

Decision

Matter of: Innovate Now, LLC

File: B-419546

Date: April 26, 2021

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Colonel Patricia S. Wiegman-Lenz, Michael J. Farr, Esq., Captain David J. Ely, and Edward S. Fisher, Esq., Department of the Air Force, for the agency.

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DIGEST

1. Protest challenging solicitation requirement that protégé members of a mentor-protégé joint venture have the same level of experience as other offerors is sustained; the requirement violates an express prohibition contained in a Small Business Administration regulation.

2. Protest alleging that solicitation is ambiguous because it requires offerors to demonstrate the staffing used on a prior contract at “a single point in time” is sustained because the solicitation does not define the “single point in time” requirement, and offerors will be unable to compete on a common basis.

DECISION

Innovate Now, LLC, of Beavercreek, Ohio, protests the terms of request for proposals (RFP) No. FA8622-21-R-8335, issued by the Department of the Air Force for engineering, professional and administrative support services at the Air Force Material Command headquarters at Wright-Patterson Air Force Base, Ohio. Innovate argues that the RFP violates the requirements of the Small Business Administration’s (SBA) regulations pertaining to small-business mentor-protégé offerors, and also is otherwise unduly restrictive of competition.

We sustain the protest.

The RFP contemplates the issuance of a cost-plus-fixed-fee type task order for a base year and four 1-year options using a unique source selection method that the Air Force

calls “the highest two technically capable offerors with realistic, balanced and reasonable pricing source selection methodology.”¹ Agency Report (AR) exh. 28, RFP Evaluation Criteria, amend. No. 0001, at 2. Innovate’s protest concerns three requirements contained in the RFP’s evaluation criteria. We discuss each of Innovate’s allegations in detail below.

DISCUSSION

Requirements for Protégé Members of Mentor-Protégé Joint Ventures

Innovate argues first that the RFP improperly requires the protégé member of any mentor-protégé joint venture offeror to meet the same experience requirements as all other offerors, in violation of SBA regulations.² The RFP specifies that, for joint venture offerors, a minimum of at least one work sample must be submitted for each member of the joint venture that meets the following requirements: (1) the work sample must have been a contract (or task order) performed for the federal government; (2) the work sample must have been performed by the entity as a prime contractor; (3) the work sample must have been performed on a non-fixed price basis; (4) the work sample must have been performed for at least six months within the last five years; and (5) the most recent past performance or contractor performance assessment reporting system (CPARS) report for the work sample must reflect a satisfactory or above rating in the categories of quality, schedule, cost control, and management. AR, exh. 28, RFP Evaluation Criteria, amend. No. 0001, at 4-6. Innovate argues that, because the protégé member of any joint venture is required to meet the same requirements applicable to all other offerors, this RFP requirement violates SBA’s regulations.

The agency responds that the RFP does not violate the requirements of SBA’s regulations because joint venture offerors are not restricted to submitting work samples performed only by the joint venture entity, and are instead permitted to submit work samples performed by each member of the joint venture. The agency also argues that the RFP reflects its minimum requirements and therefore is reasonable, notwithstanding that a protégé member of a joint venture may not be able to meet those requirements. Finally, the agency notes that the RFP contemplates evaluation of the joint venture work samples in the aggregate.

¹ The task order is being issued under the General Services Administration’s One Acquisition Solution for Integrated Services small business multiple award indefinite-delivery, indefinite-quantity contract program. The estimated value of the solicited task order is in excess of \$50 million. Because the value of the task order is more than \$10 million, our Office has jurisdiction to consider the protest. 41 U.S.C. § 4106(f).

² SBA regulations provide for the establishment of joint ventures between a mentor firm (which can be either a small or large business) and a small business protégé firm for purposes of providing assistance to the protégé firm to improve its ability to successfully compete for federal government contracts. See 13 C.F.R. § 125.9.

We sustain this aspect of Innovate's protest. The applicable SBA regulation provides:

When evaluating the capabilities, past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section [which includes mentor-protégé joint ventures], a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. *A procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally.* The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.

13 C.F.R. § 125.8(e) (emphasis supplied).

The plain language of the regulation is clear; a procuring agency may not require a protégé firm to individually meet the same evaluation requirements as those imposed on other offerors. Here, the RFP violates this express prohibition. All offerors--including the protégé member of a mentor-protégé joint venture--must meet exactly the same evaluation requirements. Each firm--including the protégé firm--must submit at least one work sample demonstrating that they have previously performed a cost-reimbursement type federal government contract as the prime contractor for a period of at least six months during the last five years, and the firm must have been rated at least satisfactory under the enumerated areas of consideration.

Our conclusion is reinforced by SBA's comments that accompanied publication of the regulation. Those comments provide:

SBA understands the concern that some procuring activities have required unreasonable requirements of protégé small business partners to mentor-protégé joint ventures. SBA's rules require a small business protégé to have some experience in the type of work to be performed under the contract. *However, it is unreasonable to require the protégé concern itself to have the same level of past performance and experience (either in dollar value or number of previous contracts performed, years of performance, or otherwise) as its large business mentor. The reason that any small business joint ventures with another business entity . . . is because it cannot meet all performance requirements by itself and seeks to gain experience through the help of its joint venture partner.*

* * * *

The joint venture should be a tool to enable it [the protégé firm] to win and perform a contract in an area that it has some experience but that it could not have won on its own.

85 Fed. Reg. 66146, 66167-68 (Oct. 16, 2020, emphasis supplied). These comments show that SBA intended to prohibit precisely what is being imposed on the protégé member of a mentor-protégé joint venture under the terms of the RFP.

We also solicited the views of SBA during the development of the record in this case. SBA agrees with the view advanced by the protester, namely, that the RFP improperly requires that which is prohibited under the regulation. SBA concludes:

SBA regulations at 13 C.F.R. § 125.8(e) prohibit an agency from applying the same experience requirements to protégés as other offerors generally. This requirement does not mandate a particular level or type of experience and provides agencies with the flexibility to determine the appropriate criteria, *with the understanding that protégés must be held to a different experience standard from mentors and other offerors.*

SBA Response to the Agency Report at 4-5 (emphasis supplied).

As a final matter, as set forth below, the arguments advanced by the agency either raise matters not material to the requirement, or are based on an incorrect reading of the regulation. First, the fact that the joint venture can meet the RFP's experience requirements with examples performed by the constituent members of the joint venture is immaterial to the question whether the protégé member of the joint venture must meet the same requirements as other offerors generally. This merely satisfies the first sentence of the regulation, which requires agencies to consider the separate experience of the joint venture members in determining whether the joint venture meets the solicitation's requirements. *See Amaze Technologies, LLC*, B-418949, B-418949.2, Oct. 16, 2020, 2020 CPD ¶ 347.

Second, the fact that the agency deems the specified requirements to be its minimum needs, and therefore reasonable, is similarly immaterial to the question whether the RFP meets the requirements of SBA's regulations. The regulation imposes an unqualified requirement; protégé firms may not be held to the same evaluation standards as other offerors. Whether the agency's requirements are reasonable does not address whether those requirements must be applied to a protégé member of a joint venture.

Third, the fact that the agency will consider the experience of the joint venture members in the aggregate does not mean that the protégé firm is not still required to individually meet the same evaluation requirements as those imposed on all other offerors. Regardless of whether the agency aggregates the experience examples during its evaluation, that fact does not eliminate the central problem, namely, that under the

terms of the RFP, protégé firms must meet the same experience requirements as all other offerors. In light of these considerations, we sustain this aspect of the protest.³

The “Single Point in Time” Requirement

Innovate also protests a requirement relating to determining whether the offerors have provided work samples that demonstrate their ability to adequately staff the task order. The RFP requires offerors to demonstrate through their submitted work samples that they have previously been able to staff a prior contract or task order adequately. To that end, the RFP requires offerors to demonstrate that the “position count” on the prior contract or task order reflects the number of personnel working on the submitted sample at “a single point in time.” AR, exh. 28, RFP Evaluation Criteria, amend. No. 0001, at 6.

More specifically, the RFP requires offerors to populate a staffing “self-scoring matrix” with various information.⁴ AR, exh. 29, Self-Scoring Matrix. The matrix requires offerors to identify the work sample (contract or task order) being referenced; the name of each employee and labor category being identified; the “evaluation criterion” for which the position or positions are being identified; and the start and end date for each employee.⁵ *Id.* Separately, offerors are required to identify a “point in time” for each of the evaluation criterion that will be used to measure the “position count” for that aspect of contract performance. *Id.*

³ The agency also suggests that because the regulation uses the word “generally,” it does not express an absolute prohibition against imposing the same experience requirements on protégé firms. The word “generally” is not used to denote an exception to the requirements of the regulation and its application to a protégé member of a joint venture. Instead, its placement at the end of the sentence is intended to convey that requirements applied to “other offerors generally” are not to be applied to the protégé member of a joint venture.

⁴ As noted, this acquisition uses the Air Force’s “highest two technically capable offerors with realistic, balanced and reasonable pricing source selection methodology.” Under this methodology, offerors “self-score” their proposals using the RFP’s self-scoring matrix. This matrix delineates the evaluation criteria and identifies the number of points and weights to be applied under each evaluation criterion. A maximum score of 36,000 points is available. AR, exh. 29, Self-Scoring Matrix. Once the offeror self-scores its work samples, the agency performs a “validation” exercise using “substantiating evidence” provided by the offeror.

⁵ The RFP identifies 12 specific “evaluation criteria” and offerors are required to identify the number of employees performing the tasks or subtasks associated with each criterion in the work samples provided to demonstrate their experience. AR, exh. 28, RFP Evaluation Criteria, amend. No. 0001, at 7-12. For example, under evaluation criterion 3.1.1.3, offerors are required to identify personnel that performed logistics support; under evaluation criterion 3.1.2.1, offerors are required to identify personnel that performed contracting business support; and so on. *Id.* at 8-9.

Innovate argues that the RFP is ambiguous because it does not define what the agency means by “a single point in time,” and also because there is no underlying rationale for the requirement. According to the protester, the phrase “a single point in time” could mean many possible alternatives, including work performed simultaneously during a specific minute on a specific day; work performed during one or more hours during a single day; or work performed during some other unspecified interval such as an entire day, a week, a month, or a year. Innovate argues that, in the absence of a clear definition of the term, offerors will be unable to compete intelligently and on a relatively equal and common basis.

Innovate also points out that the substantiating documentation called for under the RFP is not likely to provide information that would actually enable the agency to validate the claimed “position count” for the work samples submitted because such documentation will not show when specific tasks were performed by particular employees, or even how many employees may have worked on a contract at “a single point in time.” For example, the RFP requires submission of past performance questionnaires and CPARS reports for the work samples submitted. AR, exh. 28, RFP Evaluation Criteria, amend. No. 0001, at 3, 4, 5, 6, 13. Innovate therefore maintains that this further demonstrates the arbitrary nature of this requirement. Finally, Innovate argues that the requirement itself is unnecessary to meet any logical agency requirement.

We sustain this aspect of Innovate’s protest. Agencies are required to draft solicitations in a manner that enables offerors to compete intelligently and on a relatively equal and common basis. *Global Technical Systems*, B-411230.2, Sept. 9, 2015, 2015 CPD ¶ 335 at 19. Here, we agree with the protester that the term “a single point in time” is ambiguous, and fails to allow offerors to compete intelligently and on a relatively equal and common basis.

In responding to this aspect of the protest, the agency has not offered any clarifying explanation regarding what is meant by the phrase “a single point in time” other than to assert that the phrase has a commonly understood meaning, and to direct our attention to the definition of the word “point” found in Merriam-Webster’s Dictionary. Agency Legal Memorandum at 10. The agency also suggests that the self-scoring matrix is self-explanatory because it calls for offerors to insert a date in the boxes calling for identification of the single point in time to be used for measuring whether the offeror has experience demonstrating its ability to perform in accordance with the various evaluation criteria.

We find the agency’s explanation unconvincing. First, contrary to the agency’s position, the self-scoring matrix is not self-explanatory and does not include any definition or instructions regarding what information offerors are required to provide to identify the “single point in time.” Instead, the self-scoring matrix includes only the following statement: “Enter in the Single Point in Time that will be used for each specific Criteria. If the work sample does not address one of the Criteria, enter N/A for the Date in Time.” AR, exh. 29, Self-Scoring Matrix, at 1.

The limited language in the self-scoring matrix quoted above does not define the term “single point in time” or otherwise instruct offerors about what interval to use to establish that a requirement was performed at “a single point in time.” In addition, the phrase “date in time” does not resolve the question of what interval offerors should use to establish that a requirement was performed at a “single point in time”; both phrases are used in the same sentence, and neither is defined. As noted by the protester, the phrase “a single point in time” could be interpreted to mean many different possible intervals, including a particular moment, or an interval of one or more hours, or an interval of days or weeks, and use of the phrase “date in time” provides no further clarification.

In addition, beyond the language from the self-scoring matrix quoted above, there is no other explanation or definition of the phrase “a single point in time” anywhere else in the RFP. The phrase appears only one other time in the RFP’s evaluation factors, but is not defined or otherwise explained. AR, exh. 28, RFP Evaluation Criteria, amend. No. 0001, at 6. In sum, the phrase “a single point in time” is not defined in the RFP in a manner that establishes unambiguously the interval of time intended by the agency.

Second, whatever interval the agency may intend by its use of the phrase “a single point in time” the agency has offered differing rationales for the requirement that do not withstand logical scrutiny. The agency’s legal memorandum states that the requirement is necessary to allow the agency to assess the offeror’s ability to employ and manage multiple positions simultaneously so that contract performance under the solicited requirement can function at maximum capacity. Agency Legal Memorandum at 12.

The contracting officer, on the other hand, states that the requirement is necessary in order to ensure that the offeror is capable of hiring a specific number of employees with demonstrated capability to perform the requisite tasks at the same time without significant turnover or vacancies in the required positions, and also to assess the offeror’s ability to hire and retain a qualified and stable workforce. Contracting Officer’s Statement of Facts at 12, 13.

While it may be true that the solicited information could shed light on the offeror’s ability to manage multiple positions simultaneously as the agency contends in its memorandum of law, it is not apparent how the solicited information could shed light on an offeror’s ability to hire and retain a stable workforce over time, as suggested by the contracting officer. In any event, the agency has not adequately explained its rationale for the requirement, and the contracting officer and agency counsel have advanced differing rationales for the requirement.

Third, we also agree with the protester that the substantiating documentation that the agency has solicited in order to allow it to validate the offerors’ self-scoring matrix claims is unlikely to allow the agency actually to perform its validating exercise. Past performance questionnaires and CPARS reports do not typically include granular, moment-by-moment (or hour-by-hour, or day-by-day, or week-by week) detailed information about the precise staffing, or identity of the personnel, used to perform a

contract. In addition, even if that information might arguably be provided to the agency, it still would not provide the agency any insight to the offeror's ability to hire and retain a stable workforce over time.

Finally, and at the most basic level, the agency has offered no explanation for its refusal to provide offerors a common definition of what the Air Force means by the phrase "a single point in time." As noted by Innovate, the phrase is susceptible to many possible interpretations. The agency has not explained why providing a common definition would somehow detract from its ability to conduct a competitive acquisition, or otherwise deprive it of some particular insight into an offeror's ability to perform the solicited requirement. Nor has the agency explained why providing a common definition of the phrase would not actually promote full and open competition by ensuring that all offerors compete intelligently and on an equal basis, with a common understanding of the agency's intended basis for evaluating proposals. In light of the foregoing, we sustain this aspect of the protest.

Requirement for Cost-Reimbursement Type Work Samples

Finally, Innovate argues that the RFP unreasonably requires each member of the joint venture to submit at least one work sample that has been performed on a cost-reimbursement basis. The protester asserts that this requirement is unduly restrictive of competition because many small business offerors do not have prior contract experience performing a prime federal government contract on a cost-reimbursable basis. Innovate notes by way of example that, although it has experience performing as a subcontractor on a cost-reimbursable basis, it does not have experience performing as a prime contractor on a cost-reimbursable basis.

We dismiss this aspect of Innovate's protest as premature at this juncture. We recommend below that the agency revise the RFP's requirements relating to the submission of work samples for the protégé member of a mentor-protégé offeror. Because the agency's implementation of this recommendation could render this aspect of the protest academic, we decline to resolve the issue at this time. *Career Quest, a division of Syllan Careers, Inc.* B-293435.2, B-293435.3, Aug. 2, 2004, 2004 CPD ¶ 152 at 5-6. In light of the foregoing discussion, we sustain Innovate's protest.

RECOMMENDATION

We recommend that the agency amend the RFP to revise the work sample experience requirements as they relate to the protégé member of any mentor-protégé offeror, as discussed in detail above. We leave it to the discretion of the agency to determine which of its requirements to revise. We also recommend that the agency clarify the phrase "single point in time" so that offerors have a common understanding of the agency's requirements. Finally, we recommend that Innovate be reimbursed the costs associated with filing and pursuing its protest, including reasonable attorneys' fees.

Innovate should submit its certified claim for such costs, detailing the time spent and the costs incurred, directly to the agency within 60 days of receiving this decision.

The protest is sustained.

Thomas H. Armstrong
General Counsel