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Decision

Matter of: DLF-CPC JV, LLC

File: B-418581; B-418581.2

Date: June 22, 2020

David S. Demian, Esq., Finch, Thornton & Baird, LLP, for the protester.
William M. Jack, Esq., and Amba M. Datta, Esq., Kelley Drye & Warren LLP, for VLJM JV, LLC, the intervenor.
Deana Jaeger, Esq., and Katherine Arutunian, Esq., Department of the Navy, for the agency.
Stephanie B. Magnell, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that the awardee made a material misrepresentation regarding its bona fide place of business is dismissed because this matter concerns its status as a participant in the 8(a) program and is therefore for exclusive review by the Small Business Administration.
 2. Protest that agency improperly evaluated the awardee's proposal under the safety factor is denied, where the agency's evaluation was reasonable, and the protester did not raise additional arguments in a timely manner.
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DECISION

DLF-CPC JV, LLC, a joint venture and 8(a) small business of National City, California, protests the decision by the Department of the Navy, Naval Facilities Engineering Command Southwest, to award a contract to VLJM JV, LLC,¹ an 8(a) small business entity of Fullerton, California, under request for proposals (RFP) No. N62473-19-R-2604, which was issued for paving projects around Marine Corps Base Camp Pendleton, California and Naval Weapons Station Seal Beach, California. The protester

¹ VLJM is an approved 8(a) joint venture between JM Construction Services, Inc. (JMCSI) and V. Lopez Jr. & Sons General Engineering Contractors Inc. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 2 n.1. JMCSI is VLJM's designated 8(a) participant managing business party. *Id.*

alleges that the agency and the SBA improperly concluded that VLJM satisfied the Small Business Administration's (SBA) criteria for an 8(a) bona fide office within the geographical competitive area of eligibility.² DLF also asserts that the Navy conducted a flawed technical evaluation.

We dismiss the challenge to the lack of an 8(a) bona fide office and deny the remainder of the protest.

BACKGROUND

On April 4, 2018, approximately a year before issuing the solicitation, the SBA conducted a site visit to JMCSI's offices in San Diego to verify that they constituted a bona fide place of business.³ Agency Report (AR), Tab 21, SBA Email to Navy, Mar. 24, 2020, at 1. The SBA concluded that JMCSI had established a bona fide branch office at 1081 Camino Del Rio South, San Diego, California, which was within the geographical boundaries served by the SBA San Diego District Office. *Id.*; Protest at 11.

On March 18, 2019, the Navy issued the RFP, which anticipated award to the firm proposing the solution that offered the best value to the agency, considering the factors of project management, experience, past performance, safety, and price. RFP at 160-165; RFP amend. 0002, at 2. The fixed-priced, indefinite-delivery, indefinite-quantity contract would have a 2-year base period, one 2-year option period, and one 1-year option period. *Id.* The project management factor was evaluated on an acceptable/unacceptable basis, while the remaining non-price factors were evaluated using adjectival ratings. RFP amend. 0002, at 2. The safety and experience factors were of equal importance and, when combined, were equal to the past performance

² Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by awarding subcontracts to socially and economically disadvantaged small business concerns. FAR 19.800. This program is commonly referred to as the 8(a) program.

³ Section 124.507(c) of title 13 of the Code of Federal Regulations provides that "[i]n order for a Participant to be eligible to submit an offer for a 8(a) procurement limited to a specific geographic area, it must receive from SBA a determination that it has a bona fide place of business within that area prior to submitting its offer for the procurement." The regulations define a bona fide place of business as a location where a participant regularly maintains an office which employs at least one full-time individual within the appropriate geographical boundary. *Id.* § 124.3. For a participant to establish a bona fide place of business in a particular geographic location, the 8(a) participant must request a determination from the SBA district office serving the participant; that SBA district office must in turn forward the request to the SBA district office where the participant's proposed bona fide place of business is located. *Id.* § 124.507(c)(2)(ii).

factor. *Id.* The combined non-price factors were approximately equal to price. *Id.* The acquisition was set-aside for 8(a) small businesses and competition was “limited to 8(a) firms located within the geographical area serviced by the SBA San Diego District Office and other 8(a) construction firms with a bona fide place of business within the geographical competitive area.” RFP, amend. 0001, at 1.

As relevant to the protest, under the safety factor, the RFP required offerors to submit experience modification rates (EMR) days away from work; restricted duty or job transfer (DART) rates; and total recordable case (TRC) rates for prior years 2016, 2017, and 2018. RFP amend. 0002 at 6-7. The solicitation provided that, “[f]or a partnership or joint venture, EMR, DART, and TRC rates are required for each entity that is part of the partnership or joint venture.” *Id.* at 6. Additionally, “[i]f an Offeror cannot submit [] DART and TRC rates, for any year, affirmatively state so and explain why.” *Id.* at 6-7.

Five firms submitted proposals by the September 19 due date, including DLF and VLJM. RFP amend. 0005; AR, Tab 12, Pre-Business Clearance Memorandum at 1.

The agency evaluated the protester’s and awardee’s proposals as follows:

	DLF	VLJM
Project Management	Acceptable	Acceptable
Experience	Outstanding	Outstanding
Past Performance	Substantial Confidence	Substantial Confidence
Safety	Good	Acceptable
Overall Technical Rating	Outstanding	Good
Price	\$3,951,987.99	\$3,124,711.73

AR, Tab 14, Post-Business Clearance Memorandum at 8-11; Tab 29, DLF Debriefing at 2-3.

On December 18, the SBA confirmed VLJM’s 8(a) award eligibility to the Navy. AR, Tab 22, First Letter of Eligibility Determination. The Navy concluded that VLJM’s proposal represented the best value to the agency and awarded the contract to the firm on December 19. AR, Tab 15, Source Selection Decision at 4.

On December 24, DLF filed a size determination protest with the SBA and the Navy, and also questioned the validity of SBA’s determination regarding JMCSI’s bona fide place of business. Protest, exh. 8, Protest of 8(a) Eligibility of Awardee. Nothing in the record reflects a response from SBA or the Navy to DLF.

On March 4, 2020, the Navy advised DLF that VLJM was the awardee. AR, Tab 16, Notice of Non-Selection. DLF requested a debriefing, which the Navy concluded on March 11. AR, Tab 19, Navy Resp. to Questions. DLF’s timely protest with our Office followed on March 16.

On March 18, the SBA advised JMCSI “that as a result of the site visit made to [JMCSI] located at 2667 Camino Del Rio S, #301-12, San Diego, CA 92108 on March 18, 2020 by the 8(a) San Diego District Office, it is confirmed that [JMCSI has] established a bona fide branch office within the geographical boundaries served by the San Diego District Office.”⁴ AR, Tab 23, Second Letter of Eligibility Determination. The SBA further wrote that, “based on the review, [JMCSI] meets the criteria, and, as of this date, meets the requirements as a bona fide place of business in accordance with the regulations which govern competitive 8(a) construction awards.” *Id.*

On March 24, the SBA provided the Navy with its basis for concluding that, despite JMCSI’s change in offices, JMCSI maintained a bona fide office in the relevant geographical area. AR, Tab 21, SBA Email to Navy, at 1-2. The SBA first advised the Navy that the December 18, 2019, Eligibility Determination was based on its “previous approval of bona fide place of business dated April 4, 2018.” *Id.* at 1. The SBA also recounted its inquiry into JMCSI’s change of office, and the SBA’s basis for concluding that JMCSI maintained a bona fide office in the relevant geographic area:

[JMCSI] stated that [it] moved to a new location a block down from the original bona fide office [. . .] On February 24, 2020 [JMCSI] submitted a letter [it] had received from the building management dated September 25, 2019 stating that the building had been sold and the lease agreement had been assigned to the new owner. [JMCSI] was given until October 25, 2019 to vacate the office. Therefore, at the time of offer including price, [JMCSI] has confirmed that [it] still maintained the approved Bona Fide place of business.

[JMCSI] leased a “temporary” office space at 2667 Camino Del Rio S. #301-12, San Diego, CA 92108 effective November 1, 2019, and then signed a “permanent” lease beginning January 1, 2020 at the same location.

Although [JMCSI] failed to notify the SBA servicing office of “changes that could affect his bona fide place of business status,” [it] did indicate that [it] had a conversation with the Contracting Officer and notified him of the temporary move within the city of San Diego. Since then [JMCSI] provided the documentation [. . .] for establishing a Bona Fide Place of Business.

The [SBA] has conducted further investigation of the Bona Fide place of business for [JMCSI] and concluded that the firm does have a Bona Fide Place of business at 2667 Camino Del Rio S [. . .] At this point we have concluded our investigation and find that there is no reason to re-open.

⁴ This determination reflects a new branch office location for JMCSI.

[. . .] 13 CFR § 124.517(a) states that the eligibility of a Participant for a competitive 8(a) requirement may not be challenged by another Participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest. [A]nyone [. . .] questioning the eligibility of a Participant to continue participation in the 8(a) BD [business development] program or for purposes of a specific 8(a) contract may submit such information to SBA under [13 CFR] § 124.112(c).

AR, Tab 21, SBA Email to Navy, at 1-2.

DISCUSSION

DLF argues that VLJM's proposal misrepresented that JMCSI maintained a bona fide place of business. For the reasons below, we dismiss this argument as it concerns a matter within the SBA's jurisdiction which our Office will not review. The protester also claims that the agency misevaluated the awardee's proposal under factor 4, safety. This argument is denied.⁵

⁵ The protester raised collateral protest grounds. We have considered all of the protest grounds and, although not all are discussed here, none provides a basis to sustain the protest. For example, the protester asserts that the agency should have investigated an apparent address discrepancy in the system for award management (SAM). Protester Comments & Supp. Protest at 7-8. The agency responds that it was only required to verify that there were no active exclusions in SAM for the intended awardee. COS/MOL at 20-21. The protester established no obligation for the agency to investigate the information in SAM. Similarly, the protester contends that the agency improperly converted the evaluation from a best-value tradeoff to one made to the lowest-priced technically acceptable offeror. Protest Comments & Supp. Protest at 13-14. The record, however, reflects a robust comparative analysis of the benefits of offerors' proposals. AR, Tab 14, Business Clearance Memorandum; Tab 15, Source Selection Decision at 1-4.

In addition, we dismiss two of the protester's supplemental protest grounds for failure to state a basis of protest. First, the protester asserts that the agency improperly concluded that one of its past performance references was not relevant. Protester Comments & Supp. Protest at 16-17. Yet the protester fails to provide details as to how this conclusion was improper. Accordingly, this protest ground is dismissed for failure to state a basis of protest. 4 C.F.R. § 21.5(f). Second, the protester disagrees with the adjectival rating assigned to VLJM's past performance, but does not describe any error on the part of the agency. Protest at 17. This argument, too, is dismissed for failure to provide adequate legal and factual support. 4 C.F.R. § 21.5(f).

Bona Fide Place of Business

DLF contends that JMCSI did not maintain a bona fide office within the geographical area serviced by the SBA San Diego District Office, as required by the solicitation and SBA regulations. Protester Comments & Supp. Protest at 3; RFP amend. 0001, at 1. The protester argues that when VLJM submitted its revised price on October 31, 2019, it did not maintain a bona fide office in the relevant geographic area, because its prior lease ended on October 25, and it did not lease its current space on Camino Del Rio S. until November 1. Protester Comments & Supp. Protest at 3. The protester therefore argues that the awardee made a material misrepresentation in its proposal concerning this place of business and should have been found ineligible for award.

In response, the Navy asserts that GAO lacks jurisdiction over the dispute, as it would require the GAO to review the SBA's determination that VLJM was eligible for award with respect to the solicitation's requirement of a bona fide place of business within the applicable geographical competitive area. COS/MOL at 14 (citing Protest at 6-11). In this regard, the agency contends that GAO does not have the authority to review whether the SBA correctly determined that VLJM satisfied the 8(a) bona fide office criteria for the area of eligibility, a requirement for award eligibility. COS/MOL at 13.

The record shows that, on March 23, 2020, the Navy requested that SBA respond to the question raised by DLF regarding the eligibility of VLJM. See AR, Tab 21, SBA Response to Navy Email, Mar. 24, 2020. SBA advised the Navy that a site visit was conducted on April 4, 2018, to verify that JMCSI operated a bona fide place of business within the geographical boundaries of the San Diego District Office. *Id.* at 1. Based in part on this site visit, SBA issued an eligibility determination on behalf of VLJM on December 18, 2019. *Id.*

After DLF questioned whether VLJM maintained a bona fide office, SBA inquired with JMCSI. *Id.* JMCSI provided documentation to SBA reflecting that, on September 25, JMCSI received a notice to vacate its [address] offices by October 25 because the building had been sold. *Id.* Importantly, the SBA concluded that, "at the time of offer including price, [JMCSI] has confirmed that [it] still maintained the approved Bona Fide place of business." *Id.* The SBA then found that VLJM had leased an office at 2667 Camino Del Rio S., #301-12, in San Diego, which was within the relevant geographic area, as of November 1. *Id.* The SBA further noted its position that "13 CFR § 124.517(a) states that the eligibility of a Participant for a competitive 8(a) requirement may not be challenged by another Participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest." *Id.* at 2.

Our Office will review competitive section 8(a) procurements for compliance with certain applicable procurement regulations, but our review generally does not extend to matters that are solely within the purview of SBA. *Mevacon-NASCO JV; Encanto Facility Servs., LLC, B-414329 et al.*, May 11, 2017, 2017 CPD ¶ 144 at 19. Challenges to a small business's eligibility for award under the 8(a) program are generally for review by

the SBA, not our Office. *Id.* Whether the SBA erred in its eligibility determination is a matter solely for the SBA; our Office will not review substantive determinations by the SBA regarding a program participant's eligibility for a particular award. 13 C.F.R. § 124.517(a); see also FAR 19.805-2(b) (SBA determines the eligibility of 8(a) participants for award of a contract); *FedServ-RBS JV, LLC*, B-411790, Oct. 26, 2015, 2015 CPD ¶ 326 at 8. Accordingly, this protest ground is dismissed.⁶ *Mevacon-NASCO JV; Encanto Facility Servs., LLC, supra* at 4, 20 (dismissing protest ground that the awardee misrepresented its bona fide place of business because it concerns a matter within the exclusive jurisdiction of the SBA).

In an effort to avoid the prohibition described in 13 C.F.R. § 124.517(a), the protester argues that the agency acted in bad faith in finding that JMCSI satisfied the eligibility requirements. Protest at 9-11; Protester Comments & Supp. Protest at 14-15; see *MPC Containment Sys., LLC*, B-416188.2, July 23, 2018, 2018 CPD ¶ 251 at 4 (“The exceptions, which GAO will interpret narrowly out of deference to the role of the SBA in this area, are protests that show possible bad faith on the part of government officials, or that present allegations that the SBA failed to follow its own published regulations or failed to consider vital information bearing on the firm’s responsibility due to the manner in which the information was presented to or withheld from the SBA by the procuring agency. 4 C.F.R. § 21.5(b)(2).”). The protester alleges that the SBA failed to follow its own regulations and that this alleged failure is, by itself, evidence of SBA’s bad faith. Protester Comments & Supp. Protest at 14-15.

Government officials are presumed to act in good faith, and a protester’s contention that contracting officials are motivated by bias or bad faith must be supported by convincing proof. *BTAS, Inc.; Innovative Techs., Inc.*, B-415810.4 *et al.*, Oct. 3, 2018, 2018 CPD ¶ 346 at 10 n.11. Here, apart from DLF’s unsupported argument, there is no evidence of bad faith. Protest at 8-9. Because the protester adduces no evidence of wrongdoing, its claims amount to nothing more than unsubstantiated allegations and do not meet our standard for demonstrating bad faith or bias by a procuring agency. Accordingly, they are dismissed. *MPC Containment Sys., supra* at 3 n.5.

Safety Factor

Next, DLF argues that the agency’s evaluation of VLJM’s proposal under the safety factor was flawed, because the agency failed to downgrade the awardee for allegedly missing historical safety records. Protester Comments & Supp. Protest at 18-19. The protester’s argument here has no merit.

⁶ The protester also argues that our Office should review the matter further because, in the protester’s view, the SBA failed to follow its own regulations. Protester Comments & Supp. Protest at 14-15 (citing *GLR-CMC A Joint Venture*, B-281004, Dec. 18, 1998, 98-2 CPD ¶ 152 at 3-4). However, the protester’s position here is, in substance, a disagreement with the SBA’s conclusion that JMCSI maintained a bona fide office.

VLJM received a rating of acceptable under the safety factor. AR, Tab 15, Source Selection Decision at 3. This evaluation reflected EMR, DART and TRC rates for VLJM partner Lopez & Sons for 2016, 2017, and 2018. *Id.* However, for VLJM partner JMCSI, the evaluation only included rates from 2018. *Id.* The evaluation did not include rates for 2016 and 2017 because they do not exist, as the record states that JMCSI was a newly-formed company. *Id.* DLF contends that the “[t]he reasons VLJM could not satisfy this requirement are irrelevant” and that the agency should have assigned VLJM an adjectival rating of marginal for the failure to submit non-existent rates. Protester Comments & Supp. Protest at 18.

The agency responds that the solicitation permitted offerors who did not submit the rates to provide an explanation. Supp. COS/MOL at 8 (citing RFP amend. 0002, at 6-7). Furthermore, the record reflects that the agency considered JMCSI to be a new company and accepted this as a reasonable explanation for the lack of rates in years 2016 and 2017. AR, Tab 15, Source Selection Decision at 3 (JMCSI “is a new company, formed in 2018, and does not have sufficient insurance premiums or established safety record for 2016 and 2017. [JMCSI] submitted a Moderate EMR rating for 2018 and Very Low DART and TRC rates for 2018.”).

In reviewing a protest challenging an agency’s evaluation, our Office will not reevaluate proposals, nor substitute our judgment for that of the agency, as the evaluation of proposals is a matter within the agency’s discretion. *Computer World Servs. Corp.*, B-410513, B-410513.2, Dec. 31, 2014, 2015 CPD ¶ 21 at 6. Rather, we will review the record only to assess whether the agency’s evaluation was reasonable and consistent with the stated evaluation criteria and with applicable procurement statutes and regulations. *ARBEIT, LLC*, B-411049, Apr. 27, 2015, 2015 CPD ¶ 146 at 4. A protester’s disagreement with an agency’s judgment, without more, is insufficient to establish that an agency acted unreasonably. *Watts-Obayashi, Joint Venture; Black Constr. Corp.*, B-409391 *et al.*, Apr. 4, 2014, 2014 CPD ¶ 122 at 9.

The record reflects that the agency considered JMCSI’s lack of historical rates and explanation, which was expressly permitted by the solicitation, and reasonably accepted the explanation. On this record, we find no basis on which to sustain the protest.

In its supplemental comments, the protester asserts for the first time that the agency’s evaluation was in error, because JMCSI’s profile in the government’s system for award management (SAM) reflects an initial registration date of December 2, 2008, which would allow for historical rates for 2016 and 2017. Protester Supp. Comments at 2 (citing Protest, exh. 4, JMCSI SAM Entry at 1).

Our Bid Protest Regulations require that protests other than those challenging the terms of the solicitation be filed within 10 days of when a protester knew, or should have known, of its basis for protest. See 4 C.F.R. § 21.2(a)(2). Moreover, our Bid Protest Regulations do not contemplate the piecemeal presentation or development of protest issues through later submissions citing examples or providing alternate or more specific

legal arguments missing from earlier general allegations of impropriety. *Spatial Front, Inc.*, B-417985, B-417985.2, Dec. 18, 2019, 2020 CPD ¶ 8 at 11 n.13.

DLF was aware of the JMCSI's formation date, as it appears in SAM, as of the date of its protest. As of April 14, the date the agency submitted the agency report, DLF was also aware that the agency believed that JMCSI was a newly-formed company. See AR, Tab 15, Source Selection Decision at 3. DLF first raised the argument that the agency erroneously considered JMCSI to be a newly-formed company on May 4. See Protester Supp. Comments. Thus, the information upon which the protester based the argument raised in its supplemental comments was known or should have been known at the time DLF filed its initial comments. Because this new argument was raised after the protester filed its comments, it is untimely and will not be considered. *Id.*; 4 C.F.R. § 21.2(a)(2). Furthermore, to the extent that this argument constituted a new protest ground, it is untimely, as it was raised more than 10 days after the protester knew or should have known of the basis for the argument. 4 C.F.R. § 21.2(a)(2).

The protest is dismissed in part and denied in part.

Thomas H. Armstrong
General Counsel