

Decision

Matter of: Zodiac-Poettker HBZ JV, LCC--Reconsideration

File: B-419292.2

Date: April 5, 2021

Scott F. Lane, Esq., Katherine Nucci, Esq., and Jayna Rust, Esq., Thompson Coburn LLP, for the protester.

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

DIGEST

Request for reconsideration of prior decision is denied where the protester reiterates arguments raised and considered in our prior decision and fails to show any error of fact or law that would warrant reversal or modification of prior decision.

DECISION

Zodiac-Poettker HBZ Joint Venture, LLC, (Zodiac), a small business of St. Louis, Missouri, requests that we reconsider our decision in *Zodiac-Poettker HBZ JV, LCC*, B-419292, January 15, 2021, 2021 CPD ¶ 54, denying its protest alleging that the Department of the Army, Corps of Engineers, improperly awarded a contract to A&K Construction, Inc., of Paducah, Kentucky, under request for proposals (RFP) No. W912QR-20-R-0057, for the construction of a middle school at Fort Campbell, Kentucky. Zodiac contends that our decision was premised on a factual error concerning the amount of funding actually available to the agency for award, and erred as a matter of law where our Office found that Zodiac was not an interested party to raise an allegation concerning the agency's application of a Historically Underutilized Business Zone (HUBZone) preference required by the solicitation.

We deny the request for reconsideration.

BACKGROUND

On June 29, 2020, the agency issued the RFP, in accordance with the procedures of Federal Acquisition Regulation (FAR) part 15, seeking proposals for construction, renovation, and demolition services at Fort Campbell, Kentucky. *Zodiac-Poettker HBZ*

JV, LCC, supra, at 1. The solicitation contemplated the award of a fixed-price contract on a best-value tradeoff basis, considering price and the following three factors, listed in descending order of importance: (1) past performance; (2) management plan; and (3) small business (SB) participation plan. *Id.* at 2. With respect to price, the RFP provided that proposals would be evaluated for fairness and reasonableness through the use of a price analysis. *Id.* The solicitation also advised that in accordance with FAR section 19.1307, the agency was required to apply a 10 percent price evaluation preference for HUBZone concerns. *Id.* The solicitation further informed potential offerors that the estimated contract cost was between \$25 million and \$100 million. *Id.*

The agency received multiple proposals in response to the solicitation, including those of Zodiac, a HUBZone small business, and A&K, a large business. *Id.* The agency evaluated the proposals and found the prices to be fair and reasonable. The agency then applied the 10 percent price evaluation preference to the prices of all large businesses, including that of A&K, and determined that Zodiac's initial price proposal (\$61,371,000) was the lowest evaluated price proposal. *Id.* The contracting officer was subsequently informed by the requiring activity that the available funding limit for the project was \$56,200,000; because none of the existing proposals offered prices below this threshold, the agency opened discussions with the offerors. *Id.*

On August 28, the agency sent each offeror a discussion letter, providing each firm with an opportunity to correct any weaknesses in its technical proposal, and inviting each to reduce its price. *Id.* Specifically, the agency's discussion letter to Zodiac stated the following, regarding price:

Please take this opportunity to also review your proposed price. Please note per the Department of Defense Form 1391 (DD 1391),¹ the Estimated Contract Cost is \$56.2M. The Government cannot guarantee funds above this amount will be available for use.

Id. Zodiac responded by submitting a revised proposal that addressed its technical weaknesses and lowered its price from \$61,371,000 to \$60,492,000. *Id.* at 3.

After reviewing the revised proposals received from all offerors, the agency issued a second discussion letter to Zodiac, which included an identical notice regarding price as in the first discussion letter, concerning the estimated contract cost on the DD Form 1391. *Id.* Zodiac responded to the agency's second discussion letter, but did not change its price. *Id.*

¹ A DD Form 1391 is a document prepared to estimate the costs associated with a given construction project, and is submitted to Congress as part of the President's budget. See generally, Army Regulation 420-1, Army Facilities Management. A project's DD Form 1391 generally supports the basis for Congress to authorize and appropriate funds for that project. See Library of Congress, Congressional Research Service, "Military Construction: Authorities, Process, and Frequently Asked Questions," No. R44710, Nov. 26, 2019.

The agency sent a third discussion letter to Zodiac, which, as relevant here, stated the following:

We invite you to please take this opportunity to review your proposed price. As previously stated, per the Department of Defense Form 1391 (DD 1391), the Estimated Contract Cost for this project is \$56.2M. The Government cannot guarantee funds above this amount will be available for use and may be forced to delay or cancel award of this particular solicitation.

Id. Zodiac responded to this discussion letter and declined to reduce its price. *Id.*

Based on its evaluation of the offerors' final revised proposals, the agency's final evaluation ratings were as follows:

	A&K	Zodiac
Past Performance	Satisfactory Confidence	Substantial Confidence
Management Plan	Good	Good
SB Participation Plan	Acceptable	Acceptable
Evaluated Price²	\$61,677,000	\$60,492,000
Proposed Price	\$56,070,000	\$60,492,000

Id. Although Zodiac's proposal had the lowest evaluated price after the application of the HUBZone evaluation preference, Zodiac's proposed price was in excess of the agency's available funding limit. Consequently, the agency did not consider Zodiac's proposal for award. *Id.* at 4. Because A&K was the only offeror with a proposed price below the available funding limit, the agency made award to A&K on September 30. *Id.*

After receiving a debriefing, Zodiac filed a protest with our Office on October 9. *Id.* Zodiac argued, among other things, that the agency conducted misleading discussions because, while the agency mentioned the funding estimate during discussions, and advised that funds might not be available beyond that estimate, the agency never specifically informed Zodiac that submitting a price above that estimate would result in the exclusion of the proposal from the competition. The protester also argued that the agency failed to apply the HUBZone preference required by the solicitation. *Id.*

² A&K proposed the lowest total actual price (base plus option years) in the amount of \$56,070,000. However, because a HUBZone Small Business firm (Zodiac) submitted a qualified proposal, the agency added 10 percent to the price of the non-HUBZone businesses, for the purpose of providing a price preference to HUBZone offerors, pursuant to the terms of the RFP. *Id.* at 3 n.1; see also FAR 19.1307. Adding 10 percent to A&K's proposed price resulted in an evaluated price of \$61,677,000. However, in the event A&K was selected, the proposed price would be the amount the government would pay for the contracted services. *Id.*

Our Office denied Zodiac's protest on January 15, 2021. In our decision, we concluded that the agency did not conduct misleading discussions with Zodiac, finding instead that the Army "notified Zodiac during discussions, on three separate occasions, that the agency had concerns regarding Zodiac's proposed price and the available funding limitation." *Id.* at 5. Moreover, having found nothing improper with the agency's conduct of discussions, our Office concluded that because Zodiac's price exceeded the agency's funding limit, the agency reasonably rejected Zodiac's proposal. *Id.* at 6. Our decision concluded by finding that because Zodiac's proposal was ineligible for award, it was not an interested party to raise any other allegations concerning the agency's award to A&K. *Id.* at 6-7.

Zodiac timely filed this request for reconsideration.

DISCUSSION

In its request for reconsideration, Zodiac contends that our decision contains errors of fact and law. Req. for Recon. at 2. Specifically, Zodiac argues that the "funding limit" stated by the agency and relied upon by our Office was not, in fact, a limit at all. *Id.* at 10. Instead, Zodiac argues its proposed price was within the amount appropriated by Congress for the project, which, the requester asserts, was the "actual" funding limit. *Id.* Because its price was less than the amount appropriated by Congress for the project, Zodiac argues the agency could not properly reject its proposal. Zodiac also alleges that our decision contains a legal error. According to Zodiac, our Office erred by concluding that Zodiac was not an interested party to challenge the agency's application of the HUBZone price preference in its evaluation. *Id.* at 13-14.

Under our Bid Protest Regulations, to obtain reconsideration, a requesting party must demonstrate that our prior decision contains errors of fact or law, or present new information not previously considered that would warrant reversal or modification of our earlier decision. 4 C.F.R. § 21.14(a); *22nd Century Techs., Inc.--Recon.*, B-417478.5, Apr. 28, 2020, 2020 CPD ¶ 153 at 2. The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. *Veda, Inc.--Recon.*, B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4. For the reasons that follow, Zodiac's request does not support reconsideration of our prior decision.

First, the protester argues that our decision contains "a glaring factual error" where our Office relied upon the agency's stated available funding limitation of \$56.2 million. Req. for Recon. At 10. In this regard, Zodiac contends that the \$56.2 million "figure represented only the Agency's calculation of the 'Estimated Contract Cost,' not the actual \$62.6 million appropriated by Congress." *Id.* Accordingly, Zodiac maintains that

its proposed price of \$60.49 million was within the “actual” funding limit of \$62.6 million.³ *Id.*

This argument is unavailing. Zodiac raised this argument, nearly verbatim, in its comments on the agency’s report. See Zodiac’s Comments on the Agency Report (AR) (B-419292) at 2-3 (arguing that “the ‘funding limitation’ of \$56.2 million cited throughout the Agency’s Memorandum of Law [] is actually only the Agency’s ‘Estimated Contract Cost’” and that the “Agency had an additional \$11.01 million available.”). Indeed, our Office addressed the protester’s specific contention. In this regard, we explained that while the protester “argues that the agency’s stated funding constraints merely reflect a discretionary decision on how to allocate its actual funding, and suggests that the agency could have obtained additional funds from elsewhere within its budget or revised its needs in order to make award to Zodiac[,]” our Office will not review an agency’s exercise of discretion concerning how it will allocate funds for a project. *Zodiac-Poettker HBZ JV, LCC, supra* at 6. That is, the Army’s decision not to move funds--for example, out of budgeted costs for supervision, inspection, and overhead, to increase the overall estimated contract cost--is one that depends on the agency’s judgment concerning which projects or activities shall receive funding, and is not for our Office’s review.⁴ See *Tektronix, Inc.*, B-219981.4, June 12, 1986, 86-1 CPD ¶ 545.

As previously stated, the repetition of arguments presented in the underlying protest, without more, provides no basis for reconsideration. *Office Design Grp.--Recon.*, B-413166.7, Mar. 9, 2017, 2017 CPD ¶ 89 at 2. Zodiac, here, presents no new information to suggest that our prior decision rests on a factual error.⁵ The requester’s disagreement with our decision not to review the agency’s exercise of discretion

³ Here, the DD Form 1391, which describes the scope, total project costs, and estimates for specific project elements, provided an “estimated contract cost” of \$56.2 million, and included other funding line items--for such considerations as supervision, inspection, and overhead costs--with a “total request rounded” amount of \$62.6 million. See B-419292, AR, Tab 22, DD Form 1391; Req. for Recon. at 11.

⁴ Zodiac concedes that even if the agency applied its contingency funding amounts to the estimated contract cost, the firm’s price would still be above the project’s funding limit, and thus ineligible for award. Req. for Recon. at 13 (“[E]ven if the Agency were to add together the DD 1391’s ‘Estimated Contract Cost’ of \$56.214 million together with the ‘contingency’ of \$2.811 million, the total (\$59.025) is merely 2% lower than Zodiac-Poettker’s proposed price (\$60.492 million).”).

⁵ The requester takes a liberal reading of our decision, suggesting that “GAO evidently relied on the DD 1391 form [] for the proposition that the project had a Congressionally-prescribed ‘funding limit’ of \$56.2 million.” Req. for Recon. at 10. Our decision reaches no such conclusion. Instead, our Office understood the \$56.2 million amount to be the agency’s “funding limitation” for the project, not the total amount Congress appropriated for the project. See *Zodiac-Poettker HBZ JV, LCC, supra* at 6 (noting that \$56.2 million was the agency’s stated funding limit).

concerning how it allocates funds for this project provides no basis for us to reconsider our prior decision.⁶

The requester also argues that our prior decision contains an error of law, namely, that our decision did not “substantively address” Zodiac’s argument that the agency failed to apply the HUBZone preference required by the solicitation. Req. for Recon. at 13. More specifically, Zodiac contends that our decision improperly determined that the firm was not an interested party to raise this challenge because even if its price exceeded the agency’s funding limit, “the Agency could not have awarded to A&K on the basis of its supposedly lower price.” *Id.* at 15. We find no legal error in our prior decision’s conclusion that Zodiac is not an interested party to raise its challenge.

Here, again, Zodiac repeats arguments it made in the underlying protest. *Compare* Req. for Recon. at 14-15 (concerning the regulatory and statutory scheme related to the HUBZone preference) *with* Zodiac’s Comments on the agency report (B-419292) at 3-5 (arguing the same). Moreover, Zodiac provided a response to the agency’s allegation that Zodiac was not an interested party to contest the agency’s application of the HUBZone preference in the underlying protest, which our Office considered. *See id.* at 7. Our decision concluded that Zodiac lacked the necessary economic interest to challenge the agency’s application of the HUBZone preference because Zodiac’s price made the firm ineligible for award. Thus, Zodiac’s request for reconsideration of this aspect of our decision repeats arguments and issues previously considered and decided by our Office, and provides no basis to reach a contrary conclusion.

In any event, there is no evidence to suggest that the agency “abandoned the HUBZone price evaluation preference,” as argued by Zodiac. Req. for Recon. at 13. Indeed, the record demonstrates the Army applied the preference by increasing A&K’s offered price, consistent with the HUBZone price preference required by the solicitation. *See* B-419292, AR, Tab 15, Source Selection Document at 3-4. Based on this preference, the agency concluded that Zodiac’s evaluated price was, in fact, lower than A&K’s price. *Zodiac-Poettker HBZ JV, LCC, supra* at 2. However, because Zodiac’s proposed price exceeded the available funding for the project, the firm was deemed ineligible for award. In turn, A&K, as the only offeror to submit a proposal below the funding limit, was awarded the contract at its offered price. In short, application of the preference in this

⁶ Zodiac’s reliance on our prior decisions is similarly unpersuasive. For example, the requester points to our decision in *Ma-Chis Kawv V, LLC*, B-409344, Mar. 20, 2014, 2014 CPD ¶ 101, as standing for the proposition that an agency can award a contract above a publicized cost limitation, or in that case, a “target ceiling amount.” Req. for Recon. at 12. Even without addressing the key factual differences between that decision and the one at hand, we fail to see how our decision in the underlying protest (concluding that our Office would not review a challenge to an agency’s decision not to budget additional funds for a project) is inconsistent with *Ma-Chis Kawv V* (where the agency made the determination that it would award a contract above its target ceiling amount).

circumstance had no impact on the competition because the preference attached to a proposal that was properly deemed ineligible for award.

Although Zodiac suggests that the HUBZone preference precluded award to a firm other than Zodiac, Zodiac provides no basis on which to conclude that the agency's actions were improper or inconsistent with law and regulation. Zodiac advances no meaningful argument and cites no relevant regulations or case law to support the notion that the Army was precluded from making award to A&K after Zodiac's proposal was deemed ineligible for award. Accordingly, we find no legal error that warrants reconsideration of our decision.

The request for reconsideration is denied.

Thomas H. Armstrong
General Counsel