



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: ADVENTureOne LLC; Apogee Engineering, LLC

File: B-408685.23; B-408685.26

Date: September 20, 2019

Carrol H. Kinsey Jr., Esq., Redmon, Peyton & Braswell, LLP, for ADVENTureOne LLC, and Amber Scott, for Apogee Engineering, LLC, the protesters.

Stephen T. O'Neal, Esq., General Services Administration, for the agency.

Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest arguing that the terms of a solicitation allowing offerors to earn points under the evaluation scoring criteria for approved purchasing and estimating systems are unduly restrictive of competition is denied where the disputed terms are not minimum requirements and where the agency reasonably explains why they are necessary to meet the agency's needs.
 2. A protester's inability to access documents through the Electronic Protest Docketing System does not provide a basis to summarily sustain the protest, nor does it provide a basis to sanction the agency for failing to meet its obligation to file an agency report, where the protester did not advise our Office of its inability to access the documents prior to the due date for filing its comments.
 3. Protest arguing that a solicitation improperly requires all members of a small business mentor-protégé joint venture have certifications in order to earn points under the evaluation scoring criteria is denied where no statute or regulation prohibits the terms.
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DECISION

ADVENTureOne LLC, of Dumfries, Virginia, a small business, and Apogee Engineering, LLC, of Colorado Springs, Colorado, also a small business, challenge the terms of request for proposals (RFP) GS00Q-13-DR-0002, which was issued by the General Services Administration (GSA), Information Technology Service, for award of new contracts in the agency's One Acquisition Solution for Integrated Services (OASIS)--small business pool of governmentwide multiple-award indefinite-delivery, indefinite-

quantity (IDIQ) contracts. The protesters argue that the RFP's scoring criteria are unduly restrictive of competition.

We deny the protests.

BACKGROUND

GSA administers seven groups of governmentwide multiple-award IDIQ OASIS contracts that are set aside for small business. Agency Report, Tab 2, RFP amend 6, at 39.¹ These seven groups of IDIQ contracts are referred to as pools and allow agencies to place orders for flexible and innovative solutions for complex professional services. *Id.* at 8, 39. The protests concern the solicitation for the award of contracts in OASIS small business pools 1, 3, and 4. *Id.* at 7. The agency initially awarded contracts in these pools in 2014; the current solicitation, which was issued on April 29, 2019, is an "open season On-Ramp," which allows additional firms to compete for the award of contracts. *Id.* Apogee states that it intends to compete for the award of a contract in pools 1 and 4 and ADVENTureOne states that it intends to compete for the award of a contract in pool 1. Apogee Protest at 2; ADVENTureOne Protest at 1. The solicitation states that the agency intends to award approximately 190 new IDIQ contracts in pool 1 and approximately 60 new contracts in pool 4. RFP at 65.

The RFP states that awards will be made to the offerors that submit the highest technically-rated proposals with fair and reasonable prices. RFP at 114. Offerors are instructed to submit proposals that address the following six areas: (1) general offeror information; (2) responsibility; (3) relevant experience for primary and secondary projects; (4) past performance; (5) systems, certifications, and clearances; and (6) cost/price. *Id.* at 80-114. Within these six areas, the RFP identifies certain criteria as minimum requirements, and others as scored evaluation criteria. *Id.* at 115-116. The RFP advises that the agency will review proposals to identify those that meet the minimum requirements, and then review those proposals under the scored evaluation criteria. *Id.* at 115. For the scored evaluation criteria, offerors were instructed to self-certify whether they qualify for points under the relevant experience, past performance, and systems, certifications, and clearances criteria. *Id.* at 118-25. The solicitation identifies 10,000 possible points for criteria under these scored evaluation criteria. *Id.* at 126-27. Award will be made, therefore, to the offerors that submit the highest-rated proposals, based on the points earned under the scored evaluation criteria, that have a fair and reasonable price. *Id.* at 114.

Prior to the deadline for receipt of proposals, both Apogee and ADVENTureOne filed protests with our Office challenging the terms of the solicitation as unduly restrictive of competition.

¹ Citations to the RFP are to solicitation amendment 6, which was provided at Tab 2 of the agency reports for B-408685.23 and B-408685.26.

DISCUSSION

Apogee primarily argues that the RFP is unduly restrictive of competition because the scored evaluation criteria for systems, certifications, and clearances provide up to 700 points for offerors that self-certify that they have an approved purchasing and acceptable estimating system. Apogee Protest at 1, 4. ADVENTureOne primarily argues that all of the scored evaluation criteria for systems, certifications, and clearances improperly require that both members of a mentor-protégé joint venture satisfy the criteria in order to receive evaluation credit. ADVENTureOne Protest at 3. For the reasons discussed below, we find no basis to sustain either protest.²

In preparing a solicitation, a contracting agency must specify its needs in a manner designed to achieve full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy the agency's legitimate needs, or are otherwise authorized by law. 41 U.S.C. § 3306(a). Where a protester challenges a solicitation term 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 term to ensure that it is rational and can withstand logical scrutiny. SMARTnet, Inc., B-400651.2, Jan. 27, 2009, 2009 CPD ¶ 34 at 7. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them, without more, does not establish that the agency's judgment is unreasonable. Protein Scis. Corp., B-412794, June 2, 2016, 2016 CPD ¶ 158 at 2.

Apogee's Challenges

Apogee argues that the RFP's scored evaluation criteria improperly provide credit to offerors that self-certify that they have purchasing and estimating systems that are approved by the Defense Contract Management Agency (DCMA) or a similar agency. The protester contends that although small businesses may have systems necessary to perform work under the OASIS contracts, it is a "near impossibility" for such firms to receive approvals from the government for these systems. Apogee Comments at 1.

The RFP provides that offerors may self-certify that they have an approved purchasing system for 500 points, and may self-certify that they have an acceptable estimating system for 200 points. RFP at 127. The RFP describes an approved purchasing system as follows:

An approved purchasing system means the Contractor's purchasing system has been approved under a Contractor Purchasing System

² The protesters also raise other collateral arguments. Although we do not address every argument, we have reviewed them all and find no basis to sustain either protest.

Review (CPSR) for efficiency and effectiveness with which the Contractor spends Government funds and complies with Government policy when subcontracting.

* * * *

An Approved Purchasing System is not mandatory; however, Contractors are encouraged to have a purchasing system approved by the Defense Contract Management Agency (DCMA) or other cognizant Government administration office for the entire term of OASIS [small business].

RFP at 42.

The RFP describes an acceptable estimating system as follows:

An estimating system is a system that includes policies, procedures, and practices for budgeting and planning controls, and generating estimates of costs and other data included in proposals submitted to customers in the expectation of receiving contract awards.

* * * *

An Acceptable Estimating System is not mandatory; however, Contractors are encouraged to have an acceptable estimating system approved by the Defense Contract Management Agency (DCMA) or other cognizant auditor for the entire term of OASIS SB. . . .

Id. at 41-42.

Apogee argues that the RFP is unduly restrictive of competition because it is difficult for small business firms to receive approvals for their purchasing or estimating systems. Protest at 1. The protester argues that “approvals are typically reserved for much larger businesses,” and notes, for example, that reviews of purchasing systems are initiated by the contracting officer and are generally limited to firms whose revenue is expected to exceed \$50 million in a 12-month period. Apogee Protest at 1; Apogee Comments at 2; see also DCMA CPSR Guidebook, www.dcma.mil/Portals/31/Documents/CPSR/CPSR_Guidebook_022619.pdf, at 5 (last visited Sept. 18, 2019). In contrast, the protester notes, pool 1 has a primary North American Industry Classification System (NAICS) code of 541330, with a corresponding size standard of \$15 million; pool 4 has a primary NAICS code of 541715, with a corresponding size standard of 1,000 employees. See Apogee Protest at 1; RFP at 7-8.

In response, GSA emphasizes that the purchasing and estimating systems provisions are not minimum requirements, and that the RFP states that each of these systems are not mandatory. Memorandum of Law (MOL) (B-408685.26) at 3-6 (citing RFP at 41-42). Offerors may self-certify that they have approved systems and earn points

under the scored evaluation criteria. The agency thus argues that the RFP's provision of points for approved purchasing and estimating systems is not unduly restrictive of competition as offerors are eligible to be awarded contracts even if they do not self-certify that they have the approved systems and do not earn the 700 points. Id.

The agency acknowledges that "the majority of the small business concerns awarded contracts under the original 2014 OASIS [small business] Solicitation did not claim points" for approved purchasing or estimating systems. Id. at 5. As relevant here, for the 45 pool 1 contract awards, three awardees had approved purchasing systems and one awardee had an acceptable estimating system; for the 40 pool 4 contract awards, eight awardees had approved purchasing systems and two awardees had an acceptable estimating system.³ Id. The record, therefore, does not support the protester's argument that small businesses will be incapable of earning points for approved systems, or that small businesses without approved systems will be ineligible to receive award of contracts. See id.

Apogee also argues that the RFP is unduly restrictive of competition because an approved purchasing or estimating system is "not a legitimate agency need." Apogee Protest at 1, 6; Apogee Comments at 3. The protester contends that the agency should give evaluation preferences to firms that have systems in place that could be capable of receiving approval in the future. Id. GSA explains that the OASIS contract allows for issuance of task orders on a cost-reimbursement, fixed-price, time-and-materials, or labor-hour basis, and that task orders may also combine different types of cost or price types. MOL (B-408685.26) at 1; see also RFP at 9. The agency further explains that orders placed by the Department of Defense (DOD) account for "approximately 90%" of the funds spent on the OASIS contract, and that cost-type task orders "account for 49% of all obligations." Contracting Officer's Statement (COS) (B-408685.26) at 3. The agency states that awarding contracts to firms that have approved purchasing and estimating systems allows the agency to "provide the high level of professional services expected on the OASIS Contract and applicable to many of these DOD cost-type requirements." Id.

For example, the agency notes that FAR § 44.201(b) requires that, if a contractor does not have an approved purchasing system, the agency must consent to subcontracts for cost-reimbursement, time and materials, or labor-hour contracts. MOL (B-408685.26) at 9. The agency states that "prior to awarding any of the above-listed task orders to an entity without the subject Approved Purchasing System, the ordering activity will have to undertake the additional administrative burden of receiving and reviewing a request from that contractor for 'consent to subcontract.'" Id. The agency further states that the solicitation provides for points for an approved system, rather than a claimed ability to receive approval in the future, to ensure that there are vendors capable of performing

³ GSA notes that, of the 10,000 points that offerors could earn under the RFP's scored evaluation criteria, the minimum score necessary in 2014 for the award of a contract was 5,925 for pool 1, and 6,575 for pool 4. MOL (B-408685.26) at 6.

cost-reimbursement work “on day-one.” MOL (B-408685.26) at 8 n.5. We agree with GSA that the criteria providing points for approved purchasing or estimating systems are reasonably related to meeting customer requirements for cost-type task orders.

Finally, the protester contends that since it cannot earn points for an approved purchasing and acceptable estimating system, it will be unfairly disadvantaged in the competition. GSA acknowledges that “[t]he purpose of [the systems, certifications, and clearances scored evaluation criteria] is not to establish minimum requirements but to allow companies who have obtained approval for these [criteria] to be rated more favorably than those companies who have not.” COS (B-408685.26) at 2.

An agency is not required to equalize a competitive advantage that a firm may enjoy--or a disadvantage it may experience--because of the firm’s particular business circumstances, where that advantage or disadvantage does not result from an improper preference or unfair action by the government. See Management & Tech. Servs. Alliance Joint Venture, B-416239, June 25, 2018, 2018 CPD ¶ 218 at 4-5; Missouri Mach. & Eng’g Co., B-403561, Nov. 18, 2010, 2010 CPD ¶ 276 at 5. As discussed above, GSA reasonably explains that the solicitation awards points to offerors with approved systems due to the large number of cost-type task orders awarded under the IDIQ contract. COS (B-408685.26) at 3. Additionally, the record shows that at least some small business offerors were able to earn points for approved purchasing and estimating systems in the competition for the prior OASIS awards. MOL (B-408685.26) at 5. Thus, even if the protester is unable to self-certify that it has these approved systems, and is unable to earn those 700 points, we find no basis to conclude that the solicitation’s optional scored evaluation criteria are unreasonable or unduly restrictive of competition. We therefore find no basis to sustain the protest.

ADVENTureOne’s Challenges

Electronic Protest Docketing System (EPDS)

As an initial matter, ADVENTureOne contends that GSA failed to provide all of the documents in the agency report as required by our Bid Protest Regulations. See 4 C.F.R. § 21.3(d) (requiring that an agency report include a contracting officer’s statement, a memorandum of law, and all relevant documents). On July 15, 2019, the due date for the agency report, GSA uploaded five documents to EPDS: (1) the agency’s legal memorandum, (2) the contracting officer’s statement, (3) the RFP, (4) ADVENTureOne’s protest, and (5) correspondence between GSA and the protester. EPDS Docket Entry No. 5 (B-408685.23). On July 17, GSA filed a notice in EPDS stating as follows: “On July 17, 2019 counsel to Protester advised they were not able to access the Agency Report through EPDS and requested that GSA re-submit the Agency Report documents.” EPDS Docket Entry No. 6 (B-408685.23). GSA’s July 17 filing resubmitted all of the documents filed on July 15. GSA also provided the documents to the protester via email on July 17. See ADVENTureOne Comments at 2.

The protester filed its comments on the agency report on July 25, 10 days after the original agency report was filed. With respect to the documents filed by the agency in EPDS on July 15, the protester states that it “was only able to open the Contracting Officer’s Statement and no other attached documents, including the Legal Memorandum.” ADVENTureOne Comments at 1. The protester explains that it contacted the agency on July 17 to advise that it was unable to access documents uploaded by the agency to EPDS on July 15, aside from the contracting officer’s statement.⁴ Id. For these reasons, the protester contends that the agency failed to file its report on the protest as required, and requests that our Office “issue a summary decision sustaining the instant protest” or “sanction GSA for its failure to timely file a complete Agency Report and allow only that document that was filed in a timely manner (the Contracting Officer’s Statement) receive consideration in this protest.” Id. at 2-3.

Our Bid Protest Regulations require protesters to file comments on the agency report “within 10 days after the agency has filed the report, except where GAO has granted an extension of time, or where GAO has established a shorter period for filing of comments.” 4 C.F.R. § 21.3(i)(1). Prior to the introduction of EPDS, our Office provided protesters a notice advising that we would assume that offerors receive the agency report on the due date specified in the notice, unless protesters advise otherwise. See Sea Sys., Inc.--Recon., B-252908.2, Sept. 16, 1993, 93-2 CPD ¶ 171. Our Office explained, therefore, that a protester’s comments are due 10 days after the scheduled due date for filing of an agency report. Id. We further explained that where a protester files comments after this time--because it had not received the agency report, or received the report at a later date--it cannot seek a retroactive extension of time for filing comments. Id. Our Office no longer provides this notice because agencies are required to file their reports responding to a protest through EPDS, and all parties to the protest are automatically notified of filings in EPDS. See 4 C.F.R. §§ 21.0(g); 21.3(c).

Here, ADVENTureOne did not contact our Office to advise that it experienced problems accessing the documents in EPDS. The only information our Office received regarding this matter was GSA’s notice that the protester had been unable to access the documents, and that the agency had refiled those documents. The protester knew or should have known as of July 17 that its inability to access documents in EPDS had not been resolved. The protester, however, did not contact our Office to resolve this matter prior to its filing of comments on the agency report. Under these circumstances, we find no basis to conclude that the agency failed to meet its obligation to file the agency report in a manner that merits the summary sustain of the protester’s arguments, or the imposition of other sanctions such as limiting our consideration of documents in the report.⁵

⁴ Our Office was able to access all of the documents uploaded to EPDS by the agency.

⁵ We find the protester’s request--to summarily sustain the protest and sanction the agency--particularly inappropriate given the protester’s receipt of all of the documents from the agency via email on July 17, and its citation to those documents in its comments on the agency report. See e.g., ADVENTureOne Comments at 3-6.

Joint Venture Requirements

Turning to ADVENTureOne's challenges to the terms of the solicitation, the protester argues that the RFP improperly limits a mentor-protégé joint venture's ability to earn points under the scored evaluation criteria. Specifically, ADVENTureOne⁶ argues that the scored evaluation criteria for systems, certifications, and clearances--which include the approved systems challenged by Apogee--are improper because the RFP requires both members of a mentor-protégé joint venture satisfy the requirements to earn the evaluation credit. ADVENTureOne Protest at 2-3. The protester contends that the solicitation's requirement violates the Small Business Act and regulations promulgated by the SBA.

The SBA's small business mentor-protégé program allows small or large business firms to serve as mentors to small business protégé firms in order to provide "business development assistance" to the protégé firms and to "improve the protégé firms' ability to successfully compete for federal contracts." 13 C.F.R. § 125.9(a), (b). One benefit of the mentor-protégé program is that a protégé and mentor may form a joint venture. Id. § 125.9(d). If SBA approves a mentor-protégé joint venture, the joint venture is permitted to compete as a small business for "any government prime contract or subcontract, provided the protégé qualifies as small for the procurement." Id. § 125.9(d)(1); see also 13 C.F.R. §§ 121.103(b)(6) & (h)(3)(ii).

The Small Business Act requires agencies under certain circumstances to evaluate the individual members of a joint venture and to attribute those evaluations to the joint venture itself:

When evaluating an offer of a joint venture of small business concerns for any multiple award contract above the substantial bundling threshold of the Federal agency, if the joint venture does not demonstrate sufficient capabilities or past performance to be considered for award of a contract opportunity, the head of the agency shall consider the capabilities and past performance of each member of the joint venture as the capabilities and past performance of the joint venture.

15 U.S.C. § 644(q)(1)(C). SBA promulgated regulations implementing this statutory provision, including the following:

When evaluating the past performance and experience of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity

⁶ ADVENTureOne states that is a joint venture small business concern under the Small Business Administration's (SBA) mentor-protégé program. Protest at 3.

must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

13 C.F.R. § 125.8(e).

The RFP states that systems, certifications and clearances “are not minimum or mandatory requirements.” RFP at 108. Offerors, however, may earn points under the scored evaluation criteria for systems, certifications, and clearances. Id. at 127. These points concern 2,000 of the 10,000 available points for the scored evaluation criteria. Id. The areas that may be self-certified to earn points are listed in RFP section L.5.5, as follows:

Government systems: (1) approved purchasing system, (2) approved forward pricing rate agreement, forward pricing rate recommendation, and/or provisional billing rates, (3) earned value management system, (4) acceptable estimating system;

Industry certifications: (1) Capability Maturity Model Integration Maturity Level 2 or higher, (2) International Organization for Standardization (ISO) 9001, (3) ISO 17025, (4) ISO 14001, (5) AS9100; and

Facility clearances: (1) secret, and (2) top secret.

Id. at 108-112.

The RFP states, however, that offerors submitting proposals as a joint venture may only earn points under these criteria if the joint venture itself, or all members of the joint venture, meet the criteria:

L.5.1.10. Contractor Team Arrangement [(CTA)], if applicable

* * * * *

(d) Offerors who are an existing Partnership or Joint Venture CTA as defined in [Federal Acquisition Regulation (FAR)] 9.601(1) or FAR 9.601(2) may submit a proposal under this Solicitation subject to the following conditions:

* * * * *

6. All evaluation criteria under L.5.5 must be held by either:

(a) All individual members of the CTA. Scoring will only be awarded at the levels met or exceeded by all members of the existing Partnership or Joint Venture; or

(b) By the Offeror (*i.e.*, the Joint Venture itself or Prime Small Business contractor).

RFP at 89-91.

ADVENTureOne argues that the SBA's regulations at 13 C.F.R. § 125.8(e) prohibit GSA from requiring each member of a mentor-protégé joint venture to individually meet the systems, certifications, and clearances criteria in order to claim points. In support of its position, the protester cites the portion of SBA's regulation which states that "a procuring activity must consider work done individually by each partner to the joint venture" when evaluating the joint venture's offer. 13 C.F.R. § 125.8(e).

As GSA notes, SBA's regulation pertains to the "past performance and experience of an entity submitting an offer," and contends that the systems, certifications, and clearances criteria do not concern past performance or experience. MOL (B-408685.23) at 7-8. The agency cites SBA's issuance of a notice of final rulemaking on July 25, 2016, which implemented the requirements of the Small Business Jobs Act of 2010, Pub. L. No. 111-240 (Sept. 27, 2010) and the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239 (Jan. 2, 2013). 81 Fed. Reg. 48558 (July 25, 2016). This final rule revised 13 C.F.R. § 125.8(e) to include the provisions cited by the protester. *Id.* at 48586. The final rule explained SBA's basis for the revision in a section titled "Agency Consideration of the Past Performance and Capabilities of Team Members." *Id.* at 48568. This discussion states that the regulations at 13 C.F.R. § 125.8(e) were proposed "in response to agencies that were considering only the past performance of a joint venture entity, and not considering the past performance of the very entities that created the joint venture entity." *Id.*

Contrary to the protester's argument, nothing in the plain text of the regulation or the SBA's notice of final rulemaking addresses matters other than past performance and experience, *i.e.*, work performed, and quality of the work performed, by the joint venture members. We therefore find no basis in 13 C.F.R. § 125.8(e) to support the protester's view that agencies must evaluate a joint venture offeror as having, for example, security clearances or ISO certifications where only one member of the joint venture meets those criteria.

ADVENTureOne also argues that even if 13 C.F.R. § 125.8(e) is limited to the agency's evaluation of past performance and experience, the Small Business Act at 15 U.S.C. § 644(q)(1)(C) more broadly requires the agency to "consider the capabilities and past performance of each member of the joint venture as the capabilities and past performance of the joint venture." ADVENTureOne Comments at 3-4. The protester contends that the scored evaluation criteria for systems, certifications, and clearances are capabilities, and that GSA must therefore amend the solicitation to treat the capabilities of any member of a joint venture offeror as the capabilities of the joint venture, itself.

We agree with ADVENTureOne that although the SBA regulations discussed above address experience and past performance, the Small Business Act addresses capabilities and past performance. GSA contends, however, that the term capabilities does not relate to systems, certifications, and clearances. MOL (B-408685.23) at 6-9. We need not resolve this matter because the Small Business Act provision cited by the protester does not apply here. GSA notes that the requirement in 15 U.S.C.

§ 644(q)(1)(c) to consider the capabilities of each member applies only where the joint venture, itself, “does not demonstrate sufficient capabilities or past performance to be considered for award of a contract opportunity.” MOL (B-408685.23) at 6. As discussed above, the systems, certifications, and clearances scored evaluation criteria are not mandatory requirements and the failure to earn points for these criteria does not preclude any offeror from being considered for award. For these reasons, the agency contends that a joint venture that does not earn the maximum points under these criteria--or any points under these criteria--may still earn sufficient points to be awarded a contract. Id.

We agree with GSA that the RFP’s requirement that all joint venture members meet the scored evaluation criteria for systems, certifications, and clearances does not prohibit an offeror from being “considered for award of a contract opportunity.” We thus find no basis to conclude that the terms of the RFP violate the statutes or regulations as cited by the protester.⁷

The protests are denied.

Thomas H. Armstrong
General Counsel

⁷ ADVENTureOne also generally argues that all of the scored evaluation criteria for systems, certifications, and clearances cause competitive disadvantage to small business mentor-protégé joint venture offerors. See ADVENTureOne Comments at 6. For the reasons discussed above in connection with Apogee’s protest, we find no basis to conclude that the inability to claim certain points under the scored evaluation criteria is the result an improper preference or unfair action by the government.