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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Explo Systems, Inc.

File: B-404952; B-404952.2

Date: July 8, 2011

Marshall J. Doke, Esq., Gardere Wynne Sewell LLP, for the protester.
Kevin C. Dwyer, Esq., and Hillary B. Levun, Esq., Jenner & Block LLP, for General Dynamics Ordnance and Tactical Systems, Inc., an intervenor.
Debra J. Talley, Esq., and Bradley J. Crosson, Esq., Department of the Army, and John W. Klein, Esq., and Sam Q. Le, Esq., Small Business Administration, for the agencies.
Linda C. Glass, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In a procurement that required a best value tradeoff, agency was required to apply Historically Underutilized Business Zone (HUBZone) price evaluation preference in evaluating proposals, even though HUBZone proposal was lower in price than the large business proposal, where the plain language of the solicitation, which incorporated Federal Acquisition Regulation clause 52.219-4, required that the price evaluation preference be applied.
 2. Protest that agency misevaluated awardee's proposal under two technical subfactors and the past performance factor is denied, where the evaluation is consistent with the criteria stated in the solicitation.
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DECISION

Explo Systems, Inc., a HUBZone¹ small business contractor, of Minden, Louisiana, protests the award of a contract to General Dynamics Ordnance and Tactical Systems, Inc., (GD-OTS), a large business in St. Petersburg, Florida, under request for proposals (RFP) No. W52P1J-10-R-0060, issued by the Department of the Army for the demilitarization and disposal of eight families of conventional ammunition.

¹ HUBZone refers to historically underutilized business zone.

The protester argues that the Army failed to apply the HUBZone price evaluation preference in favor of Explo and improperly evaluated the awardee's proposal.

We sustain in part, and deny in part, the protest.

BACKGROUND

The RFP, which was issued on an unrestricted basis on September 9, 2010, contemplated the award of a fixed-price contract to the offeror whose proposal represented the best value to the government, on the basis of the following evaluation factors listed in descending order of importance: technical, past performance, price, and small business utilization. RFP at 61. All evaluation factors other than price, when combined, were significantly more important than price. Id. The RFP provided that evaluated proposals would be assigned adjectival ratings of exceptional/very low risk, good/low risk, satisfactory/moderate risk, and unsatisfactory/high risk for each factor, with an additional rating of neutral available under the past performance factor. Id. at 61-69.

The technical evaluation factor consisted of the following equally-weighted subfactors: program management plan, technical approach, safety approach, security approach and environmental approach. Id. at 61-65. As is relevant here, with respect to the safety approach subfactor, the RFP stated that the agency would evaluate each offeror's technical expertise to perform demilitarization operations, including the offeror's safety program of demilitarization. Id. at 64. With respect to the environmental approach subfactor, the RFP stated that the agency would evaluate each offeror's compliance with all applicable environmental regulations, as well as the offeror's approach for managing hazardous and non-hazardous waste streams during demilitarization operations. Id. at 65.

With respect to the past performance factor, the RFP provided that the agency would evaluate each offeror's recent and relevant experience for the offeror's record of quality and on time delivery, based on the results of the past performance surveys. Id. at 53, 65.

With respect to the price factor, the RFP incorporated Federal Acquisition Regulation (FAR) clause 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns. RFP amend. 1, at 2. Pursuant to this clause, the agency was required to "add a factor of 10 percent to the price of all offers," except offers from HUBZone small business concerns that did not waive the evaluation preference, and otherwise successful offers from small business concerns. Id. at 3.

Only two firms responded to the RFP, Explo and GD-OTS. Their proposals were evaluated by a source selection evaluation board (SSEB), which consisted of nine evaluators. Contracting Officer's Second Supp. Statement at 1. Each technical evaluation subfactor was assigned to an individual evaluator who independently

evaluated proposals under the assigned technical subfactor, and then those individual evaluations were provided to a lead technical evaluator to consolidate. Id. The consolidated evaluations were provided to a source selection authority (SSA), who relied on the SSEB's findings in making the selection decision. The SSA's decision documents in detail the evaluation ratings, the relative strengths and weaknesses of each proposal, and the basis for the SSA's selection decision. As reflected in the SSA's source selection decision, the final evaluation ratings were as follows:

FACTOR	EXPLO	GD-OTS
Technical	Satisfactory	Exceptional
Program Management Plan	Satisfactory	Exceptional
Technical Approach	Satisfactory	Exceptional
Safety Approach	Good	Exceptional
Security Approach	Exceptional	Exceptional
Environmental Approach	Satisfactory	Exceptional
Past Performance	Exceptional	Exceptional
Small Business Utilization	Exceptional	Good
Total Evaluated Price	\$152,194,236.82	\$165,796,060.28

Agency Report (AR), Tab 16, Source Selection Decision, 3.

As is relevant here, with respect to the evaluation of GD-OTS's proposal under the safety approach subfactor of the technical approach factor, the SSA noted that GD-OTS' proposal demonstrated an in-depth understanding of the applicable safety requirements and regulations, identified a highly qualified safety individual with extensive ammunition demilitarization experience, and had excellent facilities. Id. at 17. The SSA concluded that there was little doubt that GD-OTS would demilitarize, process, store, and ship ammunition and by-products without seriously endangering production, personnel, and facilities. Id.

With respect to the evaluation of GD-OTS' proposal under the environmental approach subfactor of the technical approach factor, the SSA noted that GD-OTS' proposal identified necessary activities for the treatment, storage, and disposal of waste streams, as well as necessary permits and licenses required to be in place at the start of the demilitarization process as required by the RFP. Id. at 20. The SSA also found that GD-OTS' proposal had demonstrated an in-depth understanding of all major and minor environmental requirements, including employee environmental training requirements, in accordance with federal and local regulations. Id. The SSA concluded that little doubt existed that GD-OTS would demilitarize, process, store, and ship ammunition and by-products without risking the environment. Id.

With respect to the past performance factor, GD-OTS identified ten recent and relevant contracts in its proposal, and it provided past performance surveys to

references for each of these contracts as required by the RFP. Eight references rated GD-OTS' performance as exceptional for quality and on time delivery; one reference rating GD-OTS' performance as good; and one reference did not return the survey. Id. at 22-23. Based on the positive information the Army received from the surveys and the lack of any negative findings, the SSA considered GD-OTS' past performance to be exceptional. Id. at 23.

The SSA conducted a best value tradeoff between proposals. In doing so, the SSA did not apply the HUBZone price evaluation preference, even though GD-OTS was a large business and Explo was a HUBZone concern, because Explo had submitted the lowest priced offer. Contracting Officer's Statement at 6. The SSA determined that the advantages associated with GD-OTS' superior technical proposal were worth the price premium, as compared to Explo's lower technically rated and lower priced proposal. AR, Tab 16, Source Selection Decision, at 23.

On March 17, 2011, award was made to GD-OTS. After a debriefing, Explo filed this protest with our Office.

DISCUSSION

Explo protests the Army's failure to apply the HUBZone price evaluation preference during the evaluation. Explo also challenges the Army's evaluation of the awardee's proposal under two technical subfactors and the past performance factor.

HUBZone Price Preference

The protester argues that the Army improperly failed to apply the HUBZone price evaluation preference provided for in 15 U.S.C. § 657a(b)(3)(A) (2006), as implemented in various regulations and incorporated into the RFP, in making its best value selection decision. The protester asserts that this preference was required because the awardee is a large business and the protester is a HUBZone concern.

Section 657a(b)(3)(A) of 15 U.S.C. provides that:

Subject to subparagraph (B), in any case in which a contract is to be awarded on the basis of full and open competition, the price offered by a qualified HUBZone small business concern shall be deemed as being lower than the price offered by another offeror (other than another small business concern), if the price offered by the qualified HUBZone small business concern is not more than 10 percent higher than the price offered by the otherwise lowest, responsive, and responsible offeror.

To implement this statute, FAR § 19.1307 provides that agencies "shall give offers from HUBZone small business concerns a price evaluation preference by adding a

factor of 10 percent to all offers,” except for offers from HUBZone small business concerns that have not waived the evaluation preference, or otherwise successful offers from small business concerns. Id.; see also 13 C.F.R. § 126.613(a)(1) (“For a best value procurement, the [contracting officer] must apply the 10 [percent] preference to the otherwise successful offer of a large business and then determine which offeror represents the best value to the Government, in accordance with the terms of the solicitation.”). Consistent with this FAR provision, and as required by FAR § 19.1309(b), the solicitation incorporated FAR clause 52.219-4, titled Notice of Price Evaluation Preference for HUBZone Small Business Concerns, which states as follows:

(b)(1) Offers will be evaluated by adding a factor of 10 percent to the price of all offers, except--

- (1) Offers from HUBZone small business concerns that have not waived the evaluation preference; or
- (2) Otherwise successful offers from small business concerns.

As noted above, the Army did not apply the price evaluation preference here.

It is well-settled that an agency must follow the ground rules of the competition set forth in the solicitation, and deviation from those stated ground rules is grounds to sustain the protest. General Dynamics Info. Tech., B-299873, Sept. 19, 2007, 2007 CPD ¶ 194 at 6. Here, the unambiguous language of the solicitation required that the agency apply “a factor of 10 percent to the price of all offers” other than certain HUBZone or small business offers. The Army failed to do so here, and we sustain the protest on this ground.

The Army maintains that it properly did not apply the HUBZone price preference in making its best value selection decision because Explo already submitted the lowest priced offer. AR, Legal Analysis Memo, at 1. The Small Business Administration (SBA), from whom we solicited comments, agrees with the Army. Both agencies contend that the language of 15 U.S.C. § 657a(b)(3)(A), quoted above, only requires that a price evaluation preference be applied where the HUBZone offer is priced higher than the large business offer; the preference does not apply when a HUBZone offer is priced lower than the large business offer. SBA Comments, May 12, 2011, at 4; SBA Supp. Comments, July 6, 2011, at 1; AR, Legal Analysis Memo, at 1-3; Letter from Army to GAO, July 6, 2011, at 1-2. Both agencies also argue that, to the extent the FAR requires that a price evaluation preference be applied to all offers (even when a HUBZone offer is priced lower than

those offers), the FAR exceeds or departs from what is required by 15 U.S.C. § 657a(b)(3)(A), and therefore the FAR should not be enforced.² Letter from Army to GAO, July 6, 2011, at 2; SBA Supp. Comments, July 7, 2011, at 2. The SBA also asserts that the FAR provisions are inconsistent with applicable SBA regulations and that the SBA regulations should be given greater deference. SBA Supp. Comments, July 7, 2011, at 2-3.

We are not persuaded by these arguments. We find nothing in the plain language of the statute, or the legislative history of the statute, that expressly limits that application of a price preference in the manner argued by the agencies. Rather, the statute only identifies when a HUBZone offer must be considered lower in price--i.e., when the HUBZone offer is “not more than 10 percent higher” than the large business offer. In the context of a best value procurement where a cost/technical tradeoff is required, this statutory language can reasonably be interpreted to include HUBZone offers lower in price, since those offers are “not more than 10 percent higher” than the large business offer. The FAR regulation and solicitation provision (FAR § 19.1307 and FAR clause 52.219-4), which implement the statute, appear to adopt a similar view since the provisions make clear that the HUBZone price evaluation preference must be applied to “all” large business offers, not just those that are lower in price than the HUBZone offer. Based on our analysis, we view the FAR provisions as articulating a reasonable and permissible implementation of 15 U.S.C. § 657a(b)(3)(A).

We find no support for the agencies’ assertions that the FAR provisions are not enforceable under the facts presented here. We note that the FAR provisions were finalized only after notice and public comment, and we have been presented no evidence that the Army or SBA (or any commenter) asserted that the FAR provisions were unlawful either during the notice and comment period, or at any time since. See 64 Fed. Reg. 51830-01 (Sept. 24, 1999). Both FAR provisions have been in effect for many years,³ and our review of case law confirms that both FAR provisions have been routinely recognized, by the U.S. Court of Federal Claims and our Office, as implementing 15 U.S.C. § 657a(b)(3)(A), including in procurements where the solicitation contemplated the performance of a best value tradeoff. See, e.g., DynCorp Int’l, LLC v. United States, 76 Fed. Cl. 528, 535 (2007); Gulf Group, Inc. v. United States, 61 Fed. Cl. 338, 361-62 (2004); Carmon Constr., Inc., B292387, B-292387.3, Sept. 5, 2003, 2003 CPD ¶ 158 at 2-3. Neither the Army nor the SBA

² The Army also asserts that FAR § 19.1307 and FAR clause 52.219-4 do not apply to best value procurements. Letter from Army to GAO, July 6, 2011, at 2. The agency cites no authority for its position, and we find nothing in the provisions themselves or in FAR Part 19 that would support such a contention.

³ In this regard, both FAR § 19.1307 and FAR clause 52.219-4 have been in existence since 1999.

have cited, and we have not found, any case law or other authority to support the agencies' position that the HUBZone price evaluation preference need not be applied in a best value procurement when the HUBZone offer is priced lower than the large business offer.⁴ In sum, the Army and SBA have not provided any persuasive arguments or authority to suggest that the plain language of the solicitation can be ignored.

We also are not persuaded by the agencies' arguments that the SBA regulation, 13 C.F.R. § 126.613(a)(1), limits the provisions of the FAR. Indeed, the plain language of 13 C.F.R. § 126.613(a)(1) appears consistent with our interpretation above, since the SBA regulation expressly provides that “[f]or a best value procurement, the [contracting officer] must apply the 10 [percent] preference to the otherwise successful offer of a large business and then determine which offer represents the best value to the Government, in accordance with the terms of the solicitation.”⁵ Although the agencies maintain that this language was not intended to require application of the price evaluation preference in situations where the HUBZone offer is priced lower than the large business offer, the plain language of

⁴ Although the SBA relies on our decision in Blue Rock Structures, Inc., B-293134, Feb. 6, 2004, 2004 CPD ¶ 63, in support of its position, that case is readily distinguishable. In Blue Rock Structures, the HUBZone offer was priced four times higher than the lowest priced offer. Given the significant price difference, we stated that the FAR did not require the application of the price evaluation preference where the HUBZone offer was more than 10 percent higher than the lowest priced offer. Id. at 8. Our decision in Blue Rock Structures did not address the issue presented here, which is whether, in a best value procurement requiring a cost/technical tradeoff, a HUBZone offer that is priced lower than the apparent successful offer of a large business is entitled to the HUBZone price evaluation preference when the applicable FAR provision requiring such a preference is incorporated into the solicitation.

⁵ As noted above, the solicitation incorporated FAR clause 52.219-4, which required application of the HUBZone price evaluation preference by “adding a factor of 10 percent to the price of all offers,” except certain HUBZone and small business offers. FAR clause 52.219-4; RFP amend. 1, at 2.

the regulation does not support the agencies' arguments.⁶ In short, the SBA regulation does not state that the HUBZone price evaluation is inapplicable in a best value procurement when the HUBZone offer is priced lower than the large business offer, which would be expected if the SBA intended to restrict or limit the application of the clear language of the FAR. Furthermore, nothing in the Federal Register notice publishing 13 C.F.R. § 126.613(a)(1) suggests that the SBA intended to limit the application of the FAR.⁷ See 69 Fed. Reg. 29411-01 (May 24, 2004).

⁶ The full text of the regulation is as follows:

Where a [contracting officer] will award a contract on the basis of full and open competition, the [contracting officer] must deem the price offered by a qualified HUBZone [small business concern] to be lower than the price offered by another offeror (other than another [small business concern]) if the price offered by the qualified HUBZone [small business concern] is not more than 10 [percent] higher than the price offered by the otherwise lowest, responsive, and responsible offeror. For a best value procurement, the [contracting officer] must apply the 10 [percent] preference to the otherwise successful offer of a large business and then determine which offeror represents the best value to the Government, in accordance with the terms of the solicitation.

13 C.F.R. § 126.613(a)(1). The agencies contend that the first sentence (which recites the statute) limits the application of the second sentence (which applies the 10 percent preference in best value procurements) to situations where the HUBZone offer is priced higher than a large business offer by not more than 10 percent. SBA Supp. Comments, July 6, 2011, at 2; SBA Supp. Comments, July 7, 2011, at 2; Letter from Army to GAO, July 6, 2011, at 2. As discussed above, we find no such specific limitation in the plain language of the statute or SBA regulation.

⁷ The Army and SBA also contend that SBA Procedural Notice No. 8000-583 supports their views that the price evaluation preference does not apply when the HUBZone offer is priced lower than the large business offer. In this regard, example No. 1 of the Notice states that where the HUBZone small business concern is the "apparent successful offeror" and is lower in price than the competing large business offeror, then the HUBZone price evaluation preference is not applicable. SBA Procedural Notice No. 8000-583, at 2. However, it is clear from the designation of the HUBZone as the "apparent successful offeror" in the example that the Notice is addressing low cost/technically acceptable procurements and not best value procurements where a cost/technical tradeoff is contemplated. Instead, SBA Procedural Notice No. 8000-597 addresses the application of the HUBZone price evaluation preference in best value procurements, and that Notice does not contain any language or examples limiting the application of the preference in the manner argued by the agencies. SBA Procedural Notice No. 8000-597, at 1-3.

We also are not persuaded by the Army's argument that there is "no reason to apply any 10 [percent] factor to the offer of a large business when the HUBZone concern's offer is lower in price." AR, Legal Analysis Memo, at 2. Although this may be true in a low cost/technically acceptable procurement, such rationale seems illogical when a best value tradeoff is required, because the agency must consider whether technical advantages of one offer outweigh a particular price differential. In a procurement requiring a best value tradeoff, the HUBZone concern is entitled to receive the benefit of a price evaluation preference in the manner set forth in the FAR, especially where, as here, the solicitation requires it. See also Delaney Constr. Corp. v. United States, 56 Fed. Cl. 470, 475 (2003) (HUBZone price evaluation preference mandated notwithstanding omission of FAR clause 52.219-4).

In sum, we find that the Army deviated from the solicitation requirement to apply the HUBZone price evaluation preference before performing its best value tradeoff, and we sustain the protest on this ground.

Safety Approach and Past Performance

Next, the protester argues that GD-OTS' proposal should not have received a good rating for the safety approach subfactor, or an exceptional rating for the past performance factor, because of a recent accident at GD-OTS' explosives waste facility that resulted in a fatality. Protest at 5-6. We deny these protest grounds.

Our Office reviews challenges to an agency's evaluation of proposals only to determine whether the agency acted reasonably and in accord with the solicitation's evaluation criteria and applicable procurement statutes and regulations. Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16 at 5. A protester's mere disagreement with the agency's judgment is not sufficient to establish that an agency acted unreasonably. Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70 at 3.

The record shows that in July 2010 the Army received notice that an accident had occurred at a GD-OTS facility, which resulted in a fatality. Contracting Officer's Statement at 3. A worker at the awardee's facility dropped a piece of steel from a high work platform, striking another worker. AR, Tabs 9 and 10, Emails Concerning Accident. The Army maintains that the accident at the GD-OTS facility was unrelated to demilitarization operations. Contracting Officer's Statement at 3; AR, Tab 9, Emails Concerning Accident. The Army further explains that the accident was an isolated incident involving a specific individual that was not caused by any systemic deficiency, or shortcomings, in GD-OTS' established company safety program or approach. Contracting Officer's Statement at 3. The Army argues that the accident does not require a lowering of GD-OTS' proposal evaluation ratings, as alleged by the protester. We agree.

With regard to the evaluation of the safety approach subfactor, the RFP required the agency to evaluate GD-OTS' expertise to perform demilitarization operations, including the offeror's safety program of demilitarization. RFP at 64. The protester has not shown that the accident was sufficiently related to GD-OTS' demilitarization expertise, or its safety program for demilitarization. Accordingly, we agree with the Army that the accident was properly not considered in the evaluation of GD-OTS' proposal under the safety approach subfactor.

Likewise, with regard to the evaluation of the past performance factor, the RFP stated that the agency would assess an offeror's record on the basis of two factors, quality and on time performance. RFP at 66. As previously stated, the Army received nine survey responses for GD-OTS that indicated that GD-OTS had an exceptional record of performance in these areas. Since the accident was not relevant to the quality or timeliness of performance, we find no basis to conclude that the Army should have considered the accident in its evaluation of GD-OTS' past performance.

Environmental Approach

The protester also argues that the Army acted unreasonably in rating GD-OTS' proposal exceptional for the environmental approach subfactor, because GD-OTS' explosive waste facility is currently non-compliant with certain air pollution regulations. Protest at 7. We deny this protest ground.

The Army reports that it was provided information by GD-OTS on March 31, 2011 concerning an emissions issue that was first discovered in February 2011. Contracting Officer's Statement at 4. The Army states that while this information was not available at the time proposals were being evaluated (in late 2010 and early 2011), upon receiving this information the agency investigated the matter and learned that GD-OTS' failure to meet air emissions standards did not involve any equipment or facilities associated with the execution of any conventional ammunition demilitarization under the subject solicitation.⁸ Id.

On this record, we have no basis to question the Army's evaluation of GD-OTS' proposal under the environmental approach subfactor. As previously stated, the RFP required the agency to evaluate GD-OTS' compliance with environmental regulations applicable to the demilitarization process. The protester has not

⁸ Furthermore, as noted by the protester, although the emissions issue occurred at the same GD-OTS facility as where demilitarization activities were being conducted, the emissions problem arose in a different building than where demilitarization operations were being conducted. Explo Comments at 6.

established that the emissions issue is sufficiently related to the awardee's demilitarization process, such that the Army was required to consider it here.⁹

RECOMMENDATION

As provided above, we sustain the protest because the Army deviated from the solicitation requirement to apply the HUBZone price evaluation preference during its evaluation. We recommend that the agency apply the HUBZone price evaluation preference in accordance with the applicable FAR provisions and that it perform a new best value tradeoff decision. If the agency determines that award should be made to other than GD-OTS, it should terminate the contract with that company and make a new award. We also recommend that the protester be reimbursed the reasonable costs of filings and pursuing its protest. 4 C.F.R. § 21.8(d)(1) (2011). The protester shall file its certified claim for costs, detailing the time expended and the costs incurred, directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained in part and denied in part.

Lynn H. Gibson
General Counsel

⁹ In our decision, we have addressed the primary arguments raised by the protester in challenging the technical and past performance evaluation. Although we may not have discussed each and every argument raised, we have considered them all and find them to be without merit.