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Decision

Matter of: Kodiak Base Operations Services, LLC

File: B-414966; B-414966.2; B-414966.3

Date: October 20, 2017

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Diane H. Breithaupt, Esq, Monica J. Vigil, Esq, and Gina M. Sirianni, Esq., United States Coast Guard, for the agency.

Michael Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of alleged evaluation error is dismissed where protester did not show that, but for the alleged error, it would have a substantial chance of award.
 2. Protest that agency unreasonably failed to refer awardee to the Small Business Administration for a size determination is dismissed where the facts alleged do not support a basis for concluding that the agency's actions were unreasonable.
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DECISION

Kodiak Base Operations Services, LLC (KBOS), an 8(a) small business of Anchorage, Alaska, protests the award of a contract to Choctaw Defense Services, Inc. (CDS), an 8(a) small business of McAlester, Oklahoma, under Request for Proposals (RFP) No. HSCG84-16-R-PKC001, issued by the United States Coast Guard for base operation support services. The protester contends that the agency erred in evaluating CDS's experience and past performance, and that the agency unreasonably failed to refer the matter of CDS's size status to the Small Business Administration (SBA) for a size determination.¹

¹ In its initial protest and first supplemental protest, KBOS raised a variety of protest grounds related to its own evaluation as well as the awardee's technical evaluation and price. KBOS subsequently withdrew these earlier protest grounds shortly following the

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We dismiss the protest.

BACKGROUND

The RFP was issued as a competitive set-aside for 8(a) small business concerns, and contemplated the award of a fixed-price, indefinite-delivery, indefinite-quantity contract for base operations services at United States Coast Guard Base Kodiak, located in Kodiak Alaska. RFP at 4, 7. The contemplated contract was for one base year, four 1-year option periods, and an additional option for a 6-month extension. Id. at 5.

The RFP provided that proposals would be evaluated on the basis of six factors, some of which contained component subfactors, as noted parenthetically: (1) management approach (organizational chart and position descriptions); (2) experience (corporate experience and critical management staff); (3) staffing plan; (4) past performance (corporate references and critical management staff references); (5) oral presentations (organizational plan and corporate support); and (6) price. Id. at 52. The RFP provided that each non-price factor would receive a rating of either high confidence, medium confidence, or low confidence, and that all non-price factors were of approximately equal importance. Id. at 68. Additionally, the RFP provided that award would be made on a best-value basis, and that the non-price factors, when combined, were significantly more important than price. Id.

Of note, the RFP provided that offerors could be credited for the experience and past performance of major subcontractors and of parent or affiliated/sister companies where the offeror's proposal demonstrates that the resources of the parent or affiliates will affect the performance of the offeror. RFP at 73. In this case, for the corporate experience and past performance portions of its proposal, CDS submitted four references from a major subcontractor, which was also an 8(a) small business, and one reference from a sister company that shares the same parent organization as CDS. Technical Evaluation of Proposals at 31-32, CDS Past Performance Information at 1.

The agency received three proposals in total, and the protester and intervenor received the following technical ratings and proposed the following prices:

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submission of its second supplemental protest. Protester's Comments on Agency Report at 4.

	KBOS	CDS
Management Approach	Low Confidence	High Confidence
Experience	Moderate Confidence	Moderate Confidence
Staffing Plan	High Confidence	Moderate Confidence
Past Performance	Moderate Confidence	High Confidence
Oral Presentations	Moderate Confidence	High Confidence
Price	\$147,235,021	\$95,661,025

Debriefing Letter at 22.

The agency made award to CDS, finding that CDS was both the highest technically rated and the lowest-priced offeror. Id. This protest followed.

DISCUSSION

KBOS challenges the agency's evaluation of CDS's experience and past performance. Second Supplemental Protest at 2. In this regard, KBOS maintains that CDS was credited with the experience and past performance of a sister company despite the fact that CDS's proposal did not include a firm commitment from that sister company to participate in the performance of this contract. Id. at 2-3. The elimination of the past performance reference would, according to KBOS, have resulted in CDS receiving lower ratings for those factors. Id. Additionally, the protester contends that the agency erred in not referring CDS to the SBA for a size determination.

Our Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3. Additionally, prejudice is an element of every viable protest, and a protester must demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving award. See Piquette & Howard Elec. Serv., Inc., B-408435.3, Dec. 16, 2013, 2014 CPD ¶ 8 at 10; Supreme Foodservice GmbH, B-405400.3 et al., Oct. 11, 2012, 2012 CPD ¶ 292 at 14.

With respect to the protester's argument that CDS was erroneously credited with the experience and past performance of its sister company, even assuming the protester's allegations to be true, the protester has not met its burden of demonstrating competitive prejudice. The sister company's reference contract was only one of five references CDS submitted, pertained to only one of the two subfactors for the experience and past performance factors, and was the lowest-rated of the submitted references. Technical Evaluation of Proposals at 31-32. Accordingly, by eliminating the sister company's reference, one could reasonably conclude that CDS's ratings for those factors could

have remained the same, or perhaps even improved due to a higher average rating. Even assuming that CDS's past performance and experience would have been downgraded as the protester suggests, to moderate and low confidence respectively, CDS's overall technical rating would still be higher overall than KBOS's rating, and CDS's price would remain approximately 50% lower than KBOS's price. Viewing the allegations in the light most favorable to KBOS, CDS's proposal would still be higher technically-rated and significantly lower in price. Accordingly, the protester has not established a reasonable possibility that it was prejudiced by the alleged error; that is, KBOS has not shown that, but for the agency's actions, it would have had a substantial chance of receiving award. This protest ground is therefore dismissed.

With respect to its second argument, the protester alleges that the agency unreasonably failed to refer CDS to the SBA for a size determination because CDS itself lacked past performance references and relevant experience, and was therefore unusually reliant on its subcontractor. According to the protester, this relationship ran afoul of SBA's ostensible subcontractor rules, and, had the matter been referred to SBA, would have resulted in a finding CDS and its subcontractor were affiliated.² Protester's Comments on Supplemental Agency Report at 4-5. The protester contends that, notwithstanding the fact that CDS proposed to subcontract less than 50 percent of the work, the ostensible subcontractor relationship was clear on the face of CDS's proposal and should have led the contracting officer to question CDS's size status.

The Small Business Act gives the SBA, not our Office, the conclusive authority to determine matters of small business status for federal procurements. See 4 C.F.R. § 21.5(b)(1) (2014). A limited exception applies where a protester argues that the awardee's proposal shows, on its face, that the awardee is not eligible for award as a small business; in those cases we will review the reasonableness of the contracting officer's decision not to refer the matter to the SBA. See Hydroid LLC, B-299072, Jan. 31, 2007, 2007 CPD ¶ 20 at 3. As noted above, our regulations contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Midwest Tube Fabricators, Inc., supra at 3. Here, the protester has not shown that anything on the face of CDS's proposal would have called into question its small business status.

Here, the facts, as alleged by the protester, do not support a conclusion that the agency acted unreasonably, because the alleged facts do not appear to establish a violation of the SBA's ostensible subcontractor rules. Specifically, CDS's subcontractor, like CDS, is an 8(a) small business, and the ostensible subcontractor rules, on their face, do not

² A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that is not a similarly situated entity and performs primary and vital requirements of a contract, or an order, or is a subcontractor upon which the prime contractor is unusually reliant. 13 C.F.R. § 121.103(h)(4).

apply to similarly situated entities. See Agency Supplemental Legal Memorandum at 10-11. In this regard, the SBA regulations provide that an ostensible subcontractor is a subcontractor that is, among other things, not a similarly situated entity. See 13 C.F.R. § 121.103(h)(4). That is to say, prime contractors with the same small business program standard and size status as their subcontractors, such as CDS and its subcontractor, would be exempt from the ostensible subcontractor rules. See 13 C.F.R. § 125.1. Of note, the protester does not contend that the awardee and its subcontractor are not similarly situated entities within the meaning of the regulation. Accordingly, the protester failed to provide allegations or evidence to establish the likelihood that it would prevail on the merits.³

The protest is dismissed.

Susan A. Poling
General Counsel

³ Even setting aside the fact that awardee and its subcontractor appear to be similarly situated, the question of a prime contractor's unusual reliance on a subcontractor is, as protester concedes, an intensely fact-specific inquiry that can be affected by a wide variety of factors. See Protester's Comments on Supplemental Agency Report at 5 citing Size Appeals of CWU, Inc., et al., SBA No. SIZ-5118, at 12 (2010). It is not apparent, given the complexity of the analysis, under what circumstances such unusual reliance would be clear on the face of a proposal.