

GAO holds solicitation requirement violates SBA's regulations regarding small business mentor-protégé joint ventures

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In a recent decision,¹ the Government Accountability Office (GAO) sustained a protest challenging the terms of a solicitation, as the solicitation impermissibly required that a protégé and mentor in a joint venture have the same level of experience as other offerors.

This is an important decision for companies that are parties to a joint venture, and a reminder to carefully review a solicitation's requirements before submitting a proposal.

As relevant background, the Small Business Administration (SBA) revised² its regulations in November 2020. Prior to November 2020, SBA's regulations provided that, in evaluating proposals submitted by a joint venture, agencies must consider the past performance of the joint venture entity itself and each party to the joint venture. Effective November 16, 2020, this provision was expanded to include capabilities, experience, business systems, and certifications.

The protester argued that, because the protégé member of a joint venture is required to meet the same requirements applicable to its mentor (and all other offerors), the requirement violates SBA's regulations.

SBA explained³ that while a small business protégé should have some experience in the type of work to be performed, "it is unreasonable to require the protégé concern itself to have the same level of past performance and experience (either in dollar value or number of previous contracts performed, years of performance, or otherwise) as its large business mentor." [Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments](#), 85 Fed. Reg. 66146, 66167 (Nov. 16, 2020).

In the procurement at issue in [Innovate Now, LLC](#), B-419546 (Apr. 26, 2021), the solicitation required that, for joint venture offerors, at least one work sample be submitted for each member of the joint venture and that each sample meet the same requirements.

The protester argued that, because the protégé member of a joint venture is required to meet the same requirements applicable to its mentor (and all other offerors), the requirement violates SBA's regulations.

GAO sustained the protest, finding that, while it was permissible for the agency to require experience from each joint venture member, the solicitation improperly required each firm — including the protégé — to meet the same evaluation requirements.

Pursuant to 13 C.F.R. § 125.8(e):

When evaluating the capabilities, past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

A procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.

As the solicitation required the protégé to meet the same qualifications as its mentor, the solicitation clearly violates SBA's regulation.

While this solicitation involved the requirements found in SBA's joint venture regulation applicable to small business mentor-protégé joint ventures (13 C.F.R. § 125.8(e)), near-identical language is found in SBA's joint venture regulation applicable to 8(a) (13 C.F.R. § 124.513(f)), SDVOSB (13 C.F.R. § 125.18(b)(5)), HUBZone (13 C.F.R. § 126.616(f)), and WOSB (13 C.F.R. § 127.506(f)) joint ventures.

If you are looking to bid as a joint venture for any set-aside procurement, it is important to understand the joint venture-specific requirements as well as your rights to challenge such requirements. Importantly, any challenge to these requirements

must be brought before proposals are due, so it is critical to raise any potential issues or concerns prior to that date and time.

Notes

¹ <https://bit.ly/3omAUvY>

² <https://bit.ly/3buVcyo>

³ <https://bit.ly/3htmrNz>

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