United States Government Accountability Office
Washington, DC 20548

Comptroller General of the United States

Decision

Matter of: KAES Enterprises, LLC

File: B-411225; B-411251; B-411350

Date: June 18, 2015

Christopher Kaes, for the protester.
Nathaniel Greeson, Esq., and John Cho, Esq., Federal Emergency Management Agency, for the agency.
Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that solicitation’s performance thresholds are unreasonable is denied where the performance thresholds reflect the agency’s need to ensure that contract requirements are met, and logically relate to the required contract tasks.

DECISION

KAES Enterprises, LLC, of Puyallup, Washington, protests the terms of requests for proposals (RFP) No. HSFE70-15-R-0002, No. HSFE70-15-R-0017, and No. HSFE70-14-R-0041, issued by the Federal Emergency Management Agency (FEMA) for generator maintenance services at FEMA distribution centers in Hawaii, Guam, and Puerto Rico, respectively. KAES alleges that the RFPs are defective because the performance thresholds in the performance work statements (PWS) do not rationally relate to the required tasks.

We deny the protest.

The three RFPs at issue here, posted by FEMA between December 23, 2014 and February 25, 2015, seek proposals from small business firms to provide generator maintenance services and associated repairs at the three FEMA distribution centers. Each RFP contemplates the award of fixed-price contract on a best-value basis. The RFPs for the Hawaii and Guam requirements anticipate a contract with a 1-year base period of performance and four 1-year option periods. The RFP for the Puerto Rico requirement anticipates a contract with a 1-year base period and two 1-year option periods.
BACKGROUND

The objective of the RFPs, as set forth in the PWS, is to ensure that the FEMA generator fleets are “kept Fully Mission Capable (FMC) at all times for rapid deployment requirements.” 1 PWS § 1.1. Pursuant to this objective, the PWS describes specific tasks to be performed by the contractor—primarily, maintenance services and repairs. 2

Concerning maintenance service tasks, section 4.1 of the PWS provides as follows:

The contractor is required to perform one Annual Maintenance Service and three Periodic Maintenance Services (approximately every 90 days) during each performance period for all assigned generators as listed on the FEMA DC Hawaii Generator Fleet (Attachment 5). The fleet make-up may be adjusted during the performance period, as FEMA deploys or otherwise adjusts the size or location of the fleet. The government may withdraw, substitute, or make not available for service any generator within the facility fleet if it is determined that it is not in the best interest of the government to service a particular machine.

PWS § 4.1 (Hawaii). Additionally, the PWS establishes a minimum operational standard for the generator fleet. Specifically, the PWS requires that:

The Contractor will maintain the FEMA generator fleet at a minimum level of 90% “fully mission capable” each month, with 100% being the targeted goal. Any time the fully mission capable level falls below 90% this will be considered a major contract compliance performance deficiency.

Id.

When, during the performance of maintenance services, the contractor discovers a generator that is not mission capable (NMC) and requires a repair, the PWS directs

1 As relevant to this decision, the three PWSs are identical in all material respects.

2 In brief, maintenance services tasks include checking fluids and filters, operating the generator, inspecting serviceability, and correcting “minor discrepancies” that “do not require significant time or significant materials.” PWS Part 3. Repairs tasks include battery replacement, coolant flush, and any other correction of a malfunction or non-conformance that requires “significant time and/or material, as determined by the [contracting officer representative].” Id.
that the contractor will “provide the government with a cost estimate detailing the required labor costs and costs for parts, prior to conducting any repairs.” PWS § 4.2. The agency will then consider the estimate to determine whether the costs are fair and reasonable; when the contractor receives approval, the contractor may begin repairs. The PWS explains that repairs are to be agreed upon and completed as follows:

While conducting Annual and Periodic Maintenance Services, the contractor may be tasked to carry out all repairs necessary to ensure the generators remain fully mission capable. Repairs will be completed during a service period that is agreed upon by the Contractor, Contracting Officer and the [contracting officer representative], if needed and agreed upon the repair will be deferred until the following service for contractor installation. [. . .] For any repairs that are deferred to the following service . . . parts are to be delivered within a reasonable amount of time based on the approval of the repair.

Id. The PWS also provides that the agency may choose to self-perform deferred repairs. Id.

The PWS provides a performance requirements summary to describe the performance objectives, performance thresholds, methods of surveillance, and impact on contractor payments under the RFP’s quality assurance surveillance plan. Concerning maintenance services, the performance threshold is that the “FEMA generator fleet has a FMC rating of 90% or higher each month.” PWS § 7.1. The impact on payments concerning this threshold provides “when FMC rate falls below 90%, $500 deduction for each generator not FMC throughout the entire inventory will be assessed.” Id. Concerning repairs, the performance threshold is “100% of the repair work is completed,” and the impact on payments provides for a “$500 deduction for each documented instance when a repair is not completed within the agreed upon timeline with the COR/CO.” Id.

DISCUSSION

Prior to the deadline for the receipt of proposals in each RFP, KAES filed a protest with our Office challenging multiple aspects of the requirements.³ KAES’s primary

³ Our Office has previously considered several of KAES’s allegations against the requirements of this PWS, and concluded that the requirements are reasonable. KAES Enterprises, LLC, B-407964, Apr. 23, 2013, 2013 CPD ¶ 183. For example, our Office has previously rejected KAES’s arguments that the 90 percent FMC requirement and the requirement to complete each annual or periodic fleet service within an 8 business day period are unduly restrictive and overstate the agency’s (continued...)
allegation is that the 90 percent FMC performance threshold for the PWS’s maintenance services tasks is unreasonable because the generator fleet FMC rate is independent of the contractor’s performance of maintenance services. According to KAES, “the contractor has absolutely no control over the individually assessed generator’s FMC status or the [overall] FEMA generator fleet FMC status.” KAES March 11, 2015 Protest, Hawaii, at 4; March 17, 2015 Protest, Guam, at 5; April 5, 2015 Protest, Puerto Rico, at 4. Rather, KAES asserts that the generator fleet FMC rate is controlled by the extent to which NMC generators have been authorized for necessary repairs, and that FEMA, not the contractor, has sole discretion to approve such repairs. In this regard, KAES contends that on discovery of a NMC generator, the contractor can only provide an estimate for the costs of repairs and that when FEMA defers or declines to conduct a repair, the generator remains NMC and negatively impacts the fleet FMC status through no fault of the contractor. Accordingly, KAES argues that all requirements tying the contractor’s performance to the fleet FMC rate must be removed from the RFP.

A contracting agency has the discretion to determine its needs and the best method to accommodate them, and we will not question an agency’s determination of its needs unless that determination has no reasonable basis. See Womack Mach. Supply Co., B-407990, May 3, 2013, 2013 CPD ¶ 117 at 3. The adequacy of the agency’s justification of its needs is ascertained through examining whether the agency’s explanation is reasonable; that is, whether the explanation can withstand logical scrutiny. See SMARTnet, Inc., B-400651.2, Jan. 27, 2009, 2009 CPD ¶ 34 at 7; Chadwick–Helmuth Co., Inc., B-279621.2, Aug. 17, 1998, 98-2 CPD ¶ 44 at 3.

Here, the agency responds that the performance thresholds in the performance requirements summary are necessary measures to ensure that the contractor performs the contract requirements, and that the 90 percent FMC threshold does

(...continued)

minimum needs. Although we discuss only KAES’s principle argument in this decision, we have reviewed each allegation presented in the protest, and conclude that none provides a basis on which our Office would sustain the protest. For example, KAES alleges that the complaints provisions of the performance requirements summary—providing for $1,000 payment deductions per customer complaint if more than one complaint per month is received—are unreasonable because FEMA could file complaints “for unknown reasons; bad haircut, dirty hands, or brown work boots.” KAES March 11, 2015 Protest, Hawaii, at 7. However, the performance requirements summary provides that complaints must be validated. Moreover, government officials are presumed to act in good faith; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7–8.
rationally relate to the contractor’s performance of the required maintenance services tasks. Concerning KAES’s allegations that the fleet FMC rate is only a reflection of FEMA’s decisions to grant, defer, or decline repair authorizations, the agency asserts that the protester misinterprets the unambiguous terms of the RFP.

In this connection, the agency explains that when FEMA defers a repair, declines a repair, or elects to self-perform a repair, the NMC generator is made “not available for service” and is withdrawn from the generator fleet in accordance with the terms of PWS section 4.1. Thus, any such NMC generator is not included within the “generator fleet” when calculating the FMC rate for measurement of the contractor’s performance of maintenance services. Complimentarily, the contractor’s performance of any agreed-to repair work is measured only against whether the repair is completed “during a service period that is agreed upon by the Contractor, Contracting Officer and the COR,” in accordance with PWS sections 4.2 and 7.1.

FEMA also contends that these provisions of the PWS, to the extent they could be considered ambiguous, were clarified in a questions and answers amendment responding to KAES’s concern, as follows:

Q. It appears FEMA is alluding to the conclusion or standard that the contractor is being held responsible for the Fully Mission Capable (FMC) status of individual generators and along with the overall FMC rate for the generator fleet. If so, that cannot exist since FEMA retains all authority on all repairs for Non-Mission Capable (NMC) generators discovered (PWS 4.2) during Quarterly or Annual inspections. The attachment, with all implications, of the contractor to any FMC status or rate must therefore be removed as the contractor has no ability or span of control over the FMC status or rate.

A. The Contractor’s performance is based on the number of units that are FMC prior to the Contractor leaving the site during each service period. If parts are ordered and FEMA chooses to execute the repair, then the Contractor is not responsible for that unit. FMC status is determined by FEMA based on the requirements outlined in the PWS.

Guam RFP Q&A at 3.

When a dispute arises as to the actual meaning of solicitation language, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Alpha Marine Servs., LLC, B-291721, B-291721.3, Mar. 5, 2003, 2003 CPD ¶ 71 at 4. A solicitation is not ambiguous unless it is susceptible to two or more reasonable interpretations. Id.
Here, we have reviewed the RFP and agree with the agency that the 90 percent FMC performance threshold is a reasonable method for accommodating its need to measure the contractor’s performance of maintenance services required by the RFP, and that the protester’s allegations are premised on an unreasonable interpretation of the RFP. Although the RFP may not be perfectly transparent as to the composition of the “generator fleet” for the purpose of calculating the fleet FMC rate, the RFP when read as a whole is susceptible to only one reasonable interpretation—that NMC generators which are pending an agreed-upon repair, or for which the agency has declined a repair, are withdrawn from the generator fleet under PWS § 4.1, and are not considered in the FMC rate calculation. We conclude that KAES interpretation of the PWS, by contrast, fails to recognize the distinction between maintenance services tasks and repairs tasks in both Part 4 and section 7.1 of the PWS, or to give effect to the language of PWS section 4.1 providing that “[t]he government may withdraw, substitute, or make not available for service any generator within the facility fleet.”

Accordingly, the contractor’s performance of maintenance services under the PWS is measured based on FEMA inspection of the FMC status of the generators previously serviced and determined FMC by the contractor at the close of the service period. Thus, the inspected fleet FMC rate rationally reflects the contractor’s successful performance of the required maintenance services to the standards set forth in the PWS. On this record, we see no basis to object to the terms of the performance requirements summary as set forth in the PWS.

The protest is denied.

Susan A. Poling
General Counsel

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4 It is apparent that KAES’s interpretation of the RFP is based largely on KAES’s presumption that the agency is acting in bad faith. KAES specifically complains that the FEMA program office for these requirements “is highly biased against KAES Enterprises,” and “actively seeking to punish KAES Enterprises on current and past contracts.” KAES March 11, 2015 Protest, Hawaii, at 3. As KAES has not raised bad faith as a protest ground here, but instead requests that our Office consider KAES’s repeated bad faith claims against the agency in interpreting the RFP and the agency’s responses, we do not further address the protester’s allegations here. Government officials are presumed to act in good faith; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Career Innovations, LLC, supra. Additionally, to the extent KAES speculates that the agency will improperly manipulate the fleet FMC rate during the performance of a contract resulting from these RFPs, the protester raises a matter of contract administration not for consideration by our Office. Bid Protest Regulations, 4 C.F.R. § 21.5(a).