

GAO decision limits consideration of mentor's past performance in a mentor-protégé joint venture

By Richard W. Arnholt, Esq., Sylvia Yi, Esq., and Taylor A. Hillman, Esq., *Bass, Berry & Sims**

APRIL 8, 2019

On February 15, 2019, the Government Accountability Office (GAO) issued a consequential decision for those contractors who will compete for federal contracts as part of a mentor-protégé joint venture.

In *Ekagra Partners, LLC*, B-408685.18, Feb. 15, 2019 (<https://bit.ly/2uoFz5A>), the GAO partially sustained the protest on the basis of an improper limitation on the submission of teaming agreement member past performance, and partially denied the protest finding that agencies can limit the number of past performance experience projects that can be submitted in a mentor-protégé joint venture's proposal in reliance on a large business mentor firm.

In *Ekagra*, the protestor challenged the terms of the request for proposals (RFP) seeking to award additional Multiple Award Task Order Contracts (MATOCs) under the General Services Administration's (GSA) One Acquisition Solution for Integrated Services (OASIS) Small Business (SB) Pool 1.

OASIS SB Pool 1 MATOC covers a wide variety of professional services including, but not limited to, consulting, logistics, engineering, scientific, management consulting, project management, and other professional services.

The RFP required offerors to provide relevant experience information for projects in three categories:

- pool qualification projects
- relevant experience (primary) projects
- relevant experience (secondary) projects

CAN AN RFP LIMIT CONSIDERATION OF A JV MEMBER'S PAST PERFORMANCE?

For offerors that submitted proposals as part of a mentor-protégé joint venture (JV), the RFP limited the number of past performance references attributed to a large business mentor. In addition, the RFP prohibited offerors from entering into a Contractor Team Arrangement (CTA) using a JV either as the prime or a subcontractor.

Ekagra filed a pre-award protest arguing that the RFP did the following:

1. Placed unreasonable limits on mentor-protégé JVs' reliance on the past performance of a large business mentor.

2. Unduly restricted competition by prohibiting mentor-protégé JV offerors from forming a contractor team arrangement.

The GAO denied the protest on ground #1 and sustained it on ground #2.

LIMITATION ON MENTOR PAST PERFORMANCE UPHELD

Offerors were required to submit a minimum of five past performance references under specific categories but were permitted to submit up to a maximum of 22 projects. The RFP limited large business mentor JV members to three of the five past performance references in the required categories, and seven out of the maximum of 22 projects.

For offerors that submitted proposals as part of a mentor-protégé joint venture, the RFP limited the number of past performance references attributed to a large business mentor.

Subsequent to the release of the solicitation, Congress amended the Small Business Act at 15 U.S.C. § 644(q)(1) to require procuring agencies to consider the past performance and capabilities of the individual members of the JV when the JV as a whole did not demonstrate sufficient capabilities or past performance experience to be considered for award.

The Small Business Administration (SBA) promulgated regulations implementing this change at 13 C.F.R. § 125.8(e), which provides:

(e) *Past performance and experience.* When evaluating the past performance and experience 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 individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

Ekagra argued that the RFP's relevant experience requirements improperly limited the number of projects that the large business mentor of a mentor-protégé JV offeror could submit in contravention of the SBA regulation.

Ekagra contended that this limitation hindered otherwise capable small businesses (specifically mentor-protégé JVs) from submitting their most competitive offers.

Ekagra also argued that because an approved mentor-protégé JV is considered small for procurements under which the protégé meets the relevant size standard, that there was no reasonable basis for the agency to distinguish between the mentor and protégé members of a JV for purposes of evaluating experience because the joint venture itself would be considered small.

The GAO sought SBA guidance on its interpretation of the relevant SBA regulations and the Small Business Act. The SBA concluded that the SBA regulations and the Small Business Act only addressed the requirement to *consider* individual JV members' past performance and experience and that they did not address the *relative consideration* an agency must give to individual JV members' past performance and experience.

The GAO also noted that Ekagra was prejudiced by this RFP's terms because it was unable to rely on the experience of its proposed subcontractors to enhance its chance of award.

In denying this protest ground, GAO agreed with the GSA and SBA that the relevant experience criteria were consistent with the requirements of 15 U.S.C. § 644(q)(1)(C) and 13 C.F.R. § 125.8(e) because the RFP provided for the consideration of the experience of each joint venture partner.

The GAO noted that while the statutes and regulations require consideration of the past performance of both the mentor and protégé, nowhere do the regulations require a specific level or degree of consideration, nor do they prohibit an agency from limiting in the RFP the experience that may be submitted by a JV member.

The GAO also agreed that the GSA set forth a rational basis for the limitation, because limiting the amount of experience that can be accredited to a large mentor JV member ensures meaningful consideration of the small protégé JV member's past experience so as to allow the agency to determine that the small protégé is capable of performing the contract work.

Importantly, it is not clear that the GAO would have reached the same result had the express limitation not been included in the RFP.

IMPROPER RESTRICTION ON CONTRACTOR TEAM ARRANGEMENTS

Ekagra also argued that the language in the RFP limiting an offeror to submitting a proposal either as a JV or a contractor team arrangement (CTA) unreasonably prohibited JVs from using additional subcontractors that were not members of the JV and relying on those additional subcontractors' experience.

Ekagra argued that because the SBA regulations treat an approved mentor-protégé JV as a small business offeror, see 13 C.F.R. § 125.9(d)(1), an approved mentor-protégé JV should be afforded the same opportunity as other small businesses to enter into CTAs with prospective subcontractors.

The GAO agreed, finding that the CTA regulations at FAR § 9.601 do not expressly require offerors to elect between the two types of CTA — a JV or a prime contractor with one or more subcontractors — and concluded that the RFP's limitation was unduly restrictive of competition. The GAO also noted that Ekagra was prejudiced by this RFP's terms because it was unable to rely on the experience of its proposed subcontractors to enhance its chance of award.

The GAO sustained the protest on this ground and recommended that the agency reassess the need and its rationale for including this term in the RFP, and if no justification existed, to remove the term and request revised proposals.

CONTRACTORS MUST CAREFULLY REVIEW RFPs AND TIMELY CHALLENGE TERMS

While there are a host of benefits to the SBA's mentor-protégé programs, the *Ekagra* protest shows that an agency may limit the weight given to a mentor's past performance in the RFP's evaluation scheme. Contractors should carefully review such limitations to adjust their bidding strategies accordingly.

The protest also highlights the importance of considering potential pre-award protest grounds upon receipt of an RFP.

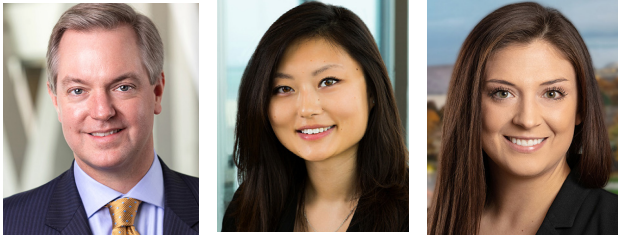
In *Ekagra*, the improper limitation on the use of CTAs with JVs could have had a material effect on the evaluation, e.g., consideration of subcontractor past performance.

Had the protester failed to contest that limitation in advance of the due date for proposals, it would have been prohibited from doing so.

This article first appeared in the April 8, 2019, edition of Westlaw Journal Government Contract.

* © 2019 Richard W. Arnholt, Esq., Sylvia Yi, Esq., and Taylor A. Hillman, Esq., Bass, Berry & Sims

ABOUT THE AUTHORS



Richard W. Arnholt (L) is a member at **Bass, Berry & Sims** in the firm's Washington office. He focuses his practice on providing practical business and legal guidance to help clients efficiently navigate the complex rules and regulations applicable to grants and contracts from federal and state governmental entities. He can be reached at RArnholt@bassberry.com. **Sylvia Yi** (C), an associate in the firm's Washington office, assists clients throughout the contracting process with federal, state and local governments. She can be reached at syi@bassberry.com. **Taylor A.**

Hillman (R) is an attorney in the firm's Washington office. She assists clients throughout the contracting process with federal, state and local governments. She can be reached at taylor.hillman@bassberry.com. This article was first published March 6, 2019, on the firm's Government Contracts & International Trade blog. Republished with permission.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit legalsolutions.thomsonreuters.com.