



Decision

Matter of: Downie Jones Ship Stores

File: B-421502

Date: June 14, 2023

Robert Malyszek, Downie Jones Ship Stores, for the protester.
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DIGEST

Protest challenging the terms of a solicitation on the basis that it provides for an unequal assessment of proposed pricing and will result in a flawed award decision is denied where the solicitation provides sufficient detail to allow offerors to compete intelligently and on a relatively equal basis.

DECISION

Downie Jones Ship Stores, of Murarrie, Australia, protests the terms of solicitation SPE300-20-R-0001, issued by the Defense Logistics Agency (DLA) for full line food distribution services. The protester contends that the solicitation is flawed because it does not provide for an assessment of proposed pricing on an equal basis.

We deny the protest.

BACKGROUND

On July 21, 2021, DLA issued the solicitation, using the commercial items procedures of Federal Acquisition Regulation (FAR) part 12, seeking proposals from offerors to provide subsistence prime vendor support to military and other authorized customers located throughout Japan, Singapore, the Philippines, Diego Garcia, and Australia. Req. for Dismissal, encl. 3, Solicitation, amend. 20, at 1, 86.¹ DLA seeks to enter into a

¹ To date, the solicitation has been amended 24 times. On November 15, 2022, DLA issued amendment 20, in which it provided a conformed copy of the solicitation that

fixed-price, indefinite-delivery, indefinite-quantity contract with economic price adjustment, for a 60-month performance period that will include three pricing tiers, with each tier corresponding to a certain period of performance. *Id.* The successful vendor will be required to provide chilled products and semi-perishable food products, including but not limited to frozen fish, meat and poultry; other frozen foods (e.g., fruits, vegetables, prepared foods); dairy and ice cream products; fresh and frozen bakery products; beverages and juices; fresh fruits and vegetables; and non-food items, such as kitchen and dining supplies; pots, pans and utensils; toiletries; comfort and health items; and government furnished materials (e.g., meals ready to eat). *Id.*

The solicitation includes domestic item preference provisions, commonly referred to as Berry Amendment source restrictions. Solicitation at 100. The Berry Amendment generally restricts expenditures by the Department of Defense for certain articles and items, including food, to domestically produced products. See 10 U.S.C. § 4862. Nonetheless, the solicitation indicates that several exceptions to these source restrictions apply, stating as follows:

One such exception, the “perishable foods” exception, can be found at [Defense Federal Acquisition Regulation Supplement (DFARS)] 225.7002-2(e). That exception permits the delivery of perishable foods ([i.e.,] fresh fruits and vegetables (“FF&V”), fresh milk, fresh bread, etc.) that are not sourced from the United States. This exception applies to deliveries to customers throughout the region ([i.e.,] Japan, Singapore, Diego Garcia, the Philippines, and Australia). As such, this solicitation includes requirements for local market ready items, [i.e.,] locally sourced FF&V, fresh milk, fresh bread, etc. The Prime Vendor must be able to locally source, purchase and/or perform deliveries for highly perishable products. A second applicable exception, referred to as the “contingency operation” exception, can be found at DFARS 225.7002-2(f) and may apply to certain customers outlined in this solicitation. With that designation, deliveries of all non-domestic food items, not just perishable items, are permitted. This exception is subject to change based on changes to contingency operation designations. At this time there are no contingency operation designations for the areas outlined in this solicitation, however, designations may change throughout the life of this contract. Please note that even with these exceptions, it is still the Government’s preference to provide domestic items to the maximum extent possible.

Solicitation at 100; see *also id.* at 101 (“Note: As discussed in the above paragraph, local market ready items that are required to be purchased from local OCONUS [outside

included the most recent substantive revisions to the statement of work and price proposal workbook. In this decision, citations to the solicitation are to the Adobe PDF page numbers of amendment 20 provided by the agency as enclosure 3 to its request for dismissal.

the continental United States] approved sources are excluded from this domestic item preference.”).

The solicitation further indicates that a domestic non-availability determination (DNAD)² for Australia, dated September 28, 2022, has been completed for the procurement because “fresh, chilled and frozen meat, poultry and seafood items cannot be imported into Australia due to the Australia import restrictions, per the Australia Department of Agriculture, Fisheries and Forestry (DAFF) biosecurity import conditions (BICON) website.” *Id.* at 101. The solicitation provides a list of examples of the meat, poultry and seafood items subject to Australian import restrictions, and states that “the BICON website should be reviewed in its entirety for determinations regarding acceptability of importing items into Australia.” *Id.* at 101-102. With respect to vendor responsibilities regarding transportation, the solicitation reiterates:

The importation of some products is, by Australia law, subject to certain biosecurity import conditions. Some products are not permitted entry while other products are only allowed into Australia subject to meeting import conditions that mitigate the biosecurity risk. Such import conditions may include providing additional documentation and/or permits for the specific item being imported.

Id. at 125. The solicitation again advises vendors to use the BICON website to determine whether a commodity intended for import into Australia would be permissible, subject to import conditions, or require supporting documentation, treatment, or an import permit. *Id.*

Regarding pricing, the solicitation defines the contract unit price as “the total price per unit charged to DLA Troop Support for a product delivered to DLA Troop Support’s customers,” and states that it consists of two components, the product price and the distribution price. *Id.* at 93. In describing the product price, the solicitation explains that for many items that will be included in the prime vendor’s catalog of products, DLA Troop Support has agreements with manufacturers that identify a fixed product price for specific items. With some exceptions, the solicitation defines the product price as the price from the manufacturer’s price agreement, or the most recent manufacturer, grower, or private label holder commercial price per unit to the contractor, exclusive of standard freight.³ *Id.* at 93-94. The solicitation states that only the product price

² The Berry amendment permits waiver of domestic source restrictions if the Director of the DLA determines that items grown, reprocessed, reused, or produced in the United States cannot be acquired as and when needed in a satisfactory quality and sufficient quantity at U.S. market prices. See 10 U.S.C. § 4862(c).

³ The first exception to this definition of product price is for FF&V, since such products must be locally sourced. Solicitation at 94. In this regard, the solicitation states that

component of the contract unit price will be subject to the economic price adjustment provisions of the contract.⁴ *Id.* at 95.

Regarding the distribution price, the solicitation states as follows:

“Distribution price(s)” means the firm fixed price portion of the Contract unit price, offered as a dollar amount per unit of measure, rounded up or down to the nearest cent. The distribution price is the only method for the Contractor to bill the Government for all aspects of contract performance other than product price, including but not limited to, the performance requirements of this Statement of Work (SOW). Product price is distinct from and not to be included in the distribution price. The distribution price may be further segregated into pricing segments covering discrete, solicitation-specific performance requirements.

Id. at 95. The solicitation includes 29 categories of distribution and the associated unit of measure (*e.g.*, each, case, or pound); these categories distinguish pricing based on, for example, whether a product will be sourced from within or outside the continental United States (CONUS or OCONUS); whether products are dry, frozen, or chilled; or whether products are government-furnished or non-food items. *Id.* at 99. Offerors are required to propose different distribution prices based on which distribution category applies to a product, *e.g.*, for a product in an OCONUS distribution category an offeror should propose a distribution price based on its capability to locally source that product. *Id.* at 98-99. The solicitation further states: “All OCONUS Distribution Categories can be utilized for Australia items that have import restrictions and have been approved to be purchased locally per the [DNAD].” *Id.* at 99. Further, the solicitation states that at no time during the life of the contract will additional money be paid for transportation, customs, or certificates, and distribution prices must cover all costs associated with any customer deliveries. *Id.* at 100.

“[c]atalog product prices must be reflective of the prime vendor’s last receipt price (the price of the stock most recently received into the OCONUS inventory.” *Id.* at 96.

⁴ The solicitation includes provisions that permit the contractor to update the product prices in the catalog when, *e.g.*, it experiences changes in its prices from suppliers, on a monthly basis. See Solicitation at 95-98. In particular, the solicitation states that for all distribution categories, “when multiple sources are being utilized and more than one manufacturer’s product is receipted prior to a catalog update, the Contractor shall establish the product price based on the mix of invoices received after the previous changes period. The product price would be derived as follows:

Supplier A – 40% X \$7.60 = \$3.04

Supplier B – 30% X \$5.90 = \$1.77

Supplier C – 30% X \$6.30 = \$1.89

Product price = \$6.70.” *Id.* at 96.

With regard to price, the agency will evaluate the prices of a subset of potential products referred to as a “Market Basket” which “represents at a minimum 40 [percent] of the anticipated dollar value of this solicitation,” rather than the entire catalog of products that will be made available to DLA customers. *Id.* at 230. The solicitation states that market basket items will become part of the vendor’s catalog, “[f]inal negotiated prices shall become the baseline catalog prices at the time of the first order,” and thereafter the product prices may be adjusted as permitted by the economic price adjustment provisions. *Id.* at 220. The solicitation indicates that, for evaluation purposes only, the offeror’s total evaluated price will be the sum of the aggregate distribution price and the weighted aggregate product price, each of which will be computed as follows:

Aggregate Distribution Price

Aggregate Distribution Price is calculated by multiplying each distribution price by its respective estimated quantity for each tiered pricing period and totaling the results. This calculation is performed for all items in the selected Market Basket and for Distribution categories 15-20 and 23, which do not have associated item product prices.

Weighted Aggregate Product Price

The Weighted Aggregate Product Pricing is calculated by multiplying each product price for all items in the selected Market Basket by its respective estimated quantity and totaling the results. The total is then multiplied by five (5), to represent the total length of the contract, and the resulting number is then multiplied by 0.30 (30%), for evaluation purposes only.

Id. at 227. The solicitation states that the market basket product prices will also be evaluated and “individual outliers may be identified and reviewed to determine if offered prices are reasonable.” *Id.*

The solicitation requires that offerors use a price proposal workbook, provided as an attachment, to submit with their price proposal volume. *Id.* (“It is mandatory that all contractors submit product prices and distribution prices in this format. Failure to submit the product and distribution prices using Attachment 2 may result in the rejection of the offeror’s entire proposal.”). Offerors are required to populate the designated cells in the distribution and market basket spreadsheets to propose their distribution and product prices. *Id.* at 228. Based on the information input by offerors, the “Totals” spreadsheet will automatically compute the offeror’s aggregate distribution price and weighted aggregate product price to arrive at the total evaluated price. *Id.*; see also *id.*, attach. 2.

For informational purposes, the price proposal workbook also includes a current catalog spreadsheet, which identifies approximately 1,200 items that are most likely to be included in the contract catalog, the distribution category designation, and the quantities ordered by customers in each destination based on historical customer demand as of

November 2019. *Id.* at 228; *see also id.*, attach. 2. The solicitation further advises offerors as follows:

To ensure an objective price evaluation, the pricing of all offerors is to be based on the exact item in our schedule of items. When offerors qualify the salient characteristics of an item or items in the schedule and/or when the government detects (through a relative pricing review and or a review of supporting invoices or quotes) that the pricing proposed is on an item which differs from the schedule of items description then the Government reserves the right to employ remedies such as:

- a) Where an insignificant number of items differ from the schedule of item descriptions, those items will be eliminated from the evaluation of all offerors;
- b) Single serve items with small quantity differences may be evaluated without adjustment, as any additional quantity provides no additional value; and
- c) Larger, generally case size items, with quantity differences may be evaluated on a per pound or similar basis.
- d) If a significant number of items differ from the schedule of item descriptions, then the offeror may be eliminated from the competitive range or may be ineligible for award.

Id. at 238-239.

The solicitation states that DLA will make award to the offeror whose proposal is most advantageous to the government, using a best-value tradeoff source selection process. *Id.* at 235. Further, the solicitation provides that proposals will be evaluated under a past performance factor and the following three technical factors: warehouse location and capacity; resource availability (cash flow, equipment and carrier agreements); and implementation and management plan. *Id.* The solicitation states that the past performance and three technical factors individually are of equal importance to each other, and when combined, are significantly more important than price, but that as proposals become more equal in technical merit, the evaluated price will become more important. *Id.*

Throughout the procurement, Downie has engaged in communications with DLA to address its concerns regarding the solicitation, including filing three agency-level protests, the last of which DLA denied on February 27, 2023. *See* Protest at 4. This protest followed.

DISCUSSION

Downie argues that the solicitation does not provide for an equal assessment of proposed pricing. In myriad ways, the protester contends that the solicitation does not properly account for an equal comparison of prices for items where Australian import

restrictions will prohibit the delivery of CONUS items. See Protest at 2-4, 13-16. The crux of the protester's argument is that the market basket does not ensure that only OCONUS prices will be compared in the market basket of items, and as a result, the best-value award decision will be flawed. *Id.* at 19 ("DLA will evaluate food product prices that cannot and will not be used on the contract; the market basket should identify and require that these restricted Australian food items be priced based on Australian supply vendors.").

The agency requests that we reject the protest because the allegations are based on factual inaccuracies regarding the solicitation. Req. for Dismissal at 1, 4-6. DLA argues that the solicitation properly identifies and accounts for import restrictions in Australia, and otherwise provides for a fair evaluation of competitive proposals on an equal basis. *Id.* at 6.

A solicitation generally 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. *WorldWide Language Resources, Inc.*, B-412495.2, Mar. 23, 2016, 2016 CPD ¶ 97 at 3. 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 that the solicitation contains sufficient information for offerors to compete intelligently and on equal terms. *Plateau Software, Inc.*, B-416386, Aug. 24, 2018, 2018 CPD ¶ 291 at 5.

Agencies must consider cost to the government in evaluating proposals, 10 U.S.C. § 2305(a)(3)(A)(ii), and while it is up to the agency to decide on some appropriate and reasonable method for evaluating offerors' prices, an agency may not use an evaluation method that produces a misleading result. *Labatt Food Serv., LP*, B-408790, Nov. 25, 2013, 2013 CPD ¶ 279 at 3. The method chosen must include some reasonable basis for evaluating or comparing the relative costs of proposals to establish which proposal would be more or less costly. *Blue Origin Florida, LLC*, B-417839, Nov. 18, 2019, 2019 CPD ¶ 388 at 14.

Based on our review of the record, we agree with the agency that the solicitation properly accounts for the Australian import restrictions and provides for a fair and equal price evaluation. As discussed, the solicitation identifies exceptions to the Berry Amendment source restrictions, such as for FF&V and contingency operations, as well as the DNAD related to meat, poultry, and seafood products restricted from importation to Australia.

The market basket includes 112 products that the agency estimates will comprise 40 percent of the contract price. All offerors are required to use the attachment provided in the solicitation to submit their price proposals. Market basket spreadsheet items 82 through 112 identify OCONUS distribution categories, and include items such as FF&V, bread and dairy products, or meat, poultry and seafood. The OCONUS distribution

category designation signifies that the product will be sourced outside of the United States, and an offeror should propose its product prices accordingly. Thus, consistent with the terms of the solicitation, and specifically with regard to Australia, all offerors' proposed OCONUS distribution prices will be added to the proposed product prices for these items, which *per se* results in offerors pricing these items as being locally sourced and therefore consistent with any Australian import restrictions. Solicitation, attach. 2, Market Basket Spreadsheet, Column AB. As noted, the solicitation explicitly states that the "perishable foods" exception at DFARS 225.7002-2(e) for FF&V and bread and dairy products applies to this procurement, and that "[a]ll OCONUS Distribution Categories can be utilized for Australia items that have import restrictions and have been approved to be purchased locally per the [DNAD]." *Id.* at 99, 100.

In addition, market basket spreadsheet items 52 through 68 are meat, poultry and seafood items with CONUS distribution categories, and require that offerors propose a product price for each location to be serviced, however, the annual quantities for Australia based on historical units of measure for these items is zero. Solicitation, attach. 2, Market Basket Spreadsheet, Column AH. The indication of zero historical units of measure for Australia is consistent with the solicitation's direction that OCONUS distribution categories be utilized for items restricted from importation to Australia, because offerors will be required to locally source those products. Accordingly, where the historical units of measure are zero for all other countries but greater than zero for Australia for a product in an OCONUS distribution category (items 82-112), this indicates that the offeror should propose a price to locally source that product from Australia. See *id.*, Columns AE, AF, and AG.

Illustrative of this approach, the solicitation states as follows:

Note: LSN 890501E190185, BEEF RIBEYE ROLL, BNLS, FZN, MIN US CH GR, 5/8-12 LB EA, N#112, is listed as Line Item 57 and 111 on the Market Basket tab due to this item being listed in two different Distribution Price Categories. Line item 57 has this item assigned Distribution Category 4, being purchased domestically, per the Berry Amendment, for all platforms other than Australia. Line Item 111 shows this item assigned Distribution Category 24 for the Australia platform, since it is allowed to be purchased locally for the customers in Australia.

Solicitation at 231. The market basket spreadsheet indicates that for line item 111, which is included in the OCONUS distribution categories, historical annual orders is zero units by customers in the Philippines, Singapore, Diego Garcia, and Japan, while 3,420 units were delivered to customers in Australia.⁵ Solicitation, attach. 2, Market

⁵ Items 110 and 112, which are also meat products, likewise indicate that historical annual orders is zero units by customers in the Philippines, Singapore, Diego Garcia, and Japan, while indicating 160 and 15,460 units, respectively, delivered to customers in Australia. Solicitation, attach. 2, Market Basket Spreadsheet, Columns AE, AF, AG, and AH.

Basket Spreadsheet, Columns AE, AF, AG, and AH. The estimated units in the spreadsheet are therefore consistent with the solicitation's direction to offerors that they can price this item as being sourced from Australia by indicating that the item will be delivered to only Australian customers (as opposed to customers in the other countries serviced by this contract). See *id.* at 99 ("All OCONUS Distribution Categories can be utilized for Australia items that have import restrictions and have been approved to be purchased locally per the [DNAD].").

In response to the agency's request for dismissal, Downie argues: "[M]any more items need an OCONUS/CONUS determination regarding Australian food items. Only when the Statement of Work or the Market Basket makes the OCONUS/CONUS determination can all the vendor's prices be compared equally."⁶ Resp. to Req. for Dismissal, Apr. 3, 2023, at 2. But this argument misrepresents the pricing scheme in the solicitation; as noted, the contract unit price is the sum of the product price and the distribution price. Offerors are required to propose prices for 29 distribution categories, eight of which include an OCONUS designation. Solicitation at 227; *id.*, attach. 2, Distribution Spreadsheet. Otherwise, as discussed, the Australian import restrictions for meat, poultry and seafood are accounted for in the market basket spreadsheet. In addition, the solicitation includes provisions to ensure an objective evaluation, such as reviewing product prices to identify outliers, and reviewing proposals to ensure that the majority of products proposed are for the exact items in the schedule of items. *Id.* at 238-239. To the extent that the protester's argument is that the market basket spreadsheet does not perfectly reflect what will occur during contract performance, the

⁶ The protester identifies 20 items in the market basket that it argues are subject to Australian import restrictions but "potential vendors still have to quote CONUS item prices when they are required [to be shipped from] OCONUS [] to Australia." Resp. to Req. for Dismissal, Apr. 21, 2023, at 1; *id.*, attach. 5 (market basket spreadsheet with protester highlights). As discussed, 12 of these items account for the Australian import restrictions by either: (1) indicating zero historical units of measure for the Philippines, Singapore, Diego Garcia, and Japan where the items indicate OCONUS distribution categories; or (2) indicating zero historical units of measure for Australia where those items indicate CONUS distribution categories.

The protester is correct that the remaining 8 items indicate CONUS distribution categories, meaning the items are to be shipped from the United States, but at least one item (item 45, raw shrimp, which indicates 160 units for Australia) may in fact be restricted from importation to Australia. Solicitation, attach. 2, Market Basket Spreadsheet, Cell AH47. However, as noted, all offerors are required to use the same price proposal workbook to submit their proposals, and the price proposal workbook is being used for evaluation purposes only. Thus, to the extent one or more of these 8 items may not reflect the ultimate contract requirements with regard to the application of the Australian import restrictions, the impact on the evaluation appears to be *de minimus*, will nonetheless be the same in all offerors' proposals, and can otherwise be addressed by the remedies included in the solicitation to ensure an objective price evaluation.

protester has failed to demonstrate that offerors' proposed pricing will be evaluated unequally.

As noted, there is no legal requirement that a competition be based on specifications drafted in such detail as to eliminate completely any risk for the contractor or that the procuring agency remove all uncertainty from the mind of every prospective offeror. *Plateau Software, Inc., supra*. Such perfection, while desirable, is manifestly impractical in some procurements, and the mere presence of risk does not render a solicitation improper. See *Salient Fed. Sols., Inc.*, B-410174, Nov. 6, 2014, 2014 CPD ¶ 350 at 4. Offerors are reasonably expected to use their professional expertise and business judgment in anticipating risks and computing their proposed pricing. See *JRS Staffing Servs.*, B-408202, July 16, 2013, 2013 CPD ¶ 175 at 2-3. Based on our review, and as discussed above, we find that the solicitation accounts for the effects of Australian import restrictions, and otherwise provides enough information to offerors to allow them to intelligently propose prices on an equal basis. We therefore find no basis to conclude that the terms of the solicitation will result in an unequal assessment of proposed pricing.

The protest is denied.

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