



United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** BC Peabody Construction Services, Inc.

**File:** B-408023

**Date:** May 10, 2013

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Andrew W. Goetz and Robert M. Carpenter, for the protester.  
William L. Bruckner, Esq., Bruckner & Walker, LLP for Edens Construction Company, an intervenor.  
Carolyn J. Fox, Esq., Department of the Army, Corps of Engineers; and John W. Klein, Esq., and Meagan K. Guerzon, Esq., Small Business Administration, for the agencies.  
Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that agency unreasonably evaluated experience and past performance of the same subcontractor proposed by both the protester and awardee in an unequal manner is denied where protester was not prejudiced by the agency's error.

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### DECISION

BCPeabody Construction Services, Inc., of Tampa, Florida, protests the award of a contract to Edens Construction Company, of South Bay, Florida, by the Department of the Army, Corps of Engineers, under request for proposals (RFP) No. W912EP-13-R-0001 for dike rehabilitation construction services. BCPeabody primarily argues that the Corps improperly rejected its proposal as technically unacceptable.

We deny the protest.

### BACKGROUND

The Corps issued the RFP on October 18, 2012, seeking proposals to perform construction on the Herbert Hoover Dike Rehabilitation Project, at culverts 7 and 9, and the Taylor Creek culvert abandonment, in Okeechobee County, Florida. Agency Report (AR), at 1; AR, Tab 17B, RFP Specifications, at 1-2. The RFP was set aside for small businesses, and stated that a contract would be awarded,

without conducting discussions, on a lowest-priced technically-acceptable basis. RFP at 00100A-1 to -2; -00100A-4. The RFP informed offerors that proposals would be evaluated on a pass/fail (acceptable/unacceptable) basis under one factor: technical acceptability. Id. at -2. The price evaluation is not at issue here.

The technical acceptability factor was divided into two subfactors: demonstrated experience, and past performance. Proposals had to be rated acceptable under both subfactors in order to be rated technically acceptable overall. Id. at -3. The demonstrated experience subfactor, in turn, consisted of two “sub-elements”: cut-off wall construction, and earthen embankment construction. The RFP provided that the submissions under these sub-elements would be evaluated to determine whether the offeror’s projects showed that it had the “knowledge and experience required” to perform the contract, and the “ability to successfully accomplish and complete” the project in the required time. Id. at -4.

For each sub-element, offerors were required to provide two examples of projects which demonstrated that the offeror and its major subcontractors (if applicable) had experience performing construction of cut-off walls and earthen embankments, respectively, that was similar to the construction required for this project. Id. at -3 to -4. Additionally, the RFP stated that at least one of the two projects submitted for cut-off wall construction experience had to show “penetrating, excavating, and backfilling through an obstruction that could not be removed by a typical backhoe or excavator.” Id. at -3. Proposals had to be rated acceptable for all submitted experiences in order to be rated acceptable overall for the demonstrated experience subfactor. Id. at -4.

The RFP stated that each subcontractor for which the offeror submitted experience would be considered a “major subcontractor.” Id. at -2. Offerors were required to submit a letter of commitment from any proposed major subcontractor; the failure to do so would be “noted as a deficiency.” Id.

Under the past performance subfactor, offerors were to submit completed past performance evaluations for the same projects that had been submitted under the experience subfactor. If a completed form was not available in time, the offeror was to submit contact information for a reference. Id. at -5. Offerors whose proposals were rated acceptable under the demonstrated experience subfactor, and received a rating of satisfactory or better from a reference, were to be rated acceptable under the past performance subfactor. Inversely, offerors whose proposals were not rated acceptable under the demonstrated experience subfactor, or did not receive a rating of satisfactory or better from a reference, were to be rated unacceptable. Id. at -6.

On November 20, the Corps received proposals from five firms, including BCPeabody and Edens. BCPeabody’s proposal identified its subcontractor for cut-off wall construction as Bauer Foundation Corp. (BFC), and included a letter of commitment from BFC. AR, Tab 16A, BCPeabody Proposal, vol. I, at 3. However, instead of submitting two examples of projects demonstrating its cut-off wall

construction experience, BCPeabody submitted two copies of the same cut-off wall construction experience narrative for BFC.<sup>1</sup> Edens's proposal also identified its subcontractor as BFC. Edens submitted the required experience narratives for BFC, and the required past performance information.

The Corps determined that the four lowest priced proposals (which included BCPeabody's) were technically unacceptable. AR, Tab 18, Source Selection Technical Acceptability Report, at 1. In evaluating BCPeabody's proposal under the cut-off wall construction sub-element, the Corps noted that the firm provided information on only one project completed by BFC, not two projects as required. The Corps also found that the narrative for the one project that was submitted did not include, as required by the RFP, a description of an obstruction that was encountered. Id. at 8. The Corps concluded that the proposal did not satisfy the solicitation's requirements--and rated it unacceptable--for the cut-off wall construction sub-element.<sup>2</sup> Consistent with the solicitation's terms, the Corps rated the proposal unacceptable under both subfactors, and technically unacceptable overall. Id. at 8-9.

In evaluating Edens's proposal, the Corps considered narratives submitted by Edens for BFC under the cut-off wall construction sub-element. The narratives showed that BFC had all required experience for this sub-element, as well as for the second sub-element. Id. at 10-11. The firm's proposal was rated acceptable under both the demonstrated experience and past performance subfactors. Id. Edens also submitted a satisfactory letter of commitment from BFC. Id. As a result, Edens's proposal was rated technically acceptable overall. The final ratings and prices were as follows:

	<b>Cut-Off Wall Experience</b>	<b>Embankment Experience</b>	<b>Past Performance</b>	<b>Overall Technical</b>	<b>Price (millions)</b>
<b>Offeror A</b>	Unacceptable	Unacceptable	Unacceptable	Unacceptable	\$2.8
<b>Offeror B</b>	Unacceptable	Unacceptable	Unacceptable	Unacceptable	\$3.8
<b>BCPeabody</b>	Unacceptable	Acceptable	Unacceptable	Unacceptable	\$3.7
<b>Offeror C</b>	Unacceptable	Unacceptable	Unacceptable	Unacceptable	\$3.7
<b>Edens</b>	Acceptable	Acceptable	Acceptable	Acceptable	\$4.8

AR, Tab 18, Source Selection Decision Document, at 1.

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<sup>1</sup> As discussed below, although not mentioned in the proposal, BCPeabody states in its protest that the second narrative it had intended to submit was for a project performed by Bauer Foundations Canada Inc. Protest attach. 1 at 1. BFC and Bauer Foundations Canada are affiliates of each other and subsidiaries of the German firm Bauer AG, but are distinct legal entities.

<sup>2</sup> The Corps found the proposal to be acceptable under the second sub-element.

On December 19, the Corps sent an e-mail to Edens, directing the firm to “verify your proposal,” and to submit a response on company letterhead. AR, Tab 6, E-mail from Contract Specialist to Edens, Dec. 19, 2012, at 1. Edens submitted the letter, which stated that the firm was confirming its November 20 proposal without changes, that it understood the work, and that it waived any claim of bid mistake.<sup>3</sup> AR, Tab 7, Letter from Secretary-Treasurer of Edens to Contract Specialist, Dec. 19, 2012, at 1.

Since Edens’s proposal was the only one evaluated as technically acceptable, the Corps awarded the contract to Edens on December 21. After its debriefing, and after filing an unsuccessful agency-level protest, BCPeabody filed this protest with our Office.

## ANALYSIS

BCPeabody primarily argues that the Corps unreasonably found its proposal technically unacceptable, and treated offerors unequally because the awardee also relied on the experience and past performance of BFC. Protest at 3-4. BCPeabody also argues that the Corps should have referred the findings of technical unacceptability to the Small Business Administration (SBA), as matters of responsibility, for consideration under the SBA certificate of competency process. Protester’s Comments at 2-3.

We invited the SBA to submit its views on the protest issues. The SBA argues that BCPeabody’s proposal was evaluated as unacceptable based on the application of traditional responsibility criteria--experience and past performance--and therefore the Corps’s evaluation of BCPeabody was equivalent to an adverse responsibility determination. As a result, the SBA contends, the Corps was required to refer the issues to the SBA for consideration of a certificate of competency. SBA Comments at 6-7.

The Corps argues that BCPeabody’s proposal was properly evaluated as unacceptable because the firm’s single experience narrative under the cut-off wall construction sub-element did not show the required experience in “excavating, penetrating and backfilling through an obstruction.” AR at 3. As a result, the Corps contends, BCPeabody’s proposal was unacceptable under both the demonstrated

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<sup>3</sup> BCPeabody characterizes this exchange as discussions and argues that the Corps should have conducted discussions with it, as well, to permit it to supply the missing experience narrative. However, communications such as these, that do not permit an offeror to revise or modify its proposal, but instead permit the offeror to explain or clarify what it has already proposed to do, are clarifications and not discussions. Allied Tech. Group, Inc., B-402135, B-402135.2, Jan. 21, 2010, 2010 CPD ¶ 152 at 6.

experience and past performance subfactors, and technically unacceptable overall Id. at 3-4. The Corps maintains that it did not find BCPeabody unable to perform the contract. Supplemental AR at 6. The Corps contends that its determination that BCPeabody's proposal was unacceptable was due to the firm's "failure to supply information" in its proposal, rather than the application of traditional responsibility criteria. Id. at 2. Based on this distinction, the Corps argues that it did not find BCPeabody nonresponsible, and was not required to refer BCPeabody to the SBA under the certificate of competency procedure. Id. at 2-3.

Moreover, the Corps appears to argue that BCPeabody was not prejudiced because the firm admitted in its protest that the missing experience narrative it intended to submit was not for a project performed by BFC, but was for a project performed by Bauer Foundations Canada. The Corps explains that BCPeabody's proposal did not include a letter of commitment from Bauer Foundations Canada, and that, pursuant to the solicitation's terms, this omission "would have been noted as a deficiency" in BCPeabody's proposal. Id. at 6.

We deny the protest because the record shows that BCPeabody was not prejudiced by the Corps' unequal evaluation of proposals.<sup>4</sup>

Although an offeror has the burden of submitting an adequately written proposal, and an agency may downgrade a proposal for the lack of requested information, an agency may not ignore prior performance information of which it is aware. Consolidated Eng'g Servs., Inc., B-279565.2, B-279565.3, June 26, 1998, 99-1 CPD ¶ 75 at 6. Where multiple proposals propose the same subcontractor, once the agency becomes aware of that subcontractor's experience, including from another firm's proposal, it cannot reasonably assign one proposal a higher score than another based on that experience. Id. Here, the proposals of both Edens and BCPeabody included BFC as their respective cut-off wall construction subcontractor, and it was not reasonable for the Corps to find BFC's experience acceptable for Edens but unacceptable for BCPeabody.

However, 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).

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<sup>4</sup> In light of this conclusion, we need not reach the question whether the Corps should have referred the rejection of BCPeabody's proposal to the SBA for a certificate of competency determination.

We agree with the Corps that BCPeabody was not prejudiced by the agency's error. BCPeabody candidly stated in its initial protest that it intended to submit a project experience narrative for Bauer Foundations Canada. Although the parties agree that the firms are affiliated, Bauer Foundations Canada is a distinct legal entity from BFC. Thus, under the terms of the RFP, the Corps would have "noted as a deficiency" the lack of a letter of commitment from Bauer Foundations Canada.<sup>5</sup> Accordingly, we have no basis to disagree with the Corps's assertion that such a deficiency would have resulted in the rejection of BCPeabody's proposal as unacceptable for a reason independent of the evaluation of experience and past performance.

The protest is denied.

Susan A. Poling  
General Counsel

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<sup>5</sup> By inference, the Corps would have interpreted such a deficiency as rendering BCPeabody's proposal unacceptable. In this regard, Offeror A also submitted experience narratives for BFC and for Bauer Foundations Canada under the cut-off wall construction sub-element. Those narratives were evaluated as showing the required experience, but Offeror A's proposal was found unacceptable because its proposal only included a letter of commitment from BFC, and not one from Bauer Foundations Canada. Thus, the record supports the Corps's claim that, even if BCPeabody had supplied the missing experience narrative, its proposal would have been evaluated as unacceptable based on the omission of this letter of commitment.