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Decision

Matter of: Shamrock Marine Towing & Salvage

File: B-419940.3; B-419940.4

Date: December 27, 2021

John M. Manfredonia, Esq., Manfredonia Law Offices, LLC, for the protester.
Gilbert E. Teal, II, Esq., Department of Homeland Security, for the agency.
April Y. Shields, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that solicitation is unclear and fails to provide sufficient information for offerors to compete on a common basis is denied; to the extent protest alleges that the solicitation conflicts with the Service Contract Act, it is the Department of Labor, and not our Office, that is statutorily charged with interpreting and administering the Service Contract Act.

DECISION

Shamrock Marine Towing & Salvage of Ocean City, New Jersey, protests the terms of request for quotations (RFQ)¹ No. 70Z08421QBB109300, issued by the Department of Homeland Security, United States Coast Guard, for services to support its aviation training program. The protester argues that the solicitation is unclear, prevents offerors from competing on an equal basis, and conflicts with the Service Contract Act.

We deny the protest.

¹ Although the solicitation was termed an “RFQ,” various parts of the record and the parties’ filings refer to it as a “request for proposals” to which offerors submitted offers or proposals. See, e.g., Agency Report (AR), Tab E, System for Award Management Posting at 4. For ease of reference, we refer to the RFQ herein as the “solicitation” and to “offerors” who submitted “proposals.”

BACKGROUND

On April 27, 2021, the agency issued the solicitation as a combined synopsis/solicitation pursuant to Federal Acquisition Regulation part 12 (acquisition of commercial items) and subpart 13.5 (simplified procedures for certain commercial items), and as a total small business set-aside. The solicitation seeks a contractor to provide and operate one or more vessels in support of the United States Coast Guard Aviation Training Program at the agency's Air Station in Atlantic City, New Jersey. AR, Tab B, Solicitation at 4.² The solicitation explains that the mission of the Air Station Atlantic City is to "maintain aircrew proficiency by conducting helicopter hoists of equipment to and from underway vessels, helicopter delivery and recovery of rescue swimmers, and aerial delivery of dewatering pumps and other equipment to the water," and that the contractor's vessel or vessels would be responsible for supporting "helicopter hoisting and aerial delivery evolutions by Air Station Atlantic City." *Id.* at 5.

The solicitation contemplates the award of a single indefinite-delivery, indefinite-quantity contract, under which fixed-price task orders would be issued, for work to be performed over a 1-year base period and four 1-year option periods. Solicitation at 4.

The solicitation provides for award on a lowest-price, technically acceptable basis, considering technical capability and understanding, past performance, and price. Solicitation at 35. Under the price evaluation factor, the solicitation requires offerors to provide "a unit price for all items." *Id.* at 36. In this regard, the solicitation provides:

The unit price for this requirement shall only include the cost for a standard training block. The standard training block will be ONE (1) hour of contract vessel on scene time, not transit time to/from the training site from the contractor's mooring/docking location. Any training time used after the initial one hour session, will be billed in 30 minute intervals at 50% of the total cost of each hour. Example: A session of 1 hour and 10 minutes will be billed as 1.5 hours. A session that is 1 hour and 35 minutes will be billed as 2 hours. As a result, the contractor will only be paid for the actual training blocks used under this contract. The Government will not be obligated to pay the contractor for unused training blocks under this contract. Example: 400 training blocks are projected for the year, but only 350 are used. The Government is not obligated to pay the remaining 50 blocks.

Id. at 4.

On or before the initial closing date for receipt of proposals of May 14, the agency received two offers from Management Marine Service Inc., of Indiantown, Florida, and Shamrock. The agency selected Management Marine for award, and Shamrock filed its

² References to page numbers for documents in the agency report or attached to the protest are to the page numbers provided by the agency and the protester, respectively.

first protest with our Office, challenging the agency's price evaluation and award decision. The agency proposed to take corrective action, to include reevaluating and making a new award decision, and we dismissed the protest as academic. *Shamrock Marine Towing & Salvage*, B-419940, July 20, 2021 (unpublished decision).

The Coast Guard then sought an advisory opinion from the Department of Labor (DOL) on the applicability of the Service Contract Act (SCA) to this procurement and, specifically, "the issue of using hourly rates versus daily rates" in the solicitation. AR, Tab A, Contracting Officer's Statement (COS).

By way of background, because this solicitation contemplates the award of a services contract, it is subject to the service contract labor standards set forth in the SCA, 41 U.S.C. §§ 6701-6707. Specifically, the solicitation incorporates the DOL's SCA wage determination 2015-0213, which "sets forth the minimum monetary wages and fringe benefits that must be paid to covered service employees employed on a SCA-covered contract involving tugboats and other coastal vessels." AR, Tab L, DOL Letter Re: Interpretation of Wage Determination 2015-0213 ("DOL Letter"); see *also* Solicitation at 27; AR, Tab D, DOL Wage Determination 2015-0213, Revision 19 dated March 31, 2021.

On September 22, the DOL responded to the Coast Guard and "concluded that it is consistent with [the wage determination] and with the SCA's requirements to convert the daily rates listed on [the wage determination] to hourly rates." DOL Letter at 3. The DOL letter further explained:

Employees must be paid for all hours worked. The hours worked which are subject to the compensation provisions of the SCA are those in which the employee is engaged in performing work on contracts subject to the SCA, including any time the employee is "engaged to wait." In the event that a contract requires training services that may be for only a few hours in a day, then the employee(s) must at least be paid for all hours worked; whether such employee(s) are entitled to a minimum guarantee of the daily rate will depend on the language in the contract.

* * * * *

This opinion is based on the documentation and information we have received from interested parties to date. Any interested party wishing further consideration of this matter should submit its request for review and reconsideration, with supporting documentation, to [agency employee's name and address omitted], within 30 days of the date of this letter.

Id. (internal citations omitted).

The agency opened discussions with Management Marine and Shamrock and requested revised offers. The agency also provided a copy of the DOL letter to the firms. On September 23, Shamrock asked the agency for “clarification on the phrase ‘engaged to wait’,” referenced in the DOL letter. Protest, attach. 2, Emails Between Shamrock and Agency at 2. Specifically, Shamrock noted that “[t]he schedule often requires one trip in the morning and another in the evening”; asked if it would be “required to pay the crew for the time in between”; and asserted that it would “be required to pay them for time spent waiting at the dock if the helo is delayed.” *Id.* The agency responded as follows:

The pay should coincide with the training blocks. So if there are two sessions in a day, you would pay the people for the time they worked on scene. They would not be working in between the sessions [and] therefore they should not be paid. Hopefully that clears it up. I would need your proposal back no later than [close of business] tomorrow.

Id. at 1.

On or before September 24, the agency received revised proposals from Management Marine and Shamrock. That same day, prior to the close of business, Shamrock also filed this protest with our Office.

DISCUSSION

Shamrock challenges the terms of the solicitation with respect to the pricing structure and applicability of the SCA. Shamrock argues that “the solicitation as written is unclear, ambiguous, and conflicting,” and “prevents offerors from competing on an equal playing field.” Protest at 4. Shamrock further argues that the solicitation conflicts with the DOL’s letter regarding the application of the SCA. Comments and Supp. Protest at 3, 7; Supp. Comments at 3. We have considered all of the protester’s arguments and find that none provides a basis on which to sustain the protest.³

As noted above, the solicitation requires offerors to quote a “unit price” that “shall only include the cost for a standard training block,” and provides that a “standard training block will be ONE (1) hour of contract vessel on scene time, not transit time to/from the training site from the contractor’s mooring/docking location.” Solicitation at 4, 36. In response to a question from Shamrock about a scenario with two scheduled sessions in a day, the agency responded that “you would pay the people for the time they worked on scene” and “[t]hey would not be working in between the sessions [and] therefore they should not be paid.” Protest, attach. 2, Emails Between Shamrock and Agency at 2.

³ Shamrock also raised, but subsequently withdrew, a supplemental protest argument. Comments and Supp. Protest at 8; Supp. Memorandum of Law (MOL) at 1-3; Supp. Comments at 1-2.

The agency argues that the solicitation was “clear and unambiguous.” MOL at 2. The agency explains that it “structured the solicitation in this manner for several legitimate government purposes,” including “the uncertainties of operating at sea in general, where sea conditions can rapidly deteriorate during changes in the weather, making operations difficult due to unstable wind conditions affecting the aircraft, as well as instability in ocean conditions given the onset of bad weather conditions.” *Id.* at 3. The agency further explains that its aviation assets are “‘on call’ and could very well be required to instantly re-deploy away from the training session on short notice to conduct Search and Rescue missions, or support pollution prevention and law enforcement efforts,” and that “[m]echanical failures are also known to occur, requiring the immediate termination of training, or on an aviation mission as to not endanger the lives of the pilots and aircrew onboard.” *Id.*

In other words, the agency explains, “[t]he simplest explanation of what the [agency] command wanted to accomplish was to have a ‘target of opportunity’ to practice the deployment and retrieval of their rescue equipment.” MOL at 3. To illustrate, the agency further explains:

The Coast Guard viewed this requirement as analogous to calling a taxi or Uber or Lyft for a ride from point “A” to point “B”; in this case being present for a training evolution of short duration. At the conclusion of the training evolution, the contractor vessel of opportunity is free to go about their other lawful business activities--whether that is operating as a commercial fishing vessel, or operating as a commercial tug. . . . In the case of fishing vessels, many of these vessels spend several days at sea at a time. The Coast Guard did not want to contract the vessel of opportunity for the entire day; it only wanted to be able to contract for a single hour, or for a few hours a day for the legitimate reasons outlined, [above]. The potential contractor would have the opportunity to engage in other lawful business activities for the remainder of the day and would not be deprived of potentially more lucrative opportunities outside of the government contract. The Coast Guard was not acting in an arbitrary or capricious manner in structuring the solicitation in the manner that it did.

Id.

Generally, a contracting agency must provide offerors with sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis. *CWTSatoTravel*, B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87 at 10. 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 bidder. *Salient Fed. Sols., Inc.*, B-410174, Nov. 6, 2014, 2014 CPD ¶ 350 at 2. Risk is inherent in most types of contracts, especially fixed-price contracts, and firms are expected to allow for that risk, and use their professional expertise and business judgment, in preparing their

proposals. See, e.g., *Katmai Info. Techs., LLC*, B-406885, Sept. 20, 2012, 2012 CPD ¶ 227 at 5; *PacOrd, Inc.*, B-253690, Oct. 8, 1993, 93-2 CPD ¶ 211 at 11.

Here, we find that the solicitation provides sufficiently detailed information to allow offerors to compete intelligently and on a relatively equal basis. As noted above, the solicitation provides instructions and examples, specifying, for instance, that unit prices are to be based on “contract vessel on scene time, not transit time to/from the training site.” Solicitation at 4. In response to Shamrock’s questions, the agency reiterated that “you would pay the people for the time they worked on scene.” Protest, attach. 2, Emails Between Shamrock and Agency at 2. Indeed, the record shows that both Shamrock and Management Marine were able to submit revised proposals, with Management Marine as the “apparent low[est priced] offeror” with a revised price of \$2,576,800 compared to Shamrock’s revised price of \$2,980,000. COS at 2.

Yet, Shamrock argues that the phrase “engaged to wait,” referenced in the DOL letter, means that the solicitation should be interpreted to allow for pricing other than, as specified in the solicitation, “contract vessel on scene time.” Solicitation at 4. In Shamrock’s view, the contractor should also be paid for: “(i) when its personnel are preparing, fueling, and cleaning the vessel; (ii) when the vessel is traveling to and from the training location; (iii) when the vessel is at the location waiting for training to begin; and (iv) when the vessel is at the training location.” Comments and Supp. Protest at 4.

In this regard, Shamrock asserts that it has “dedicated a single vessel to perform work for this procurement” such that it “must pay SCA wages to its personnel during travel times.” Comments and Supp. Protest at 6-7. Shamrock points out that Management Marine has also proposed a dedicated single vessel approach and argues that, based on their proposed approaches, the solicitation “must not, and cannot, prevent offerors from passing this cost onto the agency.” *Id.* Yet, Shamrock has not explained why the agency should be required to take into account Shamrock’s or Management Marine’s business decisions to “dedicate[] a single vessel to perform work for this procurement.” *Id.* at 6. There is no requirement that an agency equalize a competitive advantage or disadvantage an offeror may experience because of its own particular business circumstances, where, as here, that disadvantage does not result from a preference or unfair action by the government. See, e.g., *RELYANT Global, LLC*, B-418693.7, Apr. 9, 2021, 2021 CPD ¶ 166 at 5, citing *Missouri Machinery & Eng’g Co.*, B-403561, Nov. 18, 2010, 2010 CPD ¶ 276 at 5.

To the extent Shamrock continues to contend that the solicitation conflicts with the DOL letter regarding the SCA and the applicable wage determination, Shamrock has not established that the terms of the solicitation are contrary to applicable procurement law or regulation. Comments and Supp. Protest at 3; Supp. Comments at 3. In this regard, Shamrock argues that we should consider “whether the waiting time is spent predominantly for the employer’s benefit or for the employee’s [benefit]” and “whether the employee is free to do what he or she wants during the waiting time.” Comments and Supp. Protest at 4-5, citing *Molly D. Kinsley, et al.--Claims for FLSA Compensation for Standby Duty*, B-235609.2, Jan. 9, 1995 (denying claims for compensation under the

Fair Labor Standards Act), and *Halferty v. Pulse Drug Co.*, 864 F.2d 1185 (Fed. Cir. 1989) (same).

In response, the agency argues that “any dispute over the appropriate wage rate is within the purview of the Department of Labor,” such that “deference” should be applied here. MOL at 4-5. We have stated that the DOL, not our Office, is statutorily charged with interpreting and administering the SCA, and the contracting agency must follow the DOL’s views on the applicability of the SCA unless they are clearly contrary to law. 29 C.F.R. §§ 4.101(b), (g) (proper course of action is to bring the matter before the DOL’s Wage and Hour Administrator for an official ruling); see, e.g., *Ober United Travel Agency, Inc.*, B-252363, May 7, 1993, 93-1 CPD ¶ 375 at 2, citing *Delta Oaktree Prods.*, B-248903, Oct. 7, 1992, 92-2 CPD ¶ 230. Indeed, as noted in the background section above, the DOL letter specifically provided that “[a]ny interested party wishing further consideration of this matter should submit its request for review and reconsideration, with supporting documentation, to [agency employee’s name and address omitted], within 30 days of the date of this letter.” DOL Letter at 3. Under these circumstances, we decline to further consider the matter.

The protest is denied.

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General Counsel