



Decision

Matter of: AES UXO, LLC

File: B-419150

Date: December 7, 2020

Terrence R. Young, and James Ratcliff, for the protester.
Susan Kim, Esq., Captain Ethan Chae, and Andrew J. Smith, Esq., Department of the Army, 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 relevant experience and past performance evaluation criteria is sustained where record shows that solicitation as written requires such experience and past performance to have been gained by firms while performing only as prime contractors or as a joint venture, and not while performing as subcontractors. In contrast, the agency's stated intent--to require the prime contractors responding to this solicitation to have relevant experience and past performance themselves--is not accurately captured by solicitation language.

DECISION

AES UXO, LLC, of New Orleans, Louisiana, protests the terms of request for quotations (RFQ) No. W911SA21Q3008, issued by the Department of the Army for unexploded ordnance clearance services at Fort McCoy, Wisconsin. AES argues that the solicitation's evaluation criteria relating to the evaluation of relevant experience and past performance are unduly restrictive of competition.

We sustain the protest in part, and deny it in part.

BACKGROUND

The RFQ, issued as a service-disabled veteran-owned small-business (SDVOSB) set-aside, contemplates the award, on a best-value tradeoff basis, of a fixed-price, indefinite-delivery, indefinite-quantity type contract for a base year and four 1-year options to provide unexploded ordnance clearance services at Fort McCoy. Firms were advised that the agency would evaluate quotations considering three equally weighted

factors, price, technical, and past performance. Agency Report (AR) exhs. 3, 18, RFP at 13, RFP amend. No. 0002, Offeror Questions and Answers, at 2-3. The technical factor includes five equally weighted subfactors, only one of which--relevant experience--is germane to the protest.

AES challenges the solicitation's evaluation scheme, and in particular, the contemplated evaluation of quotations in the areas of relevant experience and past performance. With respect to relevant experience, the RFQ's instructions¹ provide as follows: "The offeror shall submit two (2) examples of recent, relevant projects that the offeror completed and served as the prime contractor or in [] Joint Ventures (JV) for similar requirements to this project." AR, exh. 19, RFQ, amend. No. 0003, at 5.

Elsewhere, the agency made clear its position that it intends to limit the evaluation of relevant experience to those instances where the entity submitting the quotation had performed as either a prime contractor or as a member of a joint venture. AR, exhs. 18, 19, RFQ amend. No 0002 at 7; RFQ amend. No. 0003 at 12, Questions and Answers, Question No. 24:

Question: On Page 12 of the solicitation, under Element 5- Relevant Experience, it states that [] "The offeror shall submit two (2) examples of recent, relevant projects that the offeror completed and served as the prime contractor, in [] Joint Ventures (JV) for similar requirements to this project". Please clarify if the offeror is required show two relevant projects as a prime contractor, or only if they were part of a JV.

Answer: The offeror shall submit two (2) examples of recent, relevant projects that the offeror completed and served as the prime contractor, OR in [] Joint Ventures (JV) for similar requirements to this project. Amendment 2 will add the word "or" into the statement. The offeror shall submit two (2) examples regardless if they are serving as the prime or a JV.

In a similar vein, the RFQ confines the evaluation of past performance examples to those where the firm submitting the quotation previously performed as the prime contractor or as a member of a joint venture.² As with the technical evaluation factor,

¹ The evaluation factors as drafted do not provide detailed information about how the agency intends to evaluate quotations. Instead, in the RFQ and its amendments--principally the RFQ instructions, and in answers to questions from prospective firms--the agency included solicitation language that forms the basis for AES's protest. The parties agree that the solicitation provisions discussed in the body of this decision are the subject of their disagreement.

² Firms are not required to include any substantive information about their past performance with their quotations. The agency required that they provide only a commercial and government entity code for the firm(s) submitting the quotation. Firms

the RFQ's evaluation factors did not elaborate on the scope of past performance examples that would be considered by the agency. Nonetheless, the agency made clear that it would confine its evaluation of past performance to instances where the firm submitting the quotation had performed as a prime contractor or member of a joint venture. The questions and answers provided by the agency, AR, exhs. 18, 19, RFQ, amend. No. 0002 at 2; RFQ amend. No. 0003 at 7, Questions and Answers, Question No. 1, provide as follows:

Question: In reference to Evaluation Criteria, C. Evaluation Approach, Factor 3 Past Performance, please confirm that the Government will only evaluate the past performance of the Prime Contractor or organizations that are under CTAs [contractor teaming agreements] and or Joint Venture agreements, i.e. documents that must be, in accordance with the SF1449 Continuation Sheet #22, submitted in their entirety with the proposal, and not evaluate the past performance of any other "non-prime" organization (subcontractors, vendors etc...)?

Answer: The Government will evaluate the offeror's record of past and current performance to ascertain the probability of successfully performing the required efforts of the PWS.

The Government will only evaluate the past performance of the Prime Contractor or organizations that are under Joint Venture agreements.

Amendment 2 removed the wording concerning the Contract Teaming Agreements (CTA).

DISCUSSION

AES objects to these requirements as unduly restrictive of competition. In this connection, the protester points out that, because the acquisition is set aside for SDVOSB concerns such as itself, it is unfair to require that firms demonstrate relevant experience and past performance as either a prime contractor, or as a member of a joint venture. AES argues that relevant experience or past performance gained, for example, as a subcontractor should be adequate to satisfy the agency's requirement.

We sustain this aspect of AES's protest. When preparing solicitations, agencies are directed by statute to include restrictive provisions only to the extent necessary to satisfy the agency's actual needs. 10 U.S.C. § 2305(a)(1)(B)(ii). Where a protester challenges a solicitation provision as unduly restrictive of competition, the procuring agency is required to establish that the challenged provision is reasonably necessary to

were advised that the agency would use other sources of past performance information, for example, the past performance information retrieval system. AR, exhs. 3, 18, 19, RFQ at 14; RFQ amend. No. 0002 at 13; RFQ amend. No 0003 at 7.

meet the agency's requirements. *Iyabak Construction, LLC*, B-409196, Feb. 6, 2014, 2014 CPD ¶ 62 at 3; see also *Total Health Resources*, B-4-3209, Oct. 4, 2010, 2010 CPD ¶ 226 at 3. Our Office will examine the adequacy of the agency's justification to ensure that it is rational and can withstand logical scrutiny. *Id.*

The agency states that its intent in drafting the terms of the RFQ is to ensure that it evaluates only the relevant experience and past performance of the firm actually submitting the quotation. According to the agency, it does not want to evaluate the relevant experience or past performance of any subcontractor that the firm submitting the quotation identifies in its quotation because there is no way for the agency to require the firm submitting the quotation to use any particular subcontractor after award. The agency states its position as follows:

In order to accurately assess the offeror's ability to remove explosives in military installations, the Army needed to evaluate only the relevant experience that were actually performed by the offerors, not necessarily their sub-contractor at the time. The agency has the discretion to reduce the risk of unsuccessful performance by restricting consideration of experience to the firms contractually obligated to meet the agency's requirements. The Army needed such language to ensure that offerors are actually capable of performing the requested tasks because the Army cannot force an offeror to use any specific sub-contractors.

While the Army had to tailor the Solicitation to achieve the most reliable result, contrary to the Protester's allegation, the language on relevant experience did not exclude any vendors from the bidding process. The Solicitation allowed the vendors without the relevant experience as a prime contractor or JV [joint venture] to submit quotations and compete for the contract.

Agency Memorandum of Law at 13-14 (citations omitted). The agency's argument relating to the evaluation of past performance is essentially the same as that advanced in connection with its position about relevant experience. *Id.* at 14-16.

The agency appears to misunderstand the protester's position as well as the meaning of the language of the solicitation. The protester is correct that the plain meaning of the RFQ as written precludes an evaluation of a firm's relevant experience and past performance to the extent that such experience or past performance was gained while performing as a subcontractor. Thus, for example, if a firm submitting a quotation previously had performed the identical services currently being solicited--even if it had performed those identical services at Fort McCoy, the location for performance of the solicited requirement--its relevant experience and past performance would not be considered under the terms of the RFQ if the firm happened to have performed those services as a subcontractor. This is an irrational result, and one apparently not intended by the agency.

As we understand the agency's position, it does not want firms to rely on the relevant experience or past performance examples of a proposed subcontractor that may later not actually join the prime in performing the contract. However, the RFQ as written does not achieve the agency's objective. Instead, the RFQ effectively penalizes firms that actually have relevant experience and past performance by not permitting them to receive evaluation credit for their experience and past performance, merely by dint of having obtained it as a subcontractor rather than as a prime contractor or joint venturer.

As a final matter, as noted, the agency takes the position that a firm with no relevant experience or past performance is not precluded by the terms of the RFQ from submitting a quotation. While perhaps true, a firm without any relevant experience would necessarily be evaluated less favorably than one with relevant experience, and also would be assigned a neutral (rather than potentially a favorable) past performance rating. The protester has never suggested that it is incapable of submitting a quotation; rather, the protester seeks only to be credited with relevant experience and past performance that it has gained performing as a subcontractor.

In the final analysis, the RFQ as written both disadvantages the protester--because it cannot demonstrate its experience and past performance gained as a subcontractor--and fails to fulfill the agency's objective--to evaluate only the relevant experience and past performance of the firm that will actually perform the requirement. In light of the discussion above, we sustain this aspect of AES's protest.

In addition to the concern discussed above, AES also objects to the RFQ's requirement that relevant experience be "similar to" and "align with" the scope of the solicitation's performance work statement. AR, exh. 19, RFQ, amend. 0003, at 5. According to the protester, this essentially requires firms to have previously performed work at Fort McCoy in order to meet the requirement of having similar experience that aligns with the requirements of the solicitation.

We have no basis to object to this aspect of the solicitation. As noted, the RFQ seeks examples of relevant experience performing work that is similar to, and aligned with, the requirements of the performance work statement. Simply stated, there is nothing inherently unreasonable or improper in the agency's seeking to evaluate relevant experience performing the work actually contemplated by the RFQ. *Flight Support, Inc.*, B-417637.2, Oct. 3, 2019, 2019 CPD ¶ 375 at 3. Moreover, the fact that incumbent contractors may have an inherent advantage because they may have performed the solicited services at Fort McCoy in the past is unobjectionable, inasmuch as we have long recognized that incumbent contractors with good performance records can offer the government real advantages in terms of reduced performance risk. *Id.* We therefore deny this aspect of AES's protest.

RECOMMENDATION

We recommend that the agency revise the solicitation in a manner consistent with the discussion above and afford all firms an opportunity to submit revised quotations in response to the revised RFQ. We also recommend that the agency reimburse the protester for the costs associated with filing and pursuing its protest. AES should submit its certified claim for such costs, detailing the time spent and the costs incurred, directly to the agency within 60 days of receiving this decision.

The protest is sustained in part, and denied in part.

Thomas H. Armstrong
General Counsel