



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: JRS Staffing Services

File: B-408202

Date: July 16, 2013

Jacqueline Sims, for the protester.

William Robinson, Esq., and Oleta Vassilopoulos, Esq., Department of Justice, for the agency.

Mary G. Curcio, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where an agency is issuing a requirements contract, the agency may properly expect the vendor to incur start-up costs before a task order is issued even though the requirements contract does not include a guaranteed minimum.

DECISION

JRS Staffing Services, of Lawrenceville, Georgia, protests the terms of request for quotations (RFQ) No. P05151300011, issued by the Department of Justice, Bureau of Prisons, for educational services for inmates at the federal correctional institute and federal prison camp in Texarkana, Texas.

We deny the protest.

The RFQ contemplates the award of an indefinite-delivery requirements contract for educational services, with a base year and four option years, under which the agency will order services through the issuance of task orders. The RFQ requires the vendor to provide five categories of instructors (Spanish GED instructor, parenting instructor, testing services coordinator, library technician, and lab monitor), and includes an estimate of the number of hours that each instructor will be needed. RFQ at 7. For each category of instructor, vendors are to quote a fixed price per hour (session), which is to include all costs associated with providing the instructor. Id. at 5.

The solicitation provides that each instructor will be required to obtain a security clearance. RFQ at 9. As amended, the solicitation further provides that

[t]he date of award will be approximately 60 days prior to the Effective Date of Award. The successor contractor will have 30 days from the date of award to provide the required documentation to initiate security clearances. A Task Order should be issued by the institution on the Effective Date of Award. The successor contractor will be required to begin performance within five (5) days of the issuing of the Task Order or within five (5) days of notification of the completion of the background checks, whichever is later.

RFQ, amend. 0001.

START OF PERFORMANCE

The protester asserts that the agency is improperly requiring performance to begin before a task order has been issued. Specifically, the protester points out that the vendor must recruit and hire personnel, and submit documentation for security clearances, before a task order is issued. The protester further notes in this regard that it will not recover the costs of these steps if no task order is issued.

We find no basis to question the solicitation in this regard. An agency may issue a requirements contract when it anticipates recurring requirements but cannot predetermine the precise quantity of services needed during a definite period. Jewett-Cameron Lumber Corp.; et al., B-229582 et al., Mar. 15, 1988, 88-1 CPD ¶ 265; Federal Acquisition Regulation (FAR) § 16.503(b). Where a requirements contract is contemplated, it is not improper for an agency to expect a vendor to incur start-up costs in advance of a task order being issued under the requirements contract. See Special Operations Group, Inc., B-256312, June 6, 1994, 94-1 CPD ¶ 350 at 2-3.

As noted by the protester, the solicitation cautions that if the agency's requirements are less than the estimated quantities, that fact will not furnish the basis for an equitable adjustment; according to the solicitation, the quantities specified in the solicitation schedule are estimates only and are not purchased by issuance of the contract. RFQ at 11. However, the absence of a minimum under the contemplated requirements contract here does not furnish a basis to object to the challenged solicitation requirements; it is not improper that a vendor may need to incur start-up costs on a requirements contract without a guaranteed minimum. Special Operations Group, Inc., supra. While there is a risk that JRS may incur costs but no task order will be issued, the imposition of risk on a vendor does not make a solicitation inappropriate or improper. It is within the discretion of an agency to offer for competition a solicitation that imposes maximum risks upon the vendor and minimum burdens on the agency. TN-KY Contractors, B-291997.2, May 5, 2003, 2003 CPD ¶ 91 at 3. Firms must use their professional expertise and business

judgment in anticipating a variety of influences affecting performance costs. See Sea-Land Serv., Inc., B-278404.2, Feb. 9, 1998, 98-1 CPD ¶ 47 at 11.

FUNDING ISSUES

The protester asserts that the agency is violating the Antideficiency Act because it is requiring the contractor to commence performance prior to placing an order under the contract and obligating funds for that order. In the alternative, the protester argues that the agency is contemplating accepting voluntary services, which is also an Antideficiency Act violation.

These arguments have no merit. First, with respect to the obligation of funds, the Antideficiency Act provides that an officer or employee of the United States may not “make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation [or] involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.” 31 U.S.C. § 1341(a) (2012); see e.g., Antideficiency Act--Applicability to Statutory Prohibitions on the Use of Appropriations, B-317450, Mar. 23, 2009. Here, in contrast, the protester does not allege that the agency obligated or expended funds in advance or in excess of available appropriations. Indeed, the essence of JRS’s prior argument was that JRS would be required to undertake preparations to perform even though there was no contract minimum and the agency was not obligated to issue an order or otherwise reimburse JRS for the costs of preparation. Since the protester’s allegations do not demonstrate that the agency is making an award in excess of an available appropriation, they provide no basis to question the agency’s actions.

Second, with respect to the acceptance of voluntary services, the Antideficiency Act provides that an officer or employee of the United States may not “accept voluntary services . . . or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.” 31 U.S.C. § 1342. This prohibition “contemplates service furnished on the initiative of the party rendering the same without request from, or agreement with, the United States.” 7 Comp. Gen. 810, 811 (1928). Where, as here, however, services are furnished pursuant to a formal contract, they are not voluntary within the meaning of the Antideficiency Act. Id.; General Services Administration; Real Estate Brokers’ Commissions, B-291947, Aug. 15, 2003. Accordingly, the services performed by the vendor who is awarded the contract do not qualify as “voluntary services” under the Antideficiency Act since the obligation to perform those services arises pursuant to contract.

The protest is denied.

Susan A. Poling
General Counsel