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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: OMNIPLEX World Services Corp.

File: B-295698; B-295698.2

Date: March 18, 2005

Katherine S. Nucci, Esq., and Timothy Sullivan, Esq., Thompson Coburn, for the protester.

Dennis J. Gallagher, Esq., Department of State, for the agency.

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DIGEST

Protest challenging solicitation provisions in indefinite-delivery/indefinite-quantity contract as unreasonably shifting risk to contractors is denied, where solicitation's assignment of risk was not shown to be unreasonable.

DECISION

OMNIPLEX World Services Corp. protests the terms of request for proposals (RFP) No. SALMEC-05-R-0002, issued by the Department of State (DOS) for construction security monitoring services at overseas and domestic DOS construction sites and storage areas. OMNIPLEX contends that the RFP contains certain provisions that unreasonably shift risk to contractors.

We deny the protest.

The RFP contemplated award of multiple indefinite-delivery/indefinite-quantity (ID/IQ) contracts for a base year with 4 option years. The minimum quantity for each year was stated to be \$50,000, with a maximum quantity of \$250,000,000 over the 5-year contract period. Award was to be made on a best-value basis, considering (in descending order of importance) program management plan, experience, technical qualification and key personnel, and past performance. The RFP stated that the agency would also perform a cost and/or price analysis to determine whether the negotiated price was fair and reasonable.

The RFP required that offerors provide "Site Security Personnel" for each site location consisting of Cleared American Guards (CAG) to staff guard posts and

control access to site locations, Construction Surveillance Technicians (CST) to monitor persons associated with construction activities, Site Security Coordinators (SSC) to supervise the security activities and ensure that the security concerns were fully integrated with the construction plans and security programs, and Team Leaders to serve as the contractor's on-site representative at each work site. The RFP, as amended, required that each offeror submit in its response to the solicitation resumes for its key personnel, to include at a minimum resumes for its proposed program manager as well as for SSCs and Team Leaders "that it reasonably expects to perform on individual task orders." For designated SSCs and Team Leaders, the RFP also provided for the submission of resumes either with task order proposals or within 10 days of task order award if these particular resumes had not already been submitted. Resumes for CAGs and CSTs to be used on particular task orders were required to be submitted only upon the agency's request. RFP § L.7; amend. 4, §§ G.5.1, H.10.

With regard to Section B pricing, offerors were to provide two sets of labor rates for each category of personnel—one for domestic and one for overseas locations—and an estimate of other direct costs (ODC) for domestic locations.¹ These labor rates were ceilings for task orders issued under the contract. The RFP specified that actual travel costs (which included transportation, lodging, meals, and incidental expenses) would be reimbursed in accordance with Federal Acquisition Regulation (FAR) § 31.205-46, but that such costs were "not to exceed . . . [s]pecific limits on reimbursements for subsistence expenses [that] will be established in delivery order proposal requests consistent with local conditions." In this regard, the RFP referred the offerors to Federal Travel Regulations and domestic and overseas per diem rates that are available on the General Services Administration website. RFP amend. 4, § B.6.2.4.

Housing for contractor personnel was to be obtained in accordance with Section H of the solicitation, which provided that the contractor was to obtain "best value" housing, in coordination with Post personnel. If the contractor was unable to find housing, it would be provided by the Post. In addition, the RFP specified that "[t]he Government reserves the right to direct contractor to specific housing or may provide government owned/leased housing to the contractor." RFP amend. 4, § H.11.9.

The RFP required that all ID/IQ contract awardees be considered for award of each task order to be issued under the ID/IQ contracts. The solicitation permitted each contractor to submit a proposal in response to a task order proposal request in which the firm could "propose rates lower than those established in Section B of [its ID/IQ] contract, but not higher." RFP amend. 4, § G.5. The solicitation stated that the agency would "select a contractor to receive the task/delivery order on a best

¹ ODCs for overseas locations were "TBD," that is, "to be determined."

value basis considering the estimated price, any technical aspects such as more responsive delivery schedules, and past performance [on] previous orders.” If a contractor failed to submit a proposal in response to a task order proposal request, the RFP stated that the agency “reserves the right to issue task orders unilaterally to a selected contractor and may do so using an estimate of the cost of the project using the contractor’s rates established in Section B and considering of the contractor’s past performance,” and “will calculate the estimated price of the task using the contractor’s labor rates as established in Section B and the Government’s estimate [of] other costs.” RFP amend. 4, § G.7.

OMNIPLEX protests the solicitation provision that allows the government to unilaterally issue task orders where an awardee does not respond to a task order proposal request, and also protests the provisions providing for travel reimbursement, housing assignments, and resumes. It contends that these provisions unreasonably shift risk to the contractor and are inconsistent with the Federal Acquisition Regulation (FAR).

The mere presence of risk in a solicitation does not make the solicitation inappropriate or improper, as it is within the agency’s discretion to compete a proposed contract that imposes maximum risks upon the selected contractor and minimum burdens upon the agency. AFB Freight Sys., Inc., et al., B-291185, Nov. 8, 2002, 2002, CPD ¶ 201 at 6.

With regard to the government’s right to unilaterally issue task orders, the agency explains that the provision is necessary to ensure the availability of security services in undesirable locations where contractors may not want to perform. It explains that the site security services are essential to providing the physical and technical security of critical locations (e.g., diplomatic facilities) and its personnel, and that it is imperative that construction efforts in these areas not be delayed because security is not available. We find that this explanation provides a reasonable basis to shift the risk of performance to the contractor in all areas covered by the contract, and that the risk is not unreasonable, given that the contractor can adjust its Schedule B pricing—which represents the maximum amount chargeable under the contract—to address these risks. Contrary to the protester’s arguments, the fact that all of the ID/IQ contractors can be considered for performance for all of the task orders to be issued under the ID/IQ contracts, including those which the contractor is not interested in performing and/or is not submitting a proposal, is not inconsistent with the FAR provisions governing ID/IQ contracts. These provisions require that an ID/IQ contract holder “must furnish any additional quantities [over and above the minimum stated quantity] not to exceed the stated maximum.” FAR § 16.504(a)(1). Thus, so long as the orders do not exceed the maximum quantity, ID/IQ contract

holders can be potentially required to perform on all task orders where it is found to be the best value.²

OMNIPLEX nevertheless complains that allowing the agency to price the proposal of a contractor that does not submit a proposal for a particular task order may bind this contractor to a task order price to its prejudice, or may allow the agency to manipulate the ODCs to provide for a particular task order award. However, the RFP makes clear that contractors who do not submit proposals will be evaluated based on their Schedule B labor-hour pricing, which is the maximum price established by the contractor in its ID/IQ contract, and the government is not permitted to unilaterally reduce this price. As indicated, the contractor can take into account in its price proposal the possibility that it may be issued task orders that it may not otherwise be interested in performing. With regard to ODCs, the RFP provides that the government's evaluation of a contractor who does not submit a proposal will be based on the government's estimate of ODCs, but the reimbursement of such costs is not constrained by these estimates; as the agency explains, contractors will be fully reimbursed, subject only to limitations stated elsewhere in the solicitation. Also, we find no basis to presume, as is suggested by the protester's arguments, that the agency will create an artificial or differing ODC estimate for a contractor that does not submit a proposal for a task order in order to make an otherwise unwarranted award.

OMNIPLEX also challenges the provision providing for travel and per diem reimbursement. It contends that the provision stating that "[s]pecific limits on reimbursements for subsistence expenses will be established in delivery order proposal requests consistent with local conditions" places an unreasonable risk on the contractor that the government will arbitrarily reduce subsistence expenses, and complains that it is unable to calculate risk because it does not know what these limits will be. However, as the agency explains, the limits on subsistence expenses for differing "local conditions" are set forth in the Federal Travel Regulations and the Standardized Regulations (Government Civilian, Foreign Areas), which are referenced in the RFP and in FAR § 31.205-46, which is incorporated into the RFP and which governs and limits subsistence reimbursements. Since the RFP's limitation on reimbursements is consistent with the language of the FAR, and the

² Although OMNIPLEX also complains that the RFP provision violates the Office of Federal Procurement Policy's 1997 interim "best practices" guidance, we do not agree that the guidance cited by the protester prohibits the agency from requiring ID/IQ contractors to perform under their contracts. Nor is this interim guidance, even if applicable, a binding rule or regulation that DOS is required to follow. In any case, such guidance does not have the force and effect of law, and thus compliance with this guidance is not subject to our Office's review. See E. F. Felt Co., Inc., B-289295, Feb. 6, 2002, 2002 CPD ¶ 37 at 4.

limits are readily obtainable by the contractor via published regulations, we find no basis to conclude that the provision is unreasonable.³

OMNIPLEX asserts that the RFP's housing assignment provision is too onerous because it allows the government to dictate where contractors will be housed if it disagrees with the contractor's "best value" determination as to housing. As the agency explains, it may be necessary in some parts of the world for the agency to arrange housing to ensure the safety and security of the contractor's personnel. Given that the agency will reimburse the contractor for its employee housing in performing each task order, regardless of whether it is contractor- or government-furnished, the protester has not shown that the risk caused by the agency's right to designate contractor housing is unreasonable.

OMNIPLEX finally contends that the resume provisions and qualification requirements for the Team Leader and SSC are unclear, and that the RFP does not provide "objective criteria" for how key personnel positions will be evaluated. We again disagree. As the RFP stated, the resumes of key personnel are to be submitted with the offerors' proposals in response to the RFP if those individuals are known; if the Team Leaders or SSCs for particular task orders are different, their resumes are to be submitted as part of its task order proposal requests or within 10 days after award of the task order. RFP § L.7; amend. 4, §§ G.5.1, H.10. With regard to the qualifications of the key personnel, while it is true that separate qualifications are not listed for Team Leaders and SSCs, the RFP does describe their roles in contract performance, see, e.g., RFP §§ C.2.4, C.6, and the agency explained in the response to offerors' questions on the solicitation that these positions were to be filled with CAGs or CSTs with the most experience. RFP Questions & Answers Nos. 4, 67. The RFP provides that the criteria against which the qualifications and experience will be evaluated are whether the offeror's approach "demonstrates a high probability of successfully performing all assigned tasks, and identif[ies] potential problem areas and solutions." RFP amend. 4, § M.4.3. Based on this information, we conclude that the offerors were provided with adequate information on which to develop a proposal.

The protest is denied.

Anthony H. Gamboa
General Counsel

³ To the extent that OMNIPLEX complains that the RFP does not identify each and every possible location where work may be performed, we do not find any risk caused by this failure to be unreasonable, given that the contractor will be reimbursed its subsistence expenses on a time-and-material basis to the extent authorized by the FAR.