



Decision

Matter of: Flight Support, Inc.

File: B-417637.2

Date: October 3, 2019

Daniel Weckstein, Esq., Anthony J. Mazzeo, Esq., and Vania Ratliff, Esq., Vandeventer Black LLP, for the protester.

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Michael T. Genchi, Esq., Robin Ray Coll, Esq., Jason Nelson, Esq., Stephanie Polk, Esq., and Karissa Johnson, Esq., Department of the Navy, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging solicitation's evaluation scheme as unduly restrictive of competition is denied where agency provides rational explanation for its requirements and demonstrates that they reasonably relate to the agency's actual needs.

DECISION

Flight Support, Inc. (FSI) of Newport News, Virginia, protests the terms of request for proposals (RFP) No. N00421-18-R-0009, issued by the Department of the Navy for high-endurance electronic warfare jet commercial air services in connection with various training requirements. FSI argues that the RFP's corporate experience and past performance requirements are unduly restrictive of competition.

We deny the protest.

The RFP seeks proposals to obtain contractor-owned, contractor-operated aircraft and personnel to support training for shipboard and aircraft weapons systems operators and aircrews. In effect, the successful offeror will operate aircraft to simulate a wide variety of airborne threats in order to train, test and evaluate shipboard and aircraft squadron weapons systems operators and aircrews about how to counter potential enemy

electronic warfare efforts. RFP at 9.¹ The RFP includes four evaluation factors, listed in descending order of importance: corporate experience, technical, past performance, and price. The RFP further provided that all non-price considerations together were deemed significantly more important than price. RFP at 112. FSI's protest concerns the solicitation's evaluation criteria relating to corporate experience and past performance.

The RFP provides that offerors will be evaluated for corporate experience based on past performance examples found to be recent and relevant. RFP at 113. The RFP specifically advises offerors that only the corporate experience of the legal entity submitting the proposal (or a team member) will be considered, and advises that the experience of an offeror's individual personnel will not be considered. Id. Similarly, for past performance, the RFP states that the agency will consider an offeror's recent and relevant past performance examples in evaluating past performance. RFP at 114.

For purposes of recency, the RFP provides that recent contracts are those performed within 5 years of the date the RFP was issued. RFP at 117. For purposes of relevancy, the RFP provides that contracts will be deemed "very relevant" if they involved operating jet aircraft, including obtaining air worthiness certificates, over water 100 nautical miles from land in support of military operations, and also either required performance of electronic warfare operations, or performance of electronic warfare integration, including aircraft modifications, in support of military operations, and have a threshold value of at least \$25 million. RFP at 118. The RFP deems contracts "somewhat relevant" if they involved either operating aircraft, including obtaining airworthiness certificates, in support of military operations and also were valued at \$1.8 million or more; or required performance of either electronic warfare operations, or electronic warfare integration, including aircraft modifications, in support of military operations, and were valued at \$1.8 million or more. Id.

FSI argues that these requirements are unduly restrictive of competition. According to the protester, only an incumbent contractor can have its corporate experience/past performance examples deemed "very relevant" because only those firms have the necessary requisite experience. The protester therefore suggests that the solicitation is a de-facto sole-source acquisition, because, as a practical matter, only the incumbent contractors will be able to demonstrate the corporate experience/past performance required to achieve the highest possible rating under the definitions found in the solicitation, and, therefore, only those firms will be selected for award.

In largely derivative allegations, FSI also argues that the RFP's limitation of corporate experience to experience of the corporate entity--as opposed to the firm's personnel--is unduly restrictive of competition; that using the same past performance examples for both the corporate experience factor and the past performance factor results in an

¹ All references to the solicitation are to the conformed version of it included in the agency report (AR) at exhibit 25.

evaluation scheme that is weighted unfairly in favor of incumbent contractors; and that the \$1.8 million dollar threshold established for a “somewhat relevant” rating” is arbitrary (and that the agency should have set the threshold value at \$1.5 million).

We have no basis to object to the terms of the solicitation for the reasons advanced by FSI. Where a protester challenges a solicitation requirement as unduly restrictive, the acquiring activity has the responsibility of establishing that the requirement is reasonably necessary to meet the agency’s requirements. OMNIPLEX World Services Corp., B-415988.2, Dec. 12, 2018, 2018 CPD ¶ 424 at 3. We examine the agency’s justification for a challenged provision to ensure that it is rational, and can withstand logical scrutiny. Id.

The agency’s fundamental position is that the RFP reflects its needs to have a contractor capable of performing the solicitation’s requirements, and that its corporate experience/past performance evaluation factors (and corresponding definitions) reasonably reflect a graduated expression of the desirable qualifications of any successful offeror. The agency also notes that, while the definition for receiving a “very relevant” determination is comparatively stringent, firms need not obtain a “very relevant” rating in order to receive award of the contract.

FSI principally maintains that the RFP’s definition of what constitutes a “very relevant” contract cannot be met by any firm other than the incumbent. However, the fact that the evaluation criteria provide an advantage--possibly even a dispositive advantage--to incumbent contractors that have the precise experience called for under the definition of a “very relevant” contract does not provide a basis for our Office to object to the requirement. That the incumbent contractors may have an advantage because they possess the most relevant past performance is unobjectionable, inasmuch as we have recognized that incumbent contractors with good performance records can offer real advantages to the government in terms of lessened performance risk. Emax Financial & Real Estate Advisory Services, LLC, B-408260, July 25, 2013, 2013 CPD ¶ 180 at 6.

FSI has not explained, and it is not apparent to us, how the RFP’s definition of “very relevant” exceeds the agency’s requirements, or how it prevents FSI from submitting a proposal. Rather, FSI argues only that it is not able to meet the definition of “very relevant” given its past performance examples, and that this will result in FSI not being relatively competitive in responding to the solicitation. As noted, an agency is not required to equalize or otherwise eliminate a competitive advantage enjoyed by incumbent contractors by virtue of their having previously performed the agency’s requirements. Emax Financial & Real Estate Advisory Services, LLC, supra.

In a similar vein, the fact that the agency is considering the same past performance examples in connection with both its evaluation of past performance and its evaluation of corporate experience also does not demonstrate that the evaluation criteria are unfairly weighted in favor of incumbent contractors. The evaluation of past performance on the one hand, and corporate experience on the other hand, provide the agency with distinct considerations in evaluating each firm’s experience. A corporate experience

evaluation focuses on whether an offeror has actually performed similar work, while a past performance evaluation considers the quality of the work. See Ausley Associates, Inc., B-417509, B-417509.2, July 24, 2019, 2019 CPD ¶ 279 at 3. Thus, the fact that the agency is evaluating both aspects of the offerors' experience using the same examples does not demonstrate that the evaluation scheme is unfairly weighted in favor of incumbent contractors. Rather, it shows merely that the agency is evaluating different aspects of the offerors' past contracts.

As noted, FSI also argues that the corporate experience factor exceeds the agency's requirements because it requires the experience to have been obtained by the corporate entity (or teaming partner) rather than a firm's personnel. However, the agency explains that, because of the limited number of personnel available in the industry that are qualified to perform the work being solicited, it concluded that requiring offerors to have personnel with particular experience would tend to limit competition. The agency therefore concluded that requiring the corporate experience to be a firm's experience rather than individual employees' experience will allow entities that have performed relevant work to demonstrate their corporate experience, even where certain employees may have left the concern submitting the proposal. The agency also states that it deems organizational experience to be a better predictor of future performance, even where individual employees may have left the offering entity. Agency Report at 17.

FSI has offered no meaningful rebuttal to the agency's position. FSI has not explained why the agency's approach does not tend to foster, rather than deter, competition by allowing entities to demonstrate relevant corporate experience based on the entity's experience rather than the experience of individual employees. FSI also has not explained why the agency's conclusion that corporate experience is a more reliable predictor of future performance than the experience of individual employees is inherently unreasonable, or otherwise exceeds the agency's requirements. As the agency explains, individual employees may leave one organization for another, thereby taking their respective experience with them. In contrast, a firm with extensive corporate experience will continue to retain that experience, even where individual employees have left. We therefore have no basis to object to the agency's requirements for this reason.

Finally, FSI's allegation that the agency arbitrarily set the dollar value threshold for contracts to be considered "somewhat relevant" at \$1.8 million does not provide a basis for our Office to object to the solicitation. The agency explains that the requirement being solicited is valued at approximately \$200 million, and that it set that threshold based on market research showing that there had been recent orders placed for approximately \$1.9 million, or slightly more than the threshold amount of \$1.8 million. AR, exh. 28, Declaration of Contracting Officer's Technical Representative, at 2. The agency further explains that it set that threshold in an effort to enhance competition, noting that this amount allows consideration of contracts valued at slightly less than 1 percent of the value of the solicited requirement. We find that the agency's decision to consider contracts worth less than 1 percent of the value of the solicited requirement is

reasonable, and the protester has offered no rational explanation for its argument that the threshold should be set still lower, other than the apparent fact that the protester does not have a prior contract valued at the threshold amount.²

The protest is denied.

Thomas H. Armstrong
General Counsel

² As a final matter, FSI initially argued in its protest that the agency should also consider contracts that are more than 5 years old. The agency provided a detailed explanation of its rationale for selecting that timeframe and the protester did not meaningfully respond to the agency's argument. We deem this aspect of FSI's protest abandoned. Yang Enterprises, Inc., B-415923, Mar. 12, 2018, 2018 CPD ¶ 109.