

Decision

Matter of: Tata America International Corporation

File: B-419956.8

Date: October 1, 2021

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Krystal A. Jordan, Esq., Department of Health and Human Services, for the agency. Jonathan L. Kang, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest alleging that a solicitation requirement that offerors disclose the identity of contracts and customers to demonstrate corporate experience is unduly restrictive of competition, because the protester contends it cannot disclose those details due to confidentiality agreements with its commercial customers, is denied where the requirement is reasonably related to the agency's need to validate the claimed experience.

DECISION

Tata America International Corporation (TAIC), of New York, New York, protests the terms of solicitation No. 75N98121R00001, which was issued by the Department of Health and Human Services, National Institutes of Health (NIH), for the award of multiple indefinite-delivery, indefinite-quantity (IDIQ) governmentwide acquisition contracts (GWACs) for information technology services, known as Chief Information Officer-Solutions and Partners (CIO-SP4). The protester argues that the solicitation's corporate experience requirements, which require offerors to identify their customers, are unduly restrictive of competition because certain of the commercial contracts the protester wishes to cite in its proposal contain confidentiality provisions that prohibit disclosure of the information required by the request for proposals (RFP).

We deny the protest.

BACKGROUND

NIH issued the solicitation on May 25, 2021, seeking proposals to provide information technology (IT) solutions and services in the areas of health, biomedical, scientific,

administrative, operational, managerial, and information systems requirements. Contracting Officer's Statement (COS) at 2; Agency Report (AR) Tab 12d, RFP at 9.¹ The purpose of the CIO-SP4 contracts is to "provide government agencies a mechanism for quick ordering of IT solutions and services at fair and reasonable prices, to give qualified small businesses a greater opportunity to participate in these requirements, and give government agencies a mechanism to help meet their socio-economic contracting goals." RFP at 9. The CIO-SP4 contracts will replace the existing IDIQ GWACs administered by NIH, known as CIO-SP3. COS at 1.

The RFP anticipates the award of multiple contracts, which will have a base period of performance of 5 years and one 5-year option. RFP at 32. The solicitation states that the agency will award "about" 305 to 510 IDIQ contracts, including as relevant here 75 to 125 contracts to other than small businesses. *Id.* at 145. Each awarded contract will have a maximum ordering value of \$50 billion. *Id.* at 44.

The RFP provides for a 3-phase evaluation of proposals. *Id.* at 173. As relevant to the protest, the phase 1 competition requires offerors to submit a self-scoring sheet that assigns points based on offerors' representations. *Id.* at 158. Offerors may claim points based on corporate experience in the following areas: experience relevant to each RFP task area² the offeror is proposing; leading edge technology; federal multiple-award contracts; and Executive Order 13779, which concerns historically black colleges and universities.³ *Id.* at 150. The solicitation advises that "[o]nly the highest rated offerors will advance to phase 2 of the evaluation." *Id.* at 174.

The phase 1 self-scoring criteria require that offerors "prove to the government the offeror's corporate experience examples are real and legitimate" by submitting for each corporate experience reference a completed copy of RFP attachment J.6, Self-Scoring

¹ Citations to the record and the parties' briefings are to the Adobe PDF pages for those documents. Citations to the solicitation are to RFP amendment No. 9, which was issued on August 2, unless otherwise noted. Subsequent to NIH's filing of its report responding to the protest, the agency issued additional RFP amendments that are not at issue here.

² The RFP identifies 10 task areas for performance. RFP at 25. Offerors are allowed to propose to perform some or all of the task areas, depending on their business category; for example, large businesses must propose for all 10 task areas, whereas small businesses may propose for task area 1 (IT services for biomedical research, health sciences, and healthcare) and at least 7 other task areas. *Id.* at 158-59.

³ Offerors may also claim points based on whether they possess the following capacities or certifications: Capability Maturity Model Integration certification Level 2; earned value management system; acceptable estimating system; International Organization for Standardization (ISO) 9001 certification; ISO 20000 Certification; ISO 27001 Certification; approved purchasing system; and secret facility clearance level. RFP at 159-160.

Sheet Experience Template. *Id.* at 161-65. This attachment directs offerors to provide the following information: contractor name; contract and/or order number; project title; customer name; period of performance; project value; funding agency name, if applicable; whether the project was an government IDIQ task order; contact information for the customer; and a description of the project. AR, Tab 8e, RFP amend. 6, attach. J.6 at 2-3. An offeror may claim points for each experience example under which an offeror performed work in the RFP's task areas; higher points may be claimed for contracts with higher dollar values. RFP at 161-64. Additionally, offerors are required to provide a "Project Verification Method," by either: (1) submitting attachment J.6 with the signature of the contracting officer, contracting officer's representative, or a corporate official; or (2) submitting a Federal Procurement Data System printout for the project. RFP attach. J.6 at 3.

In phase 2 of the evaluation, the agency will validate whether offerors' proposals comply with "go/no-go" criteria and other mandatory certification requirements. *Id.* at 174. Proposals that satisfy the phase 2 evaluation criteria will advance to the phase 3 evaluation. *Id.* In phase 3 of the evaluation, the agency will evaluate proposals under the following four evaluation factors: (1) health IT capability, (2) management approach, (3) past performance, and (4) price. *Id.* at 176. For purposes of award, the solicitation states that "the government will use a selection methodology that awards contracts to offerors whose proposals represent the best value to the government at fair and reasonable prices." *Id.* at 173.

TAIC filed this protest on July 15, which was prior to the then-applicable July 23 closing date for receipt of proposals established by RFP amendment No. 5. See AR, Tab 8b, RFP amend. No. 5 at 1.

DISCUSSION

TAIC argues that the RFP is unduly restrictive of competition because it requires offerors to provide information to validate their corporate experience⁴ that would disclose the identity of their customers and contracts performed. Protest at 5-6. The protester contends that this requirement places prospective offerors such as itself at a competitive disadvantage because its otherwise relevant commercial contracts contain confidentiality provisions that prohibit disclosure of information required by the RFP. *Id.* at 6. For the reasons discussed below, we find no basis to sustain the protest.

Agencies must specify their needs in a manner designed to permit full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy the agencies' legitimate needs or as otherwise authorized by law.

⁴ The protester's arguments concern the RFP requirement to submit corporate experience examples for the self-scoring criteria in (1) RFP section L.5.2.1, corporate experience relevant to the RFP task areas, and (2) RFP section L.5.2.2, leading edge technology experience. Protest at 1-2. We refer to these requirements collectively as corporate experience.

41 U.S.C. § 3306(a). Where a protester challenges a solicitation specification or requirement as unduly restrictive of competition, the procuring agency must establish that the specification or requirement is reasonably necessary to meet the agency's needs. *Remote Diagnostic Techs., LLC*, B-413375.4, B-413375.5, Feb. 28, 2017, 2017 CPD ¶ 80 at 3-4. We examine the adequacy of the agency's justification for a solicitation provision challenged as unduly restrictive to ensure that it is rational and can withstand logical scrutiny. *Coulson Aviation (USA), Inc.*, B-414566, July 12, 2017, 2017 CPD ¶ 242 at 3. 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. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them, without more, does not establish that the agency's judgment is unreasonable. *Protein Scis. Corp.*, B-412794, June 2, 2016, 2016 CPD ¶ 158 at 2.

As discussed above, phase 1 of the competition requires offerors to substantiate their self-scoring points for each corporate experience reference by submitting a completed attachment J.6 that identifies the contract and the customer. RFP at 161-65, 174; RFP attach. J.6 at 2-3. In the case of commercial contracts, attachment J.6 must also be signed by a corporate official for the customer. RFP attach. J.6 at 3.

TAIC argues that the RFP's requirement to provide the information required by attachment J.6 is unduly restrictive of competition because the protester is "legally restricted from providing this information in some cases based on confidentiality agreements with its commercial customers." Protest at 2. The protester contends that it "possesses the requisite experience in the commercial sector" to compete for an award, but states that it cannot claim self-scoring points under the RFP because it cannot disclose certain of those contracts. Protest at 2, 6. Specifically, the protester explains that it is "precluded by the terms of certain confidentiality agreements from disclosing customer names, contract numbers, period of performance, and corporate official contract information, as required by Attachment J.6." *Id.* at 6. For example, the protester states that "one of TAIC's contracts includes a confidentiality provision that defines 'the existence and terms' of the contract as 'Confidential Information' that TAIC is obligated to hold in confidence and may not disclose to anyone, at any time (other than to its personnel to perform the services required under the contract)." *Id.*

NIH states that the solicitation's requirement to provide the information in RFP attachment J.6 is reasonable because the agency needs to validate that the experience claimed by offerors is "real and legitimate." Memorandum of Law at 6-7 (*citing* RFP at 161-64 ("The documentation must prove to the government the offeror's corporate experience examples are real and legitimate.")). In this regard, the contracting officer explains that "the intent of Attachment J.6 is to provide validation beyond the offeror's own assertion regarding the experience provided." COS at 4. NIH states that relying solely on an offeror's representations concerning its experience, without the validation provided by attachment J.6, "introduces a high risk of fraudulent proposal submissions

that the agency would be unable to mitigate, which would result in an unfair competition.” *Id.*

We think that NIH reasonably explains that it needs to validate an offeror’s claimed corporate experience. The agency states that in order to ensure that an offeror’s claimed experience--and self-scoring points--are legitimate, the agency requires information about the contract performed, including the identity of the customer. See COS at 4. The protester does not contend that the agency is prohibited under any procurement law or regulation from requesting information to validate an offeror’s claim.⁵ On this record, we see no reason why the agency cannot require that offerors provide information to support their claimed corporate experience.

TAIC argues that the requirement to submit the information in attachment J.6 is not reasonably related to the agency’s need to validate claimed corporate experience for two primary reasons. First, the protester argues that because of “pre-existing civil, criminal, and administrative measures prohibiting false statements in proposals,” the requirement to validate an offeror’s experience is “redundant and not reasonably necessary to meet the Agency’s needs.” Comments at 2-4. The protester also argues that the requirement to provide a signature from a corporate official of a commercial customer “is not likely to provide the anti-fraud benefit that the Agency claims” because such a signature could be forged. *Id.* at 3-4. For these reasons, the protester contends that the agency has not established that the information required by attachment J.6 is reasonably related to the need to validate an offeror’s claimed corporate experience.

We think that the requirement to submit the information in attachment J.6 is reasonably related to the agency’s need to avoid fraud and validate an offeror’s claimed corporate experience. In this regard, we agree with the agency that the contract number and identify of the client are essential data for validating the existence of a claimed corporate experience reference. The protester, in essence, disagrees with the agency’s view that the threat of legal sanction attached to a false statement in a proposal is not sufficient to protect the agency’s interests. On this record, we find that the protester’s disagreement with the agency’s judgment regarding the probative value of the required information and certifications to the agency’s need to validate offeror’s corporate experience, without more, does not provide a basis to sustain the protest. See *Remote Diagnostic Techs., LLC, supra*; *Protein Scis. Corp., supra*

⁵ TAIC argues that the Freedom of Information Act (FOIA), 5 U.S.C. § 552, treats certain commercial contract information as confidential, and that this information is exempt from disclosure under FOIA. Protest at 6. The protester contends, therefore, that the RFP improperly requires disclosure of confidential information. See *id.* This argument, however, does not establish that the RFP provision challenged here is unreasonable, as FOIA concerns disclosure of information by the government to the public, and does not concern disclosure of information by prospective contractors to the government for the purposes of competing for awards. See 5 U.S.C. § 552.

Second, TAIC argues that NIH could accept alternative forms of information to validate offerors' corporate experience, in lieu of information that specifically identifies the contracts performed. Protest at 7. For example, the protester contends that an offeror could provide redacted copies of contract documents for its corporate experience that address "performance dates, value, and task areas involved" but do not identify the contract number, the customer, and the project performed, or provide the validating signature of a corporate official. See Comments at 6.

In support of its proposed alternative, the protester contends that other agencies, such as the General Services Administration (GSA), have allowed offerors to provide alternative documentation to substantiate claimed self-scoring points in proposals, in lieu of documents specified in the solicitation, as long as the alternative documentation substantiates the claimed points. Protest at 7-8. The protester also contends that GSA has issued solicitations for multiple award IDIQ GWACs to provide IT services that do not require customer signatures. Comments at 3.

Our Office has recognized that each procurement is a separate transaction, and an agency's practices or actions under one procurement do not bind its practices or actions in other procurements. *Ideal Fastener Corp.*, B-404206, Jan. 11, 2011, 2011 CPD ¶ 19 at 4; *The Standard Register Co.*, B-289579, Mar. 5, 2002, 2002 CPD ¶ 54 at 2-3; *Southern CAD/CAM*, B-254201, Nov. 16, 1993, 93-2 CPD ¶ 278 at 4. It therefore follows that where, as here, an agency has a reasonable basis for the issuance of a solicitation requirement or provision, that requirement or provision is not rendered unreasonable by the fact that another agency utilized a less-restrictive requirement or provision. See *id.* We therefore find that even if other agencies have issued solicitations that accept information that the protester views as less restrictive, nothing bars NIH from imposing the otherwise reasonable requirement for information in RFP attachment J.6.⁶

In sum, we think that the solicitation issued by NIH reasonably requires offerors to provide the information in RFP attachment J.6 to validate offerors' claimed corporate experience and self-scoring points. To the extent the protester contends that the challenged solicitation terms place it at a competitive disadvantage, an agency is not required to eliminate a disadvantage an offeror may experience because of its particular

⁶ In any event, we note that TAIC does not clearly explain how its proposed alternative submissions could validate its claimed corporate experience. TAIC represents that certain of the contracts it wishes to cite in its proposal prohibit the protester from disclosing "customer names, contract numbers, period of performance, and corporate official contract information," and at least one contract precludes disclosure of the "existence" of the contract. Protest at 6. In light of the protester's challenge to disclosure of information that the agency states is necessary to validate the self-scoring representations, and the protester's acknowledged limitations on what kinds of redacted information it could provide, we find no basis to conclude that the protester's proposed alternatives constitute a reasonable alternative to meet the agency's requirements.

business circumstances, where that advantage or disadvantage does not result from an improper preference or unfair action by the government. See *Management & Tech. Servs. Alliance Joint Venture*, B-416239, June 25, 2018, 2018 CPD ¶ 218 at 4-5; *Missouri Mach. & Eng'g Co.*, B-403561, Nov. 18, 2010, 2010 CPD ¶ 276 at 5. The fact that a requirement may be burdensome, or even impossible, for a particular firm to meet does not make it objectionable if that requirement reasonably represents the agency's needs. *Advanced Commc'n Cabling, Inc.*, B-410898.2, Mar. 25, 2015, 2015 CPD ¶ 113 at 6-7. We therefore find no basis to sustain the protest.⁷

The protest is denied.

Edda Emmanuelli Perez
General Counsel

⁷ TAIC also argues that the solicitation's requirement to complete the attachment J.6 provision "effectively" limits corporate experience to contracts performed for the federal government. Protest at 7. The RFP, however, expressly permits offerors to submit government and non-government experience references. RFP at 161-64. As discussed above, the competitive disadvantage alleged by TAIC arises from the protester's own circumstances--the commercial contracts it negotiated with its customers--rather than any unfair action on the part of the government. Because, as discussed above, we conclude that the agency's requirement is reasonable, we find no basis to conclude that the protester's inability to satisfy the requirement establishes that it is unduly restrictive of competition.