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Decision

Matter of: Science and Technology Corporation

File: B-420216

Date: January 3, 2022

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DIGEST

1. Protest challenging solicitation's key personnel requirement as unduly restrictive of competition is dismissed as untimely where the protester failed to file its protest with our Office within 10 days of initial adverse agency action following the protester's agency-level protest of the same issue.
 2. Protest challenging solicitation's corporate experience requirement as unduly restrictive of competition is denied where the agency has articulated a reasonable basis for imposing the requirement.
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DECISION

Science and Technology Corporation (STC), of Hampton, Virginia, protests the terms of fair opportunity request for proposals (FORFP) No. 1305M321QNWWX0061, issued by the Department of Commerce (DOC), National Oceanic and Atmospheric Administration (NOAA), for scientific support services on behalf of the National Centers for Environmental Prediction (NCEP). STC argues that certain solicitation requirements are unduly restrictive of competition and are designed to provide the incumbent contractor with an unfair competitive advantage.

We deny the protest.

BACKGROUND

The NCEP, an office within the National Weather Service (which is part of NOAA), “is the nation’s focal point for all matters relating to environmental modeling, which includes developing, enhancing, and maintaining numerical forecast systems for the atmosphere, hydrosphere, and cryosphere in support of national and international forecast requirements.” Contracting Officer’s Statement (COS) at 1; see Agency Report (AR), Tab 2b, FORFP amend. 2, Performance Work Statement (PWS) at 17.¹

On September 7, 2021, the agency issued the FORFP for scientific support services to holders of NOAA’s “ProTech Weather Domain” indefinite-delivery, indefinite-quantity (IDIQ) contract, pursuant to the procedures of Federal Acquisition Regulation (FAR) section 16.505. COS at 1. The solicitation contemplates the award of a hybrid time-and-materials and fixed-priced task order for a base year with four 1-year options. FORFP amend. 2 at 13, 58. In general terms, the contractor is to provide qualified personnel capable of meeting the PWS requirements regarding numerical model prediction, analysis, data assimilation, observation processing, forecasting, post-processing, product development, verification and validation, and data archival.² PWS at 17-27. The solicitation establishes that task order award is to be made on a best-value tradeoff basis, based on four evaluation criteria: (1) technical approach; (2) management approach; (3) corporate experience; and (4) price. FORFP amend. 2 at 56-57. The nonprice factors are of equal importance, and when combined, are significantly more important than price. *Id.* at 56.

Relevant to the protest here, the solicitation includes a key personnel requirement for five lead physical scientist positions (and a program manager). FORFP amend. 2 at 12. Additionally, with regard to the corporate experience evaluation factor, the solicitation establishes that “[t]he Government will evaluate the summary of work experience for similar nature, scope, complexity, and difficulty to that which will be performed under the prospective task order contemplated by this FORFP, assessing the likelihood that the offeror’s relevant experience will minimize risk to the Government of unsuccessful performance.” *Id.* at 57.

On September 13, STC submitted a “letter of concerns” to the director of NOAA’s Western Acquisition Division regarding the many “competition-inhibiting” requirements of the solicitation, including the number of key personnel positions: “Requiring six Key Personnel – especially in the domain of numerical modeling – a field whose experts are not easily available outside the NASA/NOAA/University community is far too demanding

¹ Unless otherwise noted, references to the solicitation are to the version produced by the Commerce Department in the agency report that is conformed through amendment No. 2.

² The solicitation also specifies the labor categories and labor hours that the contractor is to deliver: 302,680 hours, or approximately 161 full-time equivalent employees, in each performance period. *Id.* at 5-9.

and highly favors the incumbent contractor.” AR, Tab 5a, STC Letter of Concerns at 1 (emphasis omitted). In that letter, the protester also stated that, “STC believes if at least the following were addressed, the FORFP would be less incumbent favoring and offer a fairer opportunity to non-incumbents and importantly, provide high quality and best value proposals to the government.” *Id.* at 2. One of STC’s requests was that the agency “[r]educe the Scientific Lead Key Personnel requirement from five to two.” *Id.*

On September 14, the NOAA acquisition director responded to the STC letter of concerns as follows:

I have received and carefully reviewed your Letter of Concerns in regards to the subject FORFP. The letter contained five (5) factors that led you to believe that the FORFP would inhibit competition and not provide best value to the Government. I will address each factor in the order they were listed in your original letter. . . . The [requiring activity] has a legitimate need for the Key Personnel as listed in the solicitation.

* * * * *

Additionally, the [STC] letter had three (3) requests, which I have addressed in the order they were listed below. . . . Key Personnel [positions] will remain the same and is an important aspect of the requirement.³

AR, Tab 5b, Agency Response to STC Letter of Concerns at 1-2.

On September 15, the agency issued FORFP amendment 1, which among other things, provided written answers to the questions submitted by prospective offerors. AR, Tab 2a, FORFP amend. 1, Questions and Answers (Q&A), at 59-71. In response to a question asking whether the agency would consider removing the key personnel requirement altogether or limiting the requirement to only one key person (the program manager), the agency stated that it would not reduce the number of lead physical scientists required as key personnel. *Id.* at 68. NOAA also clarified in a follow-on Q&A that the agency’s evaluation of corporate experience would be limited to “the prime [contractor] with which the Government has contractual privity.” AR, Tab 3, Additional Q&A Responses.

³ STC subsequently raised the same concern regarding the lead physical scientist key personnel requirement again with NOAA’s acquisition and grants ombudsman on September 20. Protest at 9; see AR, Tab 5c, STC Letter of NOAA Ombudsman at 1-6. The ombudsman responded the following day, stating, among other things, that “[b]ased on my findings, it appears that the Government has not breached or intends to breach policy or law, and that it has demonstrated that it has every intention to consider all proposals fairly and objectively.” Tab 5d, NOAA Ombudsman Email to STC at 1-2.

On October 1, prior to the solicitation's October 4 closing date, STC filed this protest with our Office.⁴

DISCUSSION

STC argues that, in two specific regards, the FORFP is unduly restrictive of competition and is designed to provide the incumbent contractor with an unfair competitive advantage. First, the protester challenges the agency's requirement for five lead physical scientists as key personnel. Second, STC alleges the solicitation's corporate experience evaluation factor--assessing only the prime contractor's experience and not considering the experience of team members and/or subcontractors--is improper and represents an unwarranted departure from NOAA past practice. We have considered all of the protester's arguments and, while we do not address every issue raised, we conclude none furnishes a basis on which to sustain the protest.

Timeliness

As an initial matter, we consider the timeliness of STC's allegation that the solicitation's key personnel requirement (*i.e.*, five lead physical scientists) is unduly restrictive of competition. Here, STC submitted a letter to the director of the NOAA Western Acquisition Division on September 13 asserting, among other things, that the lead physical scientist requirement was unduly restrictive, and requesting that the number of key personnel positions be decreased. The agency asserts that this letter was an agency-level protest, and that STC failed to timely file its protest with GAO within 10 days of the agency's denial of STC's protest regarding this issue. We agree.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. *Coulson Aviation (USA), Inc.*, B-411525, B-411525.2, Aug. 14, 2015, 2015 CPD ¶ 272 at 5. As a general rule, our regulations require that protests based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals are required to be filed before that time. 4 C.F.R. § 21.2(a)(1); *A&T Sys., Inc.*, B-401701, B-401701.2, Nov. 12, 2009, 2010 CPD ¶ 62 at 5. A limited exception to this rule exists, however, when a protester has filed a timely agency-level challenge to a solicitation, and receives an unfavorable answer. *Coulson Aviation (USA), Inc.*, *supra*. In such instances, any subsequent protest on the same issue to our Office will be considered if it is filed within 10 days of actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(3).

⁴ The agency represents that the estimated value of the task order to be issued exceeds \$10 million. Supp. Memorandum of Law (MOL) at 3. Accordingly, the procurement here is within our jurisdiction to hear protests related to the issuance of task orders under IDIQ contracts awarded by civilian agencies. 41 U.S.C. § 4106(f); *Analytic Strategies LLC; Gemini Indus., Inc.*, B-413758.2, B-413758.3, Nov. 28, 2016, 2016 CPD ¶ 340 at 4-5.

Furthermore, our Office has long held that, to be regarded as a protest, a written statement need not state explicitly that it is or is intended to be a protest, but must convey the intent to protest by a specific expression of dissatisfaction with the agency's procurement actions and a request for relief. *Coulson Aviation (USA), Inc., supra*; *Mackay Commc'ns--Request for Recon.*, B-238926.2, Apr. 25, 1990, 90-1 CPD ¶ 426 at 1. In contrast, we have explained that a letter that merely expresses a suggestion, hope, or expectation, does not constitute an agency-level protest. *DCR Servs. & Constr., Inc.*, B-415565.2, B-415565.3, Feb. 13, 2018, 2018 CPD ¶ 125 at 4 n.7.

As discussed above, NOAA issued the FORFP on September 7 which required, among other things, five lead physical scientists as key personnel. On September 13, STC sent a letter to the director of the NOAA Western Acquisition Division objecting to the agency's decision to denote five lead physical scientists as key personnel. AR, Tab 5a, STC Letter of Concerns at 1. Specifically, STC asserted that requiring five lead physical scientists as key personnel was unduly restrictive of competition. *Id.* STC also requested that the agency revise the RFP and "[r]educe the Scientific Lead Key Personnel requirement from five to two." *Id.* at 2.

On September 14, the NOAA acquisition director denied STC's request to amend the solicitation. AR, Tab 5b, Agency Response to STC Letter of Concerns at 1-2. Specifically, in response to STC's request that the lead physical scientist requirement be adjusted from five positions to two positions, the agency stated that "[k]ey Personnel will remain the same and is an important aspect of the requirement." *Id.* at 1.

Based on this record, we conclude that STC's September 13 letter to the NOAA acquisition director was an agency-level protest. As stated above, to be regarded as a protest, a written statement need only convey the intent to protest by an expression of dissatisfaction with an agency procurement action and a request for corrective action. *See Mackay Commc'ns--Request for Recon., supra.* Here, STC's letter clearly expressed dissatisfaction with the solicitation by disagreeing with NOAA's decision to designate five lead physical scientists as key personnel. The STC letter also requested specific corrective action by asking that NOAA revise downward the FORFP's key personnel requirement here. STC's letter therefore conveyed the intent to protest. *See FAR 33.103(d); Coulson Aviation (USA), Inc., supra* at 6-7; *compare American Material Handling, Inc.*, B-250936, Mar. 1, 1993, 93-1 CPD ¶ 183 at 2-3 (finding protester's letter to be an agency-level protest when it recommended changes in the solicitation specifications and requested a response from the agency to its letter), *with Silver Investments, Inc.*, B-419028, Oct. 26, 2020, 2020 CPD ¶ 332 at 4-5 (concluding protester's letter was not an agency-level protest where it did not request a ruling or any specific relief from the agency).

The record also reflects that, on September 14, NOAA first advised STC as to the agency's position that the key personnel requirement was an important aspect of the scientific support services requirement, and that the agency would not modify the requirement as requested by STC. AR, Tab 5b, Agency Response to STC Letter of Concerns at 1-2. On September 15, the agency then issued an amended FORFP

which, consistent with the NOAA acquisition director's September 14 statements in his letter to STC, did not change the key personnel requirements, and reemphasized in the Q&A that "[t]he requirement for [lead physical scientists] Key Personnel will remain." FORFP amend. 1 at 68.

STC does not dispute that its September 13 letter to the NOAA acquisition director was a formal objection to an agency procurement action. See Protest at 8 ("STC lodged two formal objections directly to the Agency. . . . First, on September 13, 2021 . . ."). Rather, the protester argues that the agency's reply "did not constitute 'adverse agency action' as it did not [entirely] shut the door on STC's concerns" Comments at 15. In support thereof, STC refers to the end of the NOAA acquisition director's response as follows:

I do appreciate you bringing forward your concerns; however, it does not appear any changes are required to the FORFP at this time. The due date for all inquiries is tomorrow and the [contracting officer] will be providing responses to all questions shortly thereafter, which should provide further clarification to guide you in providing a response to the FORFP. If warranted, an extension to the FORFP may be provided.

AR, Tab 5b, Agency Response to STC Letter of Concerns at 2.

We find STC's reliance on the agency's September 14 letter to be both selective and misplaced. First, as set forth above, the NOAA acquisition director responded point-by-point to each STC concern and request. With regard to STC's request that the agency "[r]educe the Scientific Lead Key Personnel requirement from five to two," AR, Tab 5a, STC Letter of Concerns at 2, the NOAA acquisition director's reply was "[k]ey Personnel will remain the same and is an important aspect of the requirement." AR, Tab 5b, Agency Response to STC Letter of Concerns at 1. We find nothing unclear or indefinite about the agency's response here. Moreover, the language upon which STC relies indicates the only aspect of the FORFP that was not entirely certain was whether the agency would extend the solicitation's closing date--which was another STC request.

Under our regulations, 4 C.F.R. §21.2(a)(3), where a protest is filed initially with the agency, any subsequent protest to our Office must be filed no later than 10 days after actual or constructive knowledge of initial adverse agency action. Our regulations define the term "adverse agency action" to include action or inaction by an agency that is prejudicial to the position taken in the protest, including a decision on the merits of the agency-level protest. 4 C.F.R. § 21.0(e).

On this record, we believe the agency clearly articulated its disagreement with STC regarding the lead physical scientist requirement as well as the fact that the agency was not going to change the requirement from five lead physical scientist positions to two positions as STC requested. The agency's disagreement with STC's position and refusal to amend the solicitation as requested by STC constituted adverse agency action. *DAI, Inc.*, B-408625, B-408625.2, Nov. 6, 2013, 2013 CPD ¶ 259 at 3; 4 C.F.R.

§ 21.0(e). As STC received notice of adverse agency action on September 14, and did not file its protest with our Office until October 1, more than 10 days later, we find this aspect of STC's protest to be untimely.⁵ 4 C.F.R. § 21.2(a)(3) ("If a timely agency-level protest was previously filed, any subsequent protest to GAO filed within 10 days of actual or constructive knowledge of initial adverse agency action . . ."). Accordingly, we dismiss this allegation as untimely.

Corporate Experience Evaluation Requirement

STC also challenges the agency's corporate experience evaluation requirement (and corresponding proposal submission instructions). Specifically, the protester contends the agency's decision to only consider the corporate experience of the prime contractor, and not also the corporate experience of the prime contractor's team members and/or subcontractors, is unduly restrictive of competition. Protest at 11-13.

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. 41 U.S.C. § 3306(a). 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. *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 restrictive solicitation provision to ensure that it is rational and can withstand logical scrutiny. *DynCorp Int'l, LLC*, B-418742.2, Sept. 25, 2020, 2020 CPD ¶ 318 at 6. A protester's disagreement with the agency's judgment concerning the agency's needs and how to accommodate them, without more, does not show that the agency's judgment is unreasonable. *Emax Fin. & Real Estate Advisory Servs., LLC*, B-408260, July 25, 2013, 2013 CPD ¶ 180 at 4.

The fact that an evaluation criterion may be burdensome, or otherwise makes a firm's offer less competitive, is not objectionable, provided the agency's criteria have a reasonable basis and are not otherwise contrary to law or regulation. *AAR Mfg. Inc.*,

⁵ In any event, even if we were to agree--which we do not--with STC's characterization of NOAA's September 14 letter, the agency's amendment to the solicitation, issued on September 15, was clearly adverse action. The amendment not only kept the same key personnel requirement, but in response to a question asking whether the agency would consider removing the lead physical scientist key personnel requirement or limiting the requirement to only one key personnel, the agency stated that "[t]he requirements for Key Personnel will remain." FORFP amend. 1 at 68. With the issuance of that amendment, the protester was plainly on notice that the agency had denied STC's request to amend the FORFP to reduce the number of required key personnel. *DAI, Inc., supra*. As such, this allegation would still be untimely because STC did not file its protest until October 1, more than 10 days of receiving notice of the adverse action. 4 C.F.R. § 21.2(a)(3).

d/b/a AAR Mobility Sys., B-418339, Mar. 17, 2020, 2020 CPD ¶ 106 at 13. Further, a protester's disagreement with an agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment regarding the selection of evaluation criteria is unreasonable. *Id.*; *Dynamic Access Sys.*, B-295356, Feb. 8, 2005, 2005 CPD ¶ 34 at 4.

We have also previously found a solicitation requirement that limited the agency's experience evaluation--to that of the prime contractor's experience--does not unduly restrict competition where the record demonstrates that the requirement is reasonably related to the agency's needs. *Diversity Marketing and Commc'ns, LLC*, B-412196.2, Mar. 9, 2016, 2016 CPD ¶ 84 at 4 (finding the agency's desire to reduce the risk of unsuccessful performance can be rationally achieved by restricting consideration of experience to the firms contractually obligated to meet the agency's requirements, *i.e.*, the prime); *Valor Constr. Mgmt., LLC*, B-405365, Oct. 24, 2011, 2011 CPD ¶ 226 at 3 (agency's decision not to consider team member's experience and past performance was not unduly restrictive of competition); *see also Emax Fin. & Real Estate Advisory Servs., LLC, supra* at 6 (agency's concern with limiting risk of unsuccessful performance by favoring experience of firms that will be in privity with the government reasonably relates to agency's needs in choosing a contractor that will best serve its interests with respect to a complex project).

Although not part of the contemporaneous record, the agency asserts that the goal of its experience evaluation requirement is to determine whether the prime contractor--the only corporate entity contractually obligated to perform the task order--has the requisite scientific support services experience.⁶ MOL at 7-8; COS at 8-9.

⁶ In reviewing an agency's procurement actions, we do not limit our consideration to contemporaneously-documented evidence, but instead consider all the information provided, including the parties' arguments, explanations, and any hearing testimony. *AllWorld Language Consultants, Inc.*, B-414244, B-414244.2, Apr. 3, 2017, 2017 CPD ¶ 111 at 4 n.3. While we accord greater weight to contemporaneous materials as opposed to judgments made in response to protest contentions, post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review of the rationality of selection decisions--so long as those explanations are credible and consistent with the contemporaneous record. *NWT, Inc.; PharmChem Labs., Inc.*, B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16 (*citing Quality Elevator Co., Inc.*, B-276750, July 23, 1997, 97-2 CPD ¶ 28 at 3-4). Here, the contracting officer indicates that she considered the FORFP's corporate experience evaluation requirement as part of the solicitation's creation and issuance. COS at 8-9; *see also* AR, Tab 3, Additional Q&A Responses. We find no basis on the record here to question the contracting officer's representations.

Specifically, the contracting officer explains:

The NCEP [scientific support services] requirement is a large, dynamic, and complex project with national importance. The [NCEP] workforce only numbers approximately 50 federal employees while the contractor workforce numbers 140 to 164 personnel at any given time. This complex undertaking requires an evaluation of a prime's similar experience, which is more informative than a proposed subcontractor's experience in this respect and greatly reduced the risk to the Agency of a prime failing to manage this complex and extensive requirement. The Agency interfaces with the prime for all activities, communication, and coordination. Federal Oversight Managers communicate directly with the prime contractor to discuss development objectives, which include multiple PWS elements for projects. The prime contractor coordinates contract staff to achieve objectives and communicate progress back to Federal Oversight Managers. The prime is expected to address and resolve operational failure promptly in a 24/7/365 manner. The prime performs urgent model adjustments responsive to discovered issues or biases in output, and responds to requests for subject matter information from NOAA, DOC, and the public for highly visible reporting. Since NCEP is heavily dependent on the services of the prime contractor to fulfill its mission, it is critical that there is privity of contract with a prime contractor that has expertise and experience in the full suite requirements of the PWS.

COS at 8.

Here, we think the record supports the agency's position that the prime contractor experience requirement is reasonably related to its needs. In this regard, the agency avers that it needs to limit the risk of unsuccessful performance with respect to its high-visibility, highly-specialized program. As we have concluded in similar circumstances, the agency's desire to reduce the risk of unsuccessful performance can be rationally achieved by restricting consideration of experience to the firms which are contractually obligated to meet the agency's requirements. *Diversity Marketing and Commc'ns, LLC, supra*; *Valor Constr. Mgmt., LLC, supra*. Given this, we find nothing improper about the FORFP provision that restricts the agency's evaluation of experience to the prime contractor. Although STC contends that it cannot compete fairly under the existing solicitation, the fact that a requirement may be burdensome, or even impossible for a particular firm, does not make it objectionable if the requirement meets an agency's legitimate needs.⁷ *Advanced Commc'n Cabling, Inc.*, B-410898.2, Mar. 25, 2015, 2015 CPD ¶ 113 at 6-7.

⁷ To the extent the protester alleges that the agency's restriction on subcontractor experience is made in bad faith (*i.e.*, that it was designed to provide the incumbent with an unfair competitive advantage), government officials are presumed to act in good faith, and a protester's contention that contracting officials are motivated by bias or bad

In sum, we conclude the agency's rationale for limiting the consideration of corporate experience to only that of the prime contractor is unobjectionable. Although the protester argues the agency "can achieve its needs in ways that are less restrictive," Protest at 18, and that the agency's rationale for restricting the consideration of corporate experience does not withstand "logical scrutiny," Comments at 5, we find that the agency has, at a minimum, articulated a basis for why the requirement is reasonably related to the agency's needs. As such, we do not find the protester's contention here to provide a basis on which to sustain the protest.⁸

The protest is denied.

Edda Emmanuelli Perez
General Counsel

faith must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. *Diversity Marketing and Commc'ns, LLC, supra* at 4 n.3. Apart from STC's unsupported allegation, STC has provided no evidence--and there is none in the record--showing bad faith here.

⁸ We also find no merit to STC's assertion that the FORFP's corporate experience evaluation requirement is unreasonable because it represents a departure from NOAA's past practice or how the agency "normally does business." Protest at 14; see Comments at 10-11. Our Office has consistently explained that each federal procurement stands on its own, and an agency's actions during one acquisition have no bearing on its actions in another acquisition. *Sheritech Pharmacy*, B-419069, Oct. 29, 2020, 2020 CPD ¶ 336 at 3, *recon. denied, Sheritech Pharmacy Piedmont, LLC--Recon.*, B-419069.2, Apr. 1, 2021, 2021 CPD ¶ 134; *Ronald L. Glass*, B-417855, Nov. 21, 2019, 2019 CPD ¶ 392 at 4 n.4. Quite simply, our review is limited to whether the challenged requirement is necessary to satisfy the agency's legitimate needs, not whether it is consistent with alleged agency past practice. *Sheritech Pharmacy Piedmont, LLC--Recon., supra* at 5 (finding that whether the contracting agency imposes the same requirement in its other medical centers "is irrelevant to deciding the reasonableness of the agency's 50-mile radius requirement for the . . . medical center" at issue).