



Government Contracts: GAO Addresses Reliance on Experience of Partners, Teammates and Subcontractors

IN SHORT

The Situation: Two new Government Accountability Office ("GAO") bid protest decisions discuss when it is appropriate to rely on the past performance or experience of a contractor's teaming partners, and what types of restrictions agencies can put on such reliance.

The Result: GAO found that agencies may limit reliance on the experience of large-business mentors in proposals submitted by mentor-protégé joint ventures. However, GAO sustained the challenge to a solicitation provision prohibiting joint ventures from relying on the experience of their subcontractors. GAO separately found that an agency may assign a high rating to a firm that relied completely on its subcontractor for experience with one important element of the solicited work.

Looking Ahead: Contractors should carefully review solicitations to ensure that they do not unfairly restrict the company's ability to demonstrate that its team has the requisite experience by highlighting and discussing the experience of a teaming partner.

GAO recently issued two decisions addressing the extent to which offerors may rely on the experience of joint-venturers, teammates, and subcontractors when submitting a proposal. First, in [Ekagra Partners, LLC](#), GAO discussed the limits an agency may place on the experience projects submitted by mentor-protégé joint ventures.

Mentor-protégé relationships allow large businesses to enter joint ventures ("JV") with a small business protégé without being "affiliated" for size purposes. These JVs can then pursue federal contracts that have been set aside for small businesses. Large businesses gain the ability to compete for contracts they normally would be ineligible to receive, and small business protégés gain valuable technical, management, and financial assistance from their mentors. The government gains an expanded competitive field, and potentially the best that both the large and small business can offer through a well-conceived team arrangement.

The Ekagra protest involved a challenge to the terms of GSA's solicitation for the One Acquisition Solution for Integrated Services ("OASIS") government-wide multiple-award indefinite-delivery, indefinite-quantity ("IDIQ") contract. This particular solicitation was for the small-business pool of awardees—meaning that only small businesses (or mentor-protégé JVs) could compete for the procurement.

The RFP contained two limitations regarding the submission of relevant experience projects. First, the solicitation provided that where a small business mentor-protégé JV submitted a proposal, the JV could rely on the large business mentor's experience for only a portion of the required experience. In other words, a substantial portion of the RFP's experience requirements had to be fulfilled by the small business protégé.

Second, the solicitation prohibited joint venture offerors from relying on the experience of their subcontractor teaming partners, even though other prime contractors were permitted to rely on the experience of their subcontractors. GAO found the former restriction unobjectionable but ruled that the latter restriction was unreasonable.



These two decisions demonstrate that it is essential to review solicitations to determine how an agency plans to evaluate the past performance and experience of partners, teammates, and subcontractors.



GAO noted that nothing in statute or regulation prohibits an agency from limiting the experience that may be submitted by one of the members of a mentor-protégé JV. In addition, GAO concluded that the General Services Administration ("GSA") offered a reasonable justification for the restriction: it would prevent small-business companies that are not part of a JV from suffering an unfair competitive disadvantage and would ensure that small-business protégés are actually capable of performing the work required by the contract.

However, GAO sustained the challenge to the second restriction. This restriction stated that individual prime contractors could rely on the experience of their subcontractors but that JVs could not rely on the experience of their subcontractors. GAO found this restriction to be unreasonable, noting that GSA's only justification for the limitation was that allowing JVs to submit such experience would create administrative burdens by increasing the overall level of effort associated with the review of proposals. GAO found this to be an insufficient justification and sustained the protest.

In another recent decision, *Apogee Engineering, LLC*, GAO considered a protest in which an agency highly evaluated a company that had relied on its subcontractor for experience with one important element of the solicited work. GAO rejected the protester's argument that it was improper for the agency to consider the subcontractor's past performance, noting that the RFP failed to address (or prohibit) the evaluation of subcontractor past performance.

The Federal Acquisition Regulation states that past performance evaluations should take into account the past performance of subcontractors that will perform major or critical aspects of a requirement. Therefore, GAO found that the agency reasonably considered the subcontractor's experience when assigning an "exceptional" rating to the offeror's corporate experience/past performance.

These two decisions demonstrate that it is essential to review solicitations to determine how an agency plans to evaluate the past performance and experience of partners, teammates, and subcontractors. If the evaluation scheme is not favorable, contractors should consider a protest challenging the unfair solicitation terms. Unclear provisions should be clarified through the question and answer process or through protests.

In addition, contractors should take the solicitation's evaluation scheme into account when building their teams and structuring their technical approaches to ensure the most favorable evaluation possible.

FOUR KEY TAKEAWAYS

1. Contractors should review solicitations carefully to determine how an agency plans to evaluate the past performance and experience of the contracting team.
2. Evaluation schemes that unfairly restrict a company's ability to rely on, or obtain credit for, its teaming partners' experience may be challenged through a protest of the terms of the solicitation.
3. Contractors should take into account the evaluation scheme regarding experience and past performance when building their teams and structuring their technical approaches to ensure the most favorable evaluation possible.
4. In post-award challenges to an agency's evaluation of past performance, GAO will likely focus on the terms



Fernand A. Lavalley
Washington



Cherie J. Owen
Washington

of the solicitation and whether they required, or permitted, consideration of team members' projects.

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