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Decision

Matter of: HK Consulting, Inc.

File: B-408443

Date: September 18, 2013

Devon E. Hewitt, Esq., Protorae Law PLLC, for the protester.

W. Michael Rose, Esq., and Capt. Daniel S. Lee, Department of the Air Force, for the agency.

Pedro E. Briones, Esq., Glenn G. Wolcott, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitation unduly restricts competition by providing for non-consideration of proposed subcontractor and key personnel past performance is denied where the provision is consistent with applicable Federal Acquisition Regulation provisions and is reasonably related to the agency's need.

DECISION

HK Consulting, Inc., (HK) of South Jordan, Utah, protests the terms of request for proposals (RFP) No. FA5215-13-R-7005, issued by the Department of the Air Force for services to support the United States Pacific Command's military exercises. Specifically, HK argues that the solicitation's past performance criteria are unreasonable and unduly restrictive of competition.

We deny the protest.

The RFP contemplates the award of a fixed-priced contract, to a section 8(a) small business contractor, on a best value basis considering factors of technical acceptability, price, and performance confidence assessment. RFP at 20-21, 49; amend. 3, at 2. The solicitation, which is being issued under Federal Acquisition Regulation (FAR) part 15, provides for an initial pass/fail technical acceptability evaluation, followed by evaluation of technically acceptable proposals under the price and performance confidence factors, which are approximately equal in importance. See RFP amend. 2, at 6; amend. 3, at 2-3.

As relevant here, section M of the RFP states that, in assessing a principal offeror's performance confidence, the agency will not consider the experience and past performance of proposed subcontractors and key personnel. RFP amend. 3, § M-3(B)(3)(1), at 4; see also amend. 2, § L-8(c)(3)(2), at 9.

HK protests the criterion, arguing that it unduly restricts competition and is not reasonably related to the Air Force's needs. Protest at 4. The protester points out in this regard that a prior version of the RFP provided for consideration of key personnel and subcontractor past performance and, in HK's view, the agency has not adequately justified the revision. See Comments at 5. HK asserts that the restriction prevents all but the incumbent from being assessed the highest performance confidence rating (substantial confidence), which, according to the protester, an offeror must receive to be considered for contract award under the RFP's adjectival rating scheme and basis for award. Id. at 3. Without reliance on the past performance of proposed subcontractors and key personnel, the protester claims, many potential offerors may not submit a proposal, because they may not receive a high enough performance confidence rating to be competitive for award. See id.

Where a protester challenges a solicitation provision as unduly restrictive of competition, the procuring agency must establish that the provision is reasonably necessary to meet the agency's needs. See Total Health Res., B-403209, Oct. 4, 2010, 2010 CPD ¶ 226 at 3. We 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. 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 agency maintains that limiting the performance confidence assessment to the principal offeror's past performance is necessary to ensure that the evaluation focuses on those with whom the Air Force will have privity of contract, and prevents ratings from being inflated by the past performance of key personnel who have no obligation to perform under the contract. AR at 2. The Air Force explains that it cancelled the earlier RFP because the agency had not properly assessed performance confidence ratings based, in part, on offerors' proposed key personnel.¹ Id. at 6-7. According to the agency, the revised past performance

¹ Under the earlier version of the RFP, the agency had assessed the highest performance confidence rating to a proposal submitted by HK, and selected it for contract award. Agency Report (AR) at 4. Two protests of the award were dismissed by our Office as academic, because the Air Force advised that it intended
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criteria, as well as the newly added technical evaluation factor, address these concerns.² Supp. AR at 2.

We find the RFP's past performance requirements unobjectionable and see no reasonable way that they can be said to restrict competition. First, 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. Secondly, as the protester concedes, Comments at 3, there is no legal requirement that an agency attribute employee experience to the contractor in evaluating its experience and past performance. See Olympus Bldg. Servs., Inc., B-282887, Aug. 31, 1999, 99-2 CPD ¶ 49 at 4. Finally, consistent with FAR part 15, the solicitation here provides that offerors lacking recent or relevant past performance history will not be evaluated favorably or unfavorably in that regard, but will be assessed a neutral rating. RFP amend. 3, § M-3(B)(3)(1), at 4; FAR § 15.305(a)(2)(iv). In other words, the RFP does not preclude HK from submitting a proposal and, contrary to the protester's suggestion, the RFP does not preclude award to an offeror with a neutral performance confidence rating.³ Futurecom, Inc., B-400730.2, Feb. 23, 2009, 2009 CPD ¶ 42 at 2-3.

While the protester would apparently prefer to receive the highest possible performance confidence assessment rating based on the quality of its proposed key personnel's past performance, as opposed to a neutral rating based (ostensibly) on a lack of relevant corporate past performance, the fact remains that the only impact of the contested provision is the difference between those two ratings.⁴ Olympus

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to take corrective action by cancelling the award and resoliciting the requirement. Visual Awareness Techs. & Consulting, Inc.; MEC Dev., LLC, B-407755, B-407755.2, Nov. 26, 2012.

² We dismissed as untimely HK's challenge to the RFP's technical evaluation scheme. HK Consulting, Inc., B-408443.2, Aug. 2, 2013; see Supp. Protest at 3-4.

³ Rather, the RFP states that the agency "reserves the right to award a contract to other than the lowest priced offer," if the lowest priced offeror is judged to have a performance confidence assessment of satisfactory confidence or lower, in which case the agency will make an integrated assessment, best value award decision. RFP amend. 3, § M-3(B)(3)(3).

⁴ As we have said in countless decisions, evaluation ratings, be they numerical, adjectival, or color, are merely guides for intelligent decision making in the procurement process, Burchick Constr. Co., B-400342.3, April 20, 2009, 2009 CPD ¶ 102 at 4-5, and the essence of an agency's evaluation is reflected in the evaluation record itself, not the adjectival ratings. Stateside Assocs., Inc., B-400670.2, B-400670.3, May 28, 2009, 2009 CPD ¶ 120 at 8; see Wackenhut Servs., Inc.

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Bldg., *supra*, at 3; Valor Constr., *supra*, at 2 (that RFP's evaluation criteria may prevent a number of firms from obtaining positive experience and past performance ratings not dispositive of whether provision is unduly restrictive).⁵

Accordingly, there is no basis to find the solicitation's past performance evaluation criteria unreasonable or inconsistent with applicable procurement laws and regulations, and the protester's disagreement with the agency's judgment concerning its needs and how to accommodate them does not provide a basis to sustain the protest. See Exec Plaza, LLC, B-400107, B-400107.2, Aug. 1, 2008, 2008 CPD ¶ 143 at 5.

The protest is denied.

Susan A. Poling
General Counsel

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B-400240, B-400240.2, Sept. 10, 2008, 2008 CPD ¶ 184 at 7 (rejecting protester's attempt to engage in a mathematical or mechanical comparison of the number of significant strengths in protester's and awardee's proposals).

⁵ HK's protest is largely premature insofar as it speculates how the agency may rate HK's past performance and whom it may select for award under the terms of the new solicitation. See, e.g., Paramount Group, Inc., B-298082, June 15, 2006, 2006 CPD ¶ 98 at 3.