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Comptroller General  
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## Decision

**Matter of:** Asset Management Real Estate, LLC; Wallin Residential Properties; Winn Realty & Appraisal, LLC; LaRosa Realty; IEI-CitySide, Joint Venture; One Source REO; Real Estate Resource Services

**File:** B-407214.5; B-407214.6; B-407214.7; B-407214.8; B-407214.9; B-407214.10; B-407214.11; B-407214.12; B-407214.13; B-407214.14; B-407214.15; B-407214.16

**Date:** January 24, 2014

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Jerome S. Gabig, Esq., and Andrew Dill, Esq., Wilmer & Lee, P.A., for Asset Management Real Estate, LLC; Michael R. Charness, Esq., Kathleen C. Little, Esq., Jenny J. Yang, Esq., and Elizabeth A. Krabill, Esq., Vinson & Elkins LLP, for Wallin Residential Properties, Winn Realty & Appraisal, LLC, and LaRosa Realty; Michael R. Golden, Esq., Michael A. Hordell, Esq., Robert T. Leahy, Esq., and Craig A. Schwartz, Esq., Pepper Hamilton LLP, for IEI-CitySide, Joint Venture; Steven J. Lewicky, Esq., and Mary B. Tung, Esq., Davis Agnor Rapaport & Skalny, LLC, for One Source REO; and Janine S. Benton, Esq., John Murdock, Esq., Kathy C. Potter, Esq., and Rosanne E. Stafiej, Esq., Benton Potter & Murdock P.C., for Real Estate Resource Services, the protesters.

David S. Cohen, Esq., John J. O'Brien, Esq., Laurel A. Hockey, Esq., Gabriel E. Kennon, Esq., Amy J. Spencer, Esq., and Nicole Picard, Esq., Cohen Mohr LLP, and Lee P. Curtis, Esq., Donald J. Carney, Esq., Eric Aaserud, Esq., John F. Henault, Esq., William J. Bainbridge, Esq., and Seth H. Locke, Esq., Perkins Cole, LLP, for BLB Resources, Inc.; and Keir X. Bancroft, Esq., J. Scott Hommer, III, Esq., James Y. Boland, Esq., Christina K. Kube, Esq., Nathaniel S. Canfield, Esq., Elizabeth Ann Buehler, Esq., George W. Wyatt, IV, Esq., and Anna Pulliam, Esq., Venable LLP, for Matt Martin Real Estate Management, LLC, the intervenors. Julie Cannatti, Esq., Jonathan English, Esq., Todd P. Maiberger, Esq., and Kasey Podzius, Esq., Department of Housing and Urban Development, for the agency.

Mary G. Curcio, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest that awardee received an improper advantage from a pre-award debriefing prior to being readmitted to competitive range as corrective action is denied where debriefing was consistent with the Federal Acquisition Regulation.

2. Agency reasonably evaluated past experience as unacceptable where offered experience was not similar in size or complexity to the required services.
3. Protest that agency failed to consider past performance of teaming partner is denied where the past performance was outside the five year time period established by the solicitation for the evaluation of past performance.
4. Protest that agency failed to perform a price realism analysis for fixed price requirement is denied where solicitation did not indicate that price realism would be assessed.
5. Protest that agency improperly failed to refer an alleged defacto nonresponsibility determination to the Small Business Administration for a Certificate of Competency review is denied where the protesters raising the issue were not in line for award.

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## **DECISION**

Asset Management Real Estate, LLC (AMRE), of Denver, Colorado; Wallin Residential Properties, of Blaine, Minnesota; Winn Realty & Appraisal, LLC, of Janesville, Wisconsin; LaRosa Realty, of Celebration, Florida; IEI-Cityside, Joint Venture, of Elkridge, Maryland; One Source REO, of Baltimore, Maryland; and Real Estate Resource Services (RERS), of Corona, California, protest the Department of Housing and Urban Development's award of contracts to BLB Resources, Inc., of Irvine, California, and Matt Martin Real Estate Management, LLC (MMRE), of Arlington, Virginia, under request for proposals (RFP), No. R-ATL-02006, for management and marketing services for foreclosed homes held in HUD'S inventory. The protesters challenge the evaluation of proposals and assert that one of the awardees received an improper competitive advantage as the result of a pre-award debriefing.

We deny the protests.

## **BACKGROUND**

The solicitation, issued on November 2, 2011, as a total small business set-aside, requested proposals to provide management and marketing services for HUD's real estate portfolio in six geographic areas (designated as 3S (Arizona), 4S (Idaho, Nevada), 5S (California, Hawaii), 6S (Oregon, Washington, Alaska), 4D (South Dakota, Nebraska, Iowa, Wisconsin), and 5D (Montana, Wyoming, North Dakota, Minnesota)).<sup>1</sup> The solicitation provided for award to be made on a best-value basis

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<sup>1</sup> Offerors were permitted to submit a proposal for one or more areas. Offerors proposing on more than one area were to submit one technical proposal.

considering the following factors: technical approach, past experience, past performance, and price. Each non-price factor was assigned an adjectival rating.<sup>2</sup> Technical approach was more important than past experience, which was more important than past performance. When combined, the technical factors were significantly more important than price. RFP § M.3.

After receiving and reviewing the initial offers, the agency established a competitive range and held discussions. BLB, which was not included in the competitive range, requested and received a pre-award debriefing. On August 23, 2012, BLB filed a pre-award protest with our Office challenging its elimination from the competitive range. BLB subsequently withdrew that protest after the agency decided to take corrective action and include BLB in the competitive range. The agency then held a second round of discussions with those offerors included in the revised competitive range. After receiving and evaluating final proposal revisions, the agency selected BLB (for areas 3S, 5S, and 6S) and MMRE (for areas 4S, 4D, and 5D) for award.

When AMRE then protested the award decision, the agency again took corrective action. Specifically, the agency agreed to review the source selection documentation and award decisions to ensure that they were made in accordance with the RFP and GAO case law related to small business responsibility issues.<sup>3</sup>

Following this review, the agency affirmed the awards to BLB and MMRE. As relevant to this protest, BLB was rated excellent under each of the three technical factors, Final Technical Evaluation Report (FTER) at 64-74, while MMRE was rated good for technical approach, excellent for past experience, and good for past performance. Id. at 1-11.

AMRE (protesting all awards) was rated good for technical approach, unacceptable for past experience, and neutral for past performance. With respect to price, BLB and MMRE offered lower prices than AMRE for each area in which they were awarded a contract.<sup>4</sup>

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<sup>2</sup>The adjectival ratings applied to proposals under the technical approach and past experience factors were excellent, good, fair, poor, or unacceptable. The ratings applied under the past performance factor were excellent, good, fair, poor, unacceptable, or neutral. RFP § M.6.

<sup>3</sup> We dismissed AMRE's protest on July 22, 2013 (B-407214.2).

<sup>4</sup>The evaluated prices (in millions) for the awarded areas for the awardees and the protesters are: (3S) AMRE-\$ [DELETED], RERS-\$[DELETED], One Source-\$[DELETED], LaRosa-\$[DELETED], BLB-\$30.5; (4S) AMRE-\$[DELETED], MMRE-\$22.2, LaRosa-\$[DELETED], RERS-\$[DELETED], One Source-\$[DELETED]; (5S) AMRE-\$[DELETED], BLB-\$39.1, LaRosa-\$[DELETED], RERS-\$[DELETED], One Source-\$[DELETED], IEI-\$[DELETED]; (6S) AMRE-\$[DELETED], LaRosa-

(continued...)

Wallin (protesting the award to MMRE for area 5D) was rated excellent for technical approach, unacceptable for past experience, and good for past performance. Winn (protesting the award to MMRE for area 4D) was rated excellent for technical approach, unacceptable for past experience, and good for past performance. LaRosa (protesting the awards to BLB for areas 3S, 5S, 6S, and to MMRE for area 4S) was rated excellent for technical approach, unacceptable for past experience, and good for past performance. BLB and MMRE submitted lower prices than Wallin, Winn, and LaRosa for the areas for which each was awarded contracts.

IEI (protesting the award to BLB for areas 5S and 6S, and the award to MMRE for areas 4D and 5D) was rated good for technical approach, excellent for past experience, and excellent for past performance. Id. at 138-48. With respect to price, BLB and MMRE offered lower prices than IEI for each area in which it was awarded a contract, except for area 6S, where IEI's price was slightly lower than BLB's.

RERS (protesting all awards) was rated fair for technical approach, unacceptable for past experience, and neutral for past performance. Id. at 54-63. One Source (protesting all awards) was rated good for technical approach, unacceptable for past experience, and neutral for past performance. Id. at 30-40. With respect to price, BLB and MMRE offered lower prices than One Source and RERS for each area in which they were awarded a contract, except for area 4D where One Source offered a slightly lower price than MMRE.

In each case, the agency concluded that the combination of technical merit and price of BLB's and MMRE's proposals offered the best value to the government. Source Selection Decisions (SSD).

## DISCUSSION

The protesters raise numerous challenges to the award decisions. We have reviewed all the arguments and conclude that they are without merit. We discuss several issues below.

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\$(DELETED), RERS-\$(DELETED), One Source-\$(DELETED), IEI-\$(DELETED), BLB-\$28.7; (4D) AMRE-\$(DELETED), MMRE-\$20.5, Winn-\$(DELETED), IEI-\$(DELETED), RERS-\$(DELETED), One Source-\$(DELETED); (5D) AMRE-\$(DELETED), MMRE-\$20.8, Wallin-\$(DELETED), IEI-\$(DELETED), RERS-\$(DELETED), One Source-\$(DELETED). SSDs at 1-2.

## Competitive Advantage for BLB

LaRosa, IEI, One Source, and RERS assert that the agency engaged in disparate treatment because it provided competitively useful information to BLB during that company's earlier preaward debriefing.<sup>5</sup>

With respect to pre-award debriefings, the Federal Acquisition Regulation (FAR) provides as follows:

(e) At a minimum, pre-award debriefings shall include:

(1) The agency's evaluation of significant elements in the offeror's proposal;

(2) A summary of the rationale for eliminating the offeror from the competition . . . .

FAR §15.505(e). The agency's preaward debriefing of BLB was consistent with these requirements. The agency explained to BLB that it was primarily eliminated from the competitive range based on its non-competitive price. It also provided BLB its evaluated price, its overall ranking based on its combined technical and price evaluation, and discussed the evaluation of BLB's offer. Debriefing Notes, BLB. Further, consistent with the prohibition in FAR § 15.505(f), the agency did not provide BLB any detailed information relating to the remaining competitors. For example, the agency did not advise BLB of the number of remaining offerors or their identity; the content of the other proposals; the ranking of the remaining offerors; or point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Id. In summary, the agency's actions during the preaward debriefing were

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<sup>5</sup> IEI also asserts that once BLB was excluded from the competitive range, FAR §15.307(a) prohibited the agency from including BLB in a re-established competitive range and allowing it to submit a revised proposal. We disagree. FAR §15.307(a) provides that, "[i]f an offeror's proposal is eliminated or otherwise removed from the competitive range, no further revisions to the offeror's proposal shall be accepted or considered." This provision notifies offerors that if they are eliminated from the competitive range they will not be permitted to submit proposal revisions. It does not, however, preclude a company from protesting its elimination from the competitive range, and it does not prohibit a procuring agency from taking corrective action which results in reinstating that offeror to the competitive range. See, e.g., Environmental Quality Management, Inc., supra, at 3.

consistent with the FAR and unobjectionable. Environmental Quality Management, Inc., B-402123.4, B-402123.6, Aug 31, 2010, 2012 CPD ¶ 79 at 4.<sup>6</sup>

#### Past Experience--Evaluation

With respect to past experience, the solicitation required offerors to submit documentation for at least three past or current contracts/task orders with requirements similar in size, complexity, and scope to the solicited tasks within the previous five years. RFP § M.5. Offerors were required to include, among other things,

a point of contact (name, company name, phone number, fax number and email), contract number, contract type, dollar value, date of award, performance period, and a brief narrative describing the Offeror's effort, the nature and complexity of the work and the relevance to the solicited task.

Id. At least one of the past experience references was required to be for the qualifying small business. Id. The solicitation further provided that failure to submit three past experience references would result in a rating of unacceptable for this factor. Id.

#### RERS

RERS was rated unacceptable for past experience because the agency found that it did not submit a reference for itself that was similar in size and complexity to the current requirements. FTER at 58. RERS disputes this conclusion, asserting that one of its references was for its work as a subcontractor for a HUD asset manager, the same work contemplated under the current solicitation.

Here, even if we concluded that RERS was unreasonably evaluated for past experience and should have received an excellent rating, RERS would not be in line for award in any of the six protested areas. In this regard, for the three areas for which BLB was awarded contracts, it was rated excellent for all three technical factors. In the three areas for which MMRE was awarded contracts, MMRE was rated good for technical approach, excellent for past experience, and good for past performance. In contrast, RERS, which did not otherwise challenge the evaluation ratings for its proposal, was only rated fair under technical approach, the most

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<sup>6</sup> To the extent the protesters assert that the pre-award debriefing resulted in unequal discussions, conferring on BLB a discussions opportunity not granted to the other offerors, the reopening of a competition following a debriefing does not transform a debriefing into discussions. Next Tier Concepts, Inc., B-406620.3, B-406620.4, Nov. 13, 2013, 2013 CPD ¶ 5 at 3.

important factor. Thus, if RERS was rated excellent for past experience, it would still have a lower rating (by two levels) for technical approach, and a less advantageous rating (neutral) for past performance. RERS also had substantially higher prices than either BLB or MMRE for each of the six areas. Given its lower technical ratings and higher prices, even if RERS were rated higher for past experience, RERS would not have a substantial chance of receiving an award. Accordingly, RERS was not prejudiced even if its past experience was improperly evaluated.<sup>7</sup> Our Office will not sustain a protest unless the protester demonstrates competitive prejudice--that is, but for the agency's actions, it would have a substantial chance of receiving the award. Velos, Inc.; OmniComm Sys., Inc.; PercipEnz Technologies, Inc., B-400500 et al., Nov. 28, 2008, 2010 CPD ¶ 3 at 12.

### One Source

One Source was rated unacceptable under the past experience factor because it did not provide a reference for itself that was similar in size, scope and complexity to the current requirement. Instead, One Source discussed the experience of its key personnel. Moreover, One Source did not include the required relevant contract information for the key personnel. One Source FPR, Experience at 1-4. One Source challenges this rating.

We find no basis to question the agency's assignment of an unacceptable rating for past experience to One Source's proposal. In this regard, One Source notes that under FAR § 15.305(a)(2)(iii), when evaluating past experience a procuring agency "should take into account past performance information regarding . . . key personnel who have relevant experience." According to One Source, this required the agency to consider the past experience of its key personnel.

We disagree. Here, under the terms of the solicitation, the experience of key personnel was to be evaluated under the technical approach factor. RFP § M.4. In contrast, the solicitation provided with respect to past experience that, "[o]fferors must submit documentation of at least three (3) [experience references]," and that "[a]t least one of the past experience references must be for the qualifying small business." RFP § M.5. The solicitation further provided that "[i]n rating this factor, the Government will evaluate the firm's comparable experience, *i.e.*, 'what the offeror has done.'" Id. The past experience factor did not reference key personnel. Further, in response to a question about whether the experience of members of a new business entity would be considered, the agency advised (in solicitation

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<sup>7</sup> Furthermore, we note that in 5 of the 6 areas, even if RERS was rated excellent for past experience, there would be other offerors in addition to the awardees with higher technical evaluations and lower prices than RERS.

amendment No. 1) that for a newly-formed business, the prior experience of the owner may be used, but the experience of other key personnel would be considered only in accordance with “sections L and M” of the solicitation (which provided for the evaluation of key personnel under the technical approach factor). RFP at 184-185.<sup>8</sup>

Thus, it was clear from the solicitation that the agency would not consider the experience of key personnel in evaluating an offeror’s experience. To the extent One Source believed that this is contrary to the requirement of FAR § 15.305(a)(2)(iii), One Source was required to protest prior to December 9, 2011, the closing time for the receipt of offers. 4 C.F.R. § 21.2(a)(1)(2013). In any case, while One Source discussed the experience of its owners in its proposal, it did so generally, without providing contract numbers and other information required by the solicitation. In fact, One Source did not even identify the companies that previously employed its two principals. One Source Experience Proposal at 1, 2. Accordingly, since One Source did not provide the required past experience reference for itself, the agency reasonably assigned One Source an unacceptable rating for past experience.<sup>9</sup>

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<sup>8</sup> In question 3, an offeror asked:

Being a newly formed corporation . . . we have assembled individuals whose background gives us the ability to perform if awarded, but we as an organization do not have this experience, how do we handle this? Will we be judged on the individual experience of the members applying?

The agency answered as follows:

Past Performance and Past Experience are being evaluated as separate factors for this solicitation. Only one of the qualifying Past Experience examples must be for the prime Small Business offeror. If the Small Business is newly-formed, prior experience from the owners’ past business dealings may be used to fulfill this requirement. Otherwise, individual Past Experience or Past Performance examples will be considered within the constraints of Sections L & M.

RFP at 184-185.

<sup>9</sup> Moreover, we note that with respect to the awards to BLB for areas 3S, 5S, and 6S, and to MMRE for areas 4S and 5D, the record indicates that One Source was not competitively prejudiced by not receiving a higher rating for past experience. As noted above, BLB was rated exceptional for all technical factors, while MMRE was rated good for technical approach, excellent for past experience, and good for past performance. In contrast, One Source was rated only good for technical approach, unacceptable for past experience, and neutral for past performance. In addition,

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Wallin, Winn, LaRosa

Wallin, Winn, and LaRosa each submitted one past experience reference for itself as a local listing broker (LLB). Each was rated unacceptable under the past experience factor based on the agency's conclusion that experience as an LLB was not similar in size and complexity to the current requirement. Technical Evaluation Report: Wallin at 1207, Winn at 1196, LaRosa at 1171.

The agency found that while LLB experience was similar in scope to the contemplated contract effort because it related to some solicitation requirements, the experience was not similar in size or complexity to the solicited requirements. Specifically, the evaluators determined that LLB services comprise only about 35% of the services required under the instant solicitation. Id. The protesters question on what basis the agency determined that LLB services accounted for 35% of the solicited services. According to the protesters, LLB services are the same work called for under the solicitation.

We find the evaluation reasonable. The agency explains that LLB services are different from the services to be performed by the asset manager under the statement of work, and account for only a portion of the services required by the solicitation. In this regard, the agency explains that an LLB is responsible for such things as listing properties in the local area, maintaining lock boxes, holding open houses, and conducting mandatory inspections. Agency Supplemental Report, Dec. 6, 2013, at 1-2; Performance Work Statement § 5.2.11. In contrast, the agency explains that an asset manager has more and broader duties. The asset manager is responsible for obtaining the services of listing brokers, and for ensuring that the

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One Source was higher-priced than the awardees for all but area 4D. In these circumstances, even if One Source were rated excellent for past experience, with respect to BLB, it would have the same rating for past experience, a lower rating for technical approach (the most important factor), a much less advantageous rating (neutral) for past performance, and significantly higher prices. With respect to MMRE for areas 6S and 5D, even if One Source were rated excellent for past experience, it would have the same ratings as MMRE for technical approach and past experience, a less advantageous rating (neutral) for past performance, and higher prices. As for area 4D, for which One Source submitted a slightly lower price (One Source \$[DELETED], MMRE \$20.5), again, even if One Source were rated excellent for past experience, it would have the same ratings as MMRE for technical approach and past experience, and a much less advantageous rating (neutral versus good) for past performance. In these circumstances, it is not apparent that One Source's very slight price advantage (approximately [DELETED]) would offset MMRE's good past performance rating.

listing brokers perform as required under the solicitation. Id. In addition, among other requirements, an asset manager must determine the list price, monitor selling compliance, list properties nationally, collect earnest money, and coordinate closings. See PWS § 5.2.1.2 et. seq. On this record, we see no basis to substitute our judgment for the agency's on the differences between the services at issue here, and those provided by LLB's.

Moreover, the agency concluded that the experience proffered by the protesters involved contracts that were substantially lower in dollar value than the current requirement, covered smaller areas, and in the case of LaRosa, dealt with a smaller number of properties.<sup>10</sup> Specifically, according to the agency, the evaluators noted that while Wallin served as an LLB for the state of Minnesota, area 5D covers 4 states. Also, while Wallin's cited experience involved a contract valued at \$896,878, its proposed price for the current requirement was in excess of **\$(DELETED)** million. AR, Wallin at 4. Likewise, while Winn served as a listing broker for one contract area, Wisconsin, the solicitation for area 4D covers four states; and while the value of Winn's cited contract was \$716,189, its proposed price for the current requirement was **\$(DELETED)** million. AR, Winn at 4. Similarly, while LaRosa indicated in its proposal that it sold 25 properties in a span of one year, in one month 547 homes were sold in area 3S, 284 in area 4S, 353 in area 5S, and 256 in area 6S. Also, while the value of LaRosa's cited contract was \$110,000, its proposed prices for the current requirements were from **\$(DELETED)** million to **\$(DELETED)** million. AR, LaRosa at 4.

We conclude that, in the circumstances here, the agency reasonably found that the protesters' cited experience was not similar in size and complexity, and therefore reasonably assigned the proposals an unacceptable rating for past experience.

#### Past Experience Discussions

Winn and LaRosa also assert that the agency failed to hold meaningful discussions with them regarding their past experience. Specifically, Winn and LaRosa argue that the agency improperly failed to advise them during discussions of their evaluated lack of similar experience.<sup>11</sup> Based on the record here, we find that even if the

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<sup>10</sup> Wallin and Winn, unlike LaRosa, did not specify the number of properties handled under the cited contract experience.

<sup>11</sup> Wallin also asserts that the agency deprived it of meaningful discussions. Specifically, Wallin explains that during the second round of discussions in December 2012, HUD notified Wallin that its past experience was relevant, but that it was not similar in size, scope or complexity to the current requirements. According to Wallin, these discussions were not meaningful because they led Wallin to conclude that its past experience was acceptable. We disagree. Discussions with

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agency failed to hold meaningful discussions with Winn and LaRosa with respect to past experience, the protesters were not prejudiced.

#### Winn

Winn, which protested the award for area 4D, was rated excellent for technical approach, unacceptable for past experience, and good for past performance, while MMRE was rated good for technical approach, excellent for past experience, and good for past performance. Winn's evaluated price was \$[DELETED] million and MMRE's was \$[DELETED] million. While the source selection official (SSO) recognized in the trade-off decision that MMRE was rated higher than Winn for past experience, the SSO specifically concluded that Winn's superior technical approach was not worth a price premium of [DELETED]%. SSD Area 4D at 11.

Winn has not shown that any additional information it would have furnished would have warranted a higher past experience rating. Winn argues that if its past experience had been raised during discussions, it could have improved its rating by providing additional information to demonstrate the relevance of the experience. Winn specifically claims that it could have pointed out that its past experience reference covered the entire state of Wisconsin, which Winn asserts amounts to 50% of Area 4D. As noted above, however, Wisconsin was only one of four states covered by Area 4D. Further, Winn served only as a listing broker in Wisconsin and thus provided only some of the services covered by the solicitation here. In addition, Winn does not explain how experience on a contract that was valued at a small fraction of the value of the current solicitation (\$716,189 for its experience as an LLB versus Winn's \$[DELETED] million price here) could be considered similar in size to the current solicitation services. Thus, we see no reasonable basis to conclude that Winn could have changed its proposal through discussions in this area in a way that would have increased its experience rating.

Winn also asserts that it "could have adjusted its price strategy" if, during discussions, the agency had informed it that its past experience was unacceptable. Winn, however, does not provide any details regarding how it might reduce its price. Further, we note that Winn was specifically told during the first round of discussions that its price was higher than commercial rates for similar services, Winn Discussion Question No. 2, Aug. 13, 2012, and during the second round of discussions that its

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Wallin were meaningful since by telling Wallin that its experience was considered relevant, but not similar in size, scope, or complexity to the solicited services, the agency led Wallin to the area of its proposal that required amplification or revision. ITT Fed. Sys. Int'l Corp., B-285176.4, B-285176.5, Jan. 9, 2001, 2001 CPD ¶ 45 at 7.

prices were higher than the competitive prices the agency received in response to the solicitation. Winn Discussion Question No. 3, Dec., 11, 2012. In these circumstances, where the difference in price ([DELETED] percent) was so substantial, and Winn already was on notice of its higher price and given the opportunity to reduce it, Winn's vague reference to reducing its price here is not sufficient to demonstrate prejudice. See Online Video Service, Inc., B-403332, Oct. 15, 2010, 2010 CPD ¶ 244 at 2.

### LaRosa

For area 4S, LaRosa was rated excellent for technical approach, unacceptable for past experience, and good for past performance, while MMRE was rated good for technical approach, excellent for past experience, and good for past performance. LaRosa's evaluated price was \$[DELETED] million, and MMRE's was \$22.2 million. For areas 3S, 5S, and 6S, LaRosa was rated excellent for technical approach, unacceptable for past experience, and good for past performance, while BLB was rated excellent for all three technical factors. Regarding price, for area 3S, LaRosa's evaluated price was \$[DELETED] million and BLB's \$30.5 million; for area 5S, LaRosa's price was \$[DELETED] million and BLB's \$39.1 million; and for area 6S, LaRosa's price was \$[DELETED] million and BLB's \$28.7 million.

LaRosa argues that had it been given the opportunity to engage in discussions regarding its past experience, it could have substituted an acceptable experience reference. Specifically, LaRosa states that it would have substituted a past performance reference that it included in its proposal for its work as a real estate broker for BB&T Commercial and Residential Properties. We find this argument unpersuasive. First, as the agency points out, LaRosa already could have included this reference in its past experience proposal since there was no limit on the number of experience references. Moreover, while there is some disagreement in the record as to how much this referenced past performance contract was worth, the highest contract value was a little over \$4 million, and the number of properties involved (at most 44) was substantially fewer than the number contemplated by the solicitation. Supplemental Agency Statement (Dec. 9, 2013) at 4. Given how much smaller this additional contract experience was in size and scope than the solicited requirements, we find that LaRosa has not demonstrated that it would have changed its proposal in a way that would make it more likely to receive an award, especially considering its higher price.

### Past Performance

With respect to past performance, the solicitation provided as follows: "In making this award, each Offeror will be evaluated on their past performance under relevant existing and prior contracts within the last five years." RFP § M.2(c). Wallin, Winn, and LaRosa each proposed to use the same teaming partner ([DELETED]) and each was rated good for past performance based on good ratings that [DELETED]

received from HUD that were available in the Contractor Performance Assessment Reporting System (CPARS). SSD (4D) at 11; SSD (5D) at 10; SSD (4S) at 10.

Each protester challenges the rating assigned to its proposal, arguing that the agency failed to consider exceptional ratings for **[DELETED]** available in the CPARS. The agency explains that it did not consider these ratings because they were for contract efforts outside the previous five year period established by the solicitation. AR at 8.<sup>12</sup> The protesters, however, argue that because section M.6 of the solicitation stated that in its past performance evaluation the government could use other available information, including that from the CPARS, without limiting the time period for data that could be considered, the agency was required to use CPARS data outside the five year period.

We find the evaluation in this regard unobjectionable. While the solicitation generally notified offerors that the agency could consider past performance data from the CPARS, it specifically limited its consideration of past performance information to contracts performed in the previous five years. RFP § M.5. In such circumstances, we have previously recognized that where the performance in question falls outside of the time period established in the solicitation, there is nothing improper about an agency's decision not to consider such performance. See American Apparel, Inc., B-407399.2, Apr. 30, 2013, 2013 CPD ¶ 113 at 5; FR Countermeasures, Inc., B-295375, Feb. 10, 2005, 2005 CPD ¶ 52 at 5.<sup>13</sup>

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<sup>12</sup>The agency also notes that since these CPARS performance ratings were designated as preliminary and not final, they would not have been considered in any case. AR at 8 n.4

<sup>13</sup>The agency considered that RERS's and One Source's neutral rating for past performance resulted in an unknown performance risk. RERS in a supplemental protest asserts that a small business without past performance cannot be penalized such that a neutral rating is considered less favorable or negative. According to RERS, an unknown performance risk equates to a negative rating. One Source makes a similar argument. We disagree. While an agency cannot assign a small business with no past performance a negative rating, in a best value procurement it can consider that a neutral rating is less desirable than a good or excellent rating. American Floor Consultants, Inc., B-294530.7, June 15, 2006, 2006 CPD ¶ 97 at 4.

## Small Business Issues

### Referral to SBA

AMRE, One Source, and RERS assert that when the agency rated their proposals unacceptable for past experience, which the protesters contend is a traditional responsibility criterion, the agency essentially determined that they were not responsible offerors. As a result, all three of these protesters argue that the agency was required to refer the determinations to the Small Business Administration (SBA) for a certificate of competency (COC) review.

Under the FAR, a contracting officer must make an affirmative determination of an offeror's responsibility before making award to the firm. FAR § 9.103(b). Where the agency determines that a small business that is otherwise in line for award is nonresponsible, the agency must refer the determination to the small business administration for a COC determination. Tenderfoot Sock Co., Inc., B-293088.2, July 30, 2004, 2004 CPD ¶ 147 at 3. Here, none of the protesters' proposals were eliminated from further consideration for award because of unacceptable past experience. Rather, their proposals were considered, but not selected, because there were higher-rated, lower-priced proposals in the competitive range. As the protesters were not in line for award, the agency was not required to refer the matter to the SBA for a COC determination. Id.

### Small Business Size Status

AMRE raises three issues related to the size status of the awardees. AMRE asserts that the awardees were no longer small business concerns when the final award was made; that the contracting officer abused his discretion by not requesting offerors to recertify their small business size status; and that the agency improperly allowed the awardees to revive their offers and did not consider their size status at the time the offers were revived.

Under our Bid Protest Regulations, only an interested party may maintain a protest; an interested party is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract, or the failure to award a contract. 4 C.F.R. §§ 21.0(a)(1), 21.1(a)(2013). Where a firm would not be in line for award in the event its protest is sustained, that firm lacks the direct economic interest necessary to maintain a protest. PAE Gov't Servs., Inc., B-407818, Mar. 5, 2013, 2013 CPD ¶ 91 at 3.

AMRE's proposal was lower-rated and higher-priced than those of other offerors in each area. AR at 5. For example, as discussed above, in area 3S, there were five offerors with lower prices and equal or higher technical ratings than AMRE. SSD (3S) at 1-2. Similarly, in area 5D there were six offerors with higher or equal technical ratings and lower prices than AMRE. SSD (5D) at 1-2. AMRE has not

challenged the evaluation of the proposals of these other offerors. Nor has AMRE provided any basis to challenge its own evaluation. Since these offerors and not AMRE would be in line for award, AMRE is not an interested party to challenge the awards on the above grounds.

AMRE also asserts that all proposals expired and, because the agency never requested extensions, but instead simply made awards which were accepted by the awardees, the awards were improper. Our Office has previously rejected such an argument. Systems Research & Applications Corp., B-407224.3, Dec. 17, 2012, 2012 CPD ¶ 352 at 9-10. As we noted in Systems Research & Applications Corp., our Office has recognized that an offeror may extend its acceptance period and even revive an expired offer if this would not compromise the integrity of the competitive procurement system. See United Elec. Motor Co., Inc., B-191996, Sept. 18, 1978, 78-2 CPD ¶ 206 at 3. Circumstances that compromise the system's integrity include those where acceptance of the extension by the agency would be prejudicial to the other offerors. Since AMRE has not shown that any of those circumstances are present here, we cannot see how AMRE was prejudiced by HUD's decision to make awards to BLB or MMRE. See International Logistics Group, Ltd., B-223578, Oct. 24, 1986, 86-2 CPD ¶ 452 at 4.

#### Price Evaluation

As relevant here, contract line item number 1 was for properties sold within the first 90 days at a sales price 95 percent or higher than the initial listing price, and line item 2 was for properties sold within the first 90 days at a price less than 95 percent of the initial listing price or properties sold after the first 90 days. RFP § B.4. Offerors were required to propose a marketing fee for each of these line items. The marketing fee was a percentage of the net offer amount, that is, essentially the sales price. The solicitation included attachment A4 which provided a snapshot of inventory across the 12 month period between October 1, 2010, and September 30, 2011, and the average net sales prices over that 12 month period.<sup>14</sup> For price evaluation purposes, the agency multiplied the proposed marketing fee by the net offer amount. RFP § B.4. This was then multiplied by the estimated quantities for each area. RFP § M.7. Offerors were also required to propose a marketing fee for

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<sup>14</sup> The solicitation cautioned that “[t]he historical numbers are for estimating purposes only, and do not constitute any form of guarantee under this contract. Actual inventory may vary significantly from the estimates provided.” RFP, Att. A4 at 1.

properties sold to asset control area participants and a fee to conduct government directed inspections.<sup>15</sup> RFP §§ B.4, M.7.

### Realism

Wallin, Winn, and LaRosa assert that HUD failed to determine whether the prices proposed by MMRE and BLB were realistic.

Although not required, an agency may provide for a price realism analysis in a solicitation for the award of a fixed-price contract for the purpose of assessing whether an offeror's low price reflects on its understanding of the contract requirements or the risk inherent in an offeror's approach. Grove Resource Solutions, Inc., B-296228, B-296228.2, July 1, 2005, 2005 CPD ¶ 133 at 4-5. However, where there is no relevant evaluation criterion pertaining to realism or understanding, a determination that an offeror's price on a fixed-price contract is too low generally concerns the offeror's responsibility, *i.e.*, the offeror's ability and capacity to successfully perform the contract at its offered price. See J.A. Farrington Janitorial Servs., B-296875, Oct. 18, 2005, 2005 CPD ¶ 207 at 4-5. An agency may only perform a price realism analysis if it is foreseeable to offerors that the agency intends to do so. Milani Construction, LLC, B-401942, Dec. 22, 2009, 2010 CPD ¶ 87 at 5.

Here, there was no price evaluation factor providing for the evaluation of the offerors' understanding of the requirements. Rather, the price evaluation factor provided only for the evaluation of the "reasonableness" of the proposed price (that is, whether the offeror's price was unreasonably high). RFP § M.7. In response, the protesters cite the solicitation's basis for award, which provides for the agency to "determine the best overall value based on the Offeror's proposal, including technical and price related factors and risks associated with successful contractor performance." RFP § M.1. According to the protesters, this provision puts offerors on notice that the agency will evaluate the risks of performance, and thus any price risks. This language however, is not sufficient to put offerors on notice that price realism will be evaluated. Milani Construction, LLC, *supra*. Accordingly, we find that there was no requirement for the agency to conduct a price realism evaluation.

### Price Analysis

IEI asserts that HUD failed to perform a meaningful price evaluation. In its protest, IEI initially asserted that the solicitation provided the process by which price would

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<sup>15</sup> Offerors were also required to propose not to exceed amounts for three pass-through items--appraisals, record retention and file delivery, and dispute resolutions. These costs are not in issue here.

be evaluated, but did not provide any further information such as the property values that the agency would use to evaluate price. Protest at 7. In response to the protest, the agency explained that the basis for the price evaluation was laid out in the solicitation. The agency agreed that the solicitation did not provide that the figures in attachment A4 would be used for evaluation purposes. The agency explained that it divided the estimated inventory in attachment A4 between the first and second line items and reduced the base year because it was not expecting a full year of performance. In addition, because the actual sales prices being reported were higher across all areas, the agency used higher net values than the averages included in attachment A4. Agency Report (AR) at 4.

In its comments on the agency report, IEI challenges the agency's decision to use a higher average net price than that provided in attachment A4 to evaluate offerors' prices. Again, however, as recognized by the protester in its initial protest, and as acknowledged by the agency in its report, the solicitation did not specify what sales prices the agency would use to calculate offerors' prices. To the extent that the protester now seeks to argue that the agency nevertheless was required to use the figures in attachment A4, its protest is untimely. Under our Bid Protest Regulations, a protest of an apparent solicitation impropriety must be filed prior to the closing date for the receipt of offers. 4 C.F.R. § 21.2(a)(1)(2013). Further, to the extent the protester challenges the agency's use of higher sales prices than those in attachment A4, the protester has not explained why the agency was unreasonable in determining that the higher rates better reflected actual current rates; nor has IEI satisfactorily explained how it was prejudiced by use of the higher sales prices. See ITT Corp.-Electronic Sys., B-402808, Aug. 6, 2010, 2010 CPD ¶ 178 at 7 (prejudice is an essential element of every viable protest, and where none is shown or otherwise evident we will not sustain a protest, even where a protester may have shown that an agency's actions arguably were improper.)

#### Price Discussions

AMRE asserts that it was not provided with meaningful discussions because the agency did not tell AMRE during discussions that its price was unreasonably high.

This argument is without merit. Specifically, during discussions an agency need not advise an offeror that its price is higher than those of its competitors if the higher price is not viewed as unreasonable. DeTekion Sec. Sys., Inc., B-298235, B-298235.2, July 31, 2006, 2006 CPD ¶ 130 at 15. Here, AMRE does not assert that at the time the agency held discussions the agency viewed its prices as unreasonably high, and, in fact, the record shows that, at that time, AMRE's prices were in line with those of other offerors. Agency Report (AR) at 14; AR at 2162-2164.

## Technical Approach

IEI asserts that the agency evaluated proposals unequally under the technical approach factor. Specifically, IEI complains that while BLB was given positive consideration for [DELETED], it was not given positive consideration for its [DELETED]. IEI asserts that the agency similarly cited [DELETED] as a strength of its marketing approach, without assessing IEI [DELETED].

In response, the agency explains that the [DELETED]. In addition, as acknowledged by IEI in its protest, the proposed [DELETED]. Protest at 14. The agency distinguishes the use of [DELETED]. Thus, the agency concluded that [DELETED] because they cast a wider net to obtain a larger pool of potential customers. Agency Statement, Jan. 8, 2014, at 2. With respect to [DELETED], Rather, MMRE was awarded a strength for its [DELETED] as only one component of a list of items that [DELETED]. *Id.* at 3.

In its final comments, IEI does not generally dispute the agency's reasoning in assigning strengths to [DELETED]. Instead, IEI complains that the agency's explanation is not part of the contemporaneous record. However, post-protest explanations that provide a detailed rationale for contemporaneous conclusions and simply fill in previously unrecorded details will generally be considered in our review of evaluations and award determinations, so long as those explanations are credible and consistent with the contemporaneous record. AdvanceMed Corp.; TrustSolutions, LLC, B-404910.4 *et al.*, Jan. 17, 2012, 2012 CPD ¶ 25 at 21 n.14. Here, in response to IEI's protest allegation, the agency has simply explained why the evaluators found that certain features of the awardees' proposals were viewed as strengths while allegedly similar elements of the protester's proposal were not. In these circumstances, where the protester has not shown the agency explanation to be inconsistent with the contemporaneous evaluation record or unreasonable, we have no basis to question the evaluation.

## Best Value Determination

Finally, IEI asserts that the agency failed to perform a reasonable best value trade-off. According to the protester, the determination was based on an unreasonable technical and price trade-off, and did not adequately analyze the benefits of the awardees' proposals.

Source selection officials in negotiated procurements have broad discretion in determining the manner and extent to which they will make use of technical and price evaluation results; price/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the tests of rationality and consistency with the evaluation criteria. Atteloir, Inc., B-290601, B-290602, Aug. 12, 2002, 2002 CPD ¶ 160 at 5. Where a price/technical tradeoff is made, the source selection decision must be documented, and the documentation must include

the rationale for any tradeoffs made, including the benefits associated with additional costs. The MIL Corp., B-297508, B-297508.2, Jan. 26, 2006, 2006 CPD ¶ 34 at 13. However, there is no need for extensive documentation of every consideration factored into a tradeoff decision, nor is there a requirement to quantify the specific cost or price value difference when selecting a higher-priced higher-rated proposal for award. Advanced Fed. Servs. Corp., B-298662, Nov. 15, 2006, 2006 CPD ¶ 174 at 5.

Our review of the record demonstrates that the source selection official (SSO) here performed a reasonable best value tradeoff. In this regard, with respect to the tradeoff decision between MMRE and IEI for Area 5D, MMRE was rated good for technical approach, excellent for past experience, and good for past performance, while IEI was rated good for technical approach, excellent for past experience, and excellent for past performance. The evaluated prices of MMRE and IEI were \$20.8 million and \$[DELETED] million respectively. The record demonstrates that in performing the trade-off decision, the SSO reviewed the technical evaluation panel report, which detailed the strengths and weaknesses in the proposals. The SSO noted that while both offerors were rated good for technical approach, and IEI's proposal included several strengths, MMRE's technical approach was stronger. Specifically, MMRE's technical approach was found to be substantially stronger in its description of how it would [DELETED]. SSD (5D) at 3-4. While the SSO also recognized that IEI had a higher rating for past performance, and addressed the strengths in IEI's past performance proposal, the SSO concluded that given MMRE's stronger technical approach, IEI's better rating for past performance, the least important non-price factor, was not worth the additional cost. Id. at 10.

With respect to the tradeoff decision between BLB and IEI for Area 6S, BLB was rated excellent under all three technical factors, and IEI was rated good for technical approach, excellent for past experience, and excellent for past performance. The evaluated prices of BLB and IEI were \$28.7 million, and \$[DELETED] million respectively. In performing the tradeoff, the SSO discussed the strengths in both offerors' technical approach as well as their past experience and past performance. The SSO concluded, however, that the strengths in BLB's technical approach, including [DELETED], were worth the price premium. SSD (6S) at 4. On the record before us we have no basis to question the tradeoff decisions in these areas.

The protests are denied.

Susan A. Poling  
General Counsel