



United States Government Accountability Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: King Construction Company, Inc.

File: B-298276

Date: July 17, 2006

James E. Krause, Esq., Regan Zebouni & Walker, PA, for the protester.
Gary F. Davis, Esq., General Services Administration, for the agency.
Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest challenging terms of solicitation for lease of build-to-suit office space as unduly restrictive of competition is denied where agency demonstrates a reasonable basis for required approach.

DECISION

King Construction Company, Inc. protests as overly restrictive the terms of solicitation for offers (SFO) No. PKY-01-LO-06, issued by the General Services Administration (GSA) for lease of build-to-suit office space for the Federal Bureau of Investigation (FBI) in Louisville, Kentucky. The protester asserts that the SFO is overly restrictive because it requires experience constructing Class A office space, to the exclusion of other relevant experience; it requires experience with Leadership in Energy and Environmental Design (LEED)¹ projects; and it contains redundant qualifications for an offeror's team members.²

¹ According to the U.S. Green Building Council, the LEED Green Building Rating System promotes "[d]esign and construction practices that significantly reduce or eliminate the negative impact of buildings on the environment and occupants." To be LEED certified, buildings must meet standards providing specialized criteria for particular types of projects. The lowest of four levels of certification is "certified." U.S. Green Building Council, An Introduction to the U.S. Green Building Council and the LEED Green Building Rating System, October 2005 at 4, 27-28, https://www.usgbc.org/FileHandling/show_general_file.asp?DocumentID=742>.

² A final ground in the original protest, challenging the terms of section 2.7(D) of the solicitation, has been rendered academic by the agency's decision to delete the
(continued...)

We deny the protest.

The procurement in this case is being conducted using the two-phase design-build procedures authorized under 41 U.S.C.A. § 253m (West Supp. 2006) and set out in Federal Acquisition Regulation (FAR) subpart 36.3, which contemplate issuance of two different solicitations for phase I and phase II of a project. Consistent with those procedures, the solicitation here, for phase I of the project, calls for submission of proposals limited to addressing the offeror's technical approach and qualifications. After evaluation of those proposals, the agency will select three to five offerors considered the most highly qualified, who then will be invited to submit proposals under phase II, addressing the specific design of the project and price.

The solicitation was based on a model SFO jointly developed by the FBI and GSA for 56 prospective lease construction projects for the FBI to be delivered over 5 years, using a standardized evaluation scheme for what, square footage variations aside, the agency considers well-defined and repeatable requirements. This requirement was for 120,197 rentable square feet of Class A office space³ and 115 parking spaces on a pre-selected site.

The SFO lists the following evaluation factors in descending order of importance: development team and key personnel experience; management plan; development team's past performance; and design approach narrative. The SFO requires the offeror's "development team" (which includes the principals of the offering entity who will have primary management or supervisory responsibilities, the architectural

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challenged provision in its entirety. Further, the protester asserts for the first time in its comments on the agency report that "[t]he Solicitation is overly restrictive in that it restricts Small Business contractors from effectively competing" Protester's Comments, June 16, 2006, at 2. Because this issue was not raised before the time set for receipt of proposals under the SFO (May 9), it is untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2006) (protests based upon alleged improprieties in a solicitation must be filed before the time set for receipt of initial proposals).

³ The SFO defines this term as follows:

The space shall be designed and constructed as a prime "Class A" commercial office building with attractive, professional surroundings. . . "Class A" buildings are designed for good appearance, comfort and convenience as well as the element of prestige. The quality of furnishings and fixtures is high and electrical outlets and services, plumbing, etc. are above average.

SFO § 1.5(C).

and/or engineering firm(s), and the general contractor) and key personnel (i.e., those individuals who “are employed by these firms and who will have direct responsibility for hands-on activities required in relation to this project and its resultant lease”) to submit information regarding their respective experience. SFO § 2.5(A)(1)(a). A “more favorable evaluation” will be given to each team member who “demonstrate[s] experience in performing projects of the size, nature and complexity required by the SFO.” SFO § 2.5(A)(1)(b). Similarly, the SFO called for submission of past performance information regarding the offeror and its key personnel, with “more favorable evaluations” to be given to those who “demonstrate successful past performance in delivering and managing projects of the size, nature and complexity described in the SFO.” SFO § 2.5(C)(1)(b). With regard to the types of projects to be considered, section 2.3(B) of the SFO states as follows:

The following types of work are not considered similar in nature for purposes of past performance and experience that can be applied to any of the minimum requirements of this project or to the past performance submission requirements: distribution, warehouse, manufacturing or processing facilities; prison, jail, correctional facilities, or detention centers; hospitals, residential projects (e.g., housing, hotels, dormitories, etc.), sports facilities, retail project[s], laboratories, schools and university classroom buildings.

The protester alleges that the solicitation contains several overly restrictive requirements. The first is that the solicitation unreasonably excludes from consideration of an offeror’s experience or past performance construction types that are more complex than Class A office space, while specifically requiring past experience designing and constructing Class A office space, which, the protester argues, is “irrelevant to the needs of the Government.” Protest at 4.

An agency has the discretion to determine its needs and the best way to meet them. USA Fabrics, Inc., B-295737, Apr. 19, 2005, 2005 CPD ¶ 82 at 4. Agency acquisition officials have broad discretion in selecting evaluation factors that will be used in an acquisition, and we will not object to the absence or presence of particular evaluation factors or an evaluation scheme so long as the factors used reasonably relate to the agency’s needs in choosing a contractor that will best serve the government’s interests. Olympus Bldg. Servs., Inc., B-282887, Aug. 31, 1999, 99-2 CPD ¶ 49 at 3; ViON Corp., B-256363, June 15, 1994, 94-1 CPD ¶ 373 at 10-11.

When a protester challenges a specification as unduly restrictive, the procuring agency has the responsibility to establish that the specification is reasonably necessary to meet its needs. See 41 U.S.C. § 253a(a)(1)(A), (2)(B) (2000). The adequacy of the agency’s justification is ascertained through examining whether the agency’s explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. 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. USA Fabrics, Inc., supra, at 4-5.

Here, contrary to the protester's assertion, there is no requirement in the SFO that offerors demonstrate experience with constructing Class A office space; rather, the SFO provides that offerors with experience with projects of the "size, nature and complexity" of the project described in the SFO will be evaluated more favorably. As further explanation, section 2.3(B), quoted above, states that experience with certain types of facilities will not be considered similar for evaluation purposes.

The agency argues that the work required to successfully complete an office building of the type called for here is unique to that type of construction, and, beyond its initial general challenge, the protester has not contested the agency's assertion. Providing that offerors that have office space construction experience are evaluated more favorably, the agency reasonably contends, will help ensure that the awardee's performance meets the agency's needs. See Leon D. Matteis Constr. Corp., B-276877, July 30, 1997, 97-2 CPD ¶ 36 at 5. In fact, the design-build procedures in the FAR used here expressly call for phase I solicitations to set out the technical qualifications sought, including specialized experience. FAR § 36.303-1(a)(2)(ii)(A). We think the agency's decision to evaluate favorably those offerors who proposed teams and individuals with experience that more closely corresponded to the requirements of the SFO was reasonable.

The protester also alleges that the solicitation unreasonably "require[s] LEEDs experience by all Offeror's Team Members." Protest at 6. King argues that the relative newness of the LEED certification process means that few firms will have had experience with the design and construction of such facilities, and thus the requirement unreasonably limits competition.

The agency notes at the outset that the solicitation does not set LEED experience as a minimum standard for any firm or individual. Rather, the requirement is that the building itself must be designed and constructed to achieve at least a LEED rating of certified. SFO § 1.5(A)(3). The architectural and engineering firms and the general contractor must address their individual firm's experience with and approach to LEED projects; firms and individuals with greater LEED experience will be evaluated more favorably. SFO § 2.5(C).

The agency argues that its requirement that the building obtain LEED certification is a reasonable method for ensuring that the agency's new construction meets certain environmental standards which the agency must achieve. As the agency notes, Executive Order 13,123 requires build-to-suit lease solicitations to "contain criteria encouraging sustainable design and development, energy efficiency, and verification of building performance." Exec. Order No. 13,123 at 7, 64 Fed. Reg. 30,852, 30,855 (June 3, 1999). Similarly, the FAR, citing other relevant legislation and Executive Orders, establishes environmental requirements for acquiring a variety of products and services, including those commonly used in office space construction and management. See FAR §§ 11.002(d)(1), 23.202. As a means of complying with these

mandates, GSA adopted the LEED program; all GSA new construction projects and substantial renovations must be LEED certified.

The agency has reasonably explained how the requirement that the building obtain LEED certification enables the agency to ensure that it meets certain mandated standards. While the requirement might place the protester at a competitive disadvantage, the fact that a requirement may be burdensome or even impossible for a particular firm to meet generally does not make it objectionable if the requirement properly reflects the agency's needs. Computer Maint. Operations Servs., B-255530, Feb. 23, 1994, 94-1 CPD ¶ 170 at 2. Given that the agency's requirement that this new build-to-suit construction be LEED-certified is reasonably related to meeting the agency's needs, it likewise is reasonable for the SFO to call for offerors to describe their experience with LEED projects and to provide that offerors with more LEED experience will be more favorably evaluated.

The protester also alleges that the SFO is overly restrictive in that it requires all individual offeror team members to provide "unnecessary and duplicative" experience. If any team member fails to meet his or her minimum requirements, then the team will be found ineligible to compete in the phase II solicitation.

The agency argues that, inasmuch as each team member performs a different function, the government has a need to ensure that each of the team members meets some minimum standards. The agency asserts that the primary issue is risk mitigation and that it can more successfully mitigate risk by imposing minimum requirements for experience on each of the members of the teams.

We find that the agency has made a reasonable determination that the possibility for success in the project is enhanced if the individual members -- the principals, the architect/engineer, and the general contractor -- have experience with projects similar to the project called for under this SFO. Further, as noted above, the FAR design-build procedures used here specifically contemplate that phase I solicitations will call for specialized expertise on the part of individuals comprising the offeror's team. FAR § 36.303-1(a)(2)(ii)(A), (C) (requiring Phase I solicitations to include technical qualifications such as "[s]pecialized experience and technical information" and "[p]ast performance of the offeror's team (including the architect-engineer and construction members)").

The protest is denied.

Gary L. Kepplinger
General Counsel