



## Decision

**Matter of:** Anders Construction, Inc.

**File:** B-420717.2

**Date:** January 17, 2023

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Jonathan S. Forester, Riess LeMieux, LLC, for the protester.  
Tristan S. Brown, Esq., Kyle B. Davis, Esq., and William G. Meiners, Esq., Department of the Army, for the agency.  
Hannah G. Barnes, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that terms of solicitation do not adequately communicate the agency's requirements is denied where the solicitation provides sufficient information to enable offerors to compete intelligently and on a relatively equal basis.

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### DECISION

Anders Construction, Inc., a small business of Harvey, Louisiana, protests the terms of request for proposals (RFP) No. W912P821R0042, issued by the Department of the Army, Army Corps of Engineers, for professional diving services. Anders contends that the solicitation does not provide sufficient information for offerors to determine whether prevailing wage rates set by the Department of Labor (DOL) must be paid to divers during the mobilization and demobilization period under the contract.

We deny the protest.

### BACKGROUND

The RFP, issued on July 30, 2021, as a small business set-aside, seeks a contractor to provide professional diving services in support of navigation, flood control, environmental projects, and other Corps missions. Agency Report (AR), Tab 3, RFP at 4. The RFP contemplates the award of a fixed-price indefinite-delivery, indefinite-quantity contract for a base period of 1 year with four 1-year options to the firm that provides the lowest-priced, technically acceptable offer. RFP at 3, 122.

On December 2, 2021, the Army sent unsuccessful-offeror letters to those offerors found technically unacceptable. *Anders Construction, Inc.*, B-420717, July 20, 2022, 2022 CPD ¶ 187 at 2. After one offeror alleged that the agency had conducted a flawed evaluation, the Army reevaluated all proposals and reopened discussions with all offerors to address various concerns the agency had with proposals. *Id.* On March 3, 2022, Anders filed an agency-level protest challenging both the agency's reevaluation of its proposal and the agency's decision to reopen discussions, and on March 9, Anders filed a supplemental protest. *Id.* On April 19, upon reviewing Anders's protests, the agency announced that it would take corrective action by revising and re-issuing the solicitation and assembling a new source selection evaluation board. *Id.*

On April 27, the agency issued an eighth amendment to the RFP, to remove two sentences stating that Service Contract Act (SCA) prevailing wage rates applied only after divers arrived at the job site and did not apply to mobilization and demobilization while divers traveled to and from the dive site.<sup>1</sup> (COS) at 3. On April 29, Anders filed a protest with our Office reiterating arguments raised in its agency-level protests and effectively challenging the scope of the agency's proposed corrective action. *Anders Construction, Inc.*, *supra* at 2. We dismissed the protest, concluding that the agency's decision to take corrective action fell within its broad discretion and that Anders's complaints consequently failed to state a valid basis for protest. *Anders Construction, Inc.*, *supra* at 4. In a tenth amendment, effective August 10, the agency re-inserted the two sentences that had been removed by the eighth amendment, later stating that it had previously removed those sentences by mistake. COS at 3.

On August 29, Anders filed its second agency-level protest, in response to which the agency took corrective action by amending the solicitation a fourteenth time, to remove the "mistakenly included" statements that SCA prevailing wage rates were to apply only after divers arrived at the job site. *Id.* In this amendment, the agency also added the following sentence to the solicitation: "The [c]ontractor is allowed to pay dive team members prevailing wages under mobilization and demobilization." AR, Tab 17, RFP amend. 14 at 1.

The agency issued this final amendment on September 16 and dismissed Anders's second agency-level protest on September 30. COS at 4, Protest at 4. On October 10, this protest was filed with our Office.

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<sup>1</sup> As relevant here, the SCA, as implemented by the Code of Federal Regulations, provides that "[a]ny contract in excess of \$2,500 shall contain, as an attachment, the applicable, currently effective wage determination specifying the minimum wages and fringe benefits for service employees to be employed thereunder." 29 C.F.R. § 4.5(a). The procurement at issue has "a total capacity of \$5 [million]," in excess of \$2,500. Contracting Officer's Statement (COS) at 2; RFP at 3. The solicitation includes the applicable wage rates provided by the DOL. RFP at 124-27.

## DECISION

Anders argues that the solicitation, as most recently amended, “fails to inform bidders” whether SCA prevailing wage rates must be paid to divers during mobilization and demobilization. Protest at 8. The protester also asserts that the solicitation language “conflicts with [the DOL] requirement” that divers must be paid according to prevailing wage rates. Protest at 4. Anders references the following regulatory language that explains when travel constitutes working time: “Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked.” 29 C.F.R. § 785.38. The protester argues that the mobilization and demobilization period constitutes a principal activity because bringing the diving equipment—including air compressors, wet suits, and secondary air supplies—to and from the dive site and ensuring that such equipment is in good working order in accordance with safety standards is an integral aspect of the work outlined in the solicitation. Protest at 5; see RFP at 20.

The agency responds that our Office is not an appropriate forum for Anders’s protest because the allegations concern the implementation of the SCA, which the Army argues is outside the scope of our Office’s review. Memorandum of Law (MOL) at 4. Specifically, the agency takes issue with Anders’s request that our Office direct the Army to issue a definitive ruling on whether SCA wage rates apply during drive time to and from a dive site. *Id.* at 5. Ultimately, the agency asserts that the protester “has all the data it needs to prepare its bid,” as it possesses “the same relevant information” that other offerors possess. *Id.* at 6.

The responsibility for the administration and enforcement of the SCA is vested in the DOL, not our Office or the Army. See *K-Mar Indus., Inc.*, B-400487, Nov. 3, 2008, 2009 CPD ¶ 159 at 6. Concerns with regard to establishing proper wage rate determinations or the application of the statutory requirements should be raised with the Wage and Hour Division in the Department of Labor, the agency that is statutorily charged with the implementation of the Act. *SAGE Sys. Techs., LLC*, B-310155, Nov. 29, 2007, 2007 CPD ¶ 219 at 3.

Here, as amended, the solicitation leaves the decision of whether to pay divers SCA wage rates for their mobilization and demobilization time to the selected contractor, expressly informing offerors that they are allowed to pay divers SCA wage rates during mobilization and demobilization. See AR, Tab 17, RFP amend. 14 at 1. Notwithstanding the protester’s assertion to the contrary, having the contractor make this decision is not inconsistent with the general requirement for the contractor to pay divers according to prevailing wage rates. While the protester would like more definitive guidance from the agency on how to apply the SCA, it is not the agency’s responsibility to advise offerors as to their legal responsibilities under the SCA; rather, these are

questions for DOL.<sup>2</sup> See *SAGE Sys. Techs., LLC, supra*. Consequently, this protest contention is without merit.

The protest is denied.

Edda Emmanuelli Perez  
General Counsel

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<sup>2</sup> Anders also argues that it “cannot properly bid its mobilization and demobilization costs under the [s]olicitation” because the RFP only permits, but does not require, contractors to pay dive team members SCA prevailing wage rates during drive time. Comments at 5. 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. *Integrity Nat’l Corp.*, B-417545, July 24, 2019, 2019 CPD ¶ 264 at 4. However, there is no legal requirement that the procuring agency remove all uncertainty from the mind of every prospective bidder. Risk is inherent in most types of contracts, and firms are expected to allow for that risk and use their professional expertise and business judgment in preparing their proposals. See *Id.* Here, the protester is asking our Office to require the agency to eliminate, in the solicitation, any uncertainty regarding the application of the provisions of the SCA; here, that “risk” stems from not knowing how DOL would rule on this question. Again, the agency does not need to eliminate all risk or uncertainty for the protester; moreover, even were we to find the RFP terms too vague, the fact remains that the application of the SCA is a matter for DOL, and not our Office or the agency.