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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

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## Decision

**Matter of:** J2A<sup>2</sup> JV, LLC

**File:** B-401663.4

**Date:** April 19, 2010

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Antonio R. Franco, Esq., and Steven J. Koprince, Esq., PilieroMazza PLLC, for the protester.

William A. Shook, Esq., Shook Doran Koehl LLP, for Specialized Veterans, LLC, an intervenor.

Peter S. Kraemer, Esq., Department of Veterans Affairs, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that awardee does not meet solicitation's definitive responsibility criterion requiring at least 5 years experience as a general contractor is sustained where record demonstrates that general contractor does not have the requisite experience, and solicitation language may not reasonably be interpreted as permitting use of a subcontractor's experience to satisfy the requirement.

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### DECISION

J2A<sup>2</sup> JV, LLC, of Tampa, Florida, protests the award of a contract to Specialized Veterans, LLC, of West Point, Georgia, under request for proposals (RFP) No. VA-101-09-RP-0101, issued by the Department of Veterans Affairs for construction services at Sarasota National Cemetery in Sarasota, Florida. The protester contends that Specialized's proposal should have been rejected for failure to comply with certain solicitation requirements pertaining to experience.

We sustain the protest.

The RFP, which was set aside for service-disabled veteran-owned small businesses, sought a contractor to perform a range of construction services, including excavation, grading, landscaping, irrigation, mechanical and electrical work, and installation of pre-placed crypts. The solicitation provided for award to the offeror submitting the lowest priced technically acceptable proposal. To be determined technically acceptable overall, a proposal had to be technically acceptable under

each of three factors: construction management, past performance, and proposed schedule.

Thirteen offerors submitted proposals; the protester's proposal was tenth lowest in price. The contracting officer referred only the five lowest priced proposals for technical evaluation. The evaluation panel determined that the first-, second-, and fifth-lowest priced proposals were technically acceptable, but that the third- and fourth-lowest priced were unacceptable.

On July 10, 2009, the VA awarded a contract to the lowest priced offeror, Blue Cord Construction. The Small Business Administration (SBA) subsequently determined that Blue Cord was other than a small business; SBA also determined that the second-lowest priced offeror was other than a small business under a different solicitation with the same size standard, and thus the VA did not consider that firm eligible for the award here. Because neither the third- nor the fourth-lowest priced proposal had been determined technically acceptable, the contracting officer selected the fifth-lowest priced offeror, Specialized Veterans, for award. By letter dated January 5, 2010, the contracting officer notified the protester that the VA had awarded a contract to Specialized. J2A<sup>2</sup> protested to our Office on January 15.

#### INTERESTED PARTY

As a preliminary matter, the VA argues that J2A<sup>2</sup> is not an interested party to protest the award to Specialized because it would not be in line for award if its protest were to be sustained. The agency points out that there are [deleted] proposals with prices lower than the protester's that would be considered for award ahead of the protester's.

In order for a protest to be considered by our Office, a protester must be an interested party, which means that it must have a direct economic interest in the resolution of a protest issue. Bid Protest Regulations, 4 C.F.R. § 21.0 (2009); Cattlemen's Meat Co., B-296616, Aug. 30, 2005, 2005 CPD ¶ 167 at 2 n.1. A protester is an interested party to challenge the agency's evaluation of proposals where there is a reasonable possibility that the protester's proposal would be in line for award if the protest were to be sustained. Family Entertainment Servs., Inc., B-298047.3, Sept. 20, 2006, 2007 CPD ¶ 59 at 3. Here, while there are proposals lower in price than the protester's, the agency has not evaluated them for technical acceptability, nor has it considered whether the offerors qualify as service-disabled veteran-owned small businesses; thus, the existing record does not establish that there would be an offeror in line for award ahead of J2A<sup>2</sup> were its protest to be sustained. Absent such a showing, we consider the protester to have a reasonable possibility of award, and thus to qualify as an interested party here. See id.

## EXPERIENCE REQUIREMENTS

The protester contends that Specialized's proposal should have been rejected for failure to comply with certain solicitation requirements pertaining to experience. Specifically, with respect to the experience of the proposed general contractor and subcontractors, the RFP provided as follows:

The general contractor and subcontractors shall meet or exceed the following minimum requirements:

- The general contractor shall have at least 5 years experience as a general contractor and at least 5 years experience building golf courses or similar earthwork projects;
- Preferably, the landscape contractor and the irrigation contractor are one and the same and have at least 5 years experience on landscaping projects with at least 50 acres in size;
- The irrigation contractor has at least 5 years irrigation experience and has completed at least 5 projects that exceeded 50 irrigated acres each;
- The earthwork contractor has at least 5 years experience in road building;
- The paving contractor has at least 5 years experience in road paving.

RFP at 15.

In addition, the RFP included the following requirement, entitled Corporate Project Experience:

The Offeror shall demonstrate corporate experience with no less than three and no more than four projects completed within the last five years of contracts similar in size and scope to this project.

Id. at 16.

J2A<sup>2</sup> argues that Specialized became a legal entity on March 25, 2009 and thus cannot meet the RFP requirement for 5 years of experience as a general contractor and in building golf courses or similar earthwork projects. The protester also argues that Specialized failed to demonstrate that it had the required corporate experience with contracts similar in size and scope to this project. J2A<sup>2</sup> notes in this connection that the four projects that Specialized cited in its proposal had values ranging from \$90,000 to \$2.5 million, whereas the solicitation estimated the contract value here as \$20 million to \$50 million. The VA argues in response that Specialized proposed a team composed of itself and two subcontractors, Specialized Services, Inc. and Batson-Cook Company, to perform the work, and that the agency properly attributed

the experience of the two subcontractors to the prime contractor (Specialized itself) in its evaluation.

Solicitation requirements that a prospective contractor have a specified number of years of experience in a particular area and a designated number of projects completed within a specified time period are definitive responsibility criteria; that is, they are specific and objective standards designed to measure a prospective contractor's ability to perform the contract. D.H. Kim Enters., Inc., B-255124, Feb. 8, 1994, 94-1 CPD ¶ 86 at 2. Failure to meet a definitive responsibility criterion renders a firm nonresponsible. Id.

As a general rule, the experience of a technically qualified subcontractor may be used to satisfy definitive responsibility criteria relating to experience for a prospective prime contractor. Tutor-Saliba Corp., Perini Corp., Buckley & Co., Inc., and O & G Indus., Inc., A Joint Venture, B-255756, Mar. 29, 1994, 94-1 CPD ¶ 223 at 4-5. An exception to the rule exists, however, where the solicitation provides that only the prime contractor's experience will be considered. Id.

With respect to the Corporate Project Experience requirement, the RFP language, as set out above, did not limit the corporate experience that could be considered to the prime contractor's experience. Accordingly, we conclude that it was proper for the agency to consider the experience of the protester's proposed subcontractors in determining whether the protester had performed similar projects in the past 5 years. Since the record shows that the awardee's proposed subcontractors have the required experience, there is no basis to object to the agency's evaluation on this ground.

With respect to the other experience requirement at issue here--that the general contractor have 5 years of experience as a general contractor and in building golf courses or similar earthwork projects--we conclude that it was improper for the evaluators to consider the experience of the awardee's proposed subcontractors for purposes of determining compliance with the requirement. In our view, because the RFP uses the term "general contractor," the only reasonable interpretation of the provision is that the proposed general contractor itself--that is, Specialized, as opposed to the members of its team--must have the required experience. Our interpretation is supported by the language used in the rest of the RFP provision, which, in addition to the "general contractor" requirement, sets out experience requirements pertaining to the "landscape contractor," the "irrigation contractor," the "earthwork contractor," and the "paving contractor." We think that this indicates that the agency was deliberate in its choice of words when describing which entity was to have the various types of experience called for, and chose the descriptions with their specific meanings in mind. Further, given that the requirement calls for experience as a general contractor, it is reasonable to assume that the agency intended that the entity that will be performing the general contractor functions

under the contract--not subcontractors performing other functions--have experience as a general contractor.

Given our interpretation of the RFP, and because it is clear from the record that Specialized, which was started in 2009, does not have 5 years of experience as a general contractor or 5 years of experience building golf courses, the contracting officer could not reasonably conclude that it satisfies these definitive responsibility requirements. Accordingly, we sustain the protest on this ground.

Since Specialized has represented that it is a small business, we recommend that the matter be referred to the SBA for review under its certificate of competency (COC) procedures. See MEI, Inc., B-277235.2, Nov. 12, 1997, 97-2 CPD ¶ 138 at 5. If SBA does not issue a COC to Specialized, the agency should proceed with evaluation of the other offers and select the lowest priced technically acceptable proposal for award. We also recommend that J2A<sup>2</sup> be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days after receipt of this decision.

The protest is sustained.

Lynn H. Gibson  
Acting General Counsel