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Decision

Matter of: General Dynamics Information Technology, Inc.

File: B-421525

Date: May 26, 2023

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DIGEST

Protest challenging solicitation terms is sustained where the solicitation, as currently structured, is ambiguous and does not comport with applicable procurement regulations for use of a firm-fixed-price, level-of-effort contract type.

DECISION

General Dynamics Information Technology, Inc., (GDIT) of Falls Church, Virginia, protests the terms of request for task order proposals (RTOP) No. W50NH9-22-R-0005, issued by the Department of the Army for information technology (IT) support services. The protester contends that the solicitation contemplates issuance of task order that is outside the scope of the underlying indefinite-delivery, indefinite-quantity (IDIQ) contract and is ambiguous.

We sustain the protest.

BACKGROUND

On December 7, 2022, using the procedures of Federal Acquisition Regulation (FAR) subpart 16.5, the agency issued the solicitation to holders of the Army's Information Technology Enterprise Solutions-3 Services (ITES-3S) IDIQ contracts. Contracting Officer's Statement (COS) at 1; Agency Report (AR), Tab 7, RTOP at 1, 33.¹ The solicitation seeks proposals for IT support services "to operate and maintain the

¹ Our citations to the record use those documents' Adobe PDF pagination.

Command and Control, Communications, Computers, and Information Management (C4IM) and Infrastructure Operations for Headquarters (HQ) United States (U.S.) Army Intelligence and Security Command (INSCOM).” AR, Tab 9, Performance Work Statement (PWS) at 1. The successful offeror will be required to “provide subject matter experts necessary to provide support to maintain the C4IM of INSCOM’s local networks and corollary infrastructure.” *Id.* The solicitation contemplates issuance of a single firm-fixed-price, task order with level-of-effort (LOE) terms (*i.e.*, a firm-fixed-price, LOE term task order) with a 1-year base period and four 1-year option periods.² RTOP at 6, 33.

Prior to the time set for receipt of proposals, GDIT, which is an ITES-3S IDIQ contract holder, filed this protest with our Office challenging the terms of the solicitation.³

DISCUSSION

The protester argues that the firm-fixed-priced, LOE term task order contemplated by the solicitation is outside the scope of the underlying IDIQ contract. The protester also maintains the solicitation is ambiguous in several respects. We have reviewed all the protester’s arguments, and we sustain the protest because the solicitation is ambiguous and does not comply with applicable regulatory requirements for use of a firm-fixed-price, LOE term type of contract.

Scope of Task Order

As an initial matter, the protester contends that the contemplated task order is beyond the scope of the IDIQ contract. According to GDIT, the ITES-3S IDIQ contract authorizes ordering agencies to issue only three types of orders: firm-fixed-price, time-and-materials, or cost-reimbursable. Protest at 8. The protester asserts that the firm-fixed-price, LOE term order contemplated by the solicitation here “is materially distinct from a standard firm-fixed-price contract.” *Id.* at 11. The protester contends that while a firm-fixed-price, LOE term order represents one type of fixed-price contract, the different kinds of fixed-price contracts exist on a continuum, with each representing a unique type of contract. *Id.* at 9, 11. The protester argues that because the underlying ITES-3S IDIQ contract provides that issued “task orders may be firm-fixed-price, time-and-materials, and/or cost-reimbursable in nature,” and does not allow for issuance of the distinct firm-fixed-price, LOE term order, the solicitation is inconsistent with the

² The contemplated task order also will have cost-reimbursable contract line item numbers for other direct costs. RTOP at 33.

³ The protester argues that the protested task order is outside the scope of the underlying IDIQ contract. Protest at 8-14. Accordingly, this protest is within our jurisdiction to hear protests of task orders placed under defense agency IDIQ contracts. 10 U.S.C. § 3406(f)(1)(B).

terms--and therefore exceeds the scope--of the underlying IDIQ contract.⁴ *Id.* at 4, 12, *citing* AR, Tab 3, ITES-3S IDIQ Contract at 2.

The agency responds that because a firm-fixed-price, LOE term order is simply a form of firm-fixed-price order, it is encompassed by the ITES-3S IDIQ contract's provision for the issuance of orders that are firm-fixed-price "in nature." Memorandum of Law (MOL) at 10, *citing* AR, Tab 3, ITES-3S IDIQ Contract at 2. Specifically, the agency maintains that the ITES-3S IDIQ contract's statement that "task orders may be firm-fixed-price, time-and-materials, and/or cost-reimbursable *in nature*" put offerors on notice that ordering agencies may choose to issue any type of firm-fixed-price order, including firm-fixed-price, LOE term type orders. MOL at 11, *citing* AR, Tab 3, ITES-3S IDIQ Contract at 2. The agency explains that had the Army's intent been to limit the types of orders that could be issued, the ITES-3S IDIQ contract either would have cited to one or more of the specific types of fixed-price contracts described in sections 16.202 - 16.207 of the FAR, or would have excluded the phrase "in nature" when describing the types of task orders that could be issued. MOL at 13. According to the agency, the inclusion of the phrase "in nature" indicates that the ITES-3S IDIQ contract "lists out in general terms the various contract types that are permitted, but does not prohibit the use of a specific type of [firm-fixed-price, time-and-materials, or cost-reimbursable] contract." *Id.*

Where a protester alleges that a solicitation would result in issuance of a task or delivery order beyond the scope of the underlying IDIQ contract, we review the protest in essentially the same manner as those in which the protester argues that a modification is outside the scope of a contract. *Oracle America, Inc.*, B-420181, Nov. 30, 2021, 2021 CPD ¶ 378 at 4. In determining whether a task or delivery order is outside the scope of the underlying IDIQ contract, and thus subject to the requirement for full and open competition under the Competition in Contracting Act of 1984, our Office examines whether the order is materially different from the original contract, as reasonably interpreted. *American Systems Group*, B-415381, B-415381.2, Jan. 4, 2018, 2018 CPD ¶ 86 at 4. In such examinations, the relevant inquiry is whether the order is one which potential offerors reasonably would have anticipated. *Meridian Knowledge Solutions, LLC*, B-420906, Nov. 2, 2022, 2022 CPD ¶ 270 at 6.

⁴ Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557, only an "interested party" may protest a federal procurement. Our Bid Protest Regulations define an interested party as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract for the failure to award a contract. 4 C.F.R. § 21.0(a)(1). While the question of the protester's interested party status was not raised by the agency, we briefly address it. We have previously explained that a multiple-award IDIQ contract holder, like GDIT in this case, is an interested party to challenge a contemplated task or delivery order on the basis that it is outside the scope of the underlying IDIQ contract. *Wester Pilot Serv.; Aerial Timber Applicators, Inc.; Evergreen Flying Servs., Inc.; G.B. Aerial Applications, Inc.*, B-415732 *et al.*, Mar. 6, 2018, 2018 CPD ¶ 104 at 5-6 n.14.

Further, where a protester and agency disagree over the meaning of solicitation or contract language, we will resolve the matter by reading the solicitation or contract as a whole and in a manner that gives effect to all of its provisions. *Meridian Knowledge Solutions, LLC, supra* at 8. To be reasonable, and therefore valid, an interpretation must be consistent with the solicitation, or contract, when read as a whole and in a reasonable manner. *Id.*; *TCG, Inc.*, B-417610, B-417610.2, Sept. 3, 2019, 2019 CPD ¶ 312 at 5.

In responding to the agency, GDIT argues “the phrase ‘in nature’ does not open the door for task order types beyond those expressly listed.” Comments at 3. Rather, the protester characterizes the phrase as “merely a generic closing descriptor to impart that it is these [listed] types of orders that could be issued.” *Id.* Further, the protester contends the agency’s “interpretation is incompatible with the rest of the contract terms.” *Id.* Specifically, the protester argues that the solicitation’s specification that “firm-fixed-price orders” could be issued encompasses a more limited universe of contract types than all the fixed-price contract types described in sections 16.202 - 16.207 of the FAR, some of which are not identified as “firm” fixed-price contracts. *Id.* Thus, the protester asserts the agency’s “sweeping interpretation would render the ‘firm’ in firm-fixed-price a superfluous nullity and is consequently an untenable construction.” *Id.* at 4. We disagree.

Here, the interpretation of the ITES-3S IDIQ contract advanced by the protester fails to give full consideration to all of the contract’s terms. Specifically, the protester’s interpretation ignores the provision that ordering agencies may issue task orders that are “firm-fixed-price . . . *in nature*” under the ITES-3S IDIQ contract. AR, Tab 3, ITES-3S IDIQ Contract at 2 (emphasis added). Reading the contract language as a whole and giving effect to both the terms “firm” and “in nature,” we conclude that the ITES-3S IDIQ contract language is broad enough to encompass issuance of all types of firm-fixed-price task orders, of which a firm-fixed-price, LOE term task order is one. See FAR 16.207-1 (describing a *firm-fixed-price*, LOE term type of contract); *The Mangi Envtl. Group, Inc.*, B-294597, Nov. 29, 2004, 2004 CPD ¶ 238 at 2 (“a fixed-price, level-of-effort contract is a form of fixed-price contract”).

More importantly, as reasonably interpreted, we do not find the terms of the task order solicitation to be materially different from the underlying IDIQ contract, such that potential offerors would not have anticipated the issuance of a firm-fixed-price, LOE term task order. See *American Systems Group, supra* at 4. Accordingly, we find that the contract language sufficiently advised offerors of the potential for the type of task order at issue here, and the allegation is denied. See *e.g.*, *Meridian Knowledge Solutions, LLC, supra* at 8 (denying protest challenging contemplated task order as outside the scope of the underlying IDIQ contract where protester’s interpretation of the contract language ignored language advising offerors of the potential for the type of task order at issue).

Ambiguity

Next, we turn to the protester's claim that the solicitation is patently ambiguous and does not comply with applicable regulatory requirements for use of a firm-fixed-price, LOE term type of contract. Protest at 20-22. The Army responds that the solicitation is clearly defined and provides sufficient information to provide all offerors with a fair opportunity to compete. MOL 23-28.

Contracting agencies generally have broad discretion to determine their needs and the best way to meet them. *Crewzers Fire Crew Transport, Inc.*, B-402530, B-402530.2, May 17, 2010, 2010 CPD ¶ 117 at 3. Additionally, the selection of a contract type is the responsibility of the contracting agency, and our role is not to substitute our judgment for the contracting agency's, but instead to review whether the agency's exercise of discretion was reasonable and consistent with applicable statutes and regulations. *URS Fed. Support Servs., Inc.*, B-407573, Jan. 14, 2013, 2013 CPD ¶ 31 at 4.

With respect to a firm-fixed-price, LOE term type of contract, our Office has explained that:

Under a [firm] fixed-price contract, the price is not subject to any adjustments on the basis of the contractor's cost experience in performing the required work. Under this contract type, maximum risk and full responsibility for all costs and resulting profit and loss associated with performing the required work is placed on the contractor. FAR 16.202-1, 16.202-2. By contrast, under a [firm] fixed-price, level-of-effort contract, the government pays a fixed price for, and the contractor is obligated to provide, *only* a specified level of effort, identified and agreed upon in advance, over a specified time. FAR 16.207-1. A [firm] fixed-price level-of-effort contract is generally intended for use in contracts for studies in research and development areas where the work required cannot be clearly defined. The FAR explains that the product of a [firm] fixed-price, level-of-effort contract is usually a report showing the results achieved through application of the required level of effort; payment, however, is based on the effort expended by the contractor rather than the results achieved. FAR 16.207-2, 16.207-3[.]

URS Fed. Support Servs., Inc., *supra* at 4-5. (emphasis added). Additionally, the FAR limits the use of a firm-fixed-price, LOE term type of contract to situations in which "[t]he work required cannot otherwise be clearly defined." FAR 16.207-3; see e.g., *Digital Systems Group, Inc.*, B-257899, Nov. 15, 1994, 94-2 CPD ¶ 188 at 7 ("A level-of-effort contract is one in which the contractor provides a specified level-of-effort over a stated period of time, on work that can be stated only in general terms.").

The solicitation here requires performance of a number of IT tasks--e.g., network operations, service desk, application maintenance--and sets out that those tasks are to be performed by a set labor mix--i.e., a specified number of full-time equivalent employees (FTEs) in prescribed labor categories. PWS at 43-73; AR, Tab 10, RTOP

attach. 2, Level of Effort Table at 1. Additionally, the solicitation establishes performance thresholds that must be met in order to achieve an “Acceptable Quality Level (AQL)” for the obligatory tasks. PWS at 82-89. In sum, to the extent the solicitation requires a specified level of effort, it does not require *only* a specified level of effort; rather it also requires performance of a prescribed set of IT tasks within certain quality thresholds, both of which are clearly defined in the solicitation. Accordingly, the task order contemplated by the solicitation does not comport with the regulatory definition of--or meet the regulatory requirements for--use of a firm-fixed-price, LOE term type of contract, which is appropriate only in circumstances where the required work cannot be clearly defined. FAR 16.207-1, 16.207-3; see e.g., *URS Fed. Support Servs., Inc.*, *supra* at 5 (denying protest alleging solicitation improperly established a fixed-price, LOE term type of contract where solicitation defined agency’s needs in both staffing and performance terms and was properly characterized as a hybrid fixed-price and time-and-materials contract type).

Moreover, while a firm-fixed-price, LOE term type of contract requires there be a specified level of effort (e.g., labor hours) over a specified period of time (i.e., performance period) agreed to in advance, GDIT contends that the solicitation is ambiguous as to whether it establishes a fixed level of effort. Protest at 20; Comments at 10-11, *citing* FAR 16.207-3(b) (requiring that the level of effort be “identified and agreed upon in advance” when using a firm-fixed-price, level-of-effort contract type). The agency maintains that the solicitation is not ambiguous and clearly requires a set number of labor hours to be performed. MOL at 24-25. We disagree.

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. In this regard, an ambiguity exists in a solicitation when two or more reasonable interpretations are possible. *Colt Def., LLC*, B-406696, July 24, 2012, 2012 CPD ¶ 302 at 8. An obvious, gross, or glaring error in the solicitation is a patent ambiguity. *Id.*

Here, the solicitation requires offerors to propose 950,279 labor hours in each performance period for the required number of FTEs in the prescribed labor categories.⁵ PWS at 8; AR, Tab 10, RTOP attach. 2, Level of Effort Table at 1; Tab 11, RTOP attach. 3, Pricing Template Worksheet at “Hours” tab. The solicitation also states that “[t]he contractor shall provide the level of support” set out in the solicitation, which seemingly indicates that the successful offeror will be obligated to perform a fixed level of effort of 950,279 labor hours in each performance period. PWS at 8.

⁵ The number of hours required to be proposed included 944,792 standard labor hours, 3,050 overtime labor hours, and 2,437 surge labor hours. AR, Tab 11, RTOP attach. 3, Pricing Template Worksheet at “Hours” tab, rows 268-272 of columns D, G, J, M, and P.

In responding to questions posed by offerors, however, the agency contradicts the requirement for a fixed level of effort by characterizing the hours as only yearly estimates. Specifically, the agency introduced a modification to the solicitation which states, “[t]here are 4,751,392 million hours that can be utilized throughout the contract; *the estimated annual 950 [thousand] is for proposal purposes and workload planning.*”⁶ AR, Tab 14, RTOP amend. 3, Question & Answer (Q&A) Set No. 1 at 6 (Q&A No. 50) (emphasis added). Additionally, the agency cautioned offerors that “[t]he Government [would not be] held to a set amount of hours annually.” *Id.* at 7 (Q&A No. 51). Further, in responding to the protest the Army explains that “[f]or pricing purposes, *each ordering year is set at a level of effort ceiling of 950,279 hours*, however the level of effort for the overall contract is 4,751,392 hours.” COS at 6-7 (emphasis added). “If[,] during an ordering year, the Government is unable to utilize the expected number of hours . . . [t]he contract is structured so that those remaining un-used hours would not expire but would be available to be utilized in the event the customer requires them over the course of the five-year period of performance.” *Id.* at 7. The agency indicates that while the 4,751,392 hours “will become a contract obligation” at the time of award, the “[y]early projections [of 950,279 hours] are subject to change throughout the life of the contract.” *Id.*

The 950,279 labor hours per the base and optional performance periods set out in the solicitation cannot, simultaneously, be a fixed level of effort that the successful offeror will be obligated to perform, and at the same time, an estimated “ceiling” number of hours to be used only for proposal purposes and workload planning. In other words, the agency’s modification establishing an estimated ceiling for the number of labor hours conflicts with the FAR’s requirement for an identified and agreed upon level of effort for a firm-fixed-price, LOE contract type. Accordingly, we conclude that the solicitation contains obvious errors that create a patent ambiguity as to whether there are a fixed number of labor hours that must be performed in each performance period or whether the number of labor hours in the solicitation serves as an estimate and ceiling. See *e.g.*, *Office Design Group*, B-415411, Jan. 3, 2018, 2018 CPD ¶ 43 at 5 (sustaining protest where conflicting information in solicitation made it impossible for offerors to determine conclusively whether the procurement was or was not set aside for service-disabled, veteran-owned small businesses). Further, as a specified level of effort must be agreed upon in advance as a prerequisite to using a firm-fixed-price, level-of-effort term type of contract, the patently ambiguous solicitation here fails to comport with the regulatory requirements for use of such a task order. Accordingly, we sustain the protest on this basis.⁷

⁶ Based on the record, it appears the agency intended the number 4,751,392 to represent the set number of labor hours required to be proposed per performance period (950,279) multiplied by the number of performance periods (5). We note, however, that the agency seems to have made a mathematical error, as 950,279 multiplied by 5 is 4,751,395 total hours over the life of the contract, not 4,751,392 hours.

⁷ The protester also argues that, as currently drafted, the solicitation’s set labor mix and potentially fixed number of labor hours prevent offerors from proposing a unique staffing

CONCLUSION AND RECOMMENDATION

In sum, we find that the solicitation is patently ambiguous and does not comply with applicable regulatory requirements for use of a firm-fixed-price, LOE term type of contract. Competitive prejudice is an essential element of a viable protest, and where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving award, there is no basis for finding prejudice, and our Office will not sustain the protest. *Threat Mgmt. Grp., LLC*, B-413729, Dec. 21, 2016, 2017 CPD ¶ 9 at 9. GAO resolves doubts regarding prejudice in favor of a protester; a reasonable possibility of prejudice is sufficient to sustain a protest. *SITEC Consulting, LLC; et al.*, B-413526.4 *et al.*, Apr. 3, 2017, 2017 CPD ¶ 164 at 15. Here, the improprieties in the solicitation prejudiced potential offerors because they were not able to compete intelligently and on a relative equal basis. See *Western Pilot Service; Aerial Timber Applicators, Inc.; Evergreen Flying Services, Inc; G.B. Aerial Applications, Inc.*, *supra*, at 12. Accordingly, we sustain GDIT's protest challenging the solicitation.

We recommend that the agency amend the solicitation to unambiguously indicate the type of task order contemplated--*e.g.*, firm-fixed-price, LOE; fixed-price; time-and-materials; hybrid fixed-price, time-and-materials; *etc.* If the agency chooses to use a firm-fixed-price, LOE contract type, we recommend it specify the fixed level of effort the successful offeror will be required to perform. We also recommend that the protester be reimbursed its costs of filing and pursuing the protest, including reasonable attorney's fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its claim for such costs,

approach to meet the solicitation's performance requirements. Protest at 17. The protester maintains that "[m]andating the labor mix and level of effort in this manner in a task order for a range of complex IT support services runs counter to the FAR's general requirement that agencies use performance-based contracting." *Id.* Further, the protester contends that the agency failed to obtain required approvals for use of other than performance-based contracting. *Id.* at 19.

The agency responds that "[performance-based acquisition] and a set [level of effort] are not mutually exclusive." COS at 5. While this may be the case, given our recommendations below, should the agency choose to revise the solicitation such that it prescribes the number of FTEs, the number of hours for each FTE, and the labor categories for each FTE that offerors must propose, the agency may wish to consider if the revised requirements may be so rigid as to be incompatible with performance-based contracting.

With regard to the protester's argument that the agency failed to obtain higher-level approval to forgo performance-based contracting, we need not decide that issue at this juncture. In implementing corrective action, the agency may revise the solicitation such that a decision on this issue from our Office would be academic. We note, however that the Defense FAR Supplement at section 237.170-2 requires a defense agency to obtain higher-level approval of an agency decision to forgo use of performance-based contracting for Department of Defense acquisitions.

detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Edda Emmanuelli Perez
General Counsel