



Decision

Matter of: KBR Services, LLC

File: B-422839

Date: November 22, 2024

Michael F. Mason, Esq., Christine Reynolds, Esq., and Taylor Hillman, Esq., Hogan Lovells US LLP, for the protester.
Lauren Thompson, Esq., Department of the Navy, for the agency.
Raymond Richards, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the terms of the solicitation as understating the agency's actual need and preventing offerors from competing intelligently and equally is denied where the protester fails to demonstrate solicitation improprieties.
 2. Protester is not an interested party to argue that the solicitation does not provide other offerors adequate information regarding labor rates.
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DECISION

KBR Services, LLC (KBR) of Houston, Texas, protests the terms of request for proposals (RFP) No. N6247022R0005, issued by the Department of the Navy for base operation support services at Camp Lemonnier, Djibouti. KBR contends that the terms of the solicitation understate the agency's need and prevent offerors from competing intelligently and equally.

We deny the protest.

BACKGROUND

The Navy issued the RFP on March 4, 2024, under the procedures of Federal Acquisition Regulation (FAR) part 15. Agency Report (AR), Exh. 1, RFP at 2, 560.¹

¹ The Navy filed the solicitation in a consolidated Adobe PDF document; our citations to the RFP reference the PDF page numbers of the consolidated document.

The RFP anticipates the award of a fixed-price indefinite-delivery, indefinite-quantity (IDIQ) contract. *Id.* at 106. The IDIQ will have a base ordering period of 1 year, six 1-year option periods, and three 6-month option periods, for a total possible ordering period of 102 months. *Id.* at 518.

The RFP seeks proposals for base operation support services at Camp Lemonnier, Djibouti. *Id.* at 121-124. Such services include, for example, grounds maintenance, galley services, and fire and emergency services. *Id.* Award will be made to the firm whose proposal represents the best value to the government considering the following evaluation factors: (1) corporate experience; (2) technical/management approach; (3) safety; (4) past performance; and (5) price. *Id.* at 551, 561-565.

Salient to the protest is the requirement to employ at least 1,087 Djiboutian nationals.² *Id.* at 140. The relevant section of the solicitation reads as follows:

The Contractor shall comply with the applicable Djiboutian labor laws, applicable Collective Bargaining Agreement [(CBA)], and the [United States Africa Command (USAFRICOM)] Requirement to employ a minimum of 1087 Djiboutian nationals under this contract.^[3] Attachment J-0200000-11 provides historical information on rates required to be paid for these personnel under this prior contract. Attachment J-0200000-11A is a copy of the [CBA]. This information is provided for reference and informational purposes only. The Contractor will be required to utilize a Djiboutian Government approved labor broker to negotiate actual rates applicable under the contract.

Id. at 140.

The price evaluation will be based on total price and “will be performed by one or more of the following techniques to ensure a fair and reasonable price:” (1) comparison of the prices received; (2) comparison of prices with the independent government cost estimate (IGCE); (3) comparison of prices with available historical information; (4) comparison of market survey results; (5) and price reasonableness assessment at the unit level. *Id.* at 561-562. The closing time for receipt of proposals was August 13, 2024. *Id.* at 2.

² The solicitation and pleadings occasionally refer to Djiboutian nationals as host country nationals (HCNs). We use the terms Djiboutian nationals and HCNs interchangeably.

³ USAFRICOM is a unified combatant command. Contracting Officer’s Statement and Memorandum of Law (COS/MOL) at 4. The agency states that following a labor strike in 2013, the Djiboutian government announced a socioeconomic policy regarding employment of Djiboutian nationals at Camp Lemonnier which was recognized by the USAFRICOM chief of staff. *Id.*

On July 30, KBR (the incumbent contractor) timely filed an agency-level protest challenging the terms of the solicitation. AR, Exh. 2, Agency-level Protest at 1. KBR opined that as written, the solicitation does not reflect the agency's minimum needs and fails to enable offerors to compete intelligently and equally. *Id.* at 5-7.

Specifically, KBR noted the solicitation's inclusion of historical information on labor rates but argued that the solicitation is flawed because it does not require offerors to "commit to pay the HCNs at rates equal to or greater than those incumbent rates." *Id.* at 2. KBR also argued that the included historical labor rate information is not up to date and omits information on the employment history of HCN workers, affecting prospective contractors' ability to comply with article 31 of the CBA.⁴ *Id.*; RFP at 608.

As argued by KBR, these alleged flaws will result in the Navy receiving unrealistically low prices and will likely result in labor disruptions. AR, Exh. 2, Agency-level Protest at 5-7. As relief, KBR asked for a solicitation amendment requiring offerors to "propose to pay HCNs at salary levels that are greater than or equal to the wage rates required under the incumbent contract, as adjusted for seniority bonuses." *Id.* at 2.

The proposal submission period closed on August 13, absent an agency response to the agency-level protest. Protest at 8. On August 16, KBR filed the instant protest with our Office, raising the same challenges as the agency-level protest. As the instant protest was filed with our Office within 10 days of initial adverse agency action (proposal submission period closing absent a response to the agency-level protest), it is timely filed. 4 C.F.R. § 21.2(a)(3); see *DAI, Inc.*, B-408625, B-408625.2, Nov. 6, 2013, 2013 CPD ¶ 259 at 3.

DISCUSSION

KBR challenges the terms of the solicitation. According to KBR, the solicitation understates the Navy's actual need and otherwise fails to allow offerors to compete intelligently or equally. Protest at 5-7; Comments at 1-2. The Navy disagrees and asks our Office to deny the protest.

As discussed below, to the extent KBR is challenging the solicitation as understating the agency's needs or as precluding intelligent and equal competition, it is denied. However, to the extent KBR challenges the solicitation as failing to provide information

⁴ Article 31 of the CBA states:

Employee shall receive a seniority bonus after two years of employment. The rate of this bonus, which is payable for each year of actual employment, is fixed as follows:

□ 4[percent] for every two years of service after the second year, up to a maximum of 52[percent].

RFP at 608.

to firms other than KBR, it is dismissed because KBR is not an interested party to raise such a challenge.⁵

Denial of Request to Intervene

Prior to addressing the merits of KBR's protest, we provide a brief discussion of our decision to deny a request to intervene. The request was filed by an actual offeror contending that should GAO sustain KBR's protest, the requested relief would competitively disadvantage other offerors and that KBR was attempting to "tilt the playing field" in its own favor. Req. to Intervene at 3; Second Req. to Intervene at 2.

In short, we denied the request because the requesting party had not demonstrated that it met the definition of an intervenor. See 4 C.F.R. § 21.0(b) ("Intervenor means an awardee if the award has been made or, if no award has been made, all bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied."). Since this protest challenged the terms of the solicitation, we have no insight into the agency's evaluation or how the agency evaluated the proposal submitted by the requesting party (or any other offeror). Accordingly, the requesting party could not show that it appeared to have a substantial prospect of receiving award at this time. Moreover, an offeror's potential to become disadvantaged should a protest be sustained is not the primary consideration when deciding whether a party is permitted to intervene in an ongoing preaward protest. See *id.* Instead, in a preaward environment, the primary consideration is whether the requesting party has demonstrated a substantial prospect of receiving an award if the protest is denied. *Id.* Here, the requesting party failed to make that demonstration.

KBR Fails to Demonstrate Solicitation Improprieties

As discussed above, KBR challenges the terms of the solicitation. The challenge is rooted in the requirement to employ at least 1,087 HCN workers in accordance with Djiboutian labor law and the CBA. See RFP at 140. In short, KBR takes issue with the solicitation's lack of a requirement to pay minimum labor rates for HCN workers. KBR requests that the solicitation be amended to require offerors to "certify that they will pay HCN[workers] wages that are equal to or greater than the rates required under the incumbent contract, plus any seniority bonuses." Protest at 7. As discussed below, KBR frames its challenge in three primary ways.

First, KBR challenges the terms of the solicitation as understating the Navy's actual need. Protest at 5-6; Comments at 2. As told by KBR, the Navy's actual need is paying the prospective HCN workforce wages that are equal to or greater than the wages KBR currently pays the incumbent HCN workforce, and the solicitation fails to ensure this happens. Protest at 5 ("The Solicitation is flawed because it does not require that offerors propose prices that are based on paying HCNs wages at least equal to the

⁵ KBR raises other collateral arguments. We have reviewed them all and find no basis to sustain the protest.

wages required under the incumbent contract”); *id.* at 6 (“historical rates paid to HCNs indeed represent the Navy’s actual needs”). KBR contends that failure to pay the HCN workers at these rates will result in labor strife and the HCN workers will not perform at lower rates. *Id.* at 5.

Second, KBR recognizes the RFP’s inclusion of historical labor rates for reference and informational purposes. *Id.* at 2. However, it argues that--based on incumbent knowledge--those historical rates are out of date.⁶ *Id.* at 6-7; Comments at 2-3. KBR asserts that the solicitation’s inclusion of “stale labor rates” misleads offerors and precludes intelligent competition. KBR Additional Briefing at 3. According to the protester, as written, the solicitation will result in other offerors underpricing KBR by “proposing pricing that is based on paying the HCNs rates that are lower than those actually required to retain the workforce[.]” Protest at 7.

Third, KBR argues that the solicitation lacks information on the length of employment for HCN workers, and contends this information is necessary to comply with the CBA. *Id.* at 2. In this regard, article 31 of the CBA requires HCN workers to receive 4 percent seniority bonuses for every 2 years of service past the first 2 years, up to a maximum of 52 percent. See RFP at 608; Protest at 7; Comments at 2-3. Without information on the length of employment for the HCN workforce, KBR argues that offerors will not be able to satisfy article 31 of the CBA.⁷ Protest at 2, 7; Comments at 2-4.

The Navy defends the solicitation as written. According to the agency, the solicitation clearly identifies its needs, and provides sufficient detail for offerors to compete intelligently and equally. COS/MOL at 4-7.

The Navy first argues that--contrary to KBR’s assertion--the relevant need is employment of at least 1,087 HCN workers; it is not setting minimum labor rates for the HCN workers. COS/MOL at 5. The agency states that this need is listed under solicitation specification 2.7.1, “Hiring of HCNs,” and is based on the socioeconomic policy explained above requiring the hiring of HCN workers, which is in turn recognized by the combatant command overseeing Camp Lemonnier. COS/MOL at 4-5; see RFP at 140.

To this point, the Navy explains that the contemplated IDIQ will be a fixed-price, performance-based contract and contends that performance-based contracts must include measurable performance standards but need not specify how those

⁶ The agency agrees that the historical information is “not current[.]” Agency Additional Briefing at 1-2. However, it explains that the historical information is included as reference material in order “to give offerors an idea” of how the HCN workforce was previously used, and that the solicitation makes this clear. *Id.*

⁷ KBR further suggests that offerors should be required to demonstrate how they will escalate salaries in accordance with the CBA’s seniority bonus requirement. Protest at 7; Comments at 3.

performance standards are met. COS/MOL at 5 (citing FAR 37.601). According to the agency, the instant solicitation includes the required measurable performance standard--employment of at least 1,087 HCN workers--and argues that "as long as an offeror's proposal complies with all the requirements of the solicitation, how they propose to fulfill that need is within their discretion." *Id.* at 6.

The Navy next counters that the solicitation includes enough detail for intelligent and equal competition. *Id.* at 6. This includes the requirements to comply with applicable Djiboutian labor laws, to employ 1,087 Djiboutian nationals, and to comply with the CBA. *Id.* The agency also notes that the solicitation includes historical labor rates for reference and explains that the prospective contractor will need to work with a labor broker to establish actual labor rates. *Id.* The Navy claims that structuring the solicitation in this way "allows all offerors the same opportunity to determine how to best utilize the HCN workforce and to negotiate rates and bargaining agreements for inclusion in their offers." *Id.*

The Navy contends that offerors will be able to combine the supplied information with their business judgment and independent research to determine their prices. Agency Additional Briefing at 2. For these reasons, the Navy asks our Office to deny KBR's protest.

The contracting agency has the primary responsibility of determining its needs and the method for accommodating them. *AirTrak Travel et al.*, B-292101 *et al.*, June 30, 2003, 2003 CPD ¶ 117 at 13-14. We will not question an agency's choice of procurement approach absent clear evidence that its decision is arbitrary, unreasonable, or violates law or regulation. *Id.*

Generally, solicitations 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 an equal and intelligent basis. *Inuksuk A-S*, B-420527.2, May 26, 2022, 2022 CPD ¶ 132 at 8. However, there is no requirement that agencies draft requirements in such detail as to entirely remove all risk to the contractor or remove all possible uncertainty. *Id.*; *Allserv, Inc.*, B-422347, Apr. 23, 2024, 2024 CPD ¶ 109 at 5.

Our decisions have consistently recognized that risk is inherent in most contracts and firms must use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. *E.g.*, *Inuksuk A-S*, *supra* at 8-10 (denying protest arguing that a solicitation required more information about equipment which may need to be replaced at contractor expense during performance); *JRS Mgmt.*, B-402650.2, June 25, 2010, 2010 CPD ¶ 147 at 5 (denying protest arguing that a contract line item number should be added to a solicitation to account for possible labor cost overruns); *Mark Dunning Industries, Inc.*, B-243757, Aug. 22, 1991, 91-2 CPD ¶ 187 (denying challenge raised by an incumbent contractor arguing that a lack of information in the solicitation placed the incumbent at a disadvantage). We have further recognized that agencies are not obligated to ensure that incumbents and

non-incumbents have the same information. *IDS Int'l. Gov't. Servs., LLC*, B-419003, B-419003.2, Nov. 18, 2020, 2020 CPD ¶ 383 at 19.

As an initial matter, we agree with the Navy that hiring at least 1,087 HCN workers is the relevant need. The agency reasonably explains that the need is based on host country policy recognized by the relevant combatant command. COS/MOL at 4; RFP at 140. Accordingly, we reject the assertion that the solicitation understates the Navy's actual need.

Next, we find that KBR fails to demonstrate how the terms of the solicitation do not provide for intelligent or equal competition. All offerors have access to the same solicitation information and will be evaluated based on the same solicitation terms. In this regard, the solicitation contains information about historical wage rates paid to HCNs that offerors can use to price their proposals. In addition, the solicitation requires offerors to comply with the CBA, and therefore offerors necessarily must honor the seniority bonuses as provided for in the CBA. Notably, KBR does not argue that the solicitation is somehow vague or ambiguous. Rather, the main thrust of its protest is that KBR knows what the Navy needs in greater detail than what is described in the solicitation. Such an argument does not provide a basis to sustain the protest. See *e.g.*, *IDS Int'l. Gov't. Servs., LLC*, *supra*. Accordingly, this protest ground is denied.

KBR is not an Interested Party to Challenge the RFP on Behalf of Other Firms

An underlying theme in KBR's pleadings is that KBR, the incumbent contractor, will be competitively prejudiced by the terms of the solicitation because other offerors lack KBR's knowledge of the requirement and may therefore propose lower prices based on their lack of understanding. See *e.g.*, Protest at 6-7 ("Other offerors, however, have not experienced [previous labor disruptions] and are likely to attempt to underbid KBR by proposing pricing that is based on paying the HCNs rates that are lower than those actually required"); Comments at 5 ("offerors without [KBR's] knowledge of the political realities in Djibouti likely submitted underpriced proposals"); KBR Supp. Filing at 2 ("if this competition is to be fair, all offerors must be fully informed of the risks of failing to honor existing HCN labor rates so that they can price their proposals accordingly").⁸ To

⁸ On November 4, KBR filed what it identified as a supplemental protest. KBR Supp. Filing. KBR explained that on October 23, KBR, as the incumbent contractor, learned that Djiboutian government officials had sent letters to certain United States government officials regarding KBR's "obligation to honor existing HCN labor rates" under the contemplated contract. *Id.* at 2. The filing explained that the Djiboutian officials expressed concern over labor rates and suggested that labor disruptions would result from any reduction in rates. *Id.* KBR argues that these letters "leave no doubt" that the contractor selected for award must commit to paying HCNs at labor rates equaling the existing current rates and provide further support for its argument that the agency should amend the solicitation to require this. *Id.* at 2-3.

(continued...)

the extent that KBR's protest challenges the terms of the solicitation on behalf of other offerors or prospective offerors, KBR is not an interested party to raise such challenges.

Under the bid protest provisions of the Competition in Contracting Act of 1984, only an interested party may protest a federal procurement. 31 U.S.C. §§ 3551, 3553. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. *RELM Wireless Corp.*, B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. Whether a protester is an interested party is determined by the nature of the issues raised and the direct or indirect benefit or relief sought. *Id.* In general, we have concluded that a protester is not an interested party to raise arguments on behalf of other offerors or prospective offerors. *IDS Int'l. Gov't. Servs., LLC, supra* at 16-17; *DNC Parks & Resorts at Yosemite, Inc.*, B-410998, Apr. 14, 2015, 2015 CPD ¶ 127 at 12-13.

We appreciate KBR's concern that as the incumbent it may have more accurate information about the solicitation's requirements as compared with other offerors, and therefore faces uncertainty as to whether other offerors may offer low pricing due to lower levels of understanding. Ultimately, such a concern turns on an alleged lack of information for other offerors. For this reason, KBR is not an interested party to challenge the terms of the solicitation for failing to provide other offerors with certain information.⁹ See *IDS Int'l. Gov't. Servs., LLC, supra* at 18.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

On November 14, GAO informed the parties that KBR's supplemental filing would be considered as part of the record but that no additional briefing was requested and that the record was consider closed. Electronic Protest Docketing System No. 39.

Based on our review of the supplemental filing, we find no reason to change our conclusions that the Navy has adequately defined its needs and that the solicitation provides sufficient information for offerors to compete intelligently and equally. Thus, the supplemental filing does not provide a basis to sustain the protest.

⁹ We note that KBR is the only firm to protest the terms of this solicitation. We have previously explained that the absence of challenges by other offerors supports a conclusion that an incumbent contractor is not the appropriate party to challenge a solicitation as defective because non-incumbent offerors lack the same information as the incumbent. *E.g., IDS Int'l. Gov't. Servs., LLC, supra* at 18.