In the United States Court of Federal Claims

No. 12-67C
(Originally Filed: April 26, 2012)
(Reissued: May 9, 2012)[1]

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EVELYN T. BURNEY, d/b/a PLOTT BAKERY PRODUCTS,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

and

STERLING FOODS INC.,

Intervenor

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OPINION

This is a post-award bid protest of the Defense Logistic Agency's ("DLA") procurement of bakery components for the Meal, Ready to Eat Ration Program ("MRE"). For the reasons stated below, defendant's motion to dismiss and for judgment on the administrative record is granted as is intervenor's motion for judgment on the administrative record. Plaintiff's motion for judgment on the administrative record and motion for bid preparation costs are denied.[2] Oral argument is deemed unnecessary.

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[1] This opinion was originally issued under seal in order for defendant and intervenor to propose redactions. They did not propose any redactions. The opinion appears in full below.

[2] In our order of February 17, 2012, we merged plaintiff's motion for a preliminary injunction and motion for declaratory judgment with her motion

(continued...)

BACKGROUND

DLA issued Solicitation SPM3S1-R7076 on April 1, 2011. The solicitation requested proposals for 20 bakery items, each a separate item to be bid on. Offerors could bid on any number of items. The solicitation called for one base year and four one-year options. As part of the proposal, the solicitation required a separate technical volume, which was to include Product Demonstration Models ("PDMs") for each item offered.

The procurement was conducted as a best value tradeoff with all factors "other than cost or price, when combined," being "[s]ignificantly more important than cost or price." Administrative Record ("AR") 34. As technical proposals became "more equal, the evaluated price [became] more important." *Id.* Technical proposals were evaluated for the following factors, in descending order of importance, (1) PDMs, (2) Past Performance, and (3) Socioeconomic Goals. Factor 1 was significantly more important than factors 2 and 3. Past Performance was further broken down into three subfactors, listed in descending order of importance: (2.1) Quality, (2.2) Delivery, and (2.3) Socioeconomic Goals.[3] PDMs and Past Performance were evaluated against stated standards and awarded adjective ratings of "Good," "Fair," and "Poor." A "9 point quality rating scale" was used to determine the adjective rating. *Id.* Factor 3, Socioeconomic Goals, was rated comparatively between offerors.

Offerors were also required to submit information about their Surge and Sustainment Plan, Product Protection Plan, and Integrated Pest Management Program in order to assure that they could meet DLA's requirements. Each of these programs were evaluated for acceptability. If an offeror failed to submit the required information, its proposal could be deemed unacceptable. Award was prohibited to an offeror rated as unacceptable with respect to product protection and pest management. These requirements were not taken into consideration as part of the best value tradeoff, however.

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[2](...continued)
for judgment on the administrative record. For the same reasons we state below, those motions are denied as well.

[3] Socioeconomic goals were separately evaluated as part of past performance.

The solicitation incorporated various Federal Acquisition Regulation ("FAR") clauses. One relevant to this protest was FAR § 52.219-24 (2011), which states, in relevant part:

> (a) This solicitation contains a source selection factor or subfactor related to the participation of small disadvantaged business (SDB) concerns in the contract. . . .
>
> (b) In order to receive credit under the source selection factor or subfactor, the offeror must provide, with its offer, targets, expressed as dollars and percentages of total contract value, for SDB participation in any of the North American Industry Classification System (NAICS) Industry Subsectors as determined by the Department of Commerce. The targets may provide for participation by a prime contractor, joint venture partner, teaming arrangement member, or subcontractor; however, the targets for subcontractors must be listed separately.

48 C.F.R. § 52.219-24.

Initially DLA intended to make an award of each bakery item to an individual offeror. That was changed, however, on April 13, 2011, when DLA issued Amendment No. 1:

> Offerors may also offer alternate pricing that is conditioned on award of more than one line time. For example, an offeror may wish to offer a discounted price on one or more line items in the event they are awarded two or all three line items. As such, the government reserves the right to award any combination of line items if it is determined to be in its best interest.

AR 316. This allowed offerors to offer additional discounts conditioned on the award of more than one item, and allowed the agency to take these discounts into consideration in its best value tradeoff analysis.

Five offerors submitted bids for various items. Plaintiff, Ms. Burney, doing business as Plott Bakery Products, bid on three of the twenty items: chocolate chip cookies, 1-pack wheat snack bread, and 2-pack wheat snack bread. The eventual awardee, Sterling Foods, bid on all twenty items. DLA performed an initial proposal evaluation and competitive range determination.

All five offerors were included in the competitive range, and DLA entered negotiations thereafter.

For its technical proposal, plaintiff's PDMs were initially rated as "Good" for its chocolate chip cookies and "Fair" for its two snack bread items:

0007	Cookie, Chocolate Chip	6.25	Good
0013	Snack Bread, Wh (1Pk)	5.42	Fair
0014	Snack Bread, Wh (2Pk)	5.60	Fair

AR 360. For past performance, plaintiff received an overall rating of "Fair" with a "Moderate" confidence level resulting from subfactor ratings of "Fair" for Quality and "Good" for Delivery. *Id.* "Plott Bakery was not rated for socioeconomic past performance under sub-factor 2.3 because the contractor did not have a prior socioeconomic plan." *Id.* For the third factor, Socioeconomic Goals, plaintiff was ranked second. Considered in that ranking were the facts that plaintiff was itself a small business, subcontracts to five different categories of small businesses,[4] and "designated 70% overall to small business." AR 361. The agency noted, however, that plaintiff's proposal did not detail who would manage the socioeconomic plan nor did it contain "steps for gaining additional small business categories" in its socioeconomic plan. *Id.*

For the additional technical requirements, plaintiff's Product Protection Plan and Quality System Plan were found to be acceptable. *Id.* Plaintiff's Surge and Sustainment Plan was not acceptable because "the company does not use off site warehousing and has not provided any detailed information regarding transportation." *Id.* The agency also found plaintiff's pest management plan to be unacceptable because the required information was not provided and the information in the Quality System Plan regarding pest management was out of date and insufficient.

For pricing, plaintiff did not offer any discounts for multiple items. Its prices were as follows:

Cookie, Chocolate Chip	$0.6200

[4] Those categories are: veteran-owned, HUB Zone, woman-owned, other small business, and Ability One.

Snack Bread, Wheat (1pk)	$0.6978
Snack Bread, Wheat (2Pk)	$0.6959

AR 339. Among the five offerors, for the items plaintiff bid on, she had the "highest average unit prices for all three (3) items." *Id.*

DLA conducted negotiations with the offerors from August 11, 2011, until October 5, 2011. The Price Negotiation Memorandum indicates that telephonic discussions between plaintiff and DLA were held on August 12, 2011, during which "initial ratings and pricing were discussed, along with strengths and weaknesses in [plaintiff's] proposal." AR 379. The memorandum included additional details from that conversation. DLA requested revised pricing and recommended that plaintiff "concentrate on pricing for all items." *Id.* DLA informed plaintiff of the specific failings of her two snack bread items in order that plaintiff might submit new PDMs. For past performance, the agency requested clarification as to plaintiff's place of performance. DLA also informed plaintiff of deficiencies in her Surge and Sustainment Plan and Pest Management Plan in order that she could correct them in its revised proposal. The agency also requested clarification about plaintiff's past and present socioeconomic plans, along with supporting documentation for plaintiff's claim of a HUB Zone price preference. DLA sent plaintiff a letter dated August 22, 2011, confirming these items and asking for further clarification. AR 770-71.

Plaintiff submitted a revised proposal and then a Final Proposal Revision. She corrected the deficiencies in her Surge and Sustainment and Pest Management Plans; she submitted additional PDMs for its snack bread items; she revised her pricing; she clarified the place of performance; and she attempted to revise her socioeconomic plan. Plaintiff did not, however, provide her past socioeconomic goals relevant to past performance nor did plaintiff provide sufficient information for the agency to evaluate whether its goals were realistic. In the final evaluation, plaintiff's ratings did not change. Plaintiff's final prices were as follows:

Cookie, Chocolate Chip	$0.3872
Snack Bread, Wheat (1pk)	$0.3425
Snack Bread, Wheat (2Pk)	$0.4125

AR 734-38.

In the final evaluation, Sterling Foods had the highest-rated PDMs for 18 of the 20 items, including the three items on which plaintiff bid. Its ratings for those items were:

0007	Cookie, Chocolate Chip	6.71	Good
0013	Snack Bread, Wh (1Pk)	6.58	Good
0014	Snack Bread, Wh (2Pk)	6.73	Good

AR 393. For the second technical factor, Past Performance, Sterling was rated "Excellent" with "Moderate" confidence overall. AR 394. It was rated as "Excellent" for the Quality and Delivery subfactors and "Fair" for the Socioeconomic subfactor. For the third technical factor, Socioeconomic Goals, Sterling was rated first among all five offerors, owing to its 51 percent small business contracting percentage, "subcontracting to six different small business concerns, and for submitting a clear plan to gain additional small business concerns." AR 395. Sterling's Surge and Sustainment, Product Protection, and Integrated Pest Management plans were all found to be acceptable.

Sterling offered a tiered pricing plan that discounted its prices based on the percentage of the total quantity of items ordered. Discount tiers ranged from 30 percent to 100 percent. With 100 percent of the items awarded to Sterling, its discounted prices for the three items for which plaintiff also bid were:

Cookie, Chocolate Chip	$0.2833
Snack Bread, Wheat (1pk)	$0.3581
Snack Bread, Wheat (2Pk)	$0.4558

AR 398.

The Contracting Officer ("CO") recommended award of all 20 bakery items to Sterling Foods based on its high PDM scores (all were rated "Good"), "Excellent" overall rating for Past Performance, first ranking for Socioeconomic Goals, and tiered pricing. Award of all twenty items to Sterling resulted in a total price approximately 26 percent less than awarding each item to the offeror with the highest rated PDM, which would have been 18 items to Sterling and two items to a third offeror. None would have been awarded to plaintiff under either pricing scenario evaluated by DLA. The Source Selection Authority ("SSA") agreed with the CO that the combination

of pricing and technical merit made Sterling the best value to the government.[5] DLA awarded the contract for all 20 bakery items to Sterling on November 27, 2011.

Plaintiff filed a protest with the agency on November 19, 2011, and was debriefed on November 28, 2011. On January 13, 2012, DLA denied the agency-level protest. Plaintiff filed suit here on February 1, 2012. We granted Sterling's motion to intervene on February 9, 2012.

DISCUSSION

When considering motions to dismiss, we examine the pleadings and supporting documents to determine whether, as a matter of law, jurisdiction is lacking or the claimant has failed to state a claim upon which relief can be granted. Assuming we find jurisdiction and proceed to consider the merits of the protest, we treat plaintiff's motion for judgment on the administrative record as the equivalent of an expedited trial on a "paper record, allowing fact-finding by the trial court." *Bannum v. United States*, 404 F.3d 1346, 1356 (Fed. Cir. 2005). Questions of fact are resolved by reference to the administrative record. *Id.*

Our standard of review is the same as that found in the Administrative Procedures Act. 28 U.S.C. § 1491(b)(4) (2006) ("In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5."). Thus, we may set aside agency action only when we find it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2006).

Plaintiff takes a shotgun approach to her protest, attacking nearly every aspect of agency's acquisition planning, evaluation, and ranking of Plott Bakery Products. Plaintiff also alleges violations of various laws and regulations in the agency's conduct of the procurement as a whole. We do not endeavor to treat each of plaintiff's many allegations individually in this opinion. It is sufficient to address plaintiff's principal arguments and explain

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[5] The CO's pricing analysis found that award to the highest rated offeror for each PDM would result in an extra $57 million in cost. The SSA agreed with the CO that the slightly better rated PDMs for two items was not worth the $57 million premium.

why they are not the basis for a sustainable bid protest. We have considered all of plaintiff's other arguments and find them non-meritorious.

We turn first to those allegations over which we have no jurisdiction. As part of plaintiff's disagreement with the agency's handling of the procurement, she alleges that the agency violated the Sherman Antitrust Act by colluding with Sterling Foods and possibly a third offeror to exclude small businesses from participating and to create too large a market-share for Sterling Food. Putting aside that these allegations are purely conjecture and lack any support in the record, jurisdiction over claims of violation of the Antitrust Act lie exclusively in the district courts. *Hufford v. United States*, 87 Fed. Cl. 696, 703 (2009). Such allegations must be dismissed for lack of jurisdiction.[6]

A number of plaintiff's arguments are untimely and thus waived. Plaintiff disagrees with the agency's decision not to set aside the procurement for small businesses. Plaintiff cannot, however, avail herself of the opportunity to participate in a procurement and then later challenge an aspect of the procurement that was readily apparent at the time she chose to bid. Such arguments are waived. *See Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed. Cir. 2007). There is no question that, on the face of the solicitation, the procurement was not set-aside for small businesses. Accordingly, this allegation must be dismissed.

Much of plaintiff's challenge to the procurement centers on the agency's decision to award all twenty items to intervenor, an outcome of the bundling discount enabled by Amendment 1. Amendment 1, however, was issued prior to the deadline for proposals. By electing to bid on the solicitation rather than challenge the amendment, plaintiff waived the right to question that aspect of the solicitation after award.

Plaintiff also argues that the solicitation was vague with respect to how many PDMs the agency would evaluate, specifically whether the limitation of

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[6] To the extent that these and other associated allegations can be construed to allege tortious conduct, we lack jurisdiction over such claims as well. 28 U.S.C. § 1491(a) (2006) (the court's jurisdiction extends only to cases "not sounding in tort").

two applied to each manufacturer and/ or each round of negotiation.[7] If the solicitation was unclear or patently ambagious, however, an offeror must seek clarification or challenge the terms of the solicitation before submitting its bid. Having failed to do so, plaintiff has waived her challenge to those terms.

Throughout plaintiff's complaint and briefing are allegations that Plott Bakery Products was owed a special credit for each evaluation factor and subfactor by reason of the fact that Plott Bakery Products is a small disadvantaged business ("SDB"). Plaintiff cites FAR § 52.219-24 in support. In the alternative, she points to the CO's memorandum in response to her agency-level protest, in which she believes that the CO stated that a special credit was given. Seeing no evidence of it, plaintiff argues that her proposal needs to be re-evaluated and the record corrected.

Defendant argues that plaintiff has waived any such claims because the inclusion of the FAR clause relating to SDBs is inconsistent with the evaluation factors listed elsewhere in the solicitation. Defendant's belief is that this inconsistency is patent, and thus, under the standard in *Blue and Gold*, 492 F.3d at 1313, plaintiff waived any challenge to the lack of factors or subfactors giving credit to SDB offerors.

Intervenor agrees that, to the extent plaintiff is complaining of not receiving a "super overriding credit for SDB participation, the lack of such a SDB source selection factor or subfactor in the RFP was patent" and thus waived. Intervenor's Mot. for J. on the AR 14. Intervenor goes further, however, and points outs that the solicitation did contain a factor or subfactor based on SDB participation: subfactor 2.3 and factor 3, Socioeconomic Goals.

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[7] Although not necessary to our holding that plaintiff waived the argument, we also disagree that the solicitation was unclear. The solicitation granted the right to submit a second PDM if the first PDM was not rated "Good" or better and if negotiations were conducted between DLA and the offerors. If the second PDM still fell short of a "Good" rating, offerors were required to submit additional samples in order to obtain a rating of "Good." The solicitation made clear, however, that "additional PDM samples, beyond this second submission, will not be used for evaluation for award." AR 145.

FAR § 52.219-24 does not create a special credit that applies to each evaluation factor or subfactor to boost the score of SDBs in those factors. The clause states only that the "solicitation contains a source selection factor or subfactor *related to the participation* of [SDBs] . . . in the contract." AR 168 (emphasis added). We agree with intervenor that the solicitation implemented that promise. Factor 3, Socioeconomic Goals, evaluated "the offeror's Socioeconomic plan to ensure that to the maximum extent practicable, Small Business (SB), Woman Owned Small Business (WOSB) and Small Disadvantaged Business (SDB) . . . concerns are used as both suppliers and subcontractors." AR 147. The agency stated that it would evaluate "the percentage of dollars subcontracted to SB, WOSB, SDB . . . concerns" and persons "designated for handling this part of the contract." *Id.* If an offeror was itself a SDB, it was promised credit "for evaluation purposes, by adding its non-subcontracting dollars to its subcontracting dollars." *Id.* Plaintiff does not allege that the agency failed to do any of these things. Plaintiff was rated second for the Socioeconomic factor for its 71 percent small business utilization, including SDBs, and was given credit for work performed itself as a SDB. Plott was also awarded credit under the past performance subfactor 2.3, Socioeconomic Goals, for being a SDB.[8] The agency fulfilled its obligations under the cited FAR clause. To the extent that plaintiff believed that the included FAR clause should have created a separate and additional credit that applied to each factor and subfactor, that argument has been waived because it was clear on the face of the solicitation that no such credit was included in the evaluation factors or subfactors. Plaintiff nonetheless chose to bid on the contract and thus waived the argument that she was owed an overriding credit for SDB status.

The remainder of Ms. Burney's arguments amount to her disagreement with how the agency evaluated the merits of her proposal. We have reviewed the agency's evaluation of Plott Bakery Product's proposal as well as the agency's tradeoff decision. We cannot say that either were arbitrary or capricious. We give a high level of deference to an agency's evaluation of proposals and best value determinations, recognizing the agency's expertise in procurement matters and application of regulations. *See CHE Consulting, Inc. v. United States*, 552 F.3d 1351, 1354 (Fed. Cir. 2008) (citing *E.W. Bliss*

[8] The CO stated in that memorandum that plaintiff's status as a SDB was known and taken into consideration under Past Performance subfactor 2.3 and Factor 3, Socioeconomic Goals. *See* AR 1438.

Co. v. United States, 77 F.3d 445, 449 (Fed. Cir. 1996)). An agency's action will be upheld unless the protestor can show that the agency's action was without a rational basis. *Impressa Construzioni Gemo. Domenico Garufi v. United States*, 238 F.3d 1324, 1333 (Fed. Cir. 2001).

Sterling Food's PDM scores for the three items bid on by Plott Bakery Products were superior. Technical proposals were "more important than cost or price." AR 154. PDMs were the most important part of the technical proposal. We cannot say that the agency acted arbitrarily or capriciously in its evaluation of proposals. We will not substitute our judgment for that of the agency. None of Ms. Burney's disagreements with how the agency scored her technical proposal warrant the court's intervention.[9] Defendant and intervenor are entitled to judgment on the record. Plaintiff is thus not entitled to her bid preparation costs.

CONCLUSION

For the foregoing reasons, we grant defendant's motions to dismiss and for judgment on the administrative record, and we grant intervenor's motion for judgment on the administrative record. We deny plaintiff's motion for judgment on the administrative record and her application for bid preparation costs. The clerk of court is directed to enter judgment accordingly. No costs.

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ERIC G. BRUGGINK
Judge

[9] It should also be noted that plaintiff did not challenge DLA's ratings of Sterling Foods.