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**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: J&J Maintenance, Inc.

File: B-405310

Date: October 17, 2011

Joseph A. Yazbeck, Jr., Esq., and D. Brent Carpenter, Esq., Yazbeck, Cloran & Bowser, PC, for the protester.

Maj. Christine C. Fontenelle, Lt. Col. Dana J. Chase, and Maj. Mark A. Ries, Department of the Army, for the agency.

Pedro E. Briones, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that a solicitation for hospital operation and maintenance services in the Republic of Korea was set aside for local sources and did not grant “invited contractor status” to non-local firms under the Status of Forces Agreement between the United States and the Republic of Korea is denied where the agency reasonably determined that local offerors could perform the required services.

DECISION

J&J Maintenance, Inc., (J&J) of Austin, Texas, protests the terms of request for proposals (RFP) No. W91QVN-11-R-0135, issued by the Department of the Army, for operation and maintenance (O&M) services for Medical Command-Korea (MEDDAC-K) facilities in the Republic of Korea.

We deny the protest.

BACKGROUND

The RFP, issued under the commercial acquisition procedures of Federal Acquisition Regulation (FAR) Part 12 as a set-aside for local sources, provides for the award of a fixed-priced contract for O&M services and related functions at Army medical facilities located throughout the Republic of Korea for a 1-month phase-in period, a base year, and 4 option years. The RFP states that “invited contractor status” under the Status of Forces Agreement (SOFA) between the United States of America and the Republic of Korea would not be granted to non-local offerors and that offerors must have or obtain the requisite Korean business licenses, as well as

comply with, among other things, Korean labor, tax, and immigration laws and regulations. See RFP at 3; RFP amend. 1, at 6. The RFP also states that if no acceptable offers are received, the agency may re-solicit the requirement and grant invited contractor status. See RFP at 3.

Under the SOFA, United States businesses present in Korea solely for the purpose of performing contracts for United States armed forces may be designated “invited contractors” and are thereby exempted from Korean customs duties, taxes, and employment laws and regulations, as well as business and corporation licensing and registration requirements, among other things. Agreement under Article IV of the Mutual Defense Treaty between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, art. XV; 17 U.S.T. 1677, T.I.A.S. No. 6127 (1967). SOFA provides that invited contractor status may only be granted upon consultation with the Korean government and where open competition is not practicable due to: security considerations; the technical qualifications of the contractors involved; limitations under United States law; or, as relevant here, the unavailability of materials or services required by United States standards. See id., § 2; see U.S. Forces Korea, Reg. No. 700-19, The Invited Contractor & Tech. Rep. Prog., June 4, 2007; see, e.g., Kongdan Kumnan Rest./Good Food Serv., B-276846.2, Feb 23, 1998, 98-1 CPD ¶ 57.

As relevant here, Department of Defense (DOD) hospitals and medical facilities including facilities like MEDDAC-K that are located overseas, must be accredited by the Joint Commission (TJC).¹ See DOD Instr. No. 6025.13, Feb. 17, 2011, *Med. Quality Assurance & Clinical Quality Mgmt. in the Mil. Health Sys.*, at 1, 6. TJC is an independent organization that accredits United States hospitals and health care organizations (HCO) consistent with United States laws, regulations, and medical practices. See Agency Report (AR) at 14; www.jointcommission.org; see also University of Kansas Med. Ctr., B-278400, Jan. 26, 1998, 98-1 CPD ¶ 120 at 1, n.1. A detailed performance work statement (PWS) was provided that requires the contractor to, among other things, meet TJC standards and to ensure that all MEDDAC-K medical facilities maintain TJC accreditation at all times. See RFP, PWS, at 8-9, 26; see also RFP amend. 1, at 2-4. In this regard, the contractor will also be required to provide monthly reports detailing on-going compliance with TJC’s Comprehensive Accreditation Manual for Hospitals. See PWS, attach. 2, Technical Exhibit 1-006, “TJC Reporting Requirements.”

The RFP states that award will be made on a lowest-priced, technically acceptable basis considering the following evaluation factors: management, experience,

¹ TJC was previously known as the Joint Commission on Accreditation of Healthcare Organizations (JCAHO).

technical, past performance, and price; offerors are required to submit separate proposals under each factor. See RFP at 77, 89-92. Under the experience factor the RFP identifies two subfactors: prime contractor experience and key personnel. See id. at 89-91. Under the technical factor the RFP identifies two subfactors: mission capability and transition of operations (phase-in and phase-out plan). Id.

With respect to the key personnel experience subfactor, the RFP requires offerors to propose certain key personnel with varying levels of experience working at TJC accredited hospitals, and states that the agency will evaluate the proposed personnel's actual level of TJC experience. See RFP, amend. 1, at 5. Specifically, the RFP requires offerors to propose (and the PWS requires the contractor to provide), as key personnel, a project manager, alternate project manager, quality control manager, and area manager/foreman, each with varying minimum amounts of continuous years of TJC experience within the last 10 years from the issuance date of the RFP. Id.; PWS at 23-24.

In contrast, with respect to the prime contractor experience subfactor, the RFP requires that offerors have relevant experience performing O&M services as a prime contractor in a hospital/healthcare facility, irrespective of the facility's accreditation.² See RFP at 81. The RFP states that the agency will evaluate the degree to which the offeror has previously encountered the same kind of work, uncertainties, challenges, and risks that it is likely to encounter under the contract. See id. at 90.

With respect to the technical evaluation factor, the RFP states that the agency will evaluate the offeror's understanding of the PWS and its proposed approach to executing the requirements. See id. As relevant here, under the mission capability subfactor, the RFP states that the agency will evaluate the offeror's ability to understand and execute all functional area requirements in the PWS.³ Id. In this regard, the RFP requires technical proposals to address each functional area,

² The RFP defines relevant experience as experience in hospital/healthcare facilities that provide the "same or similar" services based on the size, scope, bed count, square footage, complexity, contract type, and facility description, as described in the PWS, and instructs offerors to provide specified documentation that the company has a minimum of 6 years of experience in that regard within the last 10 years from the issuance date of the RFP. RFP at 89-90; see also RFP amend. 1, at 4.

³ The PWS categorizes the required O&M services under 10 functional work areas: work classification and management; quality control; buildings and structures maintenance; fire protection and prevention; utility systems; heating and steam systems; water and sewage collection systems; heating, ventilation, and air conditioning systems; emergency power and electrical systems; and general equipment repair and commercial kitchen systems. PWS at 12.

including a thorough explanation of the concept of operations as it relates to the TJC requirements and quality control and quality assurance, among other things. See id. at 82.

DISCUSSION

J&J complains that setting aside the RFP for local sources under SOFA (and not granting invited contractor status to non-local offerors) unnecessarily restricts competition. See Protest at 2. The protester contends that no Korean company has the experience or technical capability needed to perform the contract work in accordance with TJC standards. See id.; Comments at 15, 2-21. In this regard, J&J argues that the prime contractor must have experience at TJC accredited facilities, because the PWS requires that the performance of the contract be in accordance with TJC standards. J&J also notes that the RFP requires that the prime contractor have relevant experience, which is defined as including work of the same or similar complexity as that described within the PWS; J&J argues that this too requires that the prime contractor have specific experience at TJC accredited facilities. See Comments at 12-14. J&J also contends that for local firms to satisfy the key personnel experience requirements and to perform the contract, they will be required to hire U.S. personnel with TJC experience, which the protester states is impracticable because of Korea's 3-year limitation on work visas. Id. at 27.

The Army responds that the terms of its SOFA with Korea restricts the agency from granting invited contractor status where Korean firms can provide hospital O&M services at TJC standards. See AR at 16. The agency states that, prior to issuing the solicitation, it issued a sources sought notice and conducted market research to determine whether there were adequate local resources and contractors with the technical expertise, qualifications, and certifications to meet the requirements. See Supp. Contracting Officer's Statement at 1; see also Acquisition Plan, Sept. 13, 2010, at 6-8. The Army determined that there were a number of Korean firms that could perform these O&M services at TJC standards.

A contracting agency has the discretion to determine its needs and the best method to accommodate them. JRS Mgmt., B-402650.2, June 25, 2010, 2010 CPD ¶ 147 at 3. However, those needs must be specified in a manner designed to achieve full and open competition. Exec Plaza, LLC, B-400107, B-400107.2, Aug. 1, 2008, 2008 CPD ¶ 143 at 5. Solicitations may include restrictive requirements only to the extent they are necessary to satisfy the agency's legitimate needs. 10 U.S.C. § 2305(a)(1)(B)(ii) (2006). 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. See Total Health Resources, B-403209, Oct. 4, 2010, 2010 CPD ¶ 226 at 3. We will examine the adequacy of the agency's justification for a restrictive solicitation provision to ensure that it is rational and can

withstand logical scrutiny. SMARTnet, Inc., B-400651.2, Jan. 27, 2009, 2009 CPD ¶ 34 at 7. A protester's mere disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. Exec Plaza, LLC, supra.

The record here establishes that the agency reasonably found from its market research that there were a number of local firms that could perform these O&M services at TJC standards. Specifically, in response to the Army's sources sought notice, five Korean firms expressed interest in providing the hospital O&M services to the agency, including the protester's subcontractor on the incumbent contract.⁴ See MEDDAC-K Market Research Memorandum, June 25, 2010, at 2; Acquisition Plan, Sept. 13, 2010, at 7. The agency also searched the central contractor registration (CCR) and found that there were 24 active Korean firms available to perform hospital O&M services. MEDDAC-K Market Research Memorandum, June 25, 2010, at 2.

Prior to conducting its market research, the agency's MEDDAC-K facilities director began investigating O&M practices of hospitals across South Korea and toured several Korean hospitals to determine the level of service that their O&M staff was providing. Statement of Facilities Director, Sept. 23, 2011, at 1. The facilities director found that there were number of Korean hospitals that had been accredited by the Joint Commission International (JCI).⁵ Id. In this regard, the Army states that, since the requirement for these services was last competed in 2006 (when the protester was granted invited contractor status), ten Korean hospitals have been accredited by the JCI.

The Army found that, although there were some differences between the TJC and JCI standards, the two accreditation standards had substantial similarities and, in some regards, were almost identical. AR at 14. Moreover, the agency found that, to the extent that JCI and TJC accreditation standards differed, the agency's requirements would be satisfied by requiring the contractor to provide experienced

⁴ The Army notes that the protester's subcontractor (a Korean firm) has for a number of years performed 90 percent of the O&M services at all MEDDAC-K hospitals. AR at 10, 15. The protester does not dispute that its subcontractor has performed 90 percent of the work on the incumbent contract and, in fact, concedes that its subcontractor has TJC experience. See Comments at 15.

⁵ JCI is the international arm of TJC, and accredits hospitals and HCOs outside the U.S consistent with international standards and locals laws and practices. See www.jointcommissioninternational.org. JCI accreditation was first accorded to a Korean Hospital in 2007.

key personnel with the specific, working knowledge of TJC standards. Statement of Facilities Director, Sept. 23, 2011, at 2.⁶

J&J disagrees with the agency that the TJC and JCI standards are sufficiently similar to allow the agency to conclude that firms with experience at JCI accredited facilities could satisfy TJC standards.⁷ In this regard, the protester cites to a question and answer in the RFP regarding key personnel experience. Comments at 18, citing, RFP amend. 1, at 3. Specifically, the agency was asked whether, in order to meet the requirements under the key personnel experience subfactor, key personnel experience at a JCI accredited hospital would be accepted as qualifying experience. See RFP amend. 1 at 3. The agency answered that “[f]or this requirement, [JCI] experience is not to be considered as equivalent to experience at a facility with [TJC] certification.” Id. Contrary to J&J’s assertion, however, this answer only indicates that the agency required more specific experience for key personnel. Although J&J disagrees with the agency’s judgment concerning the similarity of the JCI and TJC standards, this disagreement does not demonstrate that the agency’s judgment was unreasonable.

J&J also complains that it is impractical to hire “U.S. citizens” as key personnel with specific experience at TJC accredited facilities, because “there is a three-year limit

⁶ The protester contends generally that the agency’s determination is not supported by contemporaneous documentation and argues that the facilities director’s statement should be accorded little weight because it was produced in response to the protest. 2nd Supp. Comment at 2, 4-6, 11. We disagree that the record is not sufficiently documented. In this regard, the agency provided contemporaneous documentation of its market research and acquisition plan. This documentation, coupled with the statement of the MEDDAC-K facility director, adequately explains the basis for the agency’s determination to set aside the RFP for local firms in accordance with the SOFA. In this regard, while we accord greater weight to an agency’s contemporaneous record of its procurement action than to arguments and documentation prepared in response to protest contentions, we do not limit our review to contemporaneous evidence, but consider all the information provided, including the parties’ arguments, explanations, and documentation prepared in response to protest contentions. Systems Research and Applications Corp.; Booz Allen Hamilton, Inc., B-299818 et al., Sept. 6, 2007, 2008 CPD ¶ 28 at 12.

⁷ The protester also contends that no local prime contractor can satisfy the RFP’s requirement for six years of relevant experience, because Korean hospitals have not been JCI accredited for a long enough period of time to allow local firms to meet this experience requirement. See Comments at 19. The RFP, however, provides that prime contractors must have six years of performing relevant O&M services “in a Hospital/Healthcare facility environment, irrespective of hospital accreditation.” RFP amend. 1, at 4.

on work visas in Korea.” Comments at 27. The RFP, however, does not require that key personnel be United States citizens. Given that the protester’s Korean subcontractor has been performing these services at the Army’s TJC accredited facilities, there are already a number of individuals in Korea with the requisite experience to meet the key personnel experience requirements here. Moreover, even accepting the protester’s argument that there are practical difficulties in hiring experienced key personnel, does not demonstrate that it will be impossible for local firms to hire experienced key personnel.

In sum, we find that the agency’s decision not to grant invited contractor status to non-local offerors under SOFA is reasonable and that the record adequately justifies the RFP’s restriction to local sources.⁸ Although not conclusive, the meaning attributed to treaty provisions by government agencies charged with their negotiation and enforcement is entitled to great weight. National Westminster Bank, PLC, v. U.S., 512 F.3d 1347, 1358 (Fed. Cir. 2008) citing Sumitomo Shoji Am. v. Avagliano, 457 U.S. 176, 184-85 (1982), (according great deference to agency’s position where treaty’s signatories, neither of which were parties to the lawsuit, agreed as to interpretation).

The protest is denied.

Lynn H. Gibson
General Counsel

⁸ The agency has received proposals under the RFP and is conducting discussions with a number of offerors. The protester contends that we should review the proposals, and the agency’s initial evaluation and conduct of discussions, to determine whether the agency’s decision to set aside the RFP for local firms was reasonable. This inquiry into the agency’s preliminary evaluations is not, however, relevant to whether the agency’s decision to restrict the RFP in accordance with the SOFA was reasonable.