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Decision

Matter of: Pond Constructors, Inc.

File: B-414307; B-414307.2

Date: May 1, 2017

David A. Rose, Esq., The Rose Consulting Law Firm, LLC, for the protester.
J. Randolph MacPherson, Esq., Halloran & Sage LLP, for the intervenor.
Karen L. King Vanek, Esq., Department of the Army, Corps of Engineers, for the agency.
Young S. Lee, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the evaluation of protester's proposal is denied where record shows that the agency's evaluation was reasonable and consistent with the terms of the solicitation.
 2. Protest alleging that agency failed to conduct cost realism analysis is dismissed where solicitation contemplated the award of a fixed-price contract and no cost realism analysis was required.
 3. Protest challenging the agency's evaluation of protester's proposal and source selection decision is denied where the protester fails to demonstrate competitive prejudice, because it does not demonstrate that, but for the alleged errors, it would have had a substantial possibility of receiving the award.
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DECISION

Pond Constructors, Inc. of Norcross, Georgia, protests the award of a contract to Tetra Tech – Maytag Joint Venture of Pasadena, California, under request for proposals (RFP) No. W912DY-16-R-0069 issued by the Department of the Army, Corps of Engineers, for recurring maintenance and minor repair services. The protester argues that the agency improperly evaluated its proposal and contends that the Army's source selection decision is flawed.

We deny the protest.

BACKGROUND

On August 8, 2016, the agency issued the RFP on an unrestricted basis pursuant to Federal Acquisition Regulation (FAR) part 12 procedures for the acquisition of commercial items. RFP at 1, 32. The solicitation sought proposals for recurring petroleum facility maintenance and minor repair services at various military installations and contemplated the award of a fixed-price contract with a 1-year base period and four 1-year option periods. Id. at 1-23.

Award was to be made on a best-value basis, considering the following four factors: (1) technical approach; (2) past performance; (3) small business participation and (4) price.¹ Id. at 41. The evaluation factors were listed in descending order of importance, with the technical approach factor being the most important. Id. All non-price evaluation factors when combined were significantly more important than price. Id.

As relevant here, the solicitation provided that proposals would be assigned a rating of outstanding, good, acceptable, or unacceptable under the small business participation factor. Id. at 46. In order to receive a higher than acceptable rating, an offeror's subcontracting participation plan had to demonstrate that the company would meet or exceed at least one or more of the solicitation's small business subcategory participation goals. Id. The goals were as follows: 5 percent to small disadvantaged businesses; 2.5 percent to woman-owned small businesses (WOSB); 3 percent to historically underutilized business zone (HUBZone) small businesses; 4 percent to veteran-owned small businesses (VOSB); and 3 percent to service-disabled veteran-owned small businesses (SDVOSB).² Id. at 44. An offeror had to meet or exceed at least one or more of these small business participation subcategory goals to receive a good rating, and least two or more of these goals to receive an outstanding rating. Id. at 46.

The RFP informed offerors that their proposals had to incorporate a small business participation worksheet. Id. at 39. The worksheet required offerors to provide the total percentage and dollar value amount intended for each of the following small business

¹ Proposals could be assigned a rating of outstanding, good, acceptable, or unacceptable for the technical approach factor; and high confidence, satisfactory confidence, low confidence, or unknown/neutral confidence for the past performance evaluation factor. RFP at 42. The agency's evaluations of these two non-price evaluation factors are not at issue in this protest.

² These percentages were based on the overall contract value proposed by an offeror. RFP at 44.

subcategories: (1) small disadvantaged businesses; (2) WOSBs; (3) HUBZone small businesses; (4) VOSBs; and (5) SDVOSBs. RFP attach. 5, 1-2.

The agency received eight proposals in response to the solicitation by the RFP's closing date of September 9, 2016. Contracting Officer (CO) Statement at 2. The offers were evaluated by an Army source selection evaluation board (SSEB). Id. at 2. As relevant here, the proposals submitted by Pond and Tetra were evaluated as follows:

	Pond	Tetra
Technical Approach	Outstanding	Outstanding
Past Performance Factor	High Confidence	High Confidence
Small Business Participation	Acceptable	Outstanding
Price	\$3,920,258	\$2,243,127

Agency Report (AR), Tab 9, Source Selection Decision, at 3; AR, Tab 6, Debrief Letter at 1.

The SSEB identified weaknesses and one strength during its evaluation of Pond's proposal under the small business participation factor. AR, Tab 21, Pond Small Business Participation Evaluation, at 1-2. With regard to the weaknesses, the SSEB determined that Pond's proposal did not identify the amount of work to be performed by each of the various small business subcategories on the small business participation worksheet, and that Pond failed to provide letters of commitment for its subcontractors.³ Id. at 1. With regard to strengths, the SSEB determined that Pond's proposal greatly exceeded the RFP's small business participation plan target goal of 20 percent. Id. at 1-2.

Based on its evaluation, the SSEB recommended that award be made to Tetra because Tetra's proposal received an outstanding rating under the technical approach factor, a high confidence rating under the past performance factor, an outstanding rating under the small business participation plan, and was the lowest priced among those offers considered for award.⁴ AR, Tab 9, Source Selection Decision, at 3-4. The source selection authority (SSA) adopted the SSEB's evaluation results and its award

³ The SSEB's evaluation indicated that Pond did not use the small business participation plan worksheet required by the solicitation. AR, Tab 21, Pond Small Business Participation Evaluation, at 1. It also noted uncertainty as to whether the total contract value listed in Pond's small business participation plan was consistent with the total contract dollar value identified in the price proposal. Id. at 3. However, neither matter was identified as a weakness. Id. at 1-3.

⁴ Three offerors received an unacceptable rating under the technical approach factor and one offeror received an unacceptable rating under the small business participation factor. AR, Tab 9, Source Selection Decision, at 4. The SSEB recommended that none of these offers be considered for award. Id. at 3.

recommendation. Id. at 4-5. In reaching the conclusion to award to Tetra, the SSA noted that Tetra's proposal received an outstanding rating under the technical approach factor and had the lowest-priced proposal. Id. at 4.

The protester received a written debriefing from the Corps on January 17, 2017.⁵ AR, Tab 6, Debriefing Letter, at 1. Pond's filed its protest with our Office on January 23.

DISCUSSION

Pond argues that the agency improperly evaluated its proposal and that the Army's source selection decision is flawed. In support of these challenges, the protester argues that the weaknesses assigned by the agency to Pond's proposal under the small business participation factor were unreasonable because Pond provided all the necessary information required by the RFP to merit a higher rating. The protester also contends that the agency improperly failed to conduct a cost realism analysis.

We have reviewed each of Pond's allegations and conclude that none provide us with a basis to sustain its protest.

Small Business Participation Factor

As explained in more detail below, we find no basis to sustain the protest of the agency's assignment of a weakness to Pond's proposal for failing to identify the percentage of work to be allocated to each of the different small business subcategories as required by the RFP.

In reviewing protests of an agency's evaluation of an offeror's technical proposal, our Office does not reevaluate proposals; rather, we review the evaluation to determine if it was reasonable, consistent with the solicitation's evaluation scheme, as well as procurement statutes and regulations, and adequately documented. Wackenhut Servs., Inc., B-400240, B-400240.2, Sept. 10, 2008, 2008 CPD ¶ 184 at 6. A protester's disagreement with the agency's evaluation, without more, is not sufficient to render the evaluation unreasonable. URS Federal Servs., Inc., B-413333, Oct. 11, 2016, 2016 CPD ¶ 286 at 6.

Here we conclude that the agency's evaluation was reasonable. As discussed above, offerors were required to include a small business participation plan worksheet with their offers. RFP at 39. That worksheet required offerors to identify the total percentage and dollar value an offeror intended to subcontract to each small business subcategory identified in the solicitation. Id. at 38; RFP attach. 5, at 2. The RFP established a

⁵ Although the debriefing letter was dated January 17, 2016, the incorrect date appears to be an administrative error. We note that the contracting officer's digital signature confirms that the document was signed on January 17, 2017. AR, Tab 6, Debriefing Letter, at 3.

minimum goal for each small business subcategory. RFP at 44. In order to receive a rating that was higher than acceptable, an offeror's subcontracting participation plan had to demonstrate that the company would meet or exceed at least one or more of the solicitation's small business subcategory participation goals. Id. at 46. Our review of the record confirms that while Pond's proposal committed generally to subcontracting 36 percent of the work to small businesses, it did not commit to meeting any of the small business subcategory participation goals.⁶ AR, Tab 3, Pond's Small Business Participation Plan, at 1-2. Specifically, Pond's proposal, on its face, committed to subcontract 0 (zero) percent to small disadvantaged businesses; 0 percent to WOSBs; 0 percent to HUBZone small businesses; 0 percent to VOSBs; and 0 percent to SDVOSBs.⁷ Id. Accordingly, we find that the agency's rating of acceptable was reasonable because the protester failed to meet any of the solicitation's small business subcategory participation goals, and thus could not have receiving a higher rating.⁸

⁶ As mentioned above, the SSEB credited Pond's proposal with a strength for greatly exceeding the RFP's small business participation plan target goal of 20 percent. AR, Tab 21, Pond Small Business Participation Evaluation, at 1.

⁷ There was also one other small business subcategory identified in the solicitation. We do not reference it in the body of our decision because that subcategory was irrelevant to our decision. Specifically, the RFP identified Historically Black Colleges and Universities and Minority Institutions (HBCU/MI) among the subcategories that were included in the solicitation. RFP at 38. Although the RFP listed HCBU/MIs as a subcategory, there was no corresponding participation goal identified for it, as evidenced by the agency's decision to provide for a 0 percent value in this subcategory. Id. at 44. Furthermore, the solicitation percentages of each of the other identified subcategories required offerors to submit a number as a percentage "of the total contract value" they intended to subcontract. Id. No similar language was included with regard to the HBCU/MI subcategory, further demonstrating that the 0 percent value was meant to convey that no goal existed. Id.

⁸ Even assuming that the agency should have credited Pond for literally meeting a 0 percent HBCU/MI goal, we nonetheless conclude that such an alleged error would not have prejudiced Pond. 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. edCount, LLC--Protest and Costs, B-407556.3 et al., Aug. 15, 2013, 2013 CPD ¶ 195 at 6; ITT Corp.-Electronic Sys., B-402808, Aug. 6, 2010, 2010 CPD ¶ 178 at 7. Our review of the record confirms that even assuming such an error under the terms of the solicitation, Pond could not have received higher than a good rating for the small business participation factor, because it did not propose to meet at least two or more of the RFP's subcategory participation goals. AR, Tab 3, Pond's Small Business Participation Plan, at 1-2. Furthermore, while both Pond and Tetra received outstanding ratings under the technical approach factor and high confidence ratings under the past performance factor, Tetra also received an outstanding rating under the small business participation plan factor. AR, Tab 9, Source Selection Decision, at 3. Thus, even assuming the

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Cost Realism Analysis

Pond also argues that the agency's "cost realism analysis of [Tetra] was flawed."⁹ Comments at 7. In this regard, the protester alleges that "[a]gencies are required to perform such an analysis when awarding cost-reimbursement contracts to determine the probable cost of performance for each offeror." Id. Furthermore, the protester asserts that "the law requires that the cost being examined must be reviewed to determine whether the estimated proposed cost elements are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the offeror's technical proposal."¹⁰ Id. at 7-8.

We dismiss the protest allegation because, as filed with our Office, it does not establish a valid basis for challenging the agency's action.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. Cybermedia Techs., Inc., B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, 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

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Army improperly assigned an acceptable, rather than good rating to Pond under the small business participation factor, Pond would still not be able to establish that its proposal would have displaced Tetra's higher technically-rated, lower-priced proposal for award. We note that Pond did not challenge any aspect of the agency's evaluation of Tetra's proposal, under any non-price factor.

⁹ To the extent Pond is alleging that the agency's price realism analysis was flawed, we dismiss this protest allegation as untimely. In this regard, the protester appears to contend in its comments that the awardee's prices were not realistic. Comments at 7. A protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Here, Pond was fully aware of Tetra's price when the protester received its debriefing on January 17, 2017. AR, Tab 6, Debriefing Letter, at 1. Therefore, a challenge to the agency's evaluation of Tetra's price is untimely because it was filed after January 27, 2017.

¹⁰ Based on these allegations, Pond requested a copy of the "alleged cost realism analysis." Comments at 8.

claim of improper agency action. Midwest Tube Fabricators, Inc., B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

Here, we note that the solicitation contemplated the award of a fixed-price contract and did not require that a cost realism analysis be conducted. RFP at 1-70. Although agencies are required to perform some sort of price or cost analysis on negotiated contracts to ensure that the agreed upon price is fair and reasonable, where, as here, the award of a fixed-price contract is contemplated, a proposal's price realism is not ordinarily considered, since a fixed-price contract places the risk and responsibility for contract costs and resulting profit or loss on the contractor.¹¹ Electronic Hardware Corp., B-295345, Jan. 28, 2005, 2006 CPD ¶ 5 at 4-5. Accordingly, this protest allegation is dismissed since the protester argues that the Army was obligated to perform an analysis that was not required by the solicitation.

Prejudice

The protester also contends that the agency's evaluation of its proposal under the small business participation factor was unreasonable for a variety of other reasons. For example, the protester contends that it was unreasonable for the agency to assign a weakness to its proposal for failing to include subcontractor letters of commitment, which the protester asserts were included with the proposal. Although we do not address every argument raised, we have reviewed each of them and find that none provides a basis to sustain the protest.¹² Here, Pond was not prejudiced by any of the other alleged errors of which it complains. Even assuming the agency improperly assigned one or more weaknesses to Pond's proposal, the terms of the RFP prevented Pond from receiving a rating under the small business participation factor that would have been equal to the awardee's rating.¹³ Id. at 46.

¹¹ Where, as here, an agency's solicitation provides for a price realism analysis in the solicitation, our Office will review a protester's allegation challenging that particular aspect of the agency's evaluation. Electronic Hardware Corp., *supra*. In this regard, our review is limited to whether the depth of the agency's price realism analysis is a matter within the sound exercise of the agency's discretion. Id. As noted earlier in this decision, to the extent the protester has raised a challenge to the agency's price realism analysis, we need not address the merits of that allegation since Pond's challenge is untimely.

¹² For example, the protester contends that the agency's source selection decision was unreasonable because it was premised on a flawed evaluation of Pond's small business plan proposal. As discussed in the decision, we deny this allegation because Pond has not shown that it was prejudiced by any alleged miscalculation of its small business plan proposal.

¹³ In order to receive a higher than acceptable rating, an offeror's subcontracting participation plan had to demonstrate that the company would meet or exceed at least
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Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

Here, as discussed above, even if the protester were to prevail on all of its protest allegations, the terms of the RFP would have prevented Pond from receiving a small business participation factor rating equal to the outstanding rating that was assigned to Tetra. At best, Pond's proposal would have still been rated lower under this particular evaluation factor while also being higher priced. As the protester is unable to demonstrate that there was a need for a price/technical tradeoff between its proposal and Tetra's, we find that Pond has failed to establish prejudice from the agency action it protests. See e.g., HP Enter. Servs., LLC, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 6 (denying challenge to agency's best-value tradeoff decision where protester failed to demonstrate the possibility of a price/technical tradeoff between its quotation and the awardee's quotation). Our Office has routinely explained that competitive prejudice is an essential element of a viable protest; where a protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. Id.

The protest is denied.

Susan A. Poling
General Counsel

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one or more of the solicitation's small business subcategory participation goals. RFP at 46. Pond could not have received a rating higher than good under the small business participation factor because, on its face, its proposal did not establish that it would meet or exceed at least two of the RFP's small business subcategory subcontracting goals. AR, Tab 3, Pond's Small Business Participation Plan, at 1-2. In this regard, Pond's small business participation rating could not have equaled the outstanding rating that was assigned to Tetra's proposal under this evaluation factor.