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Washington, DC 20548**

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The decision issued on the date below was subject to a GAO Protective Order. No party requested redactions; we are therefore releasing the decision in its entirety.

## Decision

**Matter of:** Nova Constructors, LLC

**File:** B-410761

**Date:** January 21, 2015

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Michaele J. Mandulak, Esq., Department of the Army, Corps of Engineers, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

Protest that solicitation requirement that offerors show at least three highly-similar contracts performed in the same country as the place of performance at issue was an unjustifiable restriction on competition is denied where the record shows that the restriction is reasonably necessary to meet the agency’s needs.

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### **DECISION**

Nova Constructors, LLC, of Okinawa, Japan, protests the terms of request for proposals (RFP) No. W912HV-14-R-0021, issued by the Department of the Army, Corps of Engineers, Japan Engineer District, for construction services to replace diesel fuel pumps and perform associated work at the Hakozaki fuel terminal, near Yokosuka, Japan. Nova argues that the RFP improperly restricts competition to firms having specific experience in Japan.

We deny the protest.

### **BACKGROUND**

The Corps issued the RFP on October 3, 2014, seeking proposals to replace nine deteriorated diesel fuel pumps at Defense Fuel Supply Point Hakozaki; to dispose of approximately 1,500 liters of oily water and sludge in the existing tanks; and to perform incidental work to upgrade the electrical service, including providing new electrical buildings and new backup generators. Agency Report (AR) at 1; RFP Specifications at § 01 11 00. The specifications also include requirements for the

contractor to handle and dispose of other toxic materials, particularly asbestos and lead. RFP Specifications at §§ 02 82 14.00 10, 02 83 13.00 20; Supplemental Agency Report (AR) at 7. The RFP specifies that all work--including the new pumps themselves--must comply with specific United States laws and regulations, and that the contractor is also responsible for identifying and complying with any applicable local laws and regulations.<sup>1</sup> RFP Specifications at § 01 35 26.

Award is to be made to the firm submitting the lowest-priced technically acceptable proposal. Technical acceptability is to be determined under two factors, past experience and past performance. RFP at 12-13. Under the past experience factor, offerors are to submit at least three examples for consideration. Id. at 12. These examples must show performance of a design-bid-build or design-build project that was valued at ¥500,000,000 or more; was new construction or renovation of a comparable fuel system project that included fuel pumping stations, piping, and electrical systems; was more than 50 percent complete (or fully complete) within the last 6 years; was performed in Japan; and was performed by the offeror as the prime contractor.<sup>2</sup> Id. at 13. Nova's protest is focused on the requirement that the projects must have been performed in Japan.

## ANALYSIS

Nova argues that the Corps lacks a valid basis to restrict competition to firms that have completed highly-similar projects in Japan under "design-bid-build" or "design-build" arrangements. Protest at 2-3. The firm argues that its parent company has successfully completed numerous similar fuel depot projects in the United States and elsewhere overseas. Supplemental Comments, exh. 8.3, Company Overview, at 12-14 ("Fuel Projects List").

The Corps maintains that it has a valid basis for the requirements. The agency explains that the requirement is for fueling equipment that will require high voltage connections to the Japanese electrical system, and will involve significant amounts of hazardous waste which must be handled and disposed of properly to prevent injury or environmental contamination. Supplemental AR at 8. The Corps further

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<sup>1</sup> In addition to general compliance with local laws, the Corps emphasizes that the specifications also specifically direct the contractor to comply with local laws in such areas as obtaining insurance, rigging construction cranes, establishing fire and safety procedures, handling spills, obtaining environmental permits, controlling noise, using landfills, disposing of waste water, protecting threatened or endangered species, and testing clean water. AR, Tab 5, Declaration of Corps Chief of Quality Assurance, at 1-5.

<sup>2</sup> The RFP also limited competition to "local sources." Nova states that it is a local firm, and does not appear to challenge this aspect of the requirements. Protest at 4.

states that, since delayed or deficient performance could impair military operations, the requirement relates to national defense and warrants heightened standards. The Corps explains that a firm without Japan-specific experience might lack familiarity with aspects of Japanese construction and electrical standards, as well as applicable Japanese laws and regulations; have trouble obtaining the proper equipment or install it incorrectly;<sup>3</sup> or improperly dispose of hazardous waste. All of these concerns could risk human safety and/or result in a delay in project completion. Contracting Officer's Statement at 10-11; Supplemental Contracting Officer's Statement at 6. The Corps contends that it is "reasonable to assume" that a contractor with experience in Japan on similar projects "will have experience with, and a better understanding of, applicable host nation environmental and safety laws and regulations," which will minimize the risks. Supplemental AR at 8.

Nova does not meaningfully dispute that the possibility for harm to human life or national defense are present, but contends this possibility exists in most construction projects. Supplemental Comments at 5. Nova argues that the applicable Japanese standards are largely consistent with international standards; the Japanese standards and laws are available in English; the use of prefabricated components from Japanese suppliers ensures consistency with Japanese standards; and it is familiar with all necessary elements to perform the work within the time and safety requirements of the RFP and applicable Japanese laws and regulations. Comments at 5-10. Nova also disputes the Corps's arguments that a contractor's lack of the required experience on projects in Japan would make the firm likely to violate the Japanese regulations cited by the Corps. Id. at 12-15.

In preparing a solicitation, a contracting agency is generally required to specify its needs and solicit offers in a manner designed to achieve full and open competition, so that all responsible sources are permitted to compete. 10 U.S.C. §§ 2304(a)(1), 2305(a)(1)(A) (2012 & Supp. I 2013). A solicitation may include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs or as authorized by law. Id. at § 2305(a)(1)(B)(ii). To the extent that a protester challenges a specification as unduly restrictive; that is, it challenges both the restrictive nature of the requirement as well as the agency's need for the restriction, the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet its needs.

Ordinarily, the adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable; that is, whether the

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<sup>3</sup> As an example, the Corps explains that in the United States, electrical conduit is specified by standard size across all types, whereas "[f]or Japanese construction, both size *and* type [of a conduit] must be explicitly indicated on the drawings. This is standard practice in Japan." Supplemental AR, Tab 4, Declaration of Corps Electrical Engineer, Dec. 8, 2014, at 1 (italics in original).

explanation can withstand logical scrutiny. Trident World Sys., Inc., B-400901, Feb. 23, 2009, 2009 CPD ¶ 43 at 3. Where requirements relate to issues of human safety or national security, however, an agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and/or effectiveness. Maersk Line, Ltd., B-406586, B-406586.2, June 29, 2012, 2012 CPD ¶ 200 at 9. Further, we recognize that a requirement to demonstrate relevant experience is a reasonable means of assuring compliance with applicable regulations. Atlantic Coast Contracting, Inc., B-270491, B-270590, Mar. 13, 1996, 96-1 CPD ¶ 147 at 3.

In our view, the record supports the Corps's need for the RFP requirement that the contractor demonstrate recent experience as a prime contractor in the performance of highly-similar fuel pump installations or replacements in Japan under design-build or design-bid-build contracts. The project involves connections to high voltage electrical systems and the handling and disposal of significant amounts of hazardous waste, all while ensuring compliance with various Japanese laws and regulations. In addition, the record shows that delayed or deficient performances pose a risk to national defense. Given the imperative to perform this work in a manner that ensures the safety of government and contractor personnel, prevents environmental contamination, and avoids delays, the record supports the agency's inclusion of the requirement as reasonable to meet its needs. While it is possible that a firm without experience in Japan might have the ability to perform the contract successfully, we have no basis to require the Corps to bear the additional risk that this lack of experience might entail, or to question its conclusion that requiring the successful contractor to have experience in Japan on similar projects is a reasonable way to minimize the risks inherent in this project.

The protest is denied.<sup>4</sup>

Susan A. Poling  
General Counsel

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<sup>4</sup> In its comments on the agency report, Nova argued that the Corps's explanation, that its requirements were intended to achieve the "highest level of reliability and effectiveness," revealed that reliability and effectiveness were to be used as unstated evaluation criteria. Comments at 17. In its response, the Corps explained that its protest argument was not a change to the terms of the RFP; rather, the Corps was presenting a legal argument to support the challenged RFP criteria. Supplemental AR at 9; Supplemental Contracting Officer's Statement at 9. We agree; Nova has not shown that the Corps's arguments in support of the past experience criteria reveal any inconsistency with the RFP's evaluation scheme.