



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Aljucar, Anvil-Incus & Co.

File: B-408936

Date: January 2, 2014

Rudy Sutherland for the protester.

John E. Cornell, Esq., General Services Administration, for the agency.

Christina Sklarew, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's contention that a solicitation is unduly restrictive of competition because it requires that potential joint venture offerors must demonstrate relevant experience for the joint venture itself--and not the individual business entities forming the joint venture--is denied where the record supports the agency's position that the requirement is reasonably necessary to meet the agency's needs.

DECISION

Aljucar, Anvil-Incus & Company (AAI), of Washington, DC, protests the terms of request for proposals (RFP) No. GS00Q-13-DR-0001, issued by the General Services Administration (GSA) for the award of multiple contracts supporting the agency's One Acquisition Solution for Integrated Services (OASIS) program.¹ AAI contends that the RFP's experience requirements for joint ventures are unduly restrictive of competition.

We deny the protest.

¹ To establish that it is an "interested party" for purposes of raising these arguments, see 4 C.F.R. § 21.0(a)(1) (2013), the protester states that it plans to participate in the upcoming competition as a small business joint venture. Protest at 3.

BACKGROUND

The OASIS procurement was designed by GSA to establish multiple indefinite-delivery, indefinite-quantity contracts, under which fixed-price, cost-reimbursement, time-and-materials, and labor-hour task orders could be issued for a range of complex professional services, including program management, management consulting, logistics, engineering, scientific, and financial services. Agency Report (AR) at 2; see also <http://gsa.gov/portal/category/105799>. GSA conducted market research to determine how to structure the procurement. See AR, Tab 6, Decl. of OASIS Deputy Director, at 1; see also AR, Tab 1, Business Case Analysis; Tab 3, Market Research Summary--Joint Ventures. Following its market research, GSA issued two solicitations for OASIS contracts: the RFP here, which was unrestricted, and RFP No. GS00Q-13-DR-0002, which was set aside for small businesses. AAI challenges only the terms of the unrestricted RFP.

The RFP states that OASIS consists of a family of seven “pools” of contracts comprising numerous North American Industry Classification System (NAICS) codes. RFP at 10, 16, 71.² Offerors were informed that an offeror may compete for more than one pool, but that offerors were restricted to the submission of a single proposal. Id. at 87.

The RFP provides for a two-phased process for evaluating proposals under a number of evaluation factors, including, as relevant here, experience and past performance factors. In the first phase, proposals would be evaluated on a pass/fail basis. If found to be acceptable, proposals would be qualitatively evaluated in the second phase. Id. at 130-44.

Extensive and detailed instructions were provided for the preparation of proposals. Id. at 87-129. The RFP describes information that offerors must submit to satisfy the minimum experience requirements. Id. at 112-21, 132-33. As relevant here with respect to proposals from joint ventures, the RFP states that joint venture offerors must have proven experience and performance under an existing contract team arrangement. Id. at 109. In this regard, the RFP informs offerors that the joint venture itself--and not the individual business entities forming the joint venture--must satisfy the RFP’s relevant experience requirement.³ Id. at 109-110.

² The RFP was amended multiple times. Our citations to the RFP are to the final, conformed version of the solicitation contained in the agency’s report.

³ Although the RFP provided for evaluation of proposals under the experience and past performance factors on a pass/fail basis, offerors were informed that offerors without a record of relevant past performance would be evaluated neither favorably nor unfavorably under the past performance factor. RFP at 141.

Prior to the closing time for submission of proposals, AAI filed an agency-level protest with GSA. This protest to our Office followed GSA's denial of AAI's agency-level protest.

DISCUSSION

The crux of AAI's protest is that the RFP is unduly restrictive of competition because the solicitation, with respect to joint venture offerors, limits consideration of experience to that of the joint venture itself. AAI complains that the solicitation does not allow newly-formed joint venture offerors to satisfy the experience requirements through the experience of the individual members of the joint venture.⁴ Protest at 14-15; Comments at 4.

Where a protester challenges a specification or requirement as unduly restrictive of competition, the procuring agency has the responsibility of establishing that the specification or requirement is reasonably necessary to meet the agency's needs. See Total Health Resources, B-403209, Oct. 4, 2010, 2010 CPD ¶ 226 at 3. 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.

⁴ In its initial protest, AAI raised numerous other complaints, such as that the RFP improperly provided for an initial pass/fail evaluation of experience; that issuance of two OASIS solicitations (one set aside for small businesses) would not provide meaningful opportunities for small businesses; and that using two separate solicitations for set-aside versus unrestricted competitions was improper since the scope of work for the two solicitations was the same. GSA responded to AAI's numerous objections in its report. AAI's comments address only the protester's fundamental concern that the RFP should allow newly-formed joint ventures to satisfy the solicitation's experience requirements through the experience of individual joint venture members. In this regard, AAI's request for relief in its comments is that our Office recommend amendment of the RFP to allow for consideration of the experience of individual members of newly-formed joint ventures. See Comments at 3. This is the issue we address in our decision, and we consider AAI's remaining arguments in its initial protest to have been abandoned. See Cedar Electric, Inc., B-402284.2, Mar. 19, 2010, 2010 CPD ¶ 79 at 3 n.4.

GSA states that its market research led it conclude that newly-formed joint ventures (that is, joint ventures without a proven “track record” of experience) could pose performance risks. See AR at 5; see also, e.g., AR, Tab 3, OASIS Market Research Summary, at 7-8. The agency also states that this is particularly so under a solicitation, as here, that involves complex, high-dollar service requirements. AR at 2. GSA also maintains, citing Valor Construction Mgmt. LLC, B-405365, Oct. 24, 2011, 2011 CPD ¶ 226, that it can be reasonable for an agency to limit consideration of experience to the entity that will hold the contract with the government--i.e., the joint venture itself. AR at 3.

Included within the GSA’s market research was a survey of articles and books assessing problems resulting in lower success rates for joint ventures. AR, Tab 3, OASIS Market Research Summary, at 6-7. For example, GSA cites a Harvard Business Review article that concluded that companies forming a joint venture rarely commit sufficient resources to the launch, and mistakes made at that point can result in problems such as strategic conflicts between the allied companies, governance gridlock, and missed operational synergies. See J. Bamford, D. Ernst, and D.G. Fubini, Launching a World-Class Joint Venture, Harvard Bus. Rev., Feb. 2004. Examples of other articles and books reviewed by GSA include Valerie Orsoni-Vauthey, Happy About Joint Venturing (2006) (joint ventures have high rates of failure within 5 years of formation), and Janel Vaughan, What is a Joint Venture?, University of Iowa College of Law Center for International Finance and Development (differences between joint venture members in priorities, direction, and values can result in confusion, frustration, and a distinctly slower decision-making process).

The agency states that, in addition to the academic research described above, it received information from clients and industry, from which it concluded that while joint ventures could be successful, they raise certain challenges and risks, and may have problems with such issues as governance, control issues, and diverging priorities of the affiliated companies. See AR, Tab 3, OASIS Market Research Summary, at 7-8; see also AR, Tab 6, Decl. of OASIS Deputy Director, at 4. Based on these concerns, and the complexity of the integrated service requirements being procured, the agency decided that while joint ventures should not be excluded, they should be required to demonstrate a proven record of experience working together as an entity. Id.

In an attachment to its initial protest filing, AAI argues that GSA’s survey of business literature addressing lower success rates for joint ventures was misleading and biased. Initial Protest, Attach. 2 at 19-22. In several instances, AAI argues that the GSA took quotes out of context to bolster its business case. Id. at 19, 21. In at least one instance, AAI even offers to “arrange a discussion with the Authors” of an article to demonstrate that the purpose of the article was intended as a roadmap to increase the success of joint ventures. Id. at 19.

As an initial matter, we will not assume that GSA officials acted in bad faith in preparing their literature survey. Pemco Aeroplex, Inc., B-310372, Dec. 27, 2007, 2008 CPD ¶ 2 at 15. While we do not accept that GSA manipulated its market survey to harm any potential pool of offerors, we accept as valid the protester's claim that many of the materials cited in GSA's survey were written to increase the likelihood of successful performance by joint ventures--or to provide a roadmap for increased success, in AAI's words. Initial Protest, Attach. 2 at 19. Even so, these articles were clearly written to address performance problems experienced by joint ventures. GSA surveyed this literature and concluded that, if possible, it would prefer to avoid some of these risks. We think the agency acted within its discretion to take notice of this work, and to reach conclusions about the possibility of increased performance risk from newly-formed joint ventures without prior experience operating as a joint entity. On questions like this one, we will not substitute our judgment for the agency's judgment. See e.g., R2Sonic, LLC, B-405864, Jan. 6, 2012, 2012 CPD ¶ 21 at 3.

With regard to AAI's comments, the protester contends that our decision in Valor Construction supports its argument that GSA must credit joint ventures with the experience of its individual members. In this regard, AAI states that in Valor we recognized that an agency may restrict consideration of a team member's experience to "only those firms with which [the agency] has contractual privity for purposes of performing the contract." See Comments at 6.

As an initial matter, AAI is correct that the agency procurement at issue in Valor Construction was, in fact, structured to permit consideration of the experience of the various entities forming the joint venture. See Valor Construction, supra at 2. However, we do not agree that the Valor decision supports AAI's contention that an agency is required to credit joint ventures with the experience of its individual members. In Valor, we found that a solicitation provision--restricting consideration of individual team members' past performance and experience to those firms with which the agency would be in privity of contract--did not prohibit teaming arrangements and was not unduly restrictive of competition. See Valor Construction, supra, at 3. Contrary to AAI's arguments, we did not hold in Valor that an agency is required to consider the experience of individual joint venture members. In addition, we are unaware of any law or regulation requiring that agencies do so.⁵

⁵ AAI contends that GSA's solicitation restriction violates FAR §§ 9.602, 9.603, presumably based upon AAI's belief that the RFP effectively prohibits the use of joint ventures. These sections of the FAR state the government's policy to allow contractors to enter into contractor teaming arrangements, such as joint ventures, for the purpose of competing for, and performing, government contracts. Here, the RFP does not prohibit the use of joint venture arrangements, but limits how the

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More importantly, AAI's argument misses the broader principle on which Valor is based, which is that 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. Valor Construction Mgmt. LLC, supra, at 2-3. Here, the agency has expressed an interest in reducing risk by evaluating the experience of its contractor--in performing government contracts, integrating solutions across multiple disciplines, and, when that contractor is a joint venture, working together as a unified entity. AR at 5.

In short, the relevant experience requirement here reflects the agency's interest in the performance of the joint venture as an established and experienced team. Although AAI disagrees with the agency's judgment in this regard, this disagreement does not show that the solicitation's experience requirement for joint ventures is unduly restrictive of competition.

The protest is denied.

Susan A. Poling
General Counsel

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experience of individual entities comprising the joint venture will be considered. We also note that AAI directs our attention to FAR § 4.102(d), which requires that a contract with joint venturers must be signed by each participant in the joint venture. None of these provisions lead us to conclude that an agency cannot reasonably decide that joint venture offerors must demonstrate experience on the part of the joint venture itself.