TRICARE.¹ Agency Report (AR) Tab 13a, Conformed RFP at 1, 46-47. Principally, the selected contractor will impartially evaluate the healthcare services provided to beneficiaries, and compare performance quality measures to national benchmarks. *Id.* at 47-48.

The RFP contemplates the award of a fixed-price indefinite-delivery, indefinite-quantity (IDIQ) contract to be performed over a 5-month base period, five 12-month option periods, and one 6-month extension period. Conformed RFP at 48, 176. Award will be made on a best-value tradeoff basis considering four factors, listed in descending order of importance: technical approach, past performance, price, and small business participation. *Id.* at 198-99.

As relevant here, the RFP contains 23 contract line-item numbers (CLIN) and related sub line-item numbers. See Conformed RFP at 2-8 (Contract Schedule for base period). For the CLINs, 21 are fixed-price, one is cost-reimbursable for travel, and the final one is a zero-dollar line-item to provide the contract data requirements list (CDRL). *Id.*

The RFP advised that the total evaluated price will be the sum of the 21 fixed-price CLINs. Conformed RFP at 205. All of the fixed-price CLINs correspond with a particular section or multiple sections of the performance work statement (PWS), and include estimated ordering values. See Conformed RFP at 2-43 (Contract Schedule). For example, CLIN x008 includes an estimated ordering value of 6,500, and corresponds with PWS § 5.5.2, which requires the selected contractor to perform quality utilization reviews. *Id.* at 5, 77. As another example, CLIN x009 provides an estimated ordering value of 150 and corresponds with PWS § 5.5.3, which requires the selected contractor to conduct medical necessity reviews. *Id.* at 5, 79. Ultimately, the agency would evaluate the total evaluated price for reasonableness and balanced pricing. *Id.* at 205.

Prior to the August 19, closing date of the solicitation period, Livanta filed this protest with our Office.

DISCUSSION

Livanta raises multiple protest allegations. First, Livanta asserts that the RFP unreasonably fails to provide some PWS tasks (*i.e.*, program management, and information technology and security (IT&S)) with corresponding CLINs in violation of Defense Federal Acquisition Regulation Supplement (DFARS) section 204.7103. Comments at 6-10. Second, Livanta complains that the agency's question and answer exchange instructed offerors to treat costs associated with particular CDRLs as "indirect

¹ TRICARE is the uniformed services health care program for active duty service members and other eligible participants.

costs,” and that the solicitation therefore violates applicable procurement regulations requiring offerors to maintain adequate accounting systems under DFARS clause 252.242-7006. Supp. Protest at 4-6. Third, Livanta contends that the RFP is ambiguous because some of the primary tasks are not identified as associated with a particular CLIN.² Protest at 6.

We have reviewed all of Livanta’s challenges, and find that none provides us with a basis to sustain the protest.³ Prior to discussing the principal allegations, we note, at the outset that, the determination of an agency’s needs and the best method of accommodating them are matters primarily within the agency’s discretion. *Verizon Bus. Network Servs., Inc.*, B-418331/3 *et al.*, July 10, 2020, 2020 CPD ¶ 235 at 6; *URS Fed. Support Servs.*, B-407573, Jan. 14, 2013, 2013 CPD ¶ 31 at 4. Our role is not to substitute our judgment for that of the contracting agency, but rather to review whether the agency’s exercise of discretion was reasonable and consistent with applicable statutes and regulations. *URS Fed. Support Servs.*, *supra*.

Designated CLINs

Livanta argues that the RFP unreasonably fails to provide CLINs for the program management, and IT&S tasks. Comments at 5. According to Livanta, DFARS section 204.7103-1 requires DHA to identify all items and services as separate CLINs unless such identification is not feasible. *Id.* Because Livanta contends that the agency

² The protester broadly argues that the RFP’s failure to identify all primary tasks as associated with particular CLINs will result in unbalanced pricing. Protest at 7. In response, the agency asserts that this argument is premature because it merely complains about the risk that offerors may submit unbalanced pricing. Memorandum of Law (MOL) at 23. Here, we dismiss this allegation as speculative and premature because it merely anticipates that other offerors will submit unbalanced pricing, and that the agency will miscalculate price proposals. See *Jantec, Inc.*, B-243192, Mar. 14, 1991, 91-1 CPD ¶ 289 at 2 (“Protests that merely anticipate allegedly improper agency action are speculative and premature.”).

As another argument, Livanta alleged that the RFP placed an undue amount of risk on offerors by failing to provide additional CLINs. Protest at 7-8. The agency responded that the amount of risk placed upon the contractor is not unreasonable, and also explained that the agency has discretion to place maximum risk on a contractor where it elects to use a fixed-price contract, as it did here. MOL at 23-27. Livanta did not rebut the agency’s position in its comments, and therefore, we dismiss the allegation as abandoned. See *Medical Staffing Sols. USA*, B-415571, B-415571.2, Dec. 13, 2017, 2017 CPD ¶ 384 at 3 (“Where, as here, an agency provides a detailed response to a protester’s assertion and the protester fails to rebut the agency’s argument in its comments, the protester fails to provide us with a basis to conclude that the agency’s position with respect to the issue in question is unreasonable, and as a result, the protester abandons that assertion.”).

³ To the extent we do not discuss any other allegation, it is denied.

may identify these tasks as separate CLINs, Livanta argues that the RFP is inconsistent with applicable regulations. *Id.* at 6-7.

The agency responds that these tasks are ancillary and therefore are not required to be identified as separate CLINs. MOL at 29-31. Additionally, the agency explains that identifying separate CLINs for every ancillary task is not feasible because doing so would hinder its ability to administer the contract. *See id.*

As background, the RFP does not identify particular CLINs for some of the specific PWS tasks and functions. Indeed, the RFP requires the selected contractor to provide various program management tasks, such as providing the government with ongoing status updates during a weekly progress meeting and ensuring that all personnel have active licenses or credentials, which are not captured by a particular CLIN. *See* Conformed RFP at 64. Likewise, the RFP requires the selected contractor to perform various IT&S functions, such as configuring its network to support access to government systems and support encrypted communication methods, which are also not captured by a particular CLIN. *See id.* at 89-91.

In relevant part, DFARS section 204.7103-1 provides, “[c]ontracts shall identify the items or services to be acquired as separate contract line items unless it is not feasible to do so.” The section also includes the following exception for ancillary functions:

If a supply or service involves ancillary functions, like packaging and handling, transportation, payment of state and local taxes, or use of reusable containers, and these functions are normally performed by the contractor and the contractor is normally entitled to reimbursement for performing these functions, do not establish a separate contract line item solely to account for these functions. However, do identify the functions in the contract schedule. If the offeror separately prices these functions, contracting officers may establish separate contract line items for the functions; however, the separate line items must conform to the requirements of . . . this subsection.

DFARS 204.7103-1(f).

On this record, we have no basis to object to the agency’s decision not to include a separate CLIN for these functions. First, we agree that the program management and IT&S tasks qualify as ancillary functions not requiring a separate CLIN because the contractor performs these functions largely to support the primary quality monitoring services. *See* MOL at 31. Indeed, the agency explains that it does not seek administration, management, or IT&S services in their own right, and therefore, these functions are not deliverables requiring a separate CLIN. Contracting Officer’s Statement (COS) at 18 (citing Federal Acquisition Regulation (FAR) 4.10). Further, as an example, the agency explains that ensuring personnel have proper licenses is ancillary to the delivery of healthcare monitoring services, and that any licensing costs should be incorporated into the pricing of the services. Agency’s Response at 5.

While Livanta may contend that program management and IT&S services are critically important requirements because they ensure that contractor performance is organized and that findings are communicated securely to government personnel, see Comments at 7, the fact that they may be important does not change the ancillary nature of the work. Consistent with the agency's position, we view proper organization and communication of findings to be tasks supporting the primary healthcare review services. See COS at 18.

Second, we have no basis to object to the agency's position that identifying separate CLINs for these functions would not be feasible for this acquisition. The agency explains that "[t]o add a separate CLIN would require DHA to completely overhaul how it tracks CDRLs, how it will administer [this contract], be a complete change in how it administered [prior contracts for these services] in the past, and is in conflict with its acquisition strategy." Agency's Response at 5. We are not persuaded by Livanta's assertion that the agency's argument only demonstrates that the agency does not prefer to add another CLIN. See Protester's Response at 6. Instead, the agency reasonably shows that adding additional CLINs for administrative functions would yield significant challenges that could not be easily or conveniently overcome. Accordingly, we deny the protest allegation.⁴

Adequate Accounting System

Next, Livanta complains that the RFP unreasonably instructs offerors, as part of a question and answer exchange, to treat the cost of providing program management, and IT&S services as indirect costs, and incorporate them in the proposed unit pricing. Supp. Protest at 3. According to Livanta, this instruction conflicts with the requirement that the selected contractor maintain an adequate accounting system under DFARS clause 252.242-7006. In this regard, Livanta explains that it cannot maintain an accounting system that segregates direct costs from indirect costs, as required by DFARS clause 252.242-7006, without having additional CLINs for the program management and IT&S tasks. Comments at 3.

⁴ We note, the agency asserts that its alleged failure to identify every line item in accordance with DFARS section 204.7103-1 does not create a cognizable protest allegation. The agency explains that the purpose of using line items, as delineated in DFARS section 204.7103-1 or its FAR counterpart (*i.e.*, FAR 4.10), is for the government to obtain comprehensive data on Federal procurement actions. MOL at 29. The agency further explains that the purpose of line item contracting is to allow the government to identify and trace tax dollars during the course of a procurement, and that such data allows the government to determine whether management decisions are effective, spending is duplicated, or financial reporting is adequate. *Id.* In contrast, Livanta provides no support for its argument that DFARS section 204.7103-1, or the related FAR provision, were intended to provide contractors with an opportunity to participate in (or, as the agency characterizes, dictate) the agency's structuring of an acquisition. See Comments at 8-9; MOL at 31-32.

The agency responds that Livanta unreasonably interprets the RFP because the RFP does not instruct offerors to treat the costs of providing program management or IT&S services as indirect costs; rather, the agency asserts that the question and answer exchange explained that such costs should be allocated amongst various CLINs because they are inherent in the overall contract performance and every task performed. Agency's Response at 2. In this regard, the agency explains that the contracting officer used the term "indirect costs" as a helpful analogy. *Id.* at 3.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by first assessing whether each posited interpretation is reasonable. *Anders Constr., Inc.*, B-414261, Apr. 11, 2017, 2017 CPD ¶ 121 at 3. An interpretation is reasonable when it is consistent with the solicitation when read as a whole and gives effect to each of its provisions. *Id.* Furthermore, we defer to the plain meaning of the provision. *Id.*

By way of background, the RFP incorporates DFARS clause 252.242-7006 by reference. Conformed RFP at 160. In relevant part, that clause provides that a "[c]ontractor shall establish and maintain an acceptable accounting system," and that failure to maintain an "acceptable accounting system" shall result in the withholding of contract payments. DFARS clause 252.242-7006(b). The clause also defines an "acceptable accounting system," in part, as a system that properly segregates direct costs from indirect costs. DFARS clause 252.242-7006(c).

The RFP also includes the following question and answer exchange:

[Question]: Please explain why there are CDRLs not associated with specific CLINs.

[Answer]: The CDRLs that are not directly tied to CLINs are requirements associated with the performance of the base IDIQ contract generally and do not directly tie to any one specific line item. The Government will not direct offerors on how to price, or where to price, such a CDRL that is inherent in the overall contract performance and not directly tied to a line item. Such CDRLs are in essence indirect costs, i.e. they are not directly identified to particular final cost objective/CLIN. Overhead, [general and administrative], and profit are conceivably priced into every unit price. It is incumbent upon the offeror to determine how to allocate such indirect costs into their unit pricing.

See AR, Tab 13b, Additional Questions and Answers, amend. 6 at 1.

On this record, we find no basis to sustain the allegation. We agree with DHA that Livanta unreasonably interprets the RFP as requiring the firm to treat the price of

providing program management or IT&S services as “indirect costs.”⁵ Indeed, we think that the contracting officer simply attempted to draw a helpful analogy between how offerors may incorporate the costs of providing program management and information technology (IT) services in their pricing strategies with how offerors typically spread indirect costs amongst various cost objectives when performing cost-reimbursable contracts. See AR, Tab 13b, Additional Questions and Answers, amend. 6 at 1.

Further, we do not think that the analogy could reasonably be interpreted as instructing offerors to incorporate those costs into their indirect cost pools because that interpretation is illogical as these costs are tied directly to this contract, the interpretation ignores that this contract is comprised of almost entirely fixed-price CLINs, and, as the agency explains, this procurement is not subject to cost accounting standards. See *Leupold Stevens, Inc.*, B-417796, Oct. 30, 2019, 2019 CPD ¶ 397 at 6 (explaining that our Office will interpret a solicitation provision “by reading the solicitation as a whole and in a manner that gives effect to all provisions”).

Additionally, we note that the contracting officer qualified the use of “indirect costs” with the phrase “in essence,” which we think reasonably communicates that the comparison should not be taken literally. See AR, Tab 13b, Additional Questions and Answers, amend. 6 at 1. Thus, we disagree that the RFP directed the protester to establish an inadequate accounting system in violation of DFARS clause 252.242-7006 because the RFP only explained that offerors should incorporate their costs of providing program management and IT&S services into their unit pricing for the primary tasks. Accordingly, we deny the protest allegation because we are not persuaded that the RFP directed offerors to violate applicable procurement regulations.⁶

“Unmapped” Primary Tasks

As a final matter, Livanta argues that the RFP prevented offerors from competing on a common basis because some primary tasks (*e.g.*, enhancing the clinical quality management websites (PWS § 5.8.3), and researching evolving medical practices (PWS § 5.7.1.1)), were not “mapped” to (*i.e.*, identified as corresponding with) a particular CLIN. Protest at 6. In other words, Livanta complains that the RFP was

⁵ As reference, the FAR defines an “indirect cost” as “any cost not directly identified with a single final cost objective, but identified with two or more final cost objectives or with at least one intermediate cost objective. FAR 2.201. In contrast, a “direct cost” is “any cost that is identified specifically with a particular final cost objective.” *Id.*

⁶ To the extent Livanta complains that no contractor can incorporate its costs of providing program management and IT services into their unit pricing for the primary tasks and still comply with DFARS clause 252.242-7006, we do not find that position persuasive. The agency explains that DFARS clause 252.242-7006 was incorporated by reference into the solicitation due to the cost-reimbursable CLIN for travel, and that the adequate accounting system requirement only applies to that CLIN. Agency’s Response at 3-4.

ambiguous with how offerors should incorporate the costs of providing some primary tasks into their unit pricing. *See id.*

The agency responds that the RFP is not ambiguous because each of the identified primary tasks is associated with a particular CLIN. MOL at 14. Specifically, the agency explains that PWS § 5.8.3 corresponds with CLIN x019, and PWS § 5.7.1.1 corresponds with CLINs x015 and x016. MOL at 16. We discuss these challenges in turn.

Regarding PWS § 5.8.3, this task requires the selected contractor to manage the Military Health System (MHS) clinical quality management websites, and is one of three subtasks associated with PWS § 5.8, “Quality Communications.” Conformed RFP at 87.

As for CLIN x019, the RFP originally identified this CLIN as “Website Management Quality Communications (PWS Section 5 paragraph 5.8.2.1).” AR, Tab 1, RFP at 8. The agency amended the solicitation to identify this CLIN as “Quality Communications (PWS Section 5 paragraph 5.8).” AR, Tab 8, RFP, amend. 3 at 3. Due to a clerical error, however, the agency did not cleanly incorporate the amended reference into a conformed version of the solicitation. Agency’s Response at 1 n.1. The conformed version of the solicitation identified the CLIN as “Quality Communications (PWS Section 5 paragraph 5.8.2.1).” Conformed RFP at 8. Thus, while the conformed version correctly captured the name change for the CLIN, it misstated the amendment’s indication that CLIN x019 was to cover PWS section 5 paragraph 5.8 in its entirety.

On this record, we are not persuaded that the RFP was ambiguous. The record shows that the agency revised the solicitation to identify the CLIN as “Quality Communications (PWS Section 5 paragraph 5.8.3)”; thus, the only reasonable interpretation is that CLIN x019 covers each of the associated subtasks, including website management, because the RFP specifically provides as much. *See* AR, Tab 8, RFP, amend. 3 at 3.

To the extent the protester argues that the conformed solicitation created confusion as to whether CLIN x019 covered the website management subtask when it erroneously referenced the incorrect PWS paragraph, the argument is misplaced because the conformed version of the solicitation is not controlling. The record shows that the agency’s process was to amend the solicitation using Standard Form 30 (SF-30), and then to issue a conformed version of the solicitation as a convenience for the offerors. *See* Agency’s Response at 1-2 n.1 (explaining that the amendments issued using SF-30 are controlling over the conformed version of the solicitation); *see also* FAR 15.210 (agency may use SF-30 to amend solicitations). Further, the protester does not provide any legal argument demonstrating that the conformed version of the solicitation supersedes the amendments issued using SF-30. *See* Comments at 8-9.

Thus, we do not think the protester's interpretation is reasonable because it ignores the operative amendments. Accordingly, we deny the protest allegation.⁷

Next, we address the protester's allegation that the RFP was ambiguous about how offerors should price preliminary research requirements required by PWS § 5.7.1.1 because the PWS section was not expressly mapped to a particular CLIN. As helpful context, PWS § 5.7 requires the selected contractor to conduct assessments of evolving practices, medical devices, treatments, and procedures. Conformed RFP at 84. As part of that process, PWS § 5.7.1.1 requires the selected contractor to conduct preliminary research in order to recommend which evolving practices, medical devices, treatments, procedures should be subject to assessment. *Id.* Assessments would either be considered short (*i.e.*, narrowly focused and lasting 45-60 days), or long (*i.e.*, more complex and lasting approximately 90 days). *Id.* at 85.

The RFP identified CLIN x015 as "Long Assessment of Evolving Practices, Devices, Medicines, Treatments, and Procedures (PWS Section 5 paragraph 5.7.3)." Conformed RFP at 7. Similarly, the RFP identified CLIN x016 as "Short Assessment of Evolving Practices, Devices, Medicines, Treatments, and Procedures (PWS Section 5 paragraph 5.7.3)." *Id.*

Here, we are not persuaded that the RFP is ambiguous. While the CLINs do not directly reference the PWS paragraphs delineating the preliminary research duties, the agency points out that the preliminary research informs and culminates in the completed assessments. MOL at 16-17; see *also* COS at 12. In this regard, we agree that the subtasks are so completely intertwined that the only reasonable interpretation is that any costs associated with the preliminary research would be incorporated into the unit pricing for completing the assessments. COS at 12. Accordingly, we deny the protest allegation.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

⁷ GAO notes that the agency did not clearly explain that it would provide a corrected conformed solicitation; however, GAO would encourage the agency to do so. See Agency's Response at 1-2 n.1.