



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Matter of: Management and Technical Services Alliance Joint Venture

File: B-416239

Date: June 25, 2018

Steven J. Koprince, Esq., Matthew T. Schoonover, Esq., Nicole D. Potroff, Esq., and Shane J. McCall, Esq., Koprince Law, LLC, for the protester.

Andrew J. Baker, Esq., and Justin V. Briones, Esq., Department of Homeland Security, for the agency.

Todd C. Culliton, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Solicitation requirement that an offeror possess a facility clearance does not unduly restrict competition where the record shows that the requirement is reasonably related to the agency's needs.

DECISION

Management and Technical Services Alliance Joint Venture (MTSA), of McLean, Virginia, protests the terms of request for proposals (RFP) No. 70RDND-18-R-00000006, issued by the Department of Homeland Security (DHS) for financial and program management support services in support of the agency's Countering Weapons of Mass Destruction Office. The protester alleges that the solicitation improperly restricts competition by requiring each offeror to possess a facility clearance prior to award.

We deny the protest.

BACKGROUND

The RFP was issued on March 19, 2018, to companies holding one of DHS's Program Management, Administration, Operations (Clerical), and Technical Services II

(PACTS II) indefinite-delivery, indefinite-quantity Functional Category 1 contracts.¹ Agency Report (AR) Tab C, Solicitation at 1. The solicitation contemplated the award of a time-and-materials task order to be performed over a 1-year base period, three 1-year option periods, and one 9-month option period. Id. at 2. Specific services contemplated including budgetary planning, developing a financial system, and providing travel and human capital support. Id. at 64-68. In order to perform these services, the selected contractor would be required to handle classified information related to national security matters. Id. at 77. Thus, the solicitation specified that “[p]rior to award, the Contractor must obtain and hold a facility clearance at the SECRET level for performance under this task order.” Id.

MTSA, a prospective offeror, is an unpopulated joint venture, meaning that it does not have any employees or facilities, and also does not hold a facility clearance itself. Protest at 3. On April 2, 2018, MTSA submitted a question to the agency, inquiring whether it would accept an unpopulated joint venture as satisfying the facility clearance requirement when all of the joint venture members hold the appropriate clearance. Tab F, E-mail Correspondence Between Agency and Protester, at 2-3. The contracting officer simply responded “No.” Id. at 2. MTSA then submitted the instant protest to our Office prior to the deadline set for receipt of proposals.

DISCUSSION

In its protest, MTSA asserts that the solicitation requirement that, prior to award, the contractor must obtain and hold a facility clearance is unduly restrictive of competition because it effectively prevents any unpopulated joint venture from receiving award. Protest at 3. To this end, the protester argues that the agency should allow an unpopulated joint venture to rely on any clearances that its constituent members hold, particularly in situations where all of the members possess facility clearances. Id. at 4.

A contracting agency generally has the discretion to determine its needs and the best method to accommodate them. Gallup, Inc., B-410126, Sept. 25, 2014, 2014 CPD ¶ 280 at 5. Further, an agency has heightened discretion to define solicitation requirements to achieve the highest possible effectiveness when the subject of the agency’s acquisition relates to national defense or human safety. Remote Diagnostic Techs., LLC, B-413375.4, B-413375.5, Feb. 28, 2017, 2017 CPD ¶ 80 at 3-4. 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. CompTech-CDO, LLC, B-409949.2, Jan. 6, 2015, 2015 CPD ¶ 62 at 4. We examine the adequacy of the

¹ The expected value of this task order is greater than \$10 million. Protest at 1, n.1. Accordingly, this procurement is within our jurisdiction to hear protests related to the issuance of task orders under civilian multiple award indefinite-delivery, indefinite-quantity contracts. 41 U.S.C. § 4106(f)(1)(B).

agency's justification for a restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. Id.

As an initial matter, we find that DHS has reasonably explained its decision to include the facility clearance requirement. The purpose of the requirement is to minimize the risk of unauthorized disclosure of classified information and ensure that classified information is safeguarded appropriately. Supp. Memorandum of Law (MOL) at 4. In this regard, we note that a facility clearance is "an administrative determination that a company is eligible for access to classified information or award of a classified contract." Supp. AR, Ex. 2, National Industrial Program Operating Manual (NISPOM), § 2-100. Thus, the allegedly restrictive solicitation requirement is reasonably necessary to meet the agency's need because the statement of work specifies that the selected contractor will work with classified information and the facility clearance is effectively a license that the selected contractor can safeguard any classified information reviewed during the course of performance. Cf. Allied Protection Servs., Inc., B-297825, Mar. 23, 2006, 2006 CPD ¶ 57 at 3 (solicitation term requiring offerors to possess a facility clearance was reasonable where the agency had a need for increased security).

With regard to MTSA's specific allegation, the record does not demonstrate that the requirement is unduly restrictive as applied to unpopulated joint ventures. Rather, as a logical consequence of the agency's need, DHS requires some method of identifying contractors qualified to handle classified information, and the record shows that DHS utilizes the Department of Defense, Defense Security Service (DSS) as its clearinghouse for security clearance matters. Supp. AR, Ex. 1, DHS Instr. 121-01-011 at 3 ("Participation in the National Industry Security Program (NISP) allows DHS to use the [DSS] to conduct investigations for contractor facility and personnel security clearances, and to monitor the contractor's compliance with safeguarding requirements. All facility and personnel security clearances granted by [Department of Defense] are accepted by DHS as establishing eligibility for access to classified information."). The record further shows that, pursuant to the NISPOM, DSS does not permit a contractor to have access to classified information until a facility clearance has been granted. Finally, the record also shows that the NISPOM does not contain an exception for unpopulated joint ventures even in instances where all of the members possess facility clearances. Supp. AR, Ex. 2, NISPOM, Chapter 2; Supp. MOL at 6-8.²

² Protester cites Section 2-109 of the NISPOM as support for its assertion that unpopulated joint ventures may rely on the facility clearances of its members. Protester's Supp. Comments at 6. We note, however, that Section 2-109 relates to parent-subsidiary relationships and not to unpopulated joint ventures. Further, that section provides "[a]s a general rule, the parent must have [a facility clearance] at the same, or higher, level as the subsidiary." Supp. AR, Ex. 2, NISPOM, § 2-109. While the section does provide a potential waiver of the requirement for parent companies, the granting of a waiver is left to the cognizant security agency (*i.e.*, DSS) and the record here does not show that MTSA has obtained a waiver.

Thus, the record demonstrates that DHS has a reasonable basis for requiring offerors, including unpopulated joint ventures, to obtain a facility clearance because the method for accommodating its need simply requires all contractors to possess a facility clearance as a prerequisite regardless of membership composition or other extenuating circumstances. While MTSA may object to the pertinent federal government policies as overbroad and assert that the agency should be able to rely on its members' facility clearances, we note that argument merely disagrees with the agency's choice of how to identify contractors qualified to handle classified information and does not establish a sufficient basis for protest. To this end, our decisions explain that a protester's 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. See, e.g., CompTech-CDO, LLC, supra at 5 (concluding that protest allegation was insufficient when the protester disagreed with solicitation term requiring offerors to possess a facility clearance at the time of submission of final proposed revisions).

Although MTSA points out that the requirement is particularly onerous for unpopulated joint ventures because they do not possess facilities or employees, our decisions explain that a protester's inability to satisfy a solicitation term does not render the agency's need improper.³ CompTech-CDO, LLC, supra at 5 (stating "the protester's inability to satisfy that need does not render the agency's need improper"). Indeed, the very nature of classified information necessitates hard and fast rules for granting access, and such rules are not required to be tailored to accommodate the unique situation of an unpopulated joint venture. See id. (concluding that the agency was not required to tailor the facility clearance requirement to meet unique situation of the

³ To the extent MTSA asserts that one of our decisions permits agencies to waive the facility clearance requirement as it pertains to unpopulated joint ventures, we conclude that decision is unpersuasive as to the allegations raised in the instant protest. See DDL Omni Eng'g, B-220075, B-220075.2, Dec. 18, 1985, 85-2 CPD ¶ 684. In DDL Omni Eng'g, the protester alleged that the agency had improperly determined that the awardee, a joint venture, satisfied a facility clearance requirement contained in the solicitation. Id. at 11. The record in that protest established that the agency had accepted the facility clearances of the awardee's constituent members as satisfactory evidence that the awardee had satisfied that requirement. Id. Upon review, our Office determined that the agency's evaluation in this regard was reasonable because the joint venture members were performing all of the work under the contract and all of the members had possessed a facility clearance. Id.

In our view, that case is distinguishable from the instant protest based on the varying procedural postures. Whereas in DDL Omni Eng'g our Office reviewed the agency's evaluation for reasonableness in the context of a post-award challenge, the instant protest concerns a pre-award challenge and requires our Office to examine whether the allegedly restrictive solicitation term reflects a legitimate agency need and is reasonably necessary.

protester); see also Contract Servs., Inc., B-411153, May 22, 2015, 2015 CPD ¶161 at 4 (same); Allied Protection Servs. Inc., supra at 3 (same). Further, even if the requirement may seem redundant as applied in this specific instance, we consider the protester's inability to obtain a facility clearance to be a legitimate disadvantage caused by its unique circumstance as an unpopulated joint venture, rather than a disadvantage caused by unfair agency action. Cf. Exec Plaza, LLC, B-400107, B-400107.2, Aug. 1, 2008, 2008 CPD ¶ 143 at 9-10 (protester faced a legitimate disadvantage under the terms of a solicitation because of its unique circumstance as the incumbent contractor). Accordingly, while MTSA may argue that the effect of the solicitation term on unpopulated joint ventures is unfair, that only demonstrates that the solicitation term is burdensome as to its particular unique situation, not that the solicitation term itself is unreasonable.

The protest is denied.

Thomas H. Armstrong
General Counsel