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Decision

Matter of: Enola-Caddell JV

File: B-292387.2; B-292387.4

Date: September 12, 2003

Thomas E. Abernathy, IV, Esq., Smith, Currie & Hancock, for the protester.
Gary L. Brooks, Esq., National Archives and Records Administration, and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester was not prejudiced by downgrading of its technical evaluation rating from excellent to good where, based on its higher price, it would not have been in line for award even had it received technical rating of excellent.
 2. Pursuant to Small Business Administration guidance, small business that is not a HUBZone small business cannot benefit from application of the HUBZone price evaluation preference to gain the award of a contract.
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DECISION

Enola-Caddell JV, a mentor-protégé joint venture consisting of Enola Contracting Services, Inc., a small disadvantaged business (SDB) that is also a Historically Underutilized Business Zone (HUBZone) small business concern, and Caddell Construction Co., Inc., a large business, protests the award of a contract to Batson-Cook Company under request for proposals (RFP) No. NAMA02SEM0009, issued by the National Archives and Records Administration (NARA) for construction of an archives facility in Morrow, Georgia. Enola-Caddell contends that the agency improperly downgraded its technical evaluation rating based on Enola's lack of experience and applicable past performance.

We deny the protest.

The RFP, which was issued on an unrestricted basis on November 15, 2002, contemplated the award of a fixed-price contract to the offeror whose proposal represented the best value to the government, with technical factors significantly

more important than price. Technical factors and their corresponding weights were as follows: experience (20 percent), past performance (20 percent), key personnel (20 percent), management plan and schedule (35 percent), and subcontracting plan (5 percent).

The RFP incorporated both Federal Acquisition Regulation (FAR) § 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business (SDB) Concerns, and § 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns. Pursuant to the former clause, the price of each non-SDB offeror's proposal was to be evaluated by adding a factor of 10 percent to the actual price offered, while pursuant to the latter, the price of the proposal of each non-HUBZone small business, with the exception of an "[o]therwise successful offer[] from [a] small business concern[]," was to be evaluated by adding a factor of 10 percent to the actual price offered. RFP, Part II, § I, at 48, 49; Part IV, § K at 10. FAR § 52.219-4(b)(3) further states that "[a] concern that is both a HUBZone small business concern and a small disadvantaged business concern will receive the benefit of both the HUBZone small business price evaluation preference and the small disadvantaged business price evaluation adjustment."

The RFP at §§ M3.3 and M3.4 furnished additional guidance with regard to the application of the SDB price evaluation adjustment and the HUBZone price evaluation preference, as follows:

M3.3. Price Evaluation Adjustment (PEA)

The PEA will be used in the event that a small disadvantaged business (SDB) meets the following three criteria:

- a. The SDB must be located within the following regions: middle atlantic, east south central, east north central and west south central.
- b. The SDB must perform work in the following (formerly) SIC Major Group: 15.
- c. The SDB has not waived the right to a PEA.

If a SDB meets the above criteria and its price is fair and reasonable, a PEA factor of 10% will be added to the prices of non-qualifying contractors.

M3.4. HUBZone Price Evaluation Preference (PEP)

The Hub Zone PEP will be used in the event that a company is certified to be a Hub Zone by the Small Business Administration and its price is fair and reasonable. A PEP factor of 10% will be added to the prices of non-qualifying contractors.

Nine proposals were received by the January 24, 2003 closing date. The evaluators rated the proposals of Batson-Cook and Offeror A as technically excellent; the proposals of Offerors B, C, and D as technically very good; and the proposals of Enola-Caddell and Offerors E, F, and G as technically good.¹ The evaluators adjusted offerors' prices by adding to them the following factors: the six large businesses (Batson-Cook and Offerors A, B, C, D, and G), 10 percent plus 10 percent; Offeror F, which represented itself as a HUBZone small business, but not as an SDB, 10 percent; and Enola-Caddell and Offeror E, which claimed both SDB and HUBZone small business status, 10 percent. With regard to the final adjustment, the agency explains that the evaluation board believed that it had discretion to deny the benefit of both the SDB PEA and the HUBZone PDP to Enola-Caddell and Offeror E because their base offers exceeded the low base offer by more than 10 percent and could therefore "be determined to be not fair and reasonable." Agency Report at 2. Based on the foregoing adjustments, the board evaluated the price of Offeror F as lowest, Enola-Caddell's as fifth lowest, and Batson-Cook's as seventh lowest. The evaluators determined that Batson-Cook's technical excellence was worth its higher price, and that its proposal represented the best value to the government. On May 23, the agency awarded a contract to Batson-Cook.

Upon receipt of protests from Enola-Caddell and two other offerors, the contracting officer reviewed the price analysis and determined that it contained errors. The contracting officer concluded that the adjustment to the large businesses' prices had been improperly calculated and that Enola-Caddell and Offeror E, which claimed both SDB and HUBZone small business status, "may have been entitled to the benefit of both SDB and HUBZone adjustments." *Id.* at 3. The source selection evaluation board reconvened to review its award recommendation in light of the following corrected adjustments:

¹ In accordance with the source selection plan, point scores of 90-100 received adjectival ratings of excellent; point scores of 80-89 received adjectival ratings of very good; and point scores of 70-79 received adjectival ratings of good.

Offeror	Size status	Tech. Rating	Base Offer	Base Offer with PEA ²	Base Offer with PEP ³
Batson-Cook	LB	90/Excellent	\$17,699,000	\$19,468,900	\$21,238,800
Offeror A	LB	90.02/Excellent	\$18,300,050	\$20,130,055	\$21,960,060
Offeror B	LB	83.56/Very Good	\$16,958,586	\$18,654,446	\$20,350,304
Offeror C	LB	83/Very Good	\$17,240,000	\$18,964,000	\$20,688,000
Offeror D	LB	82/Very Good	\$18,867,809	\$20,754,590	\$22,641,371
Enola-Caddell	HUBZone SB/SDB	78.25/Good	\$19,091,048	\$19,091,048	\$19,091,048
Offeror E	HUBZone SB/SDB	77.43/Good	\$19,364,073	\$19,364,073	\$19,364,073
Offeror F	HUBZone SB	77.43/Good	\$18,427,604	\$20,270,364	\$20,270,364
Offeror G	LB	77.25/Good	\$16,950,001	\$18,645,001	\$20,340,001

Supplemental Source Selection Evaluation Board (SEEB) Report at 5. After reviewing the above information, the evaluation board again determined that the proposal of Batson-Cook, which was essentially equal technically to, and lower in price than, Offeror A's, and which had a technical score "considerably higher" and an evaluated price up to approximately 10 percent higher than the other seven proposals, represented the best value to the government. *Id.* at 7. The Source Selection Authority affirmed the board's determination.

In its initial protest to our Office, Enola-Caddell complained that the agency had failed to give it the benefit of the PEA and the PEP, to which it was entitled, in evaluating its proposal.⁴ NARA responded that because Caddell was a large business it was not clear that Enola-Caddell was entitled to the PEP, and that, in any event, it had given the protester the benefit of both the PEA and the PEP in performing its evaluation and had nonetheless determined that Batson-Cook's proposal represented a better value to the government.

² The PEA differential was not added to the prices of Enola-Caddell and Offeror E based on their status as SDBs.

³ The PEP differential was not added to the prices of Enola-Caddell and Offerors E and F based on their status as HUBZone small businesses.

⁴ In its initial protest, Enola-Caddell also complained that the agency had failed to furnish it with a timely debriefing, as required by FAR § 15.506. Upon receipt of the agency report, the protester abandoned this argument, noting that its complaint was "now moot due to the information in the Agency Report and related documents released by the Agency." Protester's Comments, July 25, 2003, at 1.

SBA also commented on Enola-Caddell's protest, opining that the protester was entitled to neither the PEA nor the PEP. SBA explained that Enola-Caddell was not entitled to the PEA because the SDB joint venturer, Enola, was located in Florida, whereas the solicitation provided for application of the PEA only in the event that the SDB (or, in the case of a joint venture involving an SDB, the SDB joint venturer) were located in the middle Atlantic (New Jersey, New York, Pennsylvania), east south central (Alabama, Kentucky, Mississippi, Tennessee), east north central (Illinois, Indiana, Michigan, Ohio, Wisconsin), or west south central (Arkansas, Oklahoma, Louisiana, Texas) region. RFP § M3.3; FAR § 52.219-22, Alternate I, incorporated into the RFP at Part IV, § K, pp. 9-10.

SBA further explained that Enola-Caddell was not entitled to the benefit of the PEP because HUBZone program regulations at 13 C.F.R. Part 126 provide that to compete for a HUBZone contract,⁵ a joint venture must meet the following requirement (among others):

A qualified HUBZone SBC may enter into a joint venture with one or more other qualified HUBZone SBCs, 8(a) participants, or WOBs [women-owned businesses] for the purpose of performing a specific HUBZone contract.

13 C.F.R. § 126.616(a). SBA observed that while Enola was a HUBZone SBC, Caddell was a large business, and that, as a consequence, Enola-Caddell did not qualify as a HUBZone joint venture and was not entitled to application of the HUBZone PEP. SBA further noted that the fact that the protester has an approved 8(a) mentor-protégé agreement is irrelevant because the 8(a) mentor-protégé program provides participants with an exemption from affiliation for size purposes, but does not provide an exemption from the HUBZone requirements concerning joint ventures.⁶

⁵ 13 C.F.R. § 126.600 defines HUBZone contracts as including contracts awarded to qualified small business concerns (SBC) through full and open competition after a price evaluation preference in favor of qualified HUBZone SBCs.

⁶ It appears that Enola-Caddell would have been ineligible for the PEA even had Enola been located in one of the enumerated regions. Regulations pertaining to the Small Disadvantaged Business Program, set forth at 13 C.F.R. § 124.1002(f), provide as follows:

Joint ventures are permitted for SDB procurement mechanisms (such as price evaluation adjustments . . .), provided that the requirements set forth in this paragraph are met.

* * * * *

- (4) An SDB must be the managing venturer of the joint venture,
and an employee of the managing venturer must be the

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In commenting on the NARA and SBA reports, the protester did not take issue with or attempt to rebut the agencies' arguments; accordingly, we consider it to have abandoned its complaint that the agency failed to give it the benefit the PEA and the PEP, to which it was entitled, in evaluating its proposal. O. Ames Co., B-283943, Jan. 27, 2000, 2000 CPD ¶ 20 at 7. Moreover, we see no reason to question SBA's conclusion that Enola-Caddell is entitled to neither the PEA nor the PEP.

Upon receipt of the agency report, Enola-Caddell raised a supplemental basis for protest, arguing that the agency had improperly downgraded its technical rating from excellent to good based on Enola's lack of experience and relevant past performance and the joint venture's failure to propose any Enola personnel for key management positions. The protester argued that the evaluators should not have penalized the joint venture for the protégé's lack of experience given that the purpose of the mentor-protégé program is to allow small disadvantaged firms that lack experience to gain it.

Even assuming for the sake of argument that the evaluators downgraded the protester's technical rating from excellent to good for the above reasons and that this was improper, the record does not demonstrate the protester was prejudiced by the action. Prejudice is an element of every viable protest, Lithos Restoration, Ltd., B-247003.2, Apr. 22, 1992, 92-1 CPD ¶ 379 at 5, and we will not sustain a protest unless the protester demonstrates a reasonable possibility of prejudice, 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 v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Here, both Batson-Cook and Offeror A received technical ratings of excellent and their prices were lower than Enola-Caddell's; thus, even if the

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project manager responsible for performance of the contract.

- (5) The joint venture must perform any applicable percentage of work required of SDB offerors, and the SDB joint venturer(s) must perform a significant portion of the contract.

Enola-Caddell's proposal did not provide for an employee of Enola to be the project manager responsible for performance of the contract. In addition, it is not clear that Enola--which, according to the protester, will perform 15 percent of the contract work, Protester's Comments, Aug. 15, 2003, at 9--will perform a significant portion of the contract.

protester's proposal had been rated excellent, both Batson-Cook's and Offeror A's proposals would still have been in line for award ahead of it. While the protester asserts that because another firm in the competition was entitled to the HUBZone PEP, the prices of large business competitors—but not small business ones, such as itself—should have been increased by a differential of 10 percent for evaluation purposes, which would have made the evaluated prices of Batson-Cook and Offeror A higher than its own, SBA guidance explicitly states that “a small business concern that is not a qualified HUBZone SBC cannot benefit from the application of the HUBZone PEP to gain the award of a contract.” SBA Procedural Notice regarding Application of the HUBZone Price Evaluation Preference, effective 11-04-2002, at 1; see Universal Constr. Co., Inc., d/b/a Turner-Universal, B-292407, Aug. 18, 2003, 2003 CPD ¶ _____. Accordingly, Enola-Caddell was not entitled to the benefit of the PEP, and, as a result, its price remained higher than Batson-Cook's and Offeror A's for evaluation purposes.

Enola-Caddell further argues, with regard to the issue of prejudice, that Batson-Cook's proposal should not have received a technical rating of excellent because its own proposal was in fact better than Batson-Cook's.

The protester first objected to the evaluation of Batson-Cook's proposal in its August 15 comments, despite having received the information providing the basis for its objection (i.e., the SSEB reports) in the July 9 agency report; accordingly, the objection is untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2003) (protests other than those objecting to solicitation improprieties must be filed within 10 days after the basis of protest is, or should have been, known). Moreover, Enola-Caddell is not an interested party to challenge the evaluation of Batson-Cook's proposal because Offeror A, rather than the protester, would be in line for award if its argument that Batson-Cook's proposal should have received a rating lower than excellent were sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7 at 1. Finally, the argument is without merit in any event because the rating of Enola-Caddell's proposal has no bearing on the rating of Batson-Cook's—i.e., there is no reason to believe that had the agency rated Enola-Caddell's proposal more favorably, it would have lowered its rating of Batson-Cook's.⁷

⁷ While due to the lack of prejudice, we do not reach the merits of the protester's argument that it was improper for the agency to downgrade the joint venture's technical rating based on the protégé's lack of similar experience and relevant past performance, we do note that SBA offers the following view:

While SBA's regulations provide no guidance on the technical evaluation of joint ventures between mentor-protégé participants by procuring agencies, it does appear contrary to both the intent of SBA's 8(a) BD [business development] mentor-protégé program and FAR § 15.305(a)(2)(iv) for a procuring agency to downgrade a proposal based on the lack of experience/past performance of a protégé. In

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The protest is denied.

Anthony H. Gamboa
General Counsel

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order to be a protégé, an entity must lack experience. 13 C.F.R.
§ 124.520(c). In our view, if a mentor has excellent experience/past
performance and is legally obligated to perform the entire requirement
[as was the case here], there is no reason why the joint venture should
not receive an excellent technical rating in those areas.

SBA Comments, Aug. 6, 2003, at 5.