



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Louis Berger Services, Inc.

File: B-410024

Date: October 10, 2014

Christopher Wolf for the protester.

Lana K. Obert, Esq., and Traci Guariniello, Esq., Department of the Navy, for the agency.

Eric M. Ransom, Esq., Susan K. McAuliffe, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Definitive responsibility criterion establishing a requirement for the submission of certain foreign certifications is not unduly restrictive of competition where the agency's interpretation of the relevant Agreement of Defense Cooperation, policy guidance, and foreign laws indicates that an offeror must possess the certifications in order to receive an award, and the protester has not demonstrated the agency's interpretation to be unreasonable.

DECISION

Louis Berger Services, Inc. (LBS), of Morristown, New Jersey, protests the terms of request for proposals (RFP) No. N33191-14-R-1010, issued by the Department of the Navy, Naval Facilities Engineering Command, for base operating support services at Naval Station Rota, Spain. LBS specifically challenges the RFP's inclusion of a definitive responsibility criterion relating to possession of certain Spanish "Certificates of Classification."

We deny the protest.

The agency issued the RFP on June 2, 2014, with a proposal submission date of July 2. Thereafter, the agency issued six amendments to the solicitation which modified the performance work statement and sections L and M of the RFP, conducted questions and answers, and ultimately extended the proposal submission date to August 29.

As relevant to the protest allegations, section L of the RFP, as amended, included a definitive responsibility criterion requiring offerors to provide certain Spanish Certificates of Classification at the time of proposal submission, as follows:

5. Certificates of Classification

a. All offerors shall, at the time of proposal submission, hold current Certificates of Classification identified below. If any part of the work is to be subcontracted, the offeror must submit the subcontractor's certificates with their proposal. The offeror or subcontractor performing the actual work must be the one holding the respective Certificate of Classification required per activity.

b. Offerors shall submit a certified copy of the updated Certificate of Classification with their price proposal. Failure to comply with this requirement may result in rejection of the offer, as a failure to meet a material requirement.

Classifications for this solicitation are identified below:
Registro Oficial de Contratistas, Ministerio de Economía y Hacienda (Registro Central de Empresas Consultoras o de Servicios):

GROUP	SUBGROUP	CATEGORY
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[Details Omitted.]

Agency Report (AR), Tab 4.c, Amendment 002, at 10-11.

LBS filed this protest on July 3, alleging that the definitive responsibility criterion requiring offerors to submit Certificates of Classification at the time of proposal submission unduly restricts competition where the requirement is not necessary to meet the government's needs, because Spanish law no longer requires Certificates of Classification to be included in proposals for service contracts.¹

¹ LBS' initial protest also contended that the agency was withholding necessary bidding information from the offerors. This basis of the protest was dismissed after the agency agreed to provide additional documentation relating to the RFP requirements. Additionally, LBS presented multiple supplemental grounds of protest in its comments on the agency report. We dismiss the supplemental protests because the bases of these grounds of protest were known to the protester at the time of the initial protest, but were not raised at that time. Where a protester initially files a timely protest, and later supplements it with new grounds of protest, the later-raised allegations must independently satisfy our timeliness requirements, (continued...)

A contracting agency generally has the discretion to determine its needs and the best method to accommodate them. Y&K Maint. Inc., B-405310.2, Oct. 17, 2011, 2011 CPD ¶ 239 at 5. An agency may reasonably restrict competition through the use of definitive responsibility criteria so long as the definitive responsibility criteria are needed to meet the agency's minimum needs. JT Constr. Co., Inc., B-244404.2, Jan. 2, 1992, 92-1 CPD ¶ 1, at 4. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. Y&K Maint. Inc., supra. To the extent a protester challenges a specification as "unduly restrictive," that is, challenges both the restrictive nature of the requirement as well as the agency's need for the restriction, the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet its needs. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. Trident World Sys., Inc., B-400901, Feb. 23, 2009, 2009 CPD ¶ 43 at 3. If the agency establishes support for the challenged solicitation term, the burden shifts to the protester to show that it is clearly unreasonable. Outdoor Venture Corp.; Applied Cos., B-299675, B-299676, July 19, 2007, 2007 CPD ¶ 138 at 5.

Here, the agency explains that the requirement for Certificates of Classification is based on its interpretation of Spanish law, on the U.S. government's Agreement of Defense Cooperation (ADC) with Spain, and on the policy guidance of the Office of Defense Cooperation (ODC) in the U.S. Embassy in Spain.² In this regard, the agency explains that the ADC and the ODC's policy guidance provide that service contracts "shall be entered into with companies authorized to carry out [the contract] activities in Spain." AR, Tab 12, ADC, at 48; ODC Policy Directive 400.4 at 3. In accordance with these provisions, the agency asserts that it has interpreted various Spanish laws in order to determine the authorization requirements for companies to perform contracts in Spain. In the agency's view, these Spanish laws require service contractors to possess various Certificates of Classification corresponding to the firm's areas of business and financial capabilities.

(...continued)

since our Regulations do not contemplate the piecemeal presentation or development of protest issues. Planning & Dev. Collaborative Int'l, B-299041, Jan. 24, 2007, 2007 CPD ¶ 28 at 11; Biospherics, Inc., B-285065, July 13, 2000, 2000 CPD ¶ 118 at 12-13.

² The ODC policy guidance states that it is "applicable to all United States contracting officers engaged in procurement of services or construction to be performed, in whole or part, at the Spanish bases where the U.S. Forces are granted support installations." ODC Policy Directive 400.4 at 1.

With specific respect to the protester's allegation, the agency acknowledges that the Spanish law concerning the requirement for Certificates of Classification for service contracts was amended in November 2011, by Article 65 of Royal Legislative Decree 3/2011. However, the agency contends that while Article 65 of that Decree did remove the Certificate of Classification requirement for service contractors, the transitional provisions of that Decree provided that Article 65 would be implemented through subsequent regulation, and that until then, the previous requirements would remain in effect. The agency asserts that it is not aware of Spanish regulatory action in this area and that, accordingly, Certificates of Classification remain a requirement for service contractors in Spain.

The protester responds that the agency's interpretation is unreasonable, where the ADC and ODC policy guidance do not explicitly require Certificates of Classification for service contracts. In this connection, the protester points out that this is in contrast to the explicit provisions of the ODC policy guidance concerning construction contracts, which specifies that "the contractors selected to perform . . . must also meet the classification requirements established by the Spanish Government for its own contracts." ODC Policy Directive 400.4 at 2.

The protester also cites additional provisions of the ADC stating that "United States forces may enter into service contracts in conformity with the provisions of this Article and subject to their laws and regulations for maintenance or support activities," and that "[t]he United States forces must forward a list of potential contractors to the Permanent Committee before awarding the contract. The Spanish authorities may disapprove a contractor for reasons of security or due to the contractor's prior misconduct with the Spanish armed services." AR, Tab 12, ADC, at 47. LBS contends that these provisions permit the agency to award service contracts subject to the agency's normal contracting procedures, and that the agency need not be concerned about whether an offeror is authorized to conduct the contract activities in Spain, because the list of potential contractors will be reviewed by the Permanent Committee before award. LBS argues that its interpretation of the ADC, ODC policy guidance, and relevant Spanish laws is reasonable, and supports the removal of the Certificates of classification requirement from the RFP.³

Setting aside the question of whether LBS' own interpretation of the relevant authorities is reasonable, the protester's arguments do not demonstrate that the agency's interpretation is clearly unreasonable. In this regard, we note that the ADC provisions cited by the protester still require that the agency enter into service contracts "in conformity with the provisions of this Article," which also requires that

³ LBS also asserts that the Department of the Air Force has not required offerors to provide Certificates of Classification for service contracts, citing two recent Air Force solicitations for work in Spain.

service contracts “shall be entered into with companies authorized to carry out [the contract] activities in Spain.” AR, Tab 12, ADC, at 47-48; ODC Policy Directive 400.4 at 3. Further, we disagree that the agency is required to defer consideration of whether an offeror is properly authorized to complete the contract requirements to the Permanent Committee. The provisions of the ADC state that the purpose of the Permanent Committee’s review relates to “reasons of security or due to the contractor’s prior misconduct with the Spanish armed services,” and not the company’s authorization to conduct business in Spain. AR, Tab 12, ADC, at 47.

Accordingly, we conclude that it is the responsibility of the contracting officer to ensure that a potential awardee is authorized to conduct the contract activities in Spain. Further, the protester has not provided evidence to contradict the agency’s interpretation of the transitional provisions of Royal Legislative Decree 3/2011 as maintaining an underlying requirement for service contractors to hold Certificates of Classification until such time as implementing regulations have been issued. Thus, we do not find it unreasonable for the agency to require updated Certificates of Classification at the time of proposal submission in order to meet the contracting officer’s duty to ensure that an award is made only to a firm authorized to carry out the contract requirements in Spain.⁴

While the parties may rationally disagree as to the appropriate interpretation of Spanish law in this matter, the protester’s disagreement does not provide a sufficient basis to conclude that the agency’s own interpretation of the relevant authorities is clearly unreasonable. Accordingly, we conclude that the requirement for offerors to submit a certified copy of their updated Certificate of Classification with their price proposal is within the discretion of the contracting officer and does not provide a basis on which our Office will sustain the protest.

The protest is denied.

Susan A. Poling
General Counsel

⁴ We note that the agency provided several additional or alternative arguments for the necessity of the Certificate of Classification requirement. This decision need not address those arguments.