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

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Decision

Matter of: Y&K Maintenance, Inc.

File: B-405310.2

Date: October 17, 2011

Michael H. Ferring, Esq., Ferring & DeLue LLP, for the protester.
Maj. Christine C. Fontenelle, 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

1. Protest that solicitation was improper because the experience requirements for the prime contractor and for key personnel are inconsistent is denied where the solicitation reflected the agency's judgment that prime contractors with more general experience could meet the agency's needs provided certain key personnel had more specific experience.
2. Protest that the solicitation's evaluation scheme improperly assigns an acceptable past performance rating to offerors with no record of relevant past performance in violation of Federal Acquisition Regulation § 15.305(a)(2)(iv) is denied where award will be made on a lowest-price, technically acceptable basis such that assigning an acceptable past performance rating to offerors without relevant past performance will be, effectively, no different than assigning a neutral rating to that offeror's past performance.
3. A solicitation for a fixed-price contract does not place undue risk upon the contractor where the solicitation warned offerors that after two years of contract performance the agency may terminate certain contract line items (CLINs) or subCLINs.

DECISION

Y&K Maintenance, Inc. (Y&K), of Seoul, Korea, 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) of 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,¹ 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.²

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).³ 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, 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.

¹ 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 will 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.

² The RFP incorporated by reference the standard FAR clause 52.212-4, "Contract Terms and Conditions--Commercial Items."

³ TJC was previously known as the Joint Commission on Accreditation of Healthcare Organizations (JCAHO).

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. RFP amend. 1, at 5; 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.⁴ 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 past performance evaluation factor, the RFP states that the agency will evaluate, on an acceptable/unacceptable basis, an offeror's past performance of relevant contracts that are similar in size, scope, and complexity to the required effort.⁵ See RFP at 91. As pertinent here, the RFP also states that, where an offeror does not have a record of relevant past performance, or for whom past performance information is unavailable, or too sparse to rate, the agency will consider the offeror to have unknown past performance and assign a rating of acceptable. See id.

⁴ 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.

⁵ The RFP defines relevant contracts as contracts for the same or similar services based on size, scope, complexity, and facility description and, in this regard, requires offerors to provide specified documentation regarding contracts performed for at least 6 continuous years within the last 10 years from the issuance date of the RFP. See RFP at 83-84, 92.

With respect to the price evaluation factor, the RFP instructs offerors to propose fixed prices for each contract line item (CLIN) and subCLIN for each year and overall.⁶ Id. at 86. The RFP states that the agency will evaluate an offeror's price proposal by adding the total price for all option years to the total price for the basic requirement. Id. at 85, 93. The RFP also states that the agency will evaluate offerors' proposed prices for realism and reasonableness. Id. at 92-93.

The RFP requires offerors to provide details--by CLIN, subCLIN, ELIN, and geographic areas of responsibility, as well as for all 5 years--regarding direct costs, subcontracts, materials, overhead, profit, and general and administrative (G&A) expenses, among other costs. See id. at 84-88; attach. 5, Sample Price Support Spreadsheet. In this regard, the RFP warns offerors that the agency intends to in-source certain functional areas (and their associated CLINS/subCLINS) during contract performance, and that price proposals should be structured such that termination for convenience of any one functional area would not affect the pricing of the remaining contract functions.⁷ See id. at 86.

DISCUSSION

Y&K challenges a number of the solicitation's requirements under the experience, past performance, and price factors.

Experience Subfactors

First, the protester complains that requirements under the two experience subfactors are inconsistent, given that proposed key personnel are required to have experience at TJC accredited facilities, while the prime contractor can rely on experience at unaccredited facilities. See Protest at 3-4; Comments at 2-5. The protester also contends that the explicit solicitation statement that prime contractors need not show experience at TJC accredited facilities is inconsistent with a number of PWS

⁶ The RFP includes six CLINs, which in turn are comprised of various subCLINS or exhibit line items (ELIN).

⁷ 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. The RFP states that any in-sourcing of these functional areas would not occur until 2 years from contract award, pending availability of funds and contract price. See id. at 12; RFP at 86.

requirements.⁸ Comments at 2-3. The protester points out that the RFP defines relevant prime contractor experience as including work of the same complexity as that described within the PWS. See id. The protester notes in this regard that the PWS requires performance of the contract in accordance with TJC standards and requires personnel with experience at TJC accredited facilities. Y&K argues that the reference to the PWS under the prime contractor experience subfactor establishes that the prime contractor must have experience at TJC accredited facilities. Id. at 3.

The agency asserts that its experience requirements under the prime contractor and key personnel subfactors are consistent. The agency contends that its needs will be met by allowing prime contractors with experience at relevant facilities (even those without TJC accreditation) to compete, even though the key personnel identified must have specific experience at TJC accredited facilities. See Agency Report (AR) at 7-10.

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. 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. Id. The fact that a requirement may be burdensome or even impossible for a particular firm to meet does not make it objectionable if the requirement properly reflects the agency's needs. Eisenhower Real Estate Holdings, LLC, B-402807, July 27, 2010, 2010 CPD ¶ 172 at 3.

Here, we see nothing improper about the agency's decision to establish different requirements for the prime contractor and key personnel subfactors under the experience evaluation factor. The PWS requires the contractor to provide certain personnel with experience at TJC accredited facilities and to perform the contract work in accordance with TJC standards. In our view, the agency reasonably

⁸ Y&K also contends that not requiring the prime contractor to have experience at TJC accredited facilities is inconsistent with the agency's published answer to an offeror's question. Comments at 3, citing RFP amend. 1, at 3 (Question and Answer No. 6). 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 Y&K's assertion, however, this answer only indicates that the agency required more specific experience for key personnel.

concluded that it could address these requirements with key personnel, while not requiring that the contractor itself have TJC experience.⁹

Although the protester argues that the solicitation should be limited to contractors with experience at TJC accredited facilities, this disagreement with the agency's judgment does not demonstrate that the agency acted unreasonably. See J&J Maint., Inc., B-214209, Nov. 2, 1984, 84-2 CPD ¶ 488 at 3. Furthermore, we generally will not consider contentions that specifications should be made more restrictive since our role in reviewing bid protests is to ensure that the statutory requirements for full and open competition are met, not to protect any interest a protester may have in more restrictive specifications. Simplix, B-274388, Dec. 6, 1996, 96-2 CPD ¶ 216 at 5-6.

Past Performance Factor

Y&K next complains that the RFP unreasonably provides for assigning an acceptable past performance rating to an offeror having no relevant record of past performance in violation of FAR § 15.305(a)(2)(iv), which provides that under such circumstances an offeror may not be evaluated favorably or unfavorably. See Protest at 3; Comments at 1-2. In this respect, the protester contends that assigning an acceptable past performance rating to an offeror with no record of relevant past performance would have a significantly favorable impact on that offeror's overall evaluation rating. See Comments at 1.

The agency disagrees that its solicitation's rating scheme violates FAR § 15.305(a)(2)(iv). In this regard, the agency notes that its rating scheme is consistent with the Department of Defense's (DOD) source selection procedures. See Memorandum from the Under Secretary of Defense, Acquisition, Technology and Logistics, Department of Defense Source Selection Procedures, Mar. 4, 2011, App. A at A-2 (offeror without past performance record shall be determined to have unknown past performance and considered acceptable).

FAR § 15.305(a)(2)(iv) provides:

In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance.

⁹ Indeed, the protester does not challenge the agency's determination that an offeror could adequately perform all the PWS requirements by hiring experienced key personnel directly, or through a subcontractor, joint venture, or other teaming arrangement.

This provision embodies the principle that an offeror neither be punished nor rewarded for the lack of relevant past performance. Thus, we have found, consistent with this provision, that an evaluation scheme that penalizes an offeror for neutral past performance ratings is improper. Colson Servs. Corp., B-310971, et al., Mar. 21, 2008, 2008 CPD ¶ 85 at 12.

Likewise, an offeror should not have its competitive position improved because of a lack of relevant past performance. In the context of this procurement, where award will be made on a lowest-price, technically acceptable basis, assigning an acceptable past performance rating to offerors without relevant past performance will be, effectively, no different than assigning a neutral rating to that offeror's past performance. Accordingly, we see no basis to object to the RFP's stated methodology for evaluating past performance.

Price Evaluation

Finally Y&K complains that the RFP's warning that certain CLINs or subCLINs may be terminated for the convenience of the government places undue risk upon the contractor. Protest at 4. Y&K also complains that the solicitation improperly requires offerors to provide detailed cost information, including their indirect costs, for each CLIN or subCLIN, because offerors cannot predict their indirect costs for each CLIN since "indirect costs do not relate to specific work items." Comments at 3.

We disagree that the RFP places undue risk upon the contractor. Under a fixed-price contract, as contemplated here, the risks associated with performance and cost escalation are borne by the contractor. See Harris Corp., B-274566, B-274566.2, Nov. 27, 1996; 96-2 CPD ¶ 205 at 5; Cardinal Scientific, Inc., B-270309, Feb. 12, 1996, 96-1 CPD ¶ 70 at 4. Here, the RFP advises that after two years the agency may in-source certain functional areas, and therefore those CLINs or subCLINs may be subject to termination for convenience. Because of the unique requirement that the government act in the interest of the society it serves, it retains a special power to terminate its contract obligations when such action serves the public interest. Southwest Lab. Of Oklahoma, Inc., B-251778, May 5, 1993, 93-1 CPD ¶ 368 at 3, citing United Steam-Engine Co., 91 U.S. 321 (1876); Torncello v. United States, 681 F.2d 756 (Cl.Ct. 1982). In this regard, the RFP incorporates the standard FAR "Contract Terms and Conditions--Commercial Items" clause, which reserves the government's right to terminate the contract, or any part thereof, for the convenience of the government and describes the contractor's rights under such circumstances. See FAR clause 52-212-4(l).

We also disagree that the offeror's calculation of direct and indirect costs assignable to each CLIN or subCLIN requires a prediction as to whether the CLIN or subCLIN may be terminated. Rather, the RFP here requests that offerors propose fixed prices for a number of functional areas (each of which was included as a CLIN or

subCLIN) and, in this respect, requires offerors to provide detailed cost information, such as their direct and indirect costs for CLINs, subCLINS, and ELINS, to allow the agency to perform a price realism analysis. An agency may provide for the use of a price realism analysis in a solicitation for the award of a fixed-price contract for the limited purpose of measuring an offeror's understanding of the requirements or to avoid the risk of poor performance from a contractor who is forced to provide services at little or no profit. Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 4-5. The depth of an agency's price realism analysis is a matter within the sound exercise of the agency's discretion. AMEC Earth & Env'tl., Inc., B-404959.2, July 12, 2011, 2011 CPD ¶ 168 at 8.

The protest is denied.

Lynn H. Gibson
General Counsel