Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The ENDMARK Corporation

File: B-278139

Date: December 31, 1997

Robert M. Cambridge, Esq., for the protester.
Laurie A. Dzien, Esq., Naval Air Systems Command, for the agency.
Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation requirements--for example, requirement that offerors submit a list of all of their subcontractors' support services contracts currently being performed or completed within the last 3 years (limited to a minimum of 20 contracts for large business subcontractors)--are deemed necessary by the agency to assess offerors' capabilities, and the requirements in fact are aimed at enabling the agency to make such an assessment, the requirements reflect the agency's needs and do not improperly restrict competition.

2. Experience requirements do not exceed agency's needs where they are directly related to the work to be performed under the solicitation.

DECISION

The ENDMARK Corporation protests the terms of Department of the Navy request for proposals (RFP) No. N00019-97-R-0046, issued as a small business set-aside for analysis and technical studies, engineering and technical services, and management and professional services. The protester contends that certain requirements in the RFP exceed the agency's needs and unduly restrict competition.

We deny the protest.

The RFP contemplated the award of an indefinite delivery/indefinite quantity contract on a best value basis for a 1-year base period, with four 1-year options. The RFP set forth the following three evaluation factors: (1) technical, (2) price and cost realism, and (3) past performance. The RFP listed three technical subfactors--personnel experience, sample tasks, and management plan--and two past performance subfactors--past contracts and key personnel.

For evaluation under the past contracts subfactor under the past performance factor, offerors were required to provide a list of their subcontractors' support

service contracts being performed or completed within the last 3 years. ENDMARK maintains that the requirement is unduly restrictive because it would be very difficult for small business offerors to assemble the voluminous contract information for proposed large business subcontractors. In response to this argument, the agency issued amendment No. 0001, establishing 20 contracts as an acceptable minimum under this requirement for large business subcontractors. The protester asserts that, while this is a step in the right direction, the requirement remains unduly restrictive since it precludes otherwise qualified large business subcontractors which have performed only a few contracts of significant value over this period. ENDMARK concludes that requiring subcontractors to provide a list of fewer than 10 contracts would be adequate to meet the agency's needs.

The determination of an agency's needs and the best method of accommodating them is primarily within the agency's discretion. See U.S. Defense Sys., Inc., B-251544 et al., Mar. 30, 1993, 93-1 CPD ¶ 279 at 5. In this same vein, although the source and type of past performance information to be included in an evaluation should be tailored to the circumstances of each acquisition, it ultimately is within the broad discretion of agency acquisition officials to determine what information is necessary. See Federal Acquisition Regulation (FAR) § 15.608(a)(2)(ii) (June 1997).

The requirements under the past contracts subfactor are unobjectionable. The Navy explains that the relatively large number of past contracts must be listed because it will use these contracts to obtain references, and history has shown that only a small percentage of references actually complete and return the performance questionnaires. Only in this manner can the agency be assured that it will have enough information for evaluation purposes. While these requirements may impose a significant burden on offerors, the Navy's concerns clearly are valid, and the agency already has relaxed the requirement to some extent by permitting as few as 20 large business subcontracts to be listed. Further, contrary to ENDMARK's contention, the RFP does not preclude offerors from proposing qualified large business subcontractors which have performed fewer than 20 contracts within the past 3 years, since amendment No. 0002 allows offerors to explain why they are unable to provide past performance information and states that offerors "will not be penalized if past performance information cannot be provided for legitimate reasons." We conclude that the requirements, as amended, have been reasonably formulated to ensure that the agency will have enough information for evaluation purposes, while both relieving somewhat the informational burden on offerors and making provision to allow offerors to propose large business subcontractors which have performed fewer than 20 past contracts.

ENDMARK also objects to inclusion of the key personnel subfactor under the past performance factor. Specifically, it objects to the Navy's use of a past performance questionnaire to obtain information concerning the key personnel's past performance because an evaluation based on this information would be purely

subjective, with the offeror having no opportunity for review or rebuttal, and improperly would convert the prior contracts into personal services contracts.[1]

The key personnel subfactor is unobjectionable. The Navy states that it is evaluating key personnel past performance, as part of its assessment of the offeror's past performance, to ensure the most effective and complete evaluation of the offeror's past performance. There is nothing improper in such an evaluation; evaluating the performance of key personnel clearly is related to the manner in which the offeror has performed previously, and thus reasonably may be considered predictive of the offeror's current performance capabilities. Agencies properly may employ such evaluation criteria that relate to their needs. Premiere Vending, 73 Comp. Gen. 201, 206 (1994), 94-1 CPD ¶ 380 at 7. The protester's specific objections are without merit. First, even if ENDMARK were correct that offerors would have no opportunity to rebut key personnel performance information if discussions were not held, agencies are not required to provide such an opportunity where discussions are not held. See FAR § 15.610 (June 1997). In any case, in response to the protester's suggestion, amendment No. 0001 includes a provision allowing offerors to "present a brief synopsis of any major performance problems encountered by key personnel and how those problems were resolved." Second, an agency's evaluation of a key employee's performance--provided to a contracting activity for the sole purpose of an evaluation of the employer's current proposal--does not establish or evidence an employer-employee relationship marked by "relatively continuous supervision and control [of the non-government employee] by a Government officer or employee," as required to constitute an improper personal services contract. FAR § 37.104(c)(1); see Logistical Support, Inc., B-224592, Dec. 23, 1986, 86-2 CPD ¶ 709 at 2.

ENDMARK complains that the areas of experience required in the RFP for three key personnel categories--senior engineer/technical analyst, program manager, and senior program analyst--are not necessary for them to accomplish many of the tasks required in the RFP. More specifically, ENDMARK asserts that many RFP tasks can be accomplished by individuals without experience with aerial targets, missiles, aircraft and unmanned aerial vehicles (UAV).

This argument is without merit. While it may be that some of the RFP work does not require the specified experience (ENDMARK does not identify which work), other work clearly does relate to the experience requirements. In other words, the fact that the senior engineer/technical analyst, for example, may perform some tasks that do not require the specified types of experience does not mean that the proposed individual will not also be called on to perform work directly related to the specified experience. The relevant question, therefore, is whether any tasks for

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[1]A personal service contract, by its express terms or as administered, makes contractor personnel appear, in effect, to be government employees. FAR § 37.101.

a key individual are related to the required experience. The agency has determined that experience related to development and execution of program planning for aerial targets, missiles, aircraft or UAV systems is directly related to tasks the senior engineer/technical analyst will perform. While the RFP does not identify each task by the key individual who will perform it, the RFP calls for the contractor to "provide engineering and technical services in support of the concept demonstration and engineering and manufacturing development of aerial targets, decoys, and related systems." Given that the senior engineer/technical analyst will be providing services of this type, it is not apparent to us, and ENDMARK does not explain, how the agency's determination in this regard could be unreasonable. An agency's discretion in determining its needs extends to determining whether key personnel need to have experience with work of the specific nature to be performed under the solicitation. See Systems Application & Techs., Inc., B-270672, Apr. 8, 1996, 96-1 CPD ¶ 182 at 3.[2]

ENDMARK argues that, since the Navy issued amendment No. 0002 as corrective action in response to several of its protest grounds, it should be reimbursed its costs of filing and pursuing this protest, pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (1997). However, while we may recommend payment of costs, we will not do so where the corrective action was taken promptly; we generally regard action taken before the agency report due date as prompt. See CDIC, Inc.--Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 1-2. Here, the amendment was issued on October 6, several weeks before the October 24 agency report due date. This is precisely the kind of prompt action our Regulations are designed to encourage. There thus is no basis for recommending reimbursement of ENDMARK's protest costs.

The protest is denied.

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[2]In its comments on the agency report, ENDMARK seems to allege that the experience and education requirements exceed the agency's needs to the extent that they exceed the requirements under a prior similar contract. This is an untimely expansion of its original argument, the specifics of which were limited to the areas we have addressed; our Regulations to not contemplate the piecemeal presentation of protest issues. OHM Remediation Servs. Corp., B-274644 et al., Dec. 23, 1996, 97-1 CPD ¶ 4 at 9.