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Decision

Matter of: Grunley Construction Company, Inc.

File: B-407900

Date: April 3, 2013

Robert J. Symon, Esq., Lewis P. Rhodes, Esq., and Aron C. Beezley, Esq., Bradley Arant Boult Cummings LLP, for the protester.

Judith B. Kassel, Esq., Richard J. Webber, Esq., William W. Goodrich, Jr., Esq., and Patrick R. Quigley, Esq., Arent Fox LLP, for Clark Construction Group, LLC, the intervenor.

Katharine Healy, Esq., Leonard E. Lucas III, Esq., Jay Bernstein, Esq., and Kris E. Durmer, Esq., General Services Administration, for the agency.

John L. Formica, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's evaluation of the protester's proposal cannot be found reasonable where the record is inconsistent regarding the evaluation, and the agency has not explained the inconsistencies or adequately responded to the protester's assertions.
 2. Agency conducted meaningful discussions with the protester where the agency led the protester into the areas of its proposal requiring amplification or revision by informing the protester that, among other things, the protester's proposed prices appeared to be materially unbalanced and unrealistically low.
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DECISION

Grunley Construction Company, Inc., Rockville, Maryland, protests the award of a contract to Clark Construction Group, LLC, Bethesda, Maryland, under request for proposals (RFP) No. GS-11P-12-MKC-0037, issued by the General Services Administration (GSA), for the replacement of certain infrastructure at a federal office building in Washington, DC. The protester argues that the agency's evaluation of its technical proposal was unreasonable, and that the agency failed to conduct meaningful discussions.

We sustain the protest in part and deny it in part.

BACKGROUND

The RFP provided for the award of a fixed-price contract, with certain option items, for the design and construction of improvements to a federal office building in Washington, D.C.; the office building was not identified in the solicitation. The solicitation specified that award would be made to the offeror whose proposal was determined to represent the best value to the government, considering price and the following non-price evaluation factors: (1) experience on similar projects (20% relative weight), (2) past performance (15% relative weight), (3) key personnel (10% relative weight), (4) project management approach (25% relative weight), (5) apprenticeship program (10% relative weight), (6) small disadvantaged business subcontracting plan (10% relative weight), and (7) project labor agreement (10% relative weight). RFP at 32. For purposes of award, the RFP informed offerors that the results of the evaluation under the non-price factors would be considered significantly more important than price. Id.

GSA received proposals from Grunley and Clark. Agency Report (AR), Tab 19, Source Selection Evaluation Board (SSEB) Report, at 21. Following the evaluation of the initial proposals, the offerors provided oral presentations during which the offerors were asked to address three questions “to elucidate crucial information that was perceived as lacking from both offerors.” Id. at 22-23. The agency next emailed the same three questions to the offerors, and requested and received revised proposals. Contracting Officer (CO) Statement at 2; AR, Tab 19, SSEB Report, at 24.

The revised proposals were evaluated, and the agency found that Grunley’s proposal evidenced five “significant deficiencies” with regard to Grunley’s proposed prices. CO Statement at 3; AR, Tab 19, SSEB Report, at 46. Based on its concerns with Grunley’s pricing, the agency requested “bid book information” from both Grunley and Clark “in order to get a full price breakdown.” AR, Tab 20, Email from CO to Grunley (Oct. 24, 2012), at 8; CO Statement at 3. The agency’s request for bid book information stated that the agency had determined that it required “a full price breakdown and backup documentation,” and specified the information that was to be included in the offerors’ bid books. AR, Tab 20, Email from CO to Grunley (Oct. 24, 2012), at 8-9.

Upon review of Grunley’s bid book, GSA concluded that Grunley “did not understand the level of effort required for the project,” and that “Grunley’s total cost was . . . significantly less than the [Independent Government Estimate] which also suggests that Grunley may not have understood the project requirements.”¹ CO

¹ Grunley’s proposed a price of \$53,133,494 in its initial proposal, which was 10.3 percent lower than the agency’s independent government estimate of \$59,226,767. AR, Tab 19, SSEB Report, at 47.

Statement at 3-4. The agency's evaluation of the protester's price proposal also found that "Grunley [was] loading resources towards the beginning of the project and may not have priced the options for what they are worth." AR, Tab 19, SSEB Report, at 47.

GSA reopened discussions, and informed Grunley that the agency had found, from its "review of [Grunley's] price proposal and bid book information," that Grunley's "proposal contains significant deficiencies and weaknesses with regard to your pricing." AR, Tab 20, Email from CO to Grunley (Nov. 21, 2012), at 11. The agency further informed Grunley that

[i]n particular, the price proposal appears to be materially unbalanced so as to reflect an unreasonable and unrealistically low price significantly below the Government's estimate and reflects poorly upon your understanding of the solicitation's level of effort requirements.

Id. The agency requested that Grunley submit a final revised proposal, and noted that the agency intended "to make award without obtaining further revisions and without conducting further discussions." Id.

Grunley submitted its final revised proposal, and in doing so, raised its total proposed price from \$53,176,429 to \$62,768,836. Protest at 8. Grunley's proposal received an overall rating under the non-price factors of 5.2 out of 10 points.² The agency ultimately determined that Clark's higher-rated, lower-priced proposal, with an overall rating of 5.4 points at a proposed price of \$58,587,000, represented the best value, and selected Clark for award. Protest at 8; AR, Tab 21, Grunley Debriefing, at 1. This protest followed.

² The source selection plan provided for a maximum score of 10 points, with points available under each evaluation factor in accordance with that factor's weight as set forth in the solicitation. For example, the project management approach factor had a relative weight of 25 percent, with 2.5 total points available, while the experience on similar projects factor had a relative weight of 20 percent with 2 total points available. AR, Tab 19, SSEB Report, at 8. The proposals were evaluated and rated on a scale of 1 to 10 under each factor, and the rating assigned was then multiplied by the weighted value of that particular rating. As such, a rating of 6 under the experience on similar projects factor, would translate into an overall score of 1.2 for that factor (6 x 20 percent = 1.2). Id. at 8-9.

PROJECT MANAGEMENT APPROACH EVALUATION

Grunley argues that GSA's evaluation of its proposal under the project management approach evaluation factor was unreasonable. For the reasons discussed below, we agree.

The evaluation of offerors' technical proposals, including the determination of the relative merits of proposals, is primarily a matter within the contracting agency's discretion, since the agency is responsible for defining its needs and the best method of accommodating them. Highmark Medicare Servs., Inc., et al., B-401062.5 et al., Oct. 29, 2010, 2010 CPD ¶ 285 at 12. In reviewing an agency's evaluation, we will not reevaluate the proposals, but will examine the record of the evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria and procurement statutes and regulations, and to ensure that the agency's rationale is adequately documented. Carothers Constr., Inc., B-403382, Oct. 28, 2010, 2010 CPD ¶ 268 at 6.

The solicitation provided under the project management approach factor that the agency would evaluate an offeror's

understanding of the contract requirements including design phase services and the Offeror's ability to manage the construction including risk management, quality control, scheduling, protection and construction in special spaces, cost control including contingency management, change order management, and "open book accounting."

RFP at 37-38.

The agency assigned a rating of 5.9 out of 10 points to Grunley's proposal under the project management approach evaluation factor.³ In doing so, the agency evaluated Grunley's proposal as evidencing a number of "strengths," including its "familiarity with the site and their management and support staff as reflected in the details" provided. The agency also evaluated as strengths Grunley's inclusion of a "[DELETED]," both of which were considered by the agency to be "critical elements of the design phase services." AR, Tab 19, SSEB Report, at 32. The agency continued, by noting as strengths, Grunley's "proposed use of [DELETED] during

³ The SSEB Report provides that the proposals could be assigned the following numerical ratings and corresponding adjectival ratings under each evaluation factor: Exceptional (8-10 points); Very Good (6-7.9 points); Satisfactory (4-5.9 points); Marginal (2-3.9 points); and Unsatisfactory (0-1.9 points). AR, Tab 19, SSEB Report, at 9.

the design phase,” as well as Grunley’s “philosophy to be willing to work effectively and efficiently with their subcontractors, as well as other contractors on the site.” Id. Finally, the agency noted that “Grunley provided a transition plan for use with [DELETED] and addressed potential [DELETED].” Id.

The agency also evaluated Grunley’s proposal under the project management approach factor as evidencing weaknesses. Specifically, the SSEB report states as follows:

Weaknesses:

Grunley did not discuss within their revised technical proposal a shift transition plan, nor did they specifically explain how [DELETED] within their manpower-loaded schedule would operate. Grunley’s schedule did not include float, which explicitly does not take into account suspensions of work or demonstrate a proactive approach to unforeseen conditions, high project risk, change orders, and project mutability. The overall discussed approach, in conjunction with the schedule, demonstrates a more reactive- than proactive- approach to project management. This prevented Grunley from achieving a higher score on this factor.

AR, Tab 19, SSEB Report, at 32. ⁴

The protester argues that the agency’s evaluation of Grunley’s proposal under the project management approach factor was unreasonable because, contrary to the finding of the agency, its proposal did provide a shift transition plan and include float in its schedule.⁵ In support of its argument, the protester points to specific pages in

⁴ Float (sometimes referred to as “slack”) in a construction schedule is the time an activity may be delayed without impacting the overall completion time. Robert F. Cushman et al., Proving & Pricing Construction Claims, § 4.8 (2nd ed. 1996); see All State Boiler Work, Inc., B-277362, Oct. 3, 1997, 97-2 CPD ¶ 144 at 5.

⁵ The agency asserts that during its oral debriefing of Grunley it disclosed that the lack of float in Grunley’s schedule was considered a weakness. The agency thus argues that this aspect of Grunley’s protest, raised by Grunley for the first time in its comments on the agency report, is untimely. Supp. AR (Feb. 13, 2013) at 4-5. In support of its assertion regarding its disclosure of this specific weakness to Grunley during the oral debriefing, the agency has provided its debriefing outline, and the declarations of the two agency representatives that conducted the debriefing. AR, Tab 21, Debriefing Outline-Grunley, Attach. A at 4; Agency Email Submission (Mar. 8, 2013), Decl. of the CO, at 1, Decl. of the Contract Specialist, at 1.

(continued...)

its proposal addressing its shift transition plan, and points out that its schedule includes float for numerous activities. Protest at 18-19; Protester's Comments at 9-10; Protester's Supp. Comments at 7, Exh. A, Schedule, at 1-10; AR, Tab 13, Grunley's Final Revised Proposal, at 71-72.

With regard to shift transition, GSA's response to Grunley's argument notes that the SSEB also found that the protester provided a shift transition plan, and that this aspect of its proposal constituted a strength. The agency also asserts, without further explanation, that "[a]s set forth in the SSEB Report, Grunley's receipt of a score of 5.9 for [the project management approach factor] was not due to a lack of a transition plan, but rather due to the SSEB's reasonable determination that Grunley's proposal suffered from a variety of weaknesses." AR at 15.

We cannot find this aspect of the agency's evaluation reasonable. As discussed above, the record shows that while the SSEB noted as a strength that "Grunley provided a transition plan for use with [DELETED]," it also noted as a weakness that "Grunley did not discuss within their revised technical proposal a shift transition plan." AR, Tab 19, SSEB Report, at 32. Despite the fact that Grunley pursued this issue in detail during this protest, the agency has not meaningfully explained, or even acknowledged, what appears to be an inconsistency in the SSEB Report. In sum, we cannot find this aspect of the agency's evaluation of Grunley's proposal to be reasonable, given the apparent inconsistency in the record regarding this aspect of the agency's evaluation, and the agency's failure during the course of this protest to meaningfully respond to the protester's arguments.

(...continued)

In response, Grunley submitted declarations from the three representatives of its firm who had participated in the oral debriefing. Two of these individuals provide that they do not recall float being mentioned during the debriefing. Protester Email Submission (Mar. 8, 2013), Decl. of Grunley Chief Estimator, at 1; Decl. of Grunley Chief Executive Officer/Chief Financial Officer, at 1. The remaining individual recalls float generally being mentioned, but not with regard to the activities within Grunley's project schedule.

In light of the fact that the debriefing was conducted orally and was not recorded, the differing recollections as to specifically what, if anything, regarding float was mentioned at the debriefing, and our longstanding practice of resolving doubts regarding timeliness in favor of the protester, we find the protester's challenge to the propriety of the agency's determination that Grunley's schedule did not include float to be timely. See Fort Mojave/Hummel, a Joint Venture, B-296691, Oct. 18, 2005, 2005 CPD ¶ 181 at 6 n.7.

In response to Grunley's assertion that its proposed schedule included float, GSA points to a sentence in Grunley's proposal, under the section pertaining to the issue of work stoppages, which the agency contends demonstrates a lack of float. This sentence provides as follows:

Work Stoppages: In evaluating the scope of work and period of performance, the Government's and Grunley's schedule is void of any free float, or any float at all for that matter.

AR, Tab 13, Grunley's Final Revised Proposal, at 73-74. The agency concludes, based on this sentence, that "[t]he SSEB's determination that the schedule lacked float is reasonable because Grunley did not provide any float for the project as a whole and stated so in its proposal." Supp. AR (Feb. 13, 2013) at 5.

Again, despite the fact that the protester has pointed out that the 10-page schedule in its proposal included float in numerous instances, the agency has made no effort to further explain this aspect of its evaluation. Protester's Comments, Attach. A, Schedule, at 1-10. That is, the agency, in responding to the protester's arguments, has simply ignored the fact that the protester's schedule included float in numerous instances, and has made no effort to explain why the sentence quoted above, in context, was found by the agency to nullify the numerous instances of float in the protester's schedule. While we recognize that the portion of Grunley's proposal, cited above, raises a question as to whether its proposal was inconsistent with regard to float, we cannot find the agency's assessment of a weakness because "Grunley's schedule . . . did not include float," to be reasonable, given the agency's failure to acknowledge or fully respond to the fact that the protester's schedule clearly included numerous instances of float. AR, Tab 19, SSEB Report, at 32. On this record, we sustain the protest.

MEANINGFUL DISCUSSIONS

Next, Grunley argues that GSA's discussions regarding its concerns with the protester's proposed price were not meaningful. The protester points out that, as mentioned above, the agency's evaluation of Grunley's initial proposal identified five specific items of concern regarding Grunley's proposed price. The protester argues that the agency was thus required to specifically raise each of these items during its discussions with Grunley. Grunley contends that had the agency provided meaningful discussions, Grunley would have provided an explanation for certain of its proposed pricing rather than raising its price in its final revised proposal (with its proposal thus remaining lower in price than Clark's), and that the agency's concerns "would have very likely been ameliorated." Protest at 12.

In negotiated procurements, whenever discussions are conducted by an agency, the discussions are required to be meaningful, equitable, and not misleading. The Communities Group, B-283147, Oct. 12, 1999, 99-2 CPD ¶ 101 at 4. To satisfy the

requirement for meaningful discussions, the agency need only lead an offeror into the areas of its proposal requiring amplification or revision; all-encompassing discussions are not required, nor is the agency obligated to “spoon-feed” an offeror as to each and every item that could be revised to improve its proposal. ITT Fed. Sys. Int’l Corp., B-285176.4, B-285175.5, Jan. 9, 2001, 2001 CPD ¶ 45 at 7. The scope and extent of discussions with offerors are matters of a CO’s judgment. Federal Acquisition Regulation § 15.306(d)(3).

Here, as set forth above, the agency made Grunley aware of its concerns with its proposed pricing. That is, despite Grunley’s view to the contrary, the agency was not required to identify the specific areas where Grunley’s prices appeared too low. See WorldTravelService, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 6. Rather, the agency was only required to lead Grunley into the area of the agency’s concern. GSA’s statement, as set forth above, that Grunley’s “unrealistically low price significantly below the Government’s estimate . . . reflects poorly upon your understanding of the solicitation’s level of effort requirements,” AR, Tab 20, Email from CO to Grunley (Nov. 21, 2012), at 11, met the agency’s obligation to provide meaningful discussions.⁶ See WorldTravelService, supra.

⁶ The protester also argued, in a supplemental filing with our Office, that the agency’s discussions, wherein Grunley was informed that its price was “unrealistically low,” were misleading, because the solicitation did not expressly provide for the consideration of whether proposed prices were realistic. The protester’s argument concerning the agency’s evaluation of the realism of the protester’s price, which was raised for the first time more than two months after Grunley’s debriefing and one month after its receipt of the agency report, is untimely. Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2013).

Alternatively, the protester requests that we consider this aspect of its protest as a “significant issue” exception to the timeliness requirements under our Bid Protest Regulations, 4 C.F.R. § 21.2(c). Under this exception, our Office may consider an untimely protest that raises issues significant to the procurement system that have not been considered previously; however, in order to prevent the timeliness rules from becoming meaningless, this exception is rarely implemented. DePaul Hosp. & The Catholic Health Assoc. of the U.S., B-227160, Aug. 18, 1987, 87-2 CPD ¶ 173 at 5. As noted by the parties here, we have considered whether an agency acted properly in considering the realism of proposed prices in a number of decisions. See Emergint Techs., Inc., B-407006, Oct. 18, 2012, 2012 CPD ¶ 295 at 5-7; Goel Servs., Inc. in assoc. with Grunley Constr. Co., Inc., B-404168, Jan. 12, 2011, 2011 CPD ¶ 59 at 7-8; Milani Constr., LLC, B-401942, Dec. 22, 2009, (continued...)

CONCLUSION AND RECOMMENDATION

We sustain the protest in part and deny it in part. We recommend that the agency reevaluate proposals, consistent with this decision, and make a new source selection. In the event Grunley's proposal is found to represent the best value to the government, Clark's contract should be terminated and the contract awarded to Grunley in accordance with the terms of the RFP. We also recommend that the agency reimburse Grunley for its costs of filing and pursuing its protest challenging the evaluation of its proposal as discussed above, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Grunley's certified claim for costs, detailing the time expended and costs incurred, must be submitted directly to the GSA within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel

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2010 CPD ¶ 87 at 4-6. Accordingly, we decline to find that a significant issue is present here.