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Decision

Matter of: Iyabak Construction, LLC

File: B-409196

Date: February 6, 2014

William K. Walker, Esq., Walker Reausaw, for the protester.
Carl F. Olson, Esq., and Michael H. Gilbert, Esq., Corps of Engineers, for the agency.
Gary R. Allen, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A solicitation that provides that the experience and past performance of an offeror's affiliates will not be considered, even for proposals that demonstrate that affiliates will participate meaningfully in contract performance, is unduly restrictive of competition where the agency fails to provide an explanation--even during or after a hearing on the question--that sets forth a reasonable basis for the restriction.

DECISION

Iyabak Construction, LLC, of Anchorage, Alaska, protests the terms of request for proposals (RFP) No. W911KB-13-R-0039, issued by the Department of the Army, Corps of Engineers, for the design, construction and repairs of various utilidor systems on Eielson Air Force Base and other military installations in Alaska. The protester challenges the RFP's experience and past performance evaluation criteria as unduly restrictive of competition.

We sustain the protest.

BACKGROUND

The RFP, issued as a small business set-aside, provides for the award of up to three task order contracts for design, construction, and repairs at Eielson Air Force

Base and other installations in Alaska. RFP at 54.¹ Offerors were informed that award would be made on a best-value basis using a two-phase evaluation process. RFP amend. 4, at 372. During the first phase, the agency was to evaluate offerors under the following factors, in descending order of importance: relevant experience; past performance; and organization. RFP amend. 3, at 287. Offerors were informed that the agency would invite only the most highly qualified firms to participate in phase two of the procurement. Id. at 295.

With respect to the experience factor, offerors were instructed to demonstrate recent (within five years), relevant experience on similar projects.² The RFP informed offerors that “[p]roject examples should be limited to those projects performed by the firm submitting an offer. The requirements of this factor cannot be met through the experience of the offeror’s parent, affiliate, or separate division.” RFP amend. 3, at 288.

With respect to the past performance factor, offerors were similarly informed that “[a]n offeror will not receive credit for relevant past performance of a parent, affiliate, or [separate] division” or “for past performance of key personnel proposed for this project.” Id. at 290. The RFP also provided with respect to this factor that, to the extent an offeror did not have a record of relevant past performance, the offeror’s past performance would be rated “neither favorably nor unfavorably” and would be assigned a “[n]eutral” rating. Id. at 292.

DISCUSSION

lyabak contends that the RFP’s restriction of experience and past performance to the offeror itself is unduly restrictive of competition.³ Protest at 5. The protester argues that the solicitation should allow consideration of an affiliate’s experience

¹ All of our citations to the record refer to the BATES numbering system the agency used in preparing its report.

² This included: experience with design/construction of utility distribution infrastructure to include steam and condensate return systems, sewer systems, water systems, petroleum pipelines, or other similar distribution systems; experience performing work located in areas with a similar climate; previous design-build experience; and previous teaming experience between the prime contractor and primary design firm.

³ Affiliates are defined as “associated business concerns or individuals if, directly or indirectly--(1) Either one controls or can control the other; or (2) A third party controls or can control both.” See Federal Acquisition Regulation (FAR) § 2.101.

and past performance where there are firm commitments for affiliates to be meaningfully involved in contract performance.⁴ Id.

The Competition in Contracting Act of 1984 requires that solicitations generally permit full and open competition and contain restrictive provisions only to the extent necessary to satisfy the needs of the agency. 10 U.S.C. § 2305(a)(1)(B)(ii) (2006). Where a protester challenges a solicitation provision as unduly restrictive of competition, the procuring agency must establish that the provision is reasonably necessary to meet the agency's needs. See Total Health Res., B-403209, Oct. 4, 2010, 2010 CPD ¶ 226 at 3 (solicitation requirement for specific experience on the part of the prime contractor was unduly restrictive of competition where the agency did not show that its needs could not be satisfied by a subcontractor with relevant experience). We examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. SMARTnet, Inc., B-400651.2, Jan. 27, 2009, 2009 CPD ¶ 34 at 7. The determination of a contracting agency's needs, including the selection of evaluation criteria, is primarily within the agency's discretion and we will not object to the use of particular evaluation criteria so long as they reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests. SML Innovations, B-402667.2, Oct. 28, 2010, 2010 CPD ¶ 254 at 2.

Here, the Corps acknowledges that the agency's solicitations generally have "permitted the consideration of [the] experience and past performance of an affiliate if the offeror's proposal clearly demonstrated that the resources (workforce, management, facilities or other resources) of that affiliate will affect the performance of the . . . contract." Contracting Officer's Statement at 5. The agency contends, however, that such consideration raised a number of concerns, namely:

The proposals received from offerors would include general statements about the availability of affiliate resources to move between affiliate companies but did not demonstrate any meaningful involvement of the affiliate or include any commitment that the affiliate would perform any part of the contract or provide personnel or resources. In some cases, the affiliate companies relied upon for experience or past performance no longer even exist and therefore could not contribute to contract performance.

⁴ For the record, there is no dispute here that the agency will consider the past performance and/or experience of joint ventures or other business arrangements when the proposal commits the joint venture or other business entity to participate in performance of the contract. RFP amend. 3, at 290. The dispute here is limited to whether the agency will, in any way, consider the past performance and/or experience of affiliates in situations where the affiliate will participate meaningfully in contract performance. Protest at 5.

Id. The Corps states that, given these concerns, it is reasonable to restrict consideration of experience and past performance to the company with which the government will have contractual privity. See Legal Memorandum at 41, citing Valor Constr. Mgmt., LLC, B-405365, Oct. 24, 2011, 2011 CPD ¶ 226.⁵

In Valor Constr. Mgmt, LLC, we found that the agency had established a reasonable basis for a solicitation provision that restricted consideration of experience and past performance to that of the offeror itself, and that provided for no consideration of the experience and past performance of subcontractors and key personnel.

Specifically, we found reasonable the agency's concern that, given the size, price, and complexity of the procurement, the restriction was necessary to lessen the agency's risk of inadequate performance by considering only the experience and past performance of the firm responsible for performance of the contract. Valor Constr. Mgmt, LLC, supra, at 4.

Here, the Corps' explanation for the RFP's experience and past performance restriction is that the agency encountered problems in the past when it considered the experience and past performance of affiliates.⁶ As recounted by the contracting officer, these problems concerned the acceptance by the agency of "general statements about availability of affiliate resources," where the offerors "did not demonstrate any meaningful involvement by the affiliate or include any commitment that the affiliate would perform any part of the contract." See Contracting Officer's Statement at 5. This explanation, however, does not address the protester's position that it is unreasonable for the agency to refuse to consider the experience and past performance of affiliates where there are firm commitments for affiliates to participate meaningfully in contract performance.

⁵ The Corps also cites our decision in HK Consulting Inc., B-408443, Sept. 18, 2013, 2013 CPD ¶ 224, at 2. Unlike the protest here and our decision in Valor Constr.Mgmt., LLC, HK Consulting Inc. concerned only the reasonableness of the solicitation's past performance factor, and not a separate experience factor. As we noted in that protest, offerors lacking a recent or relevant past performance history would not be evaluated favorably or unfavorably. HK Consulting Inc., supra, at 3, citing FAR § 15.305(a)(2)(iv).

⁶ The Corps also appears to argue that the restriction on consideration of affiliates' experience and past performance is necessary to ensure an equal competition. Specifically, the contracting officer states that "[o]ther offerors are sole entities with no affiliate experience or past performance to rely upon therefore to effect fair competition, in addition to the other concerns discussed above, consideration of affiliate experience and past performance was removed from recent solicitations." Contracting Officer's Statement at 5. The Corps has provided no further information, as to why restricting consideration of an affiliate's (or subcontractor's) experience and past performance is an appropriate method of obtaining a fair competition. Simply stated, we see no merit to this concern.

After receiving a report from the agency that did not squarely address the issues raised here, we convened a telephone hearing to elicit further information from the agency's contracting officer to explain why the solicitation's restriction on consideration of an affiliate's experience and past performance was reasonably necessary to meet the agency's needs. The contracting officer did not provide any further support for the restriction, other than to note that in the past offerors had not explained their affiliates' proposed involvement with intended performance of contracts. In particular, despite explicit inquiry, the contracting officer was unable to address why the agency could not consider an affiliate's experience and past performance in cases where the offeror demonstrates a firm commitment that the affiliate will participate meaningfully in the performance of the contract. At the conclusion of the hearing we provided the parties with an opportunity to file post-hearing comments. The Corps did not provide post-hearing comments, or otherwise provide any further information.

In sum, we find that the RFP's past performance and experience requirements are unduly restrictive of competition, given the agency's failure to explain why its needs could not be satisfied by a less restrictive method of evaluating offerors' past performance and experience. That is, the Corps has not explained or shown why the agency's concerns with considering an affiliate's past performance and experience under the RFP are not satisfied by making such consideration contingent upon a firm commitment that the affiliate would participate meaningfully in the performance of the contract. In fact, it is not appropriate for an agency to credit an offeror with the experience and past performance of separate affiliates where the affiliates will not be meaningfully involved in contract performance. See IAP World Servs., Inc.; EMCOR Gov't Servs., B-407917.2 et al., July 10, 2013, 2013 CPD ¶ 171 at 9.

RECOMMENDATION

We recommend that the Corps amend the RFP in accordance with this decision. We also find that the protester is entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees. Iyabak should submit its claim for protest costs directly to the Corps within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel