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United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Aventura Technologies, Inc.

File: B-410492.3

Date: October 8, 2015

Bryan Ha, Esq., Law Offices of Bryan Ha, for the protester.
Jason R. Collins, Esq., and Dean Daisy, Esq., Frias Daisy Collins Attorneys at Law, for Orion Management, LLC, the intervenor.
Jonathan D. Tepper, Esq., Lori R. Larson, Esq., and Holly L. Styles, Esq., Department of the Treasury, Internal Revenue Service, for the agency.
Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency misevaluated the successful vendor's quotation as acceptable under a corporate experience evaluation factor is denied where the record shows that the evaluation was reasonable and consistent with the solicitation evaluation criteria.

2. Protest that agency treated vendors unequally by determining that the successful vendor's Federal Supply Schedule contract permitted the agency's services-only order, but that the protester's Schedule contract did not, is denied where the record shows that the agency determination was reasonably based on differences in the terms of the Schedule contracts.

DECISION

Aventura Technologies, Inc., of Hauppauge, New York, a small business, protests the issuance of a Federal Supply Schedule (FSS) order to Orion Management, LLC, of Springfield, Virginia, by the Department of the Treasury, Internal Revenue Service (IRS) under request for quotations (RFQ) No. BEP-RFQ-14-0478 (also identified as e-Buy RFQ No. RFQ889613) for security system maintenance services for the Bureau of Engraving and Printing (BEP). Aventura argues that the IRS misevaluated Orion's quotation.

We deny the protest in part and dismiss it in part.

BACKGROUND

The RFQ, issued on July 2, 2014, sought quotations from small businesses holding FSS contracts under Schedule No. 84 (the Total Solutions for Law Enforcement, Security, Facilities Management, Fire, Rescue, Clothing, Marine Craft and Emergency/Disaster Response schedule) to provide maintenance and support services for the BEP physical security systems and equipment. The RFQ contemplated the issuance of an FSS order for a 1-year base period, four 1-year options, and a 6-month option under an extension-of-services clause. RFQ at 4-11.

The RFQ provided that the order would be issued to the firm that submitted the lowest-priced technically acceptable quotation. Technical acceptability was to be assessed under four evaluation factors, each of which would be rated pass or fail: technical capability/approach, management approach/personnel qualifications, corporate experience, and past performance. RFQ at 16-17. The technical and management factors are not relevant to the resolution of the protest.

The corporate experience factor required each vendor to submit two or three project profiles that demonstrated relevant experience of the vendor or a subcontractor within the past 5 years. Id. Vendors were instructed to select references to "identify contracts that describe security services," to demonstrate relevant experience, and to show "technical and management expertise which will exemplify their experience." Id. Under the past performance factor, the RFQ requested relevant corporate past performance within the past 3 years. For vendors without a record of relevant past performance, the RFQ provided that the past performance would be considered unknown, and would be rated "pass" for that factor. Id.

The performance work statement (PWS) included a statement of "REQUIRED STAFFING AND CERTIFICATIONS." PWS at 3. With respect to certifications, the PWS stated that, "[w]ithin 90 calendar days from the date of contract award," the vendor was required to have specific personnel receive manufacturer training and/or hold certifications for five systems, of which two systems were identified as Aventura equipment. Id. at 4. The RFQ also designated three roles as key personnel, and identified the major responsibilities and minimum qualifications for each: a project manager, a senior drafter, and a supervisory senior electronic technician. Id. at 8-10.

The IRS received quotations from five vendors, three of which the agency evaluated as acceptable. On September 15, the IRS issued the FSS order to the third vendor, but later terminated that order when the vendor informed the IRS that the firm was not a small business, which made it ineligible for award under the small business set-aside provisions of the RFQ. Contracting Officer's Statement at 2.

On December 15, the IRS issued the order to Aventura. Orion protested that action to our Office, arguing that the order exceeded the scope of Aventura's FSS contract, among other things. At this Office's request, the General Services Administration (GSA) submitted its view, which was that Aventura's FSS contract did not include eligible labor categories for all key personnel positions. As a result, the IRS decided to take corrective action by terminating the order to Aventura. Id. On July 23, 2015, the IRS issued an order[1] to Orion as the only remaining vendor to have submitted a technically acceptable quotation. Aventura then filed this protest.[2]

ANALYSIS

Aventura argues that the IRS should have rejected Orion's quotation because the firm allegedly lacks required certifications, lacks required experience and past performance, and Orion's FSS contract lacks the same services that had caused the IRS to terminate the earlier order to Aventura. Protest at 4. As explained below, we deny Aventura's challenges.

Corporate Experience Evaluation

Aventura argues that Orion's quotation should have been found unacceptable based on an alleged lack of relevant experience. Protest at 4. More specifically, Aventura argues that the corporate experience identified in Orion's proposal is not relevant, and therefore, the IRS should have assigned a rating of "fail" under that factor to Orion's quotation. Protester's Comments at 8-9. According to Aventura, the RFQ required a vendor to show "experience related specifically to the equipment . . . to be maintained and supported under the contract at issue, which includes Aventura equipment." Protester's Comments at 9. Aventura argues that rating Orion's quotation "pass" under the corporate experience factor was unreasonable because Orion's quotation did not show experience with each of the specific systems for which services will be required under the order here. Id.

The IRS contends that it evaluated Orion's corporate experience as acceptable, and reasonably assigned a "pass" rating under the corporate experience factor. AR at 7-8. Orion's quotation described the firm's experience generally, including its ability to maintain and improve security systems that it had not installed, and identified two specific contracts for maintenance of closed circuit television systems: one for on-board security cameras on transit buses, and one for security cameras in a professional baseball stadium. AR, Tab D.2, Orion Technical Proposal, at 22-24.

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[1] The contracting officer notes that the order was issued for a 1-month base period and three annual options. Contracting Officer's Statement at 1.

[2] Although the IRS cancelled the order that was issued to Aventura, we regard the firm as an interested party to protest the issuance of the order to Orion because there is no other firm in line for award.

The IRS argues that the evaluators reviewed Orion's experience[3] and reasonably concluded that it was sufficiently similar in size, scope, and complexity to the BEP requirement. AR, Tab K.2, Final Consensus Evaluation Report, at 4 (Offeror A Corporate Experience Evaluation). In the final source selection decision document, the contracting officer and the source selection authority further justified the evaluation of Orion's corporate experience, and identified six types of systems with which Orion had demonstrated experience providing technical services which they considered relevant to the PWS requirements. AR, Tab H.2, Final Source Selection Decision Document, at 9. As a result, the IRS argues, the evaluation of Orion under the corporate experience factor is supported by the contemporaneous record, and reflects a reasonable exercise of the agency's evaluation judgment. AR at 7-8.

Our Office examines an agency's evaluation of experience to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and applicable statutes and regulations. RORE, Inc., B-410759, Feb. 6, 2015, 2015 CPD ¶ 94 at 5. Here, the RFQ provided for the evaluation of each vendor's experience as a distinct evaluation factor under a somewhat broader scope than the past performance factor. Experience references were required to be within the past 5 years for "security services" of a "similar size, scope, magnitude, and complexity as outline[d] in the PWS." RFQ at 17. In contrast to Aventura's general challenge, the contemporaneous record demonstrates that the IRS reviewed Orion's corporate experience references, identified similarities between that experience and the RFQ requirements, and concluded that Orion's experience was sufficiently similar to justify a "pass" rating under the corporate experience factor.

In evaluating a vendor's experience, an agency has broad discretion to determine whether a particular contract is relevant. RORE, Inc., supra. The record here shows that Orion described specific experience involving the maintenance of security systems in large, complex settings. Although Aventura argues that Orion's experience does not include every system identified in the PWS, Aventura has not shown that the RFQ required such brand-specific experience in order for a vendor to be rated acceptable under the corporate experience factor. Therefore the RFQ required the IRS evaluators to exercise reasonable judgment, as they did. In short, Aventura's arguments do not show that the IRS's evaluation judgment was unreasonable in finding Orion's corporate experience to be sufficiently relevant to justify a "pass" rating, so we deny this ground of protest.

Unequal Treatment of FSS Labor Categories

Aventura also argues that Orion's quotation had the same defect as that which caused the IRS to terminate Aventura's order under this RFQ. Specifically,

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[3] Orion provided additional information about the scope of the transit bus camera maintenance contract in the past performance section of its quotation. Id. at 26-27.

Aventura states that Orion's FSS contract "lack[ed] the same identical labor categories" as had been missing from Aventura's FSS contract. Protest at 4-5. In particular, Aventura argues that Orion's FSS contract does not include the "senior drafter" and "supervisory senior electronic technician" labor categories that the RFQ required. Protest at 4.

The IRS responds that the situations of Aventura and Orion are not comparable, and their differences justify the different treatment of the vendors. First, the IRS argues, Aventura inaccurately characterizes the reason for the cancellation of its earlier order. The reason for the cancellation was that the terms of Aventura's FSS contract allowed the services at issue to be ordered under special item number (SIN) 426-4S[4] only where those services were ancillary to a purchase of supplies. The order here did not involve the purchase of supplies, so the IRS concluded that the order exceeded the scope of Aventura's FSS contract. AR at 9, 16; Contracting Officer's Statement at 11. The IRS explains that it reached this conclusion after additional communication with the GSA, id., and that Orion's situation is demonstrably different.

The IRS counters that in contrast to Aventura's circumstances, Orion's Schedule 84 contract has multiple SINs that are expressly identified for the delivery of services (i.e., apart from the purchase of supplies). AR at 17 n.5. Orion's FSS contract also includes labor categories that correspond to the RFQ requirements. Id. at 13-14. The IRS explains that issuing the order under Orion's FSS contract was proper because the firm quoted its "superintendent/task supervisor" labor category for the supervisory senior electronic technician requirement, and quoted its "drafter/CAD operator" labor category for the senior drafter requirement, and those labor categories were adequate for the respective positions. AR at 11 (citing AR, Tab D.1, Orion Final Proposal vol. II, at 3-15). The IRS argues that, in contrast to Aventura's FSS contract, Orion's FSS contract permits the use of those labor categories to meet the agency's requirements.

In its comments on the agency report, Aventura maintains that it was arbitrary for the IRS to have terminated the order to Aventura stating that it lacked the appropriate labor categories, and then to have issued the order to Orion; in other words, claiming that Aventura's FSS contract lacks services-only SINs whereas Orion's FSS contract has them.[5] Protester's Comments at 5-7. Aventura argues

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[4] The IRS explains that SIN 426-4S was "the only SIN listed in the table of awarded SINs on Aventura's GSA 84 Schedule." AR at 16.

[5] Aventura goes on to argue in essence, that the termination of its order on March 26, 2015, was invalid. Protester's Comments at 5-7. Although we regard Aventura as an interested party, and we consider (and deny) Aventura's argument that it was treated unequally compared to Orion, we do not regard Aventura's further arguments, which challenge the termination of its order, as timely because
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that the IRS rationale for issuing the order to Orion should be rejected as unsound. Id.

Where a protest challenges the placement of an order under the FSS as exceeding the scope of the successful vendor's FSS contract, the relevant inquiry is whether the services offered actually are included on the vendor's FSS contract, as reasonably interpreted. National Forensic Sci. Tech. Ctr., Inc., B-409457.2, B-409457.3, July 29, 2014, 2014 CPD ¶ 224 at 6. Here, Orion's FSS contract includes labor categories that appear to correspond sufficiently to the solicitation requirements that the IRS reasonably concluded that placing the order with Orion was within the scope of its contract. The agency's distinction between the limit on the scope of Aventura's FSS contract (lacking authority to order services other than services that are ancillary to a purchase of supplies) and the broader scope of Orion's FSS contract (expressly providing for orders of services) is rational and consistent with the record.[6] Accordingly, we see no basis to conclude that Orion's FSS contract lacked the appropriate labor categories.

As a result, there is also no basis on which to conclude that the determination that the order could be issued under Orion's FSS contract, but not under Aventura's FSS contract, reflected unequal treatment. The contemporaneous record reflects a reasonable distinction between Aventura's contract providing for services ancillary to the purchase of supplies, and Orion's, which provides for supplies-only orders like the one at issue.

Lack of Certifications and Past Performance

Finally, Aventura raises two issues that we dismiss. First, it argues that Orion's personnel do not have the certifications required by the RFQ, and that Orion "could not and can never meet" the requirement to provide personnel with those certifications. Aventura explains that it considers Orion to be unqualified and therefore will not issue certifications for Orion to perform maintenance on the Aventura equipment. Protester's Dismissal Response at 3. The IRS argues that Aventura's grounds of protest relating to certifications should be dismissed because

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they were not raised within 10 days of the cancelation. Moreover, to the extent that Aventura argues that GSA has interpreted the scope of its FSS contract SINs inconsistently, see id. at 6-7, that objection regards a matter of contract administration over which our Office does not have jurisdiction. 4 C.F.R. § 21.5(a).

[6] Aventura does not meaningfully challenge the validity of the specific labor categories selected by Orion to meet the PWS requirements for these positions, other than to argue that Aventura's own FSS contract also had equivalent labor categories, which, as we explain herein, ignores a material difference in the two FSS contracts.

Orion's compliance with those requirements is a matter of contract administration. IRS Dismissal Request at 1-2.

We agree with the IRS that Orion's compliance with the certifications requirement is outside our bid protest authority. The RFQ required the successful vendor to provide the certifications at issue within 90 days after award. In the absence of a solicitation requirement that offerors provide proof of qualifications or certifications prior to award, such requirements contained in a solicitation's SOW constitute performance provisions rather than preconditions for award. Bode Aviation, Inc., B-411265, June 26, 2015, 2015 CPD ¶ 191 at 3; see also Evergreen Fire & Sec., B-296510, Aug. 22, 2005, 2005 CPD ¶ 165 at 3 (protester's argument that awardee's technicians lacked required certifications raised a matter of contract administration). Whether an offeror complies with such qualification and certification requirements is a matter of contract administration, which we do not review as part of our bid protest function. Id.; see 4 C.F.R. § 21.5(a). Therefore, we dismiss Aventura's challenge to Orion's compliance with the certification requirements of the RFQ.

Second, Aventura argues that the IRS misevaluated Orion under the past performance factor because Orion allegedly lacks relevant past performance. Protest at 4. The IRS requests dismissal of the past performance evaluation challenge because, even assuming Aventura is correct that Orion lacks relevant past performance, the agency properly assessed its past performance with a rating of "pass" under the express terms of the RFQ. IRS Dismissal Request at 4.

We agree with the IRS that Aventura's challenge to the past performance evaluation must also be dismissed. As explained above, the RFQ expressly provided that an offeror having unknown past performance (such as an offeror without relevant past performance) would receive a rating of "pass." RFQ at 17 (citing Federal Acquisition Regulation (FAR) § 15.305(a)(2)(iv)[7]). Therefore, Aventura's allegation that Orion lacks relevant past performance does not provide a factual basis, even if true, on which our Office could sustain its protest. Accordingly, we dismiss Aventura's challenge to the past performance evaluation.

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel

[7] The RFQ actually cites a non-existent provision, "FAR 15.303(q)(2)(iv)," for this principle instead of FAR § 15.505(a)(2)(iv), which the RFQ paraphrased in the accompanying text.