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Decision

Matter of: Emax Financial & Real Estate Advisory Services, LLC

File: B-408260

Date: July 25, 2013

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DIGEST

1. Protest that solicitation's evaluation factors and relative weights are unduly restrictive of competition is denied, where the record supports the agency's position that its evaluation factors are reasonably necessary to meet the agency's needs.
 2. Small business concern's challenge to the agency's determination to set the procurement aside for small businesses is denied, where the agency's decision was reasonably based on responses to a sources sought notice.
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DECISION

Emax Financial & Real Estate Advisory Services, LLC, of New York, New York, protests the terms of request for proposals (RFP) No. N62470-13-R-6001 issued by the Department of the Navy, Naval Facilities Engineering Command, for professional services to support the Navy's Public Private Venture (PPV) Program. Emax contends that the solicitation improperly restricts competition, and should not have been set aside for small business concerns.

We deny the protest.

BACKGROUND

In 1996, Congress enacted legislation authorizing the Military Housing Privatization Initiative (MHPI), with the goal of improving Department of Defense (DOD) military family housing by using an approach considered to be more economical and quicker than the traditional military construction processes. This initiative allows

private sector financing, ownership, and operation and maintenance of military housing. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106 § 2801 et seq., 110 Stat. 186 et seq., codified at 10 U.S.C. §§ 2871-85 (2006), as amended. The PPV program is the Navy's housing program under this initiative.

Before issuing the RFP, the Navy posted a sources sought notice on the Federal Business Opportunities (FedBizOpps) web site to determine whether the solicitation should be set aside for small business concerns. Agency Report (AR), Tab 2, Sources Sought Notice, Jan. 9, 2013. The notice described the services the Navy would procure, such as project development and execution, portfolio management advice and support consistent with the Navy's privatization approach, and business, economic, and financial analysis concerning energy projects. The notice invited small business concerns to submit statements of capabilities that described in detail the firm's capability of providing contractor support services to the program. Id. The Navy received capability statements from seven small businesses, including Emax. The Navy determined that two small businesses, Emax and Basile Baumann Prost Cole (the incumbent), were clearly capable of performing the work, while two other small businesses were likely to be capable of performing the work. See AR, Tab 15, 1st Review of Capability Statements; Tab 16, 2nd Review of Capability Statements.

The RFP, which was issued as a combined synopsis/solicitation for commercial items under Federal Acquisition Regulation (FAR) Part 12, was set aside for small business concerns. The solicitation provides for the award of an indefinite-delivery/indefinite-quantity contract for professional services to support the Navy's PPV program for a base year and two option years. These services include general program development and implementation support, concept and feasibility assessments, negotiations with third parties, and portfolio and asset management. RFP, Performance Work Statement (PWS), § C.3 Privatization Support Scope and Objectives.

The RFP states that the agency's selection decision will be based on a tradeoff between price, past performance, and the following technical evaluation factors: corporate experience, understanding of the Navy's MHPI program, and key personnel qualifications. Offerors were informed that the three technical factors are of equal importance to each other and, when combined, are of equal importance to past performance. The non-price factors, when combined, are of equal importance to price. RFP at 28.

With respect to the corporate experience factor, the solicitation requires offerors to provide up to five project examples in which the offeror performed services similar to those required under the RFP in support of public-private venture projects that collectively demonstrate relevant experience. The RFP provides that this experience should be in large scale real estate portfolio oversight and monitoring

over a wide geographic area; complex real estate/financial project execution experience; large scale public-private venture projects for federal, state, or local agencies; financial and business consulting services; comprehensive research and analysis of energy, utility, real estate and financial issues; and the military environment, culture, and protocol. RFP amend. 1, at 2-3. Offerors were advised that:

Offerors may be rated more favorably by demonstrating the following:

- Relevant project experience for [Navy] Public Private Venture;
- Depth of experience in relevant projects completed by the Prime as opposed to subcontractors/team members.

RFP at 29.

With respect to the understanding the Navy's MHPI program factor, the RFP requires offerors to "provide a written narrative demonstrating an understanding and knowledge of the [Navy's] Military Housing Privatization Initiative (MHPI) program and the ability to advise the Government in a variety of business and financial matters related to the long-term oversight and monitoring of a large-scale, complex real estate portfolio in a manner consistent with the [Navy] approach to PPV housing projects." Id. The RFP states that the Navy would evaluate the offerors' demonstrated understanding of the Navy's MHPI approach, limited liability company business structure used in existing housing PPV projects, complex financial structures, effective asset management, development and application of metrics and methodology for monitoring the Navy's housing PPV portfolio performance, and understanding of the MHPI legislative authority. Id. at 30.

With respect to the past performance factor, the RFP requires offerors to, among other things, submit a completed contractor performance assessment retrieval system (CPARS) evaluation or a past performance questionnaire for each project included under the corporate experience factor. Id. at 31. Offerors were informed that the Navy would consider the currency and relevance of the information, the source and context of the information, and general trends in the offeror's performance. Id. at 32.

Prior to the closing time for receipt of proposals, Emax protested to our Office.¹

¹ Emax did not submit a proposal in response to the RFP.

DISCUSSION

Emax contends that the RFP's evaluation scheme is unduly restrictive of competition. Specifically, the protester complains that the corporate experience, understanding of the Navy's MHPI program, and past performance factors unfairly favor the incumbent contractor. Additionally, Emax contends that the RFP should not be set aside for small businesses. As explained below, we find that the solicitation is not unduly restrictive of competition. We also find reasonable the Navy's decision to set the procurement aside for small businesses.

Corporate Experience and Understanding of the Navy's MHPI Program Factors

Emax argues that the RFP's focus on the Navy's MHPI program under the corporate experience factor and under the understanding of the Navy's MHPI program factor unfairly favors the incumbent. Protest at 9. Emax contends that the solicitation should provide that experience with any DOD MHPI program would be of equal weight to specific experience with the Navy's MHPI program under the corporate experience factor. Similarly, Emax contends that the RFP should only require offerors to demonstrate their understanding of the DOD's MHPI program rather than the Navy's specific program. Id.; Comments at 9. Emax argues that the Navy's program is not significantly different from other housing privatization programs run by the other military services. Protest at 10; Comments at 9.

The Competition in Contracting Act of 1984 (CICA) requires that solicitations generally permit full and open competition and contain restrictive provisions only to the extent necessary to satisfy the needs of the agency. 10 U.S.C. § 2305(a)(1)(B)(ii) (2006). Where a protester challenges a specification 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 will examine the adequacy of the agency's justification for a restrictive solicitation provision 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 mere disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. Exec Plaza, LLC, B-400107, B-400107.2, Aug. 1, 2008, 2008 CPD ¶ 143 at 5.

The Navy points out that the RFP does not preclude consideration of offerors' experience with other housing privatization programs, but simply informs offerors that the Navy will value experience with its own program more favorably. AR at 7. In this regard, the Navy states that its PPV program is a large, complex program with features that are significantly different from that of other DOD MHPI programs. For example, the Navy notes that its PPV program is executed by two separate

commands, the Naval Facilities Engineering Command, which has primary responsibility for executing project business agreements, and Commander Naval Installations Command, which has responsibility for overall policy and requirements definition. AR at 7. The Navy invests appropriated funds and takes a membership interest in developers carrying out its privatization projects, and enters into operating agreements that describe the governance, terms, and structure of the developer. In comparison, the Air Force makes direct loans to developers without an ownership interest. The agency also explains that the Navy requires a PPV offeror to propose project scope, design, management, and financial structure up front, whereas the Air Force and Army work with the selected firm to develop project details. AR at 10. The Navy also uses fewer consultants because of the services provided by the Naval Facilities Engineering Command.² The Navy contends that a contractor's familiarity with the Navy's program and command structure will reduce the contractor's learning curve and require less initial government oversight, thus enabling the contractor to perform more efficiently and to provide better support services to the Navy. AR at 7.

The record does not support Emax's objection that the corporate experience and understanding of the Navy's MHPI program factors are unduly restrictive of competition. First, we agree with the Navy that agencies are not prohibited from assigning a greater value to program-specific experience. Indeed, we have long recognized that, even under generally-worded experience criteria, an agency properly may evaluate the extent to which offerors have experience directly related to the work required by the RFP. See ITT Corp., Sys. Div., B-310102.6 et al., Dec. 4, 2009, 2010 CPD ¶ 12 at 7 (more favorable consideration of incumbent's experience not improper); Systems Integration & Dev., Inc., B-271050, June 7, 1996, 96-1 CPD ¶ 273 at 4 (higher rating for experience with specific computer system unobjectionable).

Next, the Navy has, in our view, adequately explained the importance of the differences between its housing privatization program and other DOD programs such that it is not unreasonable for the agency to assign greater value to specific experience with its program or to require offerors to demonstrate an understanding of the Navy's program as opposed to other DOD programs. Moreover, as noted by the Navy, offerors with experience with other housing privatization programs are not

² The Navy cites to two GAO reports, MILITARY HOUSING PRIVATIZATION: DOD Faces New Challenges Due to Significant Growth at Some Installations and Recent Turmoil in the Financial Markets, GAO-09-352, May 15, 2009; MILITARY HOUSING: Better Reporting Needed on the Status of the Privatization Program and the Costs of Its Consultants, GAO-04-111, Oct. 9, 2003, as explaining some of the differences between the services' housing privatization programs. AR at 7 n.1. For example, the military services differ in the costs that are included in reporting privatization support and consultant costs to Congress. See GAO-04-111 at 10.

excluded from competing or precluded from being rated favorably. AR at 7. Although Emax contends that the differences between the Navy's program and other DOD program are minimal, Comments at 7, the protester has not explained any similarities in the programs.³

Emax also complains that the RFP informed offerors that a prime contractor's experience may be more favorably rated than that of subcontractors under the corporate experience factor. Emax argues that only the incumbent contractor has experience as a prime contractor with the Navy's PPV program. Protest at 9. Emax contends that the experience of its intended subcontractor, who is experienced with the Navy's Enhanced Use Lease program, should be considered to be of equal value to that of the prime contractor.⁴ Comments at 5.

The Navy responds that it places more value on the experience of the proposed prime contractor because the agency will be in privity of contract with only the prime contractor and that placing greater emphasis on the prime contractor's own experience limits performance risk for the project. AR at 8.

While agencies are permitted to consider the experience of a subcontractor in the evaluation of corporate experience, the significance of, and the weight to be assigned to, a subcontractor's corporate experience is a matter of contracting agency discretion. See Loral Sys. Co., B-270755, Apr. 17, 1996, 96-1 CPD ¶ 241 at 5. An 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. Valor Constr. Mgmt., LLC, B-405365, Oct. 24, 2011, 2011 CPD ¶ 226 at 4. In our view, the agency's concern with limiting the risk of unsuccessful performance by favoring the experience of firms that will be in privity with the government, and thus obligated to perform in accordance with the contract requirements, reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests with respect to a complex project. See id. at 3 (agency's decision not to consider team member's experience and past performance not unduly restrictive of competition).

³ Emax also argues that under the understanding of the Navy's MHPI program evaluation factor, an offeror must have experience with the program to be able to demonstrate knowledge. Comments at 9. We disagree. The RFP requests offerors to demonstrate knowledge of the program, which, as the Navy explained, can be obtained through research using publicly available information. Moreover, the Navy invited prospective offerors to submit questions.

⁴ Emax states that it would have proposed that this subcontractor perform 49 percent of the work. Comments at 5.

In short, Emax has not shown to be unreasonable the agency's explanation for the RFP's emphasis on specific corporate experience and the requirement that offerors demonstrate understanding of the Navy's MHPI program.⁵ Accordingly, we find that these factors are not unduly restrictive of competition.

Past Performance Factor

Emax also complains that the RFP's weighting of the past performance factor--past performance is equal to the other non-price evaluation factors combined--is unduly restrictive of competition. Emax argues that this also unfairly favors the incumbent contractor, which, Emax contends, is the only firm that can receive the highest evaluation rating under the past performance factor. Protest at 16; Comments at 12-13.

⁵ Emax also generally argues that the RFP failed to provide sufficient information concerning the Navy's information technology resources and PPV portfolio to allow offerors to adequately respond under the understanding of the Navy's MHPI program factor. In this regard, Emax suggests that the incumbent contractor may have a competitive advantage or an unequal access to information organizational conflict of interest. Protest at 11; Comments at 10. The Navy contends that the RFP and other publically available information provide sufficient information for offerors to fairly compete. AR at 11. Emax disagrees but does not identify any hard facts or other specific information that it contends is missing and should be provided. Emax also states that this "non-public information is not material or rationally related to a contractor's capability to perform the Statement of Work requirements." Protest at 11; Comments at 10.

Apart from its general disagreement with the Navy, Emax's argument appears to be no more than a complaint that Basile Baumann may have some advantage as the incumbent contractor. However, it is well settled that an offeror may possess unique information, advantages, and capabilities due to its prior experience under a government contract, including performance as the incumbent contractor. CACI, Inc.--Fed., B-403064.2, Jan. 28, 2011, 2011 CPD ¶ 31 at 10; MASAI Techs. Corp., B-298880.3, B-298880.4, Sept. 10, 2007, 2007 CPD ¶ 179 at 8. Our Office has held that the government is not required to equalize competition to compensate for such an advantage, unless there is evidence of preferential treatment or other improper action. Council for Adult & Experiential Learning, B-299798.2, Aug. 28, 2007, 2007 CPD ¶ 151 at 6. The existence of an advantage, in and of itself, does not constitute preferential treatment by the agency, nor is such a normally occurring advantage necessarily unfair. See, e.g., Onsite Health, Inc., B-408032, B-408032.2, May 30, 2013, 2013 CPD ¶ 138 at 9 (incumbent's process approved under prior contract); Northrop Grumman Tech. Servs., Inc., B-406523, June 22, 2012, 2012 CPD ¶ 197 at 17-18 (advantage of original equipment manufacturer).

The Navy responds that the RFP's relative weighting of past performance was not done to improperly benefit the incumbent contractor. The Navy explains that its goal is to award to the most qualified contractor, and that emphasizing past performance is a reasonable methodology to ensure successful performance. AR at 14. In this regard, Navy notes that FAR § 12.206 directs agencies to include past performance as an important element of every evaluation in commercial acquisitions, and that the Naval Facilities Acquisition Supplement (NFAS) requires that past performance be equal to all technical factors combined. See NFAS § 15.304 ("In all [Source Selection Plans], Technical factors shall be equal to Past Performance").

Emax's complaint is without merit. The choice of evaluation factors that apply to an acquisition, and their relative importance, are within the broad discretion of the agency. American Med. Info. Servs., B-288627, Nov. 7, 2001, 2001 CPD ¶ 188 at 2. Here, the Navy has explained the importance of past performance to successful performance and indicated that agency regulations require such an emphasis on past performance. The fact that it may be difficult for the protester to compete under such an evaluation scheme does not by itself render the scheme improper. Id. To the extent that the basis for the protester's complaint is that the incumbent has the most relevant past performance, we have recognized that incumbent contractors with good performance records can offer real advantages to the government in terms of lessened performance risk. Philadelphia Produce Market Wholesalers, LLC, B-298751.5, May 1, 2007, 2007 CPD ¶ 87 at 3.

Small Business Set-Aside

Emax--a small business--also challenges the Navy's decision to set this procurement aside for small business concerns. Emax states that, had it known how the evaluation factors would be structured and weighted, it would not have responded to the agency's sources sought notice. Emax contends that setting aside the procurement for small businesses interferes with its ability to structure a team that would maximize its evaluation scores under these circumstances. Protest at 17.

Procuring agencies are generally required to set aside any procurement with an anticipated dollar value of more than \$150,000, such as the one here, for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at a fair market price. See FAR § 19.502-2(b). Because a decision whether to set aside a procurement is a matter of business judgment within the contracting officer's discretion, our review generally is limited to ascertaining whether that official abused his or her discretion. Admiral Towing & Barge Co., B-291849, B-291849.2, Mar. 6, 2003, 2003 CPD ¶ 164 at 3-4. We will not question a small business set-aside determination where the record shows that the evidence before the contracting officer was adequate to support the reasonableness of the

conclusion that small business competition reasonably could be expected. National Linen Serv., B-285458, Aug. 22, 2000, 2000 CPD ¶ 138 at 2.

Here, we find the Navy reasonably concluded that at least two small businesses were capable of performing satisfactorily. The Navy issued the sources sought notice and reviewed the capability statements it received in response. On this basis the Navy concluded that two respondents--Emax and the incumbent--were clearly capable of performing the work, and that two others likely were capable of performing. Regardless of Emax's current position, the Navy reasonably based its set-aside decision on the capability statements it received in response to its sources sought notice.⁶

Moreover, the Navy received quotations from [Deleted] apparently responsible small businesses in response to the RFP. See York Int'l Corp., B-244748, Sept. 30, 1991, 91-2 CPD ¶ 282 at 7 (receipt of offers from small businesses supports an agency's determination to set aside a procurement for small businesses). Although Emax disagrees with the agency's decision to set aside this procurement for small businesses and contends that some of the small business offerors are not capable of doing the work, the protester does not show that the Navy violated any law or regulation in setting the procurement aside for small businesses.

The protest is denied.

Susan A. Poling
General Counsel

⁶ We note that Emax is not arguing that the PWS differs from the information provided under the sources sought notice, but rather, Emax is taking exception to the RFP's evaluation scheme. In this regard, Emax fails to state a valid basis for protest. The set-aside decision entails consideration of whether small businesses can be expected to perform satisfactorily, not the choice of evaluation factors. EMMES Corp., B-402245, B-402245.2, Feb. 17, 2010, 2010 CPD ¶ 53 at 6.