



## Decision

**Matter of:** Valor Construction Management, LLC

**File:** B-405365

**Date:** October 24, 2011

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Gordon M. Butler, Jr., for the protester.

Jennifer Payton, Esq., Department of the Army, Corps of Engineers, for the agency.  
Paul E. Jordan, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO,  
participated in the preparation of the decision.

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### DIGEST

Protest that solicitation's experience and past performance criteria are unduly restrictive is denied where the record shows that the provisions are reasonably related to the agency's needs.

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### DECISION

Valor Construction Management, LLC, of Pahokee, Florida, protests the terms of request for proposals (RFP) No. W912QR-11-R-0047, issued by the Department of the Army, Corps of Engineers for design and construction of an Army Reserve Center in West Palm Beach, Florida. Valor asserts that the solicitation (a service-disabled, veteran-owned small business (SDVOSB) set-aside) is unduly restrictive of competition.

We deny the protest.

The RFP called for construction of a training center/unit storage building, an organizational maintenance shop, and an unheated storage building for the specified Army Reserve Center. Proposals were to be evaluated under six factors, listed in descending order of importance: experience (prime contractor and design team); past performance (prime contractor and design team); technical proposal information; management plan; safety; and price.

With regard to the evaluation of experience and past performance for the prime contractor and design team, offerors were instructed to submit up to three projects completed within the past 5 years, which were similar in scope, size, and complexity to the solicited work. RFP §§ 5.1.1, 5.2.1. Each prime contractor's and design team's

experience and past performance was to be evaluated on the extent, quality, and degree of successful completion of the submitted projects. RFP §§ 5.1.2, 5.2.2. Under the heading “submission requirements” the RFP provided the following note:

For purposes of evaluating Prime Contractor Experience and Prime Contractor Past Performance, the Prime Contractor is defined as the contractor identified in Block 14 of the Standard Form 1442. If more than one contractor is listed in Block 14, then a signed joint venture (JV) agreement must be submitted with the proposal and the [JV] shall be registered as such in the Central Contractor Registration (CCR). . . . Projects performed by contractors other than the offeror, such as teaming partners or subcontractors, will not be evaluated as prime contractor experience or prime contractor past performance, unless those other contractors are part of a [JV] offeror as demonstrated by a signed [JV] agreement.

RFP § 5.1.1.

In responding to questions concerning teaming agreements at the pre-proposal conference, the agency explained that its market survey had shown adequate competition among SDVOSBs. RFP Question/Answer No. 96. With regard to the agency’s “rationale for not allowing evaluation of teaming arrangement[s],” the agency reiterated its plan to evaluate the experience and past performance of the prime contractor (listed in Block 14) with which it would have contractual privity. Id. No. 97. The agency explained that it would consider a team member’s experience and past performance if the member could “be considered the prime contractor,” i.e., if it had “a legal relationship [with the prime] such as a partnership or joint venture that itself can be considered the prime contractor.” Id. Prior to the closing date for receipt of proposals, Valor filed this protest challenging the terms of the solicitation.

Valor asserts that the RFP’s evaluation provisions are unreasonable and unduly restrict competition because they will not provide the protester, as prime contractor, credit for a proposed team member’s experience or past performance, unless that team member is in a legal relationship such as a joint venture with Valor. Valor objects to a requirement to form a legal relationship with the teaming member in order to benefit from the teaming member’s experience and past performance on the basis that, if the teaming member is a large business, an arrangement such as a joint venture could mean that Valor would be precluded from competing because it would no longer qualify as an SDVOSB.

The fact that an aspect of the RFP’s evaluation criteria may prevent a number of firms from obtaining positive experience and past performance ratings is not dispositive of whether the provision is unduly restrictive. In this regard, the determination of a contracting agency’s needs, including the selection of evaluation criteria, is primarily within the agency’s discretion and we will not object to the use of particular evaluation criteria so long as they reasonably relate to the agency’s

needs in choosing a contractor that will best serve the government's interests. SML Innovations, B-402667.2, Oct. 28, 2010, 2010 CPD ¶ 254 at 2. The fact that a requirement may be burdensome or even impossible for a particular firm to meet does not make it objectionable, if the requirement properly reflects the agency's needs. JBG/Naylor Station I, LLC, B-402807.2, Aug. 16, 2010, 2010 CPD ¶ 194 at 4. Further, a protester's mere disagreement with an agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. Dynamic Access Sys., B-295356, Feb. 8, 2005, 2005 CPD ¶ 34 at 4.

Here, the agency was not prohibiting teaming agreements, but merely restricting its consideration of any team member's experience and past performance to only those firms with which it has contractual privity for purposes of performing the contract. RFP Question/Answer No. 97. This restriction is unobjectionable. In this regard, the agency explains that its design-build project has an estimated price range between \$10 million and \$25 million and that this large, complex undertaking requires experience on the part of the contractor who will be in privity with the government. Agency Report at 7. The agency intends to lessen its risk of inadequate performance by requiring that any team member, on whose experience the agency relies, qualifies as the "prime contractor" so that it will have contractual privity with that entity. Such privity is not available to the government for team members that qualify only as subcontractors. In our view, the agency's concern with limiting the risk of unsuccessful performance by ensuring that the source selection is based on only the experience of firms that will be in privity with the government, and thus obligated to perform in accordance with the specifications, reasonably relates to the agency's needs in choosing a contractor that will best serve the government's interests with respect to this particular, complex project.

Valor asserts that the evaluation restrictions also violate government policy to recognize team arrangements. Federal Acquisition Regulation (FAR) § 9.603. This argument is without merit. While, by its terms, FAR § 9.603 requires the government to "recognize the integrity and validity of contractor team arrangements," it does not restrict how an agency chooses to evaluate team members' past performance and experience. Again, the RFP specifically allows for teaming arrangements. An agency's reasonable determination to restrict its consideration of experience and past performance only to team members with which it will have contractual privity is not prohibited by FAR § 9.603.

Valor's further argument that the agency otherwise is required to take into account subcontractors' past performance information is also without merit. In this regard, FAR § 15.305(a)(2)(iii) provides that an agency "should" take into account a subcontractor's past performance information when it is relevant to the acquisition. Here, the agency has determined that, given the complexity of the project, the past performance of team members which will lack contractual privity with the government does not lessen the risk of inadequate performance (and thus is not relevant) in the same way as the past performance of team members with which the

agency will have a contractual relationship. In any case, while an agency may consider a subcontractor's information, it is not required to do so. See MW-All Star Joint Venture, B-291170.4, Aug. 4, 2003, 2004 CPD ¶ 98 at 4. As discussed above, the agency has a legitimate interest in assessing performance risk by considering only the experience and past performance of entities with which it will have contractual privity. See Olympus Building Servs., Inc., B-282887, Aug. 31, 1999, 99-2 CPD ¶ 49 at 3-4 (agency may, but not required to, consider experience of proposed key personnel who, as practical matter, may not stay for contract's duration). Accordingly, there is no basis to find the agency's actions are inconsistent with FAR § 15.305(a)(2)(iii).

The protest is denied.

Lynn H. Gibson  
General Counsel