

Decision

Matter of: Department of the Army--Reconsideration and Clarification of Remedy

File: B-419150.2

Date: March 30, 2021

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Terrence Young, AES UXO, LLC, the protester.
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DIGEST

1. Request for reconsideration of a prior decision sustaining a protest concerning an unduly restrictive solicitation provision is denied, where the requester does not show that the prior decision contains errors of fact or law that warrant reversal or modification of the decision.
2. Request for reconsideration alleging errors in the underlying decision based on information that was available, but not submitted, during the initial protest is denied because parties withhold or fail to submit relevant evidence, information, or analysis for our initial consideration at their own peril.

DECISION

The Department of the Army requests reconsideration of our decision, *AES UXO, LLC*, B-419150, Dec. 7, 2020, 2020 CPD ¶ 395, sustaining in part a protest filed by AES UXO, LLC, of New Orleans, Louisiana, protesting the terms of request for quotations (RFQ) No. W911SA21Q3008. The RFQ sought unexploded ordnance clearance services at Fort McCoy, Wisconsin. We sustained the protest, finding that the RFQ was unduly restrictive of competition because it limited the evaluation of relevant experience and past performance to instances where the firm submitting the quotation had performed as a prime contractor or member of a joint venture, which precluded consideration of AES's relevant experience as a subcontractor. The Army argues that our decision was based on factual and legal error and an incomplete record.

We deny the request for reconsideration, but clarify the recommendation of our prior decision.

BACKGROUND

As relevant here, the solicitation's evaluation scheme contemplated evaluation of quotations in the areas of relevant experience and past performance. Agency Report (AR),¹ exhs. 3, 18, RFQ at 13, RFQ amend. No. 0002, Offeror Questions and Answers, at 2-3. The RFQ restricted evaluation of experience and past performance in two respects. First, it limited the evaluation of experience and past performance to that of the firm submitting the quotation (*i.e.*, the prime contractor that would be in privity of contract with the Army if awarded the contract). Second, the solicitation restricted evaluation of the relevant experience of the firm submitting the quotation to that firm's prior experience performing work as a prime contractor or a joint venture member.

Prior to the solicitation closing date, AES filed a protest with our Office, challenging the solicitation's evaluation criteria relating to the evaluation of experience and past performance as unduly restrictive of competition. Protest at 1-2. Among other things, AES argued that the solicitation limited the evaluation of experience and past performance to projects performed by the offeror as a prime contractor or a joint venture, which precluded consideration of AES's prior relevant experience as a subcontractor. Protest at 1-2. Four days later, AES submitted a timely quotation to the Army in response to the RFQ. AR, Tab 2, Contracting Officer's Statement (COS) at 2.

In its response to the protest, the Army justified the restrictive evaluation criteria in the RFQ for experience and past performance on the basis that the agency wanted to ensure that it evaluated the relevant experience and past performance of only the firm actually submitting the quotation. The agency explained that, "[i]n order to accurately assess the offeror's ability to remove explosives in military installations," the Army needed to evaluate "only the relevant experience . . . actually performed by the offerors, not necessarily their sub-contractor at the time." AR, Tab 1, Memorandum of Law (MOL) at 13-14. The agency stated that it has "the discretion to reduce the risk of unsuccessful performance by restricting consideration of experience to the firms contractually obligated to meet the agency's requirements." *Id.*

The Army further explained that it "needed such language to ensure that offerors are actually capable of performing the requested tasks because the Army cannot force an offeror to use any specific sub-contractors." *Id.* The Army asserted that, although it tailored the RFQ to achieve the most reliable result, the solicitation did not exclude vendors without relevant experience as a prime contractor or joint venture from submitting quotations and competing. *Id.* Our decision noted that the agency's justification relating to the evaluation of past performance was essentially the same as that advanced in connection with its position about relevant experience. *AES UXO, supra* at 4 (*citing* AR, Tab 1, MOL at 14-16).

Based on the justification provided by the agency, our decision explained that we understood the agency's objective in restricting the evaluation of experience and past

¹ Citations are to the AR provided in response to AES's underlying protest, B-419150.

performance to be that the agency “does not want firms to rely on the relevant experience or past performance examples of a proposed subcontractor that may later not actually join the prime in performing the contract.” *AES UXO, supra* at 5. Our decision also found, however, that the plain language of the RFQ precluded evaluation of the prime contractor’s relevant experience and past performance to the extent that such experience or past performance was gained while performing as a subcontractor. *Id.* at 4. We concluded that this aspect of the RFQ language did not “achieve the agency’s objective.” The decision explained that, instead, this RFQ language “effectively penalizes firms that actually have relevant experience and past performance by not permitting them to receive evaluation credit for their experience and past performance,” merely because they obtained it as a subcontractor rather than as a prime contractor or joint venture. *Id.* at 5.

Our Office sustained AES’s protest finding that the RFQ both disadvantaged AES--because the protester could not receive credit for projects on which it gained experience as a subcontractor--and failed to fulfill the agency’s stated objective--to evaluate only the relevant experience and past performance of the firm that will actually perform the requirement. *Id.* at 5. In our decision, we recommended the agency amend the solicitation in a manner consistent with the discussion in our decision. *Id.* at 6. We further recommended that the agency afford all firms an opportunity to submit revised quotations in response to the revised RFQ. *Id.* We also recommended that the agency reimburse AES its costs of filing and pursuing the protest. *Id.* After the issuance of our decision sustaining AES’s protest, the Army requested that our Office reconsider our decision.²

² On January 11, 2021, in response to the request for reconsideration filed by the Army, AES filed a redacted document entitled, “Reconsideration of GAO Protest.” See AES Resp. AES asserts that it is providing “additional information for reconsideration of the original information” provided in the underlying protest, and that its “request for reconsideration hinges [on] an apparent violation of potential information being released [by the agency] prior to any proper announcement of an awarded contract” under the solicitation. AES Resp. at 1. AES states that its request is based on information received during a telephone conversation on December 29, 2020. *Id.* Specifically, AES asserts that an individual contacted AES after having “seen information pertaining to [the] A.E.S. Bid Protest concerning experience” and that he “wanted to offer his services to A.E.S.[,] which he deemed to be the potential [a]wardee.” *Id.*

To the extent AES’s filing amounts to a request for reconsideration, we conclude that AES’s request is untimely. Our Bid Protest Regulations, 4 C.F.R. § 21.14, provide that, to be timely, requests for reconsideration must be filed within 10 days of when the basis for reconsideration is known or should have been known. Here, because AES states that its request for reconsideration is based on information it learned during a telephone call on December 29, 2020, which is more than 10 days prior to the date AES filed its request on January 11, 2021, the request is untimely and therefore dismissed. Furthermore, we note that even if AES’s request was not untimely, because it is based on information regarding events that took place after our decision was issued, it does

DISCUSSION

The Army requests reconsideration on the basis that our decision was based on factual error and an incomplete record. With regard to the allegation of factual error, the Army asserts that our decision concluded that the RFQ did not restrict the evaluation of experience and past performance to firms that would be in privity of contract with the Army, and that this conclusion was based on an error of fact. With regard to the agency's assertion that our decision was based on an incomplete record, the agency contends that its agency report did not address the Army's justification for restricting the RFQ's evaluation of experience and past performance to only those firms with experience performing as a prime or joint venture. The agency asserts that this justification was not provided because the agency did not interpret the protest as raising this argument. Instead, the Army argues that it was not aware that the protester was challenging the evaluation criteria relating to relevant experience and past performance on the basis that the solicitation terms precluded evaluation of relevant experience and past performance that AES had gained as a subcontractor. The agency complains that, in light of its understanding of the protest allegations, our decision was based on an argument that it did not address. For the reasons discussed below, we find the Army's arguments fail to establish a basis for reconsideration.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a). In order to provide a basis for reconsideration, additional information not previously considered must have been unavailable to the requesting party when the initial protest was being considered. *Department of Commerce-Recon.*, B-417084.2, Mar. 21, 2019, 2019 CPD ¶ 112 at 2. Failure to make all arguments or submit all information available during the course of the initial protest undermines the goals of our bid protest forum--to produce fair and equitable decisions based on consideration of all parties' arguments on a fully developed record--and cannot justify reconsideration of our prior decision. *Department of Veterans Affairs-Recon.*, B-405771.2, Feb. 15, 2012, 2012 CPD ¶ 73 at 4. In this regard, we have repeatedly warned that parties that withhold or fail to submit all relevant evidence, information, or analyses for our consideration do so at their own peril. *Department of the Air Force-Recon.*, B-244007.3, Mar. 17, 1992, 92-1 CPD ¶ 287 at 6; *Department of the Army-Recon.*, B-237742.2, June 11, 1990, 90-1 CPD ¶ 546 at 5.

The Army's first argument rests on the mistaken premise that our decision incorrectly and "[w]ithout explanation" determined that the RFQ "does not restrict the Army's evaluation to offerors that would be in privity of contract with the Army (either as a prime or JV)." Req. For Recon. at 6. The agency contends that our decision was correct "regarding the Army's position that the RFQ required the Army to evaluate only the experience [and] past performance of the firm that will actually perform the requirement

not provide a basis for reconsideration. *Epsilon Sys. Sols., Inc.*, B-414410.3, Sept. 20, 2017, 2017 CPD ¶ 292 at 5.

(i.e., firms that would be in privity of contract with the Army).” *Id.* at 4. The agency asserts, however, that by concluding that the RFQ “does not achieve the agency’s objective,” our decision essentially determined that the solicitation does not restrict the agency’s evaluation to only firms that would be in privity of contract with the Army. *Id.*

In our view, the Army’s contention does not accurately capture the content of our decision. Our decision acknowledged that the RFQ limited the evaluation of relevant experience and past performance to projects completed by the firm submitting the quotation; that said, our decision also noted that the RFQ further limited the evaluation to projects where the firm submitting the quotation had previously performed as the prime contractor or as a member of a joint venture. *AES UXO, supra* at 2. As the agency notes, the rationale it provided for restricting its evaluation to its prime contractor was that it does not want to evaluate the relevant experience or past performance of any subcontractor that the firm submitting the quotation identifies in its quotation because the firm submitting the quotation could later elect not to use the identified subcontractor after award. *Id.* at 4 (*citing* AR. Tab 1, MOL at 13-14). The agency’s rationale and contention addresses the first part of the RFQ’s compound requirement, but not the second part.

With respect to the second part of this requirement, we found that “the plain meaning of the RFQ as written precludes an evaluation of a firm’s relevant experience and past performance to the extent that such experience or past performance was gained while performing as a subcontractor.” *AES UXO, supra* at 4. We explained that the impact of the RFQ’s language meant, for example, that “if a firm *submitting a quotation* previously had performed the identical services currently being solicited,” that firm’s relevant experience and past performance “would not be considered under the terms of the RFQ if the firm happened to have performed those services as a subcontractor.” *Id.* (emphasis added).

We found that this provision of the RFQ as written did not “achieve the agency’s objective.” *Id.* at 5. As set forth above, the agency explained that its objective was to evaluate only the relevant experience and past performance of firms “contractually obligated to meet the agency’s requirements (i.e., firms that would be in privity of contract with the Army).” *Id.* To put our conclusion differently, while the agency’s objective was met with respect to its intent to focus only on the experience of the agency’s prime contractor (i.e., the one in privity with the agency), the objective was unrelated to--and hence was not met--by the second part of the requirement (i.e., the part that limited consideration of the prime contractor’s experience to experience performed as a prime contractor). As such, the agency’s argument appears to be based on a misunderstanding of our underlying decision, and does not provide a basis to reconsider our conclusion.³

³ The Army also argues that the failure of our decision to “acknowledge the national security and human safety aspect of this requirement (and the corresponding deference granted to the agency)” in sustaining the protest “constituted a clear legal error.” Req.

The Army next requests that we reconsider our prior decision because the record did not include the Army's justification for the restrictive provision as it relates to limiting the evaluation of experience and past performance to firms with experience performing as a prime or joint venture. The agency argues that its failure to provide this justification during the underlying protest should be excused because it was not aware that the protester was challenging the evaluation criteria for experience and past performance on this basis. Rather, the agency asserts that it understood AES's protest as challenging the evaluation criteria for experience and past performance only on the basis that it "prohibited certain businesses from bidding for the requirement[.]" Req. for Recon. at 1-2.

In support of its position, the agency points to AES's initial protest filing. The agency asserts that AES's protest consisted of "freewheeling allegations" that did not "clearly identify or enumerate [the] protest grounds" and "did not rely on any legal authority to support [the] allegations." Req. for Recon. at 8. Additionally, the Army contends that its failure to previously produce the additional justification for the restriction should be excused because our Office did not provide adequate notice of our concerns with the agency's "misinterpretation" of the protester's argument or with the adequacy of the justification for the requirement provided with the record.

We find that the agency's argument provides no basis for reconsideration. While AES's protest may not be a model of clarity, it clearly challenged the RFQ's evaluation criteria for relevant experience and past performance. Additionally, when read in its entirety, the protest specifically raised, among other things, the issue that the criteria precluded

for Recon. at 14. As relevant here, the record reflects that the contracting officer explained that the procurement involved a "non-personal services contract to provide clearance of unexploded ordnances at Fort McCoy," and "[b]ased on the specific nature and the need of this service", the requirement relates to "issues of human safety and/or national security." AR, Tab 2, COS at 1. Additionally, we note that our Office has previously explained that, "[w]here a requirement relates to national defense or human safety, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and/or effectiveness." *Womack Machine Supply Co.*, B-407990, May 3, 2013, 2013 CPD ¶ 117 at 3. As relevant here, in sustaining the protest, our decision concluded that the plain language of the RFQ resulted in an "irrational result" and one "apparently not intended by the agency." *AES UXO*, *supra* at 4. In this regard, there is no evidence in the record that the agency argued, or provided any justification, in support of the restriction for limiting evaluation of a firm's experience performing as a prime or joint venture member, including any arguments or justifications in support of this restriction that were based on issues of human safety or national security. See AR, Tab 1, COS; Tab 2, MOL. Accordingly, although our decision did not mention the heightened standard of deference afforded to agencies when reviewing requirements involving issues relating to national security and human safety, the outcome of our decision would have been the same regardless of the standard used. We find the agency's allegation fails to provide a valid basis for reconsideration.

evaluation of the relevant “experience, knowledge, and capabilities” of a firm “that actually performed the work.” Protest at 1-2. As referenced above, in order to provide a basis for reconsideration, additional information not previously considered must have been unavailable to the requesting party when the initial protest was being considered. *Department of Veterans Affairs-Recon.*, *supra* at 4. Here, there is no question that the information now relied upon by the agency was available and could have been submitted during our initial consideration of the protest. We find unavailing the agency’s assertion that the Army should be excused from submitting all relevant evidence, information, and analyses in responding to a protest challenging the solicitation’s evaluation criteria for relevant experience and past performance as unduly restrictive of competition. See *Department of the Air Force-Recon.*, *supra* at 6 (warning that parties that withhold or fail to submit all relevant evidence, information, or analyses for our consideration do so at their own peril). Thus, this additional information fails to provide a viable basis to request reconsideration of our prior decision.

We also find the Army’s arguments--that it was incumbent upon our Office to notify the agency of concerns regarding the agency’s understanding of the protester’s position or with the adequacy of the justification for the requirement provided with the record--are misplaced. Our bid protest process is by its nature an adversarial process whereby the parties are responsible for arguing the issues in the protest and presenting support for their positions. *Department of Commerce-Recon.*, *supra* at 4. Accordingly, notwithstanding the agency’s suggestions to the contrary, it is not the responsibility of our Office to advise an agency when it has failed to adequately support its position during the course of a protest other than through the issuance of a final decision resolving the protest, which we did.⁴ *Id.* Thus, the agency’s failure to produce an adequate record in support of its position, to which it alone had access, rests at its own feet. The agency’s argument therefore fails to state an adequate basis upon which to reconsider our prior decision.

In sum, we do not find that our underlying decision contained a material error of law or mistake of fact, or that the Army has presented any additional information for our consideration that was not available to the agency during the initial protest. As such, we find no basis to reconsider the legal analysis supporting our prior decision.

CLARIFICATION OF RECOMMENDATION

Although we find no basis to reconsider the legal analysis supporting our prior decision, we nonetheless conclude that a clarification of the recommendation is merited by the facts presented here. We relied on the record before us in issuing our recommendation that the agency revise the solicitation and reopen the procurement.

⁴ Pursuant to 4 C.F.R. § 21.10(e), the GAO attorney assigned to a protest may conduct alternative dispute resolution outcome prediction and advise the parties regarding the likely outcome of protest; however, this is not mandatory, and was not used in this case.

In its request for reconsideration, the Army has for the first time presented a new justification for restricting the evaluation of a prime contractor's experience to only those firms whose experience was also gained while serving as a prime contractor.⁵ To the extent the agency has a reasonable justification for restricting the evaluation to only those firms with experience at the prime level, it remains within the agency's discretion, when implementing our prior recommendation, to include the restriction as necessary when defining the solicitation's requirements to meet the Army's needs.

The request for reconsideration is denied.

Thomas H. Armstrong
General Counsel

⁵ Specifically, the agency states that, "[i]n addition to seeing whether an offeror has done similar work in size and scope, the Army also wanted to assess whether an offeror was capable of handling not just a portion, but all duties and responsibilities relating to the overall project." Req. for Recon. at 14-15. In this regard, "[r]ather than focusing on a particular task, the Army's goal was to evaluate an offeror's ability and capacity to successfully oversee and complete the entire requirement." *Id.*