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## Decision

**Matter of:** Desbuild Inc.

**File:** B-413613.2

**Date:** January 13, 2017

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### DIGEST

1. Protest challenging the agency’s evaluation of the awardee’s prior experience is denied where it is based upon an unreasonable interpretation of the solicitation.
  2. Protest challenging the agency’s evaluation of the awardee’s key personnel is denied where, although the agency effectively waived a solicitation requirement, the protester does not demonstrate that it was prejudiced by the waiver.
  3. Protest challenging the agency’s evaluation of the awardee’s past performance is dismissed as untimely, where any ambiguity as to the scope of the analysis contemplated was patent.
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### DECISION

Desbuild Inc., a small business, of Hyattsville, Maryland, protests the award of a contract to Edifice, LLC, doing business as Edifice Solutions, a small business, of Beltsville, Maryland, under request for proposals (RFP) No. GS-11P-16-MKC-7003, issued by the General Services Administration (GSA) for a perimeter security improvement project at the Albert V. Bryan U.S. Courthouse in Alexandria, Virginia. The protester challenges the agency’s evaluation of the awardee’s proposal under the solicitation’s non-price factors.

We deny the protest in part and dismiss the protest in part.

## BACKGROUND

On June 3, 2016, GSA issued the solicitation as a set-aside for small businesses. The solicitation was amended nine times, including an amendment that replaced the entire solicitation with a revised solicitation, referred to hereinafter as the “Revised RFP.” RFP Amend. 1, June 10, 2016, at 2; Memorandum of Law (MOL), Oct. 18, 2016, at 1-2. As amended, the solicitation contemplated the award of a fixed-price contract for general construction services to improve perimeter security at the Albert V. Bryan U.S. Courthouse in Alexandria, Virginia. Revised RFP at 18.

The solicitation provided for award to the offeror that submitted the lowest-priced, technically acceptable (LPTA) proposal. RFP Amend. 3, June 21, 2016, at 2. In this respect, the solicitation, as amended, provided that the agency would evaluate the lowest-priced offer received; if determined to be technically acceptable, award would be made to that offeror, and no other proposals would be evaluated. Id. at 2. If the lowest-priced proposal was determined to be technically unacceptable, the agency would evaluate the next lowest-priced proposal. Id. This process would continue until a technically acceptable proposal was identified.

In determining technical acceptability, the solicitation stated that proposals would be evaluated under the following three non-price factors: experience, key personnel, and past performance. Revised RFP at 22-26. Under the experience and key personnel factors, proposals would be evaluated on a pass/fail basis. Id. at 26. An offeror’s past performance would be evaluated as part of responsibility. Id.

In response to the solicitation, GSA received only two proposals, from the protester and the awardee respectively. Agency Report (AR), Exh. 2, Technical Evaluation Board (TEB) Report, at 1. GSA determined that Edifice submitted the lowest-priced proposal and, thus, evaluated its proposal under the non-price factors. Id. GSA concluded, however, that Edifice’s proposal was technically unacceptable. Id. GSA evaluated Desbuild’s proposal and concluded that its proposal was also technically unacceptable. Id. As a result, the agency entered into discussions with both offerors.<sup>1</sup> Id. After the submission of revised proposals, GSA determined Edifice’s proposal to be technically acceptable and Desbuild’s proposal to be technically unacceptable. Id. On August 16, GSA notified Desbuild that its proposal had been excluded from the competitive range and that Edifice was the apparent successful offeror. Id. at 3.

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<sup>1</sup> Although the agency intended to award the contract without discussions, it reserved the right to conduct discussions, if necessary. Revised RFP at 17.

On August 22, Desbuild filed a protest with our Office alleging, among other things, that, pursuant to 13 C.F.R. § 125.5(a)(2)(ii), the agency was required to refer the matter of Desbuild's acceptability to the Small Business Administration (SBA) for a final determination under the SBA's certificate of competency (COC) procedures. On September 15, we dismissed the protest as academic after the agency notified our Office that it intended to take corrective action. Specifically, GSA represented that it intended to amend the solicitation to clarify its technical requirements and to allow both offerors to submit revised proposals.

GSA subsequently amended the solicitation four times, see RFP Amend. 6, 7, 8 and 9, and again received revised proposals from Desbuild and Edifice. Contracting Officer's Statement (COS), Oct. 18, 2016, at 3. After reevaluating proposals, the agency concluded that Edifice submitted the lowest-priced, technically-acceptable proposal and informed Desbuild on September 28 that Edifice was the apparent successful offeror.<sup>2</sup> AR, Exh. 5, Source Selection Decision, at 2; COS at 4. Desbuild requested a debriefing, which the agency provided on October 5. Desbuild filed the instant protest with our Office on October 6.

## DISCUSSION

Desbuild challenges the agency's evaluation of the awardee's proposal under the experience, key personnel, and past performance factors, contending that the awardee should have been found ineligible for award. Protest at 1. In reviewing protests challenging an agency's evaluation of proposals, our Office does not reevaluate proposals or substitute our judgment for that of the agency; rather, we review the record to determine whether the agency's evaluation was reasonable and consistent with the solicitation's evaluation criteria, as well as applicable statutes and regulations. FP-FAA Seattle, LLC, B-411544, B-411544.2, Aug. 26, 2015, 2015 CPD ¶ 274 at 7. Although our decision does not address all of Desbuild's arguments, we have fully considered each of them and find that none provides a basis to sustain the protest.<sup>3</sup>

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<sup>2</sup> GSA did not evaluate Desbuild's proposal during its reevaluation because GSA determined the Edifice offered the lowest-price proposal. AR, Exh. 2, TEB Report, at 1.

<sup>3</sup> For instance, Desbuild argued that GSA, in revising the solicitation during its corrective action, relaxed its requirements to favor Edifice. Protest at 9 n.3. The agency, in its report, responded to this allegation. MOL at 4; COS at 4. Desbuild's comments on the report did not address the agency's response. As a consequence, we consider Desbuild to have abandoned this allegation, and we will not further consider it. 22<sup>nd</sup> Century Techs., Inc., B-412547 et al., Mar. 18, 2016, 2016 CPD ¶ 93 at 10.

## Experience Factor

Desbuild argues that Edifice's proposal did not demonstrate the requisite experience to be found technically acceptable. Protest at 10; Desbuild Comments, Oct. 28, 2016, at 2. Of relevance here, the solicitation provided that, to be considered technically acceptable under the experience factor, an offeror had to demonstrate successful experience as a general construction contractor responsible for the construction of at least two similar projects completed within the last five years with a total cost of not less than \$2.5 million. RFP Amend. 6, Sept. 14, 2016, at 2. To be considered "similar," a project had to include all of the following three "characteristics:"

- 1) Project involved the construction of any similar type of rated (min. rated K-4) vehicle perimeter security barrier system;
- 2) Project involved all of the following disciplines: landscape (including planting of trees and shrubs, installation of hardscape such as pavers and lighting), civil engineering (including utility coordination), and structural engineering;
- 3) Project involved methods used to mitigate noise affecting occupied surrounding buildings. In order to satisfy this element, offerors must describe the type of noise constraint and mitigation methods used to manage noise during construction in its proposal.

Id. at 3. The RFP further provided that the experience of an offeror's subcontractors would not be considered in evaluating the experience of the offeror. Id. Instead, "the Offeror itself must satisfy the experience factor[.]" Id.

The record reflects that Edifice identified two projects. AR, Exh. 1b, Edifice Technical Proposal, at 3-7. GSA determined that Edifice was the general construction contractor for both projects and that both projects satisfied the solicitation's requirements to be considered "similar projects." AR, Exh. 2, TEB Report, at 2-5. Hence, GSA assigned Edifice's proposal a rating of acceptable under the experience factor. Id. at 2.

Desbuild contends that neither project met all of the requirements to be rated acceptable. Desbuild Comments at 1, 5. Although Desbuild raises a number of arguments in this respect, see id. at 3-5, we find that none provides a basis to sustain the protest. We address one primary argument below.

Desbuild argues that Edifice's second project did not meet the requirement that the offeror, not its subcontractors, satisfy the experience factor. Id. at 4; Desbuild Supp. Comments, Nov. 14, 2016, at 3. Specifically, Desbuild alleges that Edifice did not self-perform the work described under the second characteristic, i.e., construction of

any similar type of rated (min. rated K-4) vehicle perimeter security barrier system. Desbuild Comments at 4. Rather, Desbuild contends that Edifice's subcontractor on the project "provided K-4 rated vehicle barriers, bollards and temporary fencing." Id. (quoting AR, Exh. 1b, Edifice Technical Proposal at 7). Thus, Desbuild contends that Edifice's proposal failed to demonstrate that Edifice, as the offeror, self-performed all of the work described in the three mandatory characteristics, and, therefore, that its proposal should have been determined to unacceptable under the experience factor.

GSA disagrees with the protester's interpretation that the offeror had to self-perform the work described under the three mandatory characteristics. Supp. MOL, Nov. 7, 2016, at 3. Rather, GSA argues that the plain language of the solicitation required the offeror to demonstrate successful experience as the general construction contractor "responsible for the construction" of at least two similar projects. Id. (quoting RFP Amend. 3 at 2). According to GSA, the term "responsible" does not require a contractor to self-perform all of the work. Id. at 4. Rather, the contractor must be fully accountable for project delivery, including the fulfillment of all contract requirements. Id. at 4 n.8. Hence, GSA contends that, under the terms of the solicitation here, offerors could submit contracts in which subcontractors performed the work, provided that the offeror served as the prime contractor responsible for general oversight of the project. Id. at 4. Having concluded that Edifice was the general contractor responsible for a project involving all three mandatory characteristics, GSA argues that its evaluation was reasonable and consistent with the terms of the solicitation. Id. at 3-4.

Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with such a reading. Wilson 5 Serv. Co., Inc., B-412861, B-412861.2, May 27, 2016, 2016 CPD ¶ 154 at 5. A solicitation is not ambiguous unless it is susceptible to two or more reasonable interpretations. WingGate Travel, Inc., B-412921, July 1, 2016, 2016 CPD ¶ 179 at 7. If the solicitation language is unambiguous, our inquiry ceases. Id. Based on our review of the solicitation, we conclude that the agency's interpretation of the solicitation, when read as a whole, is reasonable, and the protester's interpretation is not reasonable.

Here, the solicitation provided that "the Offeror itself must satisfy the experience factor[.]" RFP Amend. 6 at 3. Under the experience factor, an offeror was required to "demonstrate successful experience as a General Construction (GC) Contractor responsible for the construction of at least two (2) similar projects[.]" Id. at 2. Similar projects were defined as projects involving all three mandatory characteristics. Id. at 3. Contrary to the protester's contentions, however, the solicitation did not require the offeror to self-perform the work described under the three characteristics. In this regard, the protester conflates the experience that an

offeror must demonstrate under the experience factor, i.e., that of a prime contractor responsible for a project, with the definition of a “similar project.” Our review of the record demonstrates that GSA followed the clear and unambiguous terms of the solicitation and reasonably concluded that Edifice’s second project met the requirements of the solicitation because Edifice was the general construction contractor “responsible” for a project that was determined to be similar. AR, Exh. 2, TEB Report, at 4. Accordingly, we find the agency’s evaluation to be unobjectionable.

#### Key Personnel Factor

Desbuild also alleges that GSA unreasonably evaluated Edifice’s proposal under the key personnel factor. Desbuild Comments at 6; Desbuild Supp. Comments at 5. Specifically, Desbuild contends that the resumes submitted by Edifice for its key personnel failed to include information required for a finding of technical acceptability. Desbuild Comments at 6.

In this respect, the solicitation required offerors to submit resumes for key personnel identified in the solicitation. Revised RFP at 23. The solicitation further required offerors to include specific “bulleted information” in the resumes. Id. at 23, 24. Among other things, the resumes had to contain the following bulleted information:

- Education degree(s), year, and institution.
- Active professional registration, year first registered, if applicable.

Id. at 24. The solicitation provided that “[a]ny proposal which does not demonstrate a resume containing all bulleted information [] and show[] that the minimum qualifications of each Key personnel are met will not be considered technically acceptable.” Id. at 23.

Desbuild alleges that the resumes submitted by Edifice did not contain two required pieces of information, namely the year that the proposed key personnel earned their degrees and the year that the proposed key personnel first obtained active professional registrations.<sup>4</sup> Desbuild Comments at 6. Our review of Edifice’s proposal confirms Desbuild’s allegations. See AR, Exh. 1b, Edifice Technical Proposal, 8-15. Moreover, neither the agency nor the intervenor dispute that the resumes submitted by Edifice failed to contain this information. Supp. MOL at 5;

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<sup>4</sup> With respect to the professional registrations, the resumes submitted by Edifice included numerous certifications, trainings, and courses under a category that Edifice entitled “active professional registrations.” See AR, Exh. 1b, Edifice Technical Proposal, at 8, 10, 12, 14. Accordingly, it is apparent from Edifice’s proposal that it viewed such information to be “applicable.”

Edifice Supp. Comments, Nov. 14, 2016, at 5. Rather, GSA argues that the omitted information was immaterial and that GSA was permitted to waive immaterial requirements. Supp. MOL at 5 n.11. We need not determine whether the omitted information should be considered material under the terms of the solicitation because we conclude that GSA effectively waived the requirement that Edifice's resumes contain this information, and Desbuild cannot demonstrate any prejudice from this waiver.

An agency may waive compliance with a material solicitation requirement in awarding a contract if the award will meet the agency's actual needs without prejudice to other offerors. Technology and Telecomms Consultants, Inc., B-413301, B-413301.2, Sept. 28, 2016, 2016 CPD ¶ 276 at 12; ExecuTech Strategic Consulting, LLC; TRI-COR Indus., Inc., B-410893 et al., Mar. 9, 2015, 2015 CPD ¶ 103 at 12. Thus, even where an agency waives a material solicitation requirement, our Office will not sustain the protest unless the protester can demonstrate that it was prejudiced by the waiver, *i.e.*, that the protester would have submitted a different proposal or quotation or that it could have done something else to improve its chances for award had it known that the agency would waive the requirement. Technology and Telecomms Consultants, Inc., *supra*, at 14; Vocus Inc., B-402391, Mar. 25, 2010, 2010 CPD ¶ 80 at 6. Here, Desbuild does not explain how it was prejudiced by the waiver of this requirement, that is, what the protester would have done differently had it known that the agency would waive the requirement to submit this information. We, therefore, find no basis to sustain the protest.

#### Past Performance Factor

Finally, Desbuild argues that GSA's evaluation of the awardee's past performance was improper because the awardee failed to submit information pertaining to its performance of at least three prior projects, as required by the solicitation. Desbuild Comments at 7. Thus, Desbuild contends that the awardee should have been found to be technically unacceptable. *Id.* at 8. GSA responds that the solicitation contained a patent ambiguity regarding the number of projects for which offerors were required to identify references and that Desbuild's challenge to the agency's past performance evaluation is untimely. MOL at 12 n. 22; Supp. MOL at 6. For the reasons below, we agree with GSA that the solicitation contained a patent ambiguity and that Desbuild's challenge to the agency's evaluation of past performance in this respect is untimely.<sup>5</sup>

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<sup>5</sup> Repeating many of the same arguments raised under the experience factor, Desbuild also contends that the awardee's two projects were not "similar" and, therefore, that the agency erroneously concluded that Edifice demonstrated satisfactory performance on "similar" projects. Protest at 1; Desbuild Comments

(continued...)

With respect to the past performance factor, the solicitation provided that the agency would review an offeror's performance on the projects "identified by the offeror under the Experience" factor. Revised RFP at 11. To facilitate this review, offerors were required to identify references "for each similar project presented in Evaluation Factor 1: Experience on Similar Projects." Id. Accordingly, the solicitation clearly contemplated that the agency would review the same projects under both the experience and past performance factors.

The solicitation, in its original form, required offerors to identify three similar projects under the experience factor. RFP at 9. The language pertaining to the past performance factor mirrored this language, stating "[t]he Offeror's past performance record must demonstrate satisfactory performance at a minimum on the 3 similar projects submitted" under the experience factor. RFP at 11. As noted above, the RFP was amended nine times, including an amendment that replaced the entire solicitation with a revised solicitation. See RFP Amend. 1 at 2. In the revised RFP, the agency reduced the number of projects to be identified under the experience factor from three projects to two projects. Compare RFP at 9 with Revised RFP at 9. Although it appears from the record that the contracting officer intended to similarly reduce the number of projects under the past performance factor, see COS at 1, the revised RFP still required offerors to demonstrate satisfactory performance on three projects. Revised RFP at 11. Moreover, although the solicitation was further amended several times, it does not appear that this inconsistency was rectified.

To the extent there is a conflict between the required number of projects to be identified under the experience and past performance factors, we conclude this was a patent ambiguity in the solicitation. In this regard, a patent ambiguity exists where the solicitation contains an obvious, gross, or glaring error. Odyssey Sys. Consulting Grp., Ltd., B-412519, B-412519.2, Mar. 11, 2016, 2016 CPD ¶ 86 at 5. In such situations, an offeror may not simply make unilateral assumptions regarding the meaning of patently ambiguous terms in the solicitation and then expect relief when the agency does not act in the manner assumed. Superior Gov't Solutions, B-409475.4, B-409475.5, Sept. 25, 2014, 2014 CPD ¶ 292 at 6. Rather, the offeror must challenge the alleged ambiguity prior to the time set for receipt of proposals. Id. (citing 4 C.F.R. § 21.2(a)(1)). Because Desbuild did not challenge the ambiguity

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(...continued)

at 2, 7. Because we have denied Desbuild's arguments with respect to the similarity of the projects under the experience factor, we likewise deny them here.



prior to the solicitation's closing date, its complaint about how many references the solicitation required for past performance is dismissed as untimely.

The protest is denied in part and dismissed in part.

Susan A. Poling  
General Counsel