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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: United Paradyne Corporation

File: B-296609

Date: August 19, 2005

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DIGEST

Agency may properly include in a work statement for fuels management services a minimum staffing requirement that the agency has shown to be necessary, without violating Federal Acquisition Regulation §§ 11.002(a)(2)(i), 37.602-1(b), which generally require that, to the maximum extent practicable, the agency's needs be described in terms of performance-based standards.

DECISION

United Paradyne Corporation protests request for proposals (RFP) No. FA8601-05-R-0050, issued by the Department of the Air Force, which contemplates the award of a fixed-price contract for fuels management services at Wright-Patterson Air Force Base, Ohio.

We deny the protest.

The work to be performed under the contract includes providing all personnel, equipment, tools, material, supervision, and other items and services necessary to perform the Fuels Management Operations as defined in the performance work statement (PWS) attached to the RFP. The PWS referenced requirements stated in a number of Air Force publications and regulations, including Air Force Instructions (AFI) 23-201, "Fuels Management." PWS App. 2. AFI 23-201, paragraph 3.3, states the Air Force policy that at least two contractor employees must handle a refueling task. Contracting Officer's Statement at 4-5. The PWS states the following additional staffing requirements relevant to this protest:

4.4.1.1. Fuels Operations and [Resource Control Center (RCC)]
(Building 154, Area C):

4.4.1.1.1. Fuels Operation located in Building 154, Area C, shall be operational and physically manned 24 hours per day, seven days per week, (Monday through Sunday) including federal holidays. Physical manning for each shift shall be of sufficient numbers to meet all daily workload requirements without exception. . . . Additionally, physical manning of all shifts shall be of sufficient numbers to ensure strict adherence to the two-person policy as specified in AFI 23-201, paragraph 3.3 . . .

4.4.1.1.2. RCC Control:

4.4.1.1.2.1. Responsibilities: RCC is the focal point for all fuels operations and acts as the single point of contact for the Fuels Management Branch, during other than normal duty hours. Primary communication with external organizations is by phone and emergency notification of real-world contingencies, incidents, accidents, weather warnings, etc... are received over the computer via the Automated Notification System. RCC's effectiveness is dependent on the physical presence of an individual to carry out the above duties while maintaining positive control over all fuels facilities and flightline operations.

4.4.1.1.2. Manning: Contractor shall provide sufficient manning, a minimum of one individual per shift, to ensure a continual physical presence in the RCC office 24 hours per day, seven days per week , (Monday through Sunday), including federal holidays. Furthermore, RCC controllers shall not be used to augment or supplement other fuel functions, if it would require the individual to leave the RCC office unmanned (without a physical presence). For example, the controller shall not be used as a second person to refill a fuel unit, act as a hydrant pumphouse operator, perform duties of laboratory safety person, etc... since this requires the RCC to be left unmanned (without a physical presence).

The closing date for submitting initial proposals was July 5. RFP at 1. The agency issued three amendments to the RFP, the last of which extended the initial closing date to July 13.

In its initial protest, filed June 13, United Paradyne argued that the PWS contained requirements contrary to the Federal Acquisition Regulation (FAR) requirements concerning statements of work for performance-based contracts.

FAR § 11.002(a)(2)(i) provides that, to the maximum extent practicable, agencies are to state their requirements with respect to an acquisition of supplies or services in terms of functions to be performed, performance required, or essential physical characteristics. FAR § 37.602-1(b) provides with regard to performance-based contracting:

When preparing statements of work, agencies shall, to the maximum extent practicable—

(1) Describe the work in terms of “what” is to be the required output rather than either “how” the work is to be accomplished or the number of hours to be provided . . .

(2) Enable assessment of work performance against measurable performance standards;

(3) Rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competitors to develop and institute innovative and cost-effective methods of performing the work . . .

The only instance mentioned in the initial protest of how the PWS was in violation of the FAR provisions concerning performance-based contracting was the agency’s requirement for a minimum of one person to be physically present at the RCC. The protester states this requirement is contrary to the regulatory requirement for performance-based standards, and is not needed in order to ensure that the RCC is operational at all times. The requirement, combined with the “two-person policy” for refueling, essentially will require the contractor to assign three employees to the third shift. The protester is the incumbent contractor under the two preceding contracts and states that it has performed the third shift with only two employees. United Paradyne states that it kept the RCC fully operational with two employees, even during the limited time when both employees were away from the RCC office performing refueling tasks, through the use of radio communications.

The agency states that it requires a continuous physical presence at the RCC office for safety, security and environmental reasons. The RCC is the primary monitor of fuels operations and must act as the single point of contact for flights during other than normal duty hours, must provide positive control over all fuels facilities and flight line operations, must notify all fuels personnel of weather warnings, must terminate fuel operations when lightning is within 5 miles, and must perform other similar duties that require continuous staffing of this critical function. The agency reported that the requirement for at least one person to be continuously present at the RCC office is necessary because, although radio is the primary means of communication, some elements of the base populace critical to emergency situations are only able to communicate via telephone. Agency Report at 2; Contracting Officer’s Statement at 4-5.

The record provides no basis to find the agency's requirement unreasonable or improper. The FAR requires the agency to use performance-based standards only to the maximum extent practicable. The agency reports that contact between agency and contractor personnel is not always possible by means other than telephone. Although the protester generally disagrees, it has not shown that the agency has not accurately represented the situation. Additionally, the agency appears reasonable in stating that, if the contractor has only two employees on duty and both are performing a refueling task, as is required by the two-person policy, neither can perform critical RCC functions that arise during refueling. While the protester seeks a performance-based standard that would allow it to occasionally leave the RCC office unstaffed during refueling tasks, the agency has demonstrated a reasonable basis for its position that an unstaffed RCC office is unacceptable. Under the circumstances, we conclude that the agency had a reasonable basis for finding that it is not practicable to leave this staff to the discretion of the contractor using a purely performance-based standard.¹

While the protester stated in its initial protest that the RFP contains "numerous" examples of improper terms in the PWS in violation of the FAR provisions governing performance-based contracting, the protest identified only the example discussed above. In its comments responding to the agency report submitted on July 25, United Paradyne for the first time identified additional examples. These specific

¹ The agency previously attempted to accomplish its actual needs with a performance-based standard, and United Paradyne, the incumbent contractor, resisted staffing the RCC as is now expressly required by this RFP absent a specific requirement in its contract. The work statements under United Paradyne's prior contracts essentially stated that the contractor had to keep the office "operational," and the agency and protester differed over what level of minimum performance was acceptable under this standard. When faced with an agency demand that United Paradyne continuously staff the RCC office, United Paradyne repeatedly asserted that it was not required to do so by the terms of the contract, and asserted that the agency's prior revision of the statement of work between the first and second contracts did not identify the agency's interpretation of its staffing requirement for the RCC office. During one exchange between the contractor and the agency, United Paradyne stated that if the agency intends for the RCC office to be continuously staffed, "then one would think it would have been clearly spelled out in the PWS" Protest, encl. F, United Paradyne Letter to the Air Force (Mar. 16, 2005). Although United Paradyne eventually agreed to provide the additional staffing under that contract, it continued to assert that the PWS did not require it and insisted on a contract adjustment based on changed conditions. Protest, encl. J, United Paradyne E-mail Message to the Air Force (May 25, 2005). The agency subsequently determined that it would not exercise any option years under the contract and would resolicit in order to obtain price competition on its actual needs.

examples were not timely submitted and will not be considered. In order for our Office to meaningfully consider protest allegations, our Bid Protest Regulations require that protest issues be presented prior to the time set for receipt of proposals if alleging improprieties apparent on the face of a solicitation. 4 C.F.R. § 21.2(a)(1) (2005). The piecemeal presentation of protest issues is not permissible; rather, each allegation must independently satisfy the timeliness requirement. Qualmed, Inc., B-257184.2, Jan. 27, 1995, 95-1 CPD ¶ 94 at 13; Sea-Land Serv., Inc., B-246784.2, Aug. 24, 1992, 92-2 CPD ¶ 122 at 14-15. All of these alleged solicitation improprieties raised by the protester were apparent on the face of the solicitation as issued, or as subsequently amended, and should have been alleged earlier in order to be considered timely.²

The protester also filed a supplemental protest on July 15, based on documents provided with the agency report. The supplemental protest alleges that the agency failed to conduct an Acquisition Strategy Panel (ASP) in accordance with Air Force Materiel Command FAR Supplement (AFMCFARS) regulation³ because the commanding officer either did not serve as ASP chairperson or did not delegate his authority to the ASP chairperson, and because the ASP minutes were signed by the contract specialist and thus were not approved by the ASP chairperson.⁴

In response, the agency produced a letter from the commanding officer that previously delegated his authority to serve as the ASP chairperson for procurements

² Most of the examples were apparent on the face of the RFP as it existed at the time of the initial protest and the protester could have identified them in its initial protest. To the extent the protester alleges improprieties first introduced in amendments to the RFP issued after the initial protest, the allegations should have been protested by the date for submission of proposals that applied to the amendment in which the alleged impropriety first appeared. 4 C.F.R. § 21.2(a)(1). However, the protester did not identify any of these additional allegations until well after the final closing date of July 13.

³ AFMCFARS § 5307.104-90(b) and Air Force FAR Supplement (AAFARS) § 5307.104-90(b) both state the agency's policy concerning who can be the ASP chairperson for various categories of acquisitions. Although AFMCFARS does not address the agency's policy for approval of the ASP meeting minutes, AAFARS § 5307.104-90(d) does state that approval for the minutes shall be obtained from the ASP chairperson.

⁴ The protester also requested documents related to the training of agency personnel involved in acquisition planning. To the extent the protester's statements in these requests constitute an allegation that agency personnel were not adequately trained, the allegation is not a matter that our Office will review absent a showing of possible fraud, conflict of interest, or actual bias. Glatz Aeronautical Corp., B-293968.2, Aug. 10, 2004, 2004 CPD ¶ 160 at 3 n.1; Arthur Lees, B-281954, May 6, 1999, at 1 n.2. No such showing has been made here.

of this size to the “Single Manager (SM) two-letter equivalent position.” Agency Supp. Report, Tab 5, Commanding Officer’s Delegation Letter (Mar. 24, 2003). The agency states that the SM for this procurement is the person who did serve as the ASP chairperson. Contracting Officer’s Supp. Statement at 1; Agency Report, Tab 3.4, ASP Minutes (May 11, 2005). The