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Comptroller General
of the United States

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Decision

Matter of: AMD CM II, LLC

File: B-420834.2

Date: November 15, 2022

Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq., John M. Mattox II, Esq., and Ian P. Patterson, Esq., Schoonover & Moriarty LLC, for the protester. Luke Killam, Esq., and Julia Fitzmaurice, Esq., Department of the Navy; and Alison Mueller Amann, Esq., Small Business Administration, for the agencies. Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitation terms included requirements for experience that exceeded the agency's needs and unduly restricted competition is denied where the record shows that the agency reasonably exercised its discretion to establish requirements to ensure successful performance of services that would affect human safety.

DECISION

AMD CM II, LLC, of Freehold, New Jersey, a small business, protests the terms of request for proposals (RFP) No. N6945022R0049, issued by the Department of the Navy, Naval Facilities Engineering Command, for commercial grounds maintenance and landscaping services at Naval Air Station Kingsville, in Kleburg County, Texas, and Navy Auxiliary Landing Field Orange Grove, in Jim Wells County, Texas. AMD argues that the terms of the RFP exceed the agency's minimum needs and thus unduly restrict competition.

We deny the protest.

BACKGROUND

The RFP, issued April 8, 2022, sought proposals from participants in the Small Business Administration's (SBA) section 8(a) program¹ to provide services described in an accompanying performance work statement (PWS) for a base year and up to four option years. Among other things, the PWS requires the contractor to perform bird/animal aircraft strike hazard (BASH) services at the airfields. Attachment J to the RFP advised offerors that the level of required services in specific areas for BASH requirements and included a copy of the BASH wildlife hazard management plan document. RFP amend. 5, attach. J, at 44 (AR, Tab 17c); RFP amend. 5, exh. "RFP BASH" (AR, Tab 17n). The accompanying sitemaps show that a majority of the areas would require BASH services. RFP amend. 5, attach. J site maps (AR, Tab 17L).

The RFP provided for award of a fixed-price contract to the offeror that submitted the lowest-priced technically acceptable proposal. Agency Report (AR), Tab 22, RFP amend. 5 at 14. Technical acceptability was to be evaluated under four factors: corporate experience, technical approach, safety, and past performance. AR, Tab 29, RFP amend. 12 at 9-11.

Under the corporate experience and past performance factors, the RFP specified that the evaluation would consider relevant projects. The RFP definition of relevance was amended during the solicitation process (including during corrective action taken after an earlier protest by AMD). Ultimately, on August 9, the Navy issued amendment 12 to the RFP, which revised the relevance definition to provide, in part, as follows:

a relevant project is defined as a grounds maintenance and landscaping services project similar in size, scope, and complexity to those described in the performance work statement/specifications of the RFP with a contract value of \$750,000.00 per year or greater. . . .

RFP amend. 12 at 9.

The proposal instructions that followed required the submission of corporate experience in the form of "recent, relevant experience as a prime contractor on projects similar in size, scope, and complexity" to the PWS. The RFP also provided that an offeror could use experience of an affiliate or first-tier subcontractor that met the relevance criteria, but reiterated that projects "in any capacity other than a prime contractor will be considered not relevant." *Id.* at 9-10. Additionally, under the past performance factor, offerors were required to submit performance information for the same projects that they had submitted under the corporate experience factor, which thus made the relevance standard applicable to both factors.

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. See 13 C.F.R. § 124.501(a) (SBA may enter into all types of awards, including contracts and orders). This program is commonly referred to as the 8(a) program.

AMD filed this protest before the next due date for submission of revised proposals, arguing that the \$750,000 value and the prime contractor requirements unduly restrict competition.

DISCUSSION

AMD contends that the relevance requirements for projects valued over \$750,000 and performed as a prime contractor exceed the agency's minimum needs and unduly restrict competition. The firm also argues that the evaluation of a small business offeror as unacceptable for failure to meet the relevant experience standard would be a negative responsibility determination that would then need to be submitted to the SBA for determination under its certificate of competency (COC) process.²

As an initial matter, AMD's contention that the Navy will need to refer to the SBA any offeror whose proposal was evaluated as unacceptable based on its lack of qualifying experience, if that offeror was otherwise in line for award, need not be addressed here. Such concerns are premature and speculative because no offeror has been evaluated, it is unknown whether any such offeror will be in line for award, and the Navy has made no determination whether, if those circumstances arise, it will refer the offeror to the SBA under that agency's certificate of competency process. Accordingly, we dismiss this contention as premature, and turn to AMD's remaining challenges to the RFP criteria. *Id.*

When establishing solicitation requirements, a contracting agency has the discretion to determine its needs and the best methods to accommodate them. *Remote Diagnostic Techs., LLC*, B-413375.4, B-413375.5, Feb. 28, 2017, 2017 CPD ¶ 80 at 3. The agency must solicit offers in a manner designed to achieve full and open competition, and include restrictive provisions only to the extent necessary to satisfy the agency's minimum needs. 10 U.S.C. § 3206(a)(2)(B). However, where requirements relate to issues of human safety or national security, the agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability or effectiveness. *Remote Diagnostic Techs., LLC*, supra at 3.

In considering a protest that challenges a solicitation requirement as unduly restrictive of competition, the procuring agency must show that the requirement is reasonably

² The SBA has statutory authority to review a contracting officer's negative responsibility determination of a small business that is otherwise in line for award, and to determine conclusively that concern's responsibility through its COC process. 15 U.S.C. § 637(b)(7); Federal Acquisition Regulation (FAR) 19.602-1(a). Where an agency evaluates proposals on a "go/no-go" basis using traditional responsibility factors, and finds a proposal from a small business unacceptable on that basis, the agency is required to refer the matter to the SBA for a final determination under COC procedures. *Vantex Serv. Corp.*, B-266199, Jan. 30, 1996, 96-1 CPD ¶ 29 at 3. Where the agency has not completed its evaluation, a protester's challenge to compliance with the COC referral requirements will be dismissed as premature. *Id.* at 4.

necessary to meet its needs. *Id.* at 4. Where the agency has met that standard, the protester's contention that the requirement is burdensome or impossible for it to meet does not provide a basis to sustain the protest. *American Int'l Movers, Inc.*, B-419756, July 20, 2021, 2021 CPD ¶ 269 at 4.

The Navy argues that the challenged requirements reflect the agency's valid minimum needs because the relevance requirement as applied to the corporate experience and past performance factors is a reasonable measure to assess whether an offeror has the current technical capability to perform the contract requirements. Memorandum of Law (MOL) at 1. Furthermore, the agency contends that in view of the requirement to perform BASH services at the airfields, the agency reasonably determined that awarding the contract to a firm that lacked experience as a prime contractor on a project valued over \$750,000 would risk unsatisfactory performance and thereby consequently increase risks to human life and safety at the two airfields. Contracting Officer's Statement at 7-8; Navy Comments on SBA Views at 1.³

The protester argues that the prime contractor experience requirement, specifically, is unduly restrictive of competition because the Navy at times has described the services as routine and commercial, and the agency also elected to use lowest-price technically acceptable award criteria. AMD contends that these undermine the agency's assertion that the experience standards are justified by technical complexity. Protester Comments on SBA Views at 1.

Expressing its support for the protester, the SBA contends that, as applied to the small business offerors under this RFP, the requirement for experience and past performance as a prime contractor is unduly restrictive of competition. SBA Views on Protest at 2. The SBA's position is that the landscaping and grounds maintenance services required here do not justify the use of that requirement, and it argues that the services here are significantly different from procurements where our Office has found experience requirements were justified; the key difference being that those requirements involved specific management challenges or complexity that SBA argues are not present here.⁴ *Id.*

The Navy counters that the views expressed by the protester and SBA overlook the complexity of the requirement, particularly the agency's need for a contractor with demonstrated managerial competence that will ensure consistent performance of the

³ In response to a request from our Office, the SBA agreed to submit its views on the protest issues.

⁴ The SBA also noted that a recent regulatory change will provide for small businesses to utilize experience as joint venture members or as first-tier subcontractors to satisfy past performance requirements that specify performance as a prime contractor, but the change does not apply here because the RFP was issued before the change went into effect. SBA Comments at 2 (citing Past Performance Ratings for Small Business Joint Venture Members & Small Business First-Tier Subcontractors, 87 Fed. Reg. 43731 (July 22, 2022) (amending 13 C.F.R. § 125.11)).

BASH requirements. Navy Comments on SBA Views at 1. The agency emphasizes that the BASH requirements “relate directly to human safety” because the growth of vegetation affects the habitat and prevalence of birds, which then affects the risk of “airstrikes” that can result in injury to or death of personnel. *Id.* at 1.

Our review of the record demonstrates that the Navy has reasonably exercised its discretion in amending the RFP to include the challenged requirements. Establishing a minimum value for the consideration of a contractor’s experience is a reasonable means of determining whether the offeror’s experience is similar to the agency’s requirement. *E.g.*, *Caduceus Healthcare, Inc.*, B-414965, B-414965.2, Nov. 1, 2017, 2017 CPD ¶ 329 at 5-6 (agency reasonably assessed similarity of experience only where the project exceeded a minimum value). Here, the minimum value for relevance of experience is less than half of the annual option price under the incumbent contract and approximately one third of the estimated annual value of the contemplated contract.⁵ MOL at 3. The Navy thus had a reasonable basis to establish a requirement for contractor experience projects to be valued over \$750,000 to be considered relevant.

With respect to the requirement that experience involve performance as a prime contractor, we similarly conclude that the Navy reasonably exercised its discretion under the circumstances here. Assessing whether a contractor’s experience was as a prime contractor is reasonably predictive of future performance as the prime contractor under an agency’s requirement. *E.g.*, *PMC Sols., Inc.*, B-310732, Jan. 22, 2008, 2008 CPD ¶ 20 at 3 (agency evaluation reasonably considered whether projects involved performance as a prime contractor). Here, the record shows that the performance of the contract will affect risks to human safety, and the Navy reasonably concluded that sound management by the contractor would minimize those risks. Those considerations provide a sufficient basis for the agency’s discretion to require that the experience demonstrate performance as a prime contractor (whether by the offeror or by its subcontractor or affiliate). *E.g.*, *Chromalloy San Diego Corp.*, B-416990.2, June 3, 2019, 2019 CPD ¶ 188 at 5 (human safety justified solicitation requirement for offerors on engine overhaul contract to demonstrate they had access to the engine manufacturer’s proprietary technical manuals and updates).

Altogether, under the circumstances here, we conclude that the Navy reasonably exercised its discretion to require that offerors meet minimum relevancy requirements for experience and past performance.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

⁵ The agency explains that its annual estimated value for this contract is in the range of \$2.2 to \$2.4 million. MOL at 4.