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# Decision

**Matter of:** Bannum, Inc.

**File:** B-411074.5

**Date:** October 10, 2017

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## DIGEST

Protest challenging agency's decision to exclude protester's proposal from the competition is denied where the record shows that the agency's request for updated right-to-use documentation was unobjectionable, and the protester's failure to provide the documentation supported the exclusion of the proposal.

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## DECISION

Bannum, Inc., of Odessa, Florida, protests its exclusion from the competitive range under request for proposals (RFP) No. RFP-200-1244-WS, which was issued by the Department of Justice, Federal Bureau of Prisons (BOP), for residential reentry center and home confinement services. Bannum objects to the agency's request for updated right-to-use documentation, and maintains that its rejection on that basis was improper.

We deny the protest.

## BACKGROUND

The solicitation, which BOP issued more than 3 and a half years ago, sought proposals for the award of a fixed-price indefinite-delivery, indefinite quantity (IDIQ) contract for a 1-year base period and four 1-year options. Agency Report (AR), Tab 3, RFP, at 3-4, 150, 222. The awardee was to provide residential reentry center and home

confinement services for federal offenders in several parishes in Louisiana. Id. at 4. Pursuant to the RFP, award was to be made to the responsible offeror whose proposal was determined to be in the best interest of the government, considering past performance, technical/management, and price. Id. at 227. The RFP identified six technical/management evaluation factors, including a site location factor that was comprised of two subfactors: site validity and suitability; and community relations program. Id. at 229.

With respect to the site validity and suitability subfactor, the RFP explained that the agency would evaluate the offeror's proposed site location and consider the validity of the offeror's right-to-use and zoning approval documentation. Id. The assessment was to consider both the "legality of the instrument and the nature of the interest."<sup>1</sup> Id. In addition, the RFP required that the contractor's facility had to be "fully operational and ready for performance to begin within 120 days after the date of contract award." Id. at 150.

BOP received proposals from Bannum and Volunteers of America Greater New Orleans, Inc. (VOA) in June 2014. Following the evaluation of proposals, the contracting officer, who was also the source selection authority, selected Bannum's \$12.2 million proposal for award in January 2015.<sup>2</sup> Contracting Officer's Statement (COS) at 1. Thereafter, VOA protested the award decision to our Office. AR, Tab 17, VOA Protest (B-411074), Jan. 26, 2015, at 1-14. In response, BOP advised our Office that it intended to take corrective action, which was to include a full reevaluation of proposals and a new source selection decision. Memorandum of Law (MOL) at 3. BOP's corrective action further provided that, if necessary, it would cancel the award, conduct another round of discussions, and request final proposal revisions. Id. Our Office subsequently dismissed VOA's protest as academic.<sup>3</sup> Volunteers of Am. Greater New Orleans, Inc., B-411074, Feb. 26, 2015 (unpublished decision).

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<sup>1</sup> Acceptable forms of right-to-use documentation included deeds, leases, bills of sale, options to lease, options to buy, contingency leases, or contingency deeds. RFP at 224.

<sup>2</sup> BOP established a competitive range and conducted two rounds of discussions in August 2014. AR, Tab 10, Discussion Notice (DN) No. 1, at 1-2; Tab 12, DN No. 2, at 1-2. The agency then requested and received final proposal revisions (FPRs) in September 2014. AR, Tab 14, Request for FPRs, at 1-2.

<sup>3</sup> Bannum, as the intervenor in VOA's protest, filed a protest against BOP's corrective action and requested that our Office reconsider our decision dismissing VOA's protest. AR, Tab 19, Bannum Protest & Request for Recon., March 4, 2015, at 1-12. Our Office denied Bannum's Protest and Request for Reconsideration in June 2015, finding that the contracting officer's concerns regarding the procurement were reasonable and the agency's decision to take corrective action was unobjectionable. Bannum Inc. - Protest & Recon., B-411074.2, B-411074.3, June 12, 2015, 2015 CPD ¶ 231.

In July 2015, as part of the corrective action being taken, BOP terminated Bannum's contract.<sup>4</sup> COS at 2; AR, Tab 21, Termination for Convenience, July 30, 2015, at 1-2.<sup>5</sup> In November 2015, the contracting officer sent discussion notices to Bannum and VOA and requested and received a second round of FPRs in December 2015. AR, Tab 25, DN No. 3, at 1-2; Tab 27, Second Request for FPR, at 1-2; Tab 28, Bannum Second FPR, at 1-3.

As part of the reevaluation of proposals, the contracting officer reviewed Bannum's proposed facility information. COS at 2. The contracting officer explains that he noticed that Bannum's right-to-use documentation was an option to lease agreement that permitted the owner of the property being proposed for performance to sell or lease it to another party. Id.; see AR, Tab 9, Bannum Proposal, at 11-13. More specifically, the option to lease agreement provided as follows:

Lessee [Bannum] and Lessor [Landlord] both acknowledge and agree to allow the Lessor to continue to market the property for sale and/or for lease. In the event Lessor receives another offer to purchase or to lease, Lessee will have 72 hours, after notification from Lessor, to exercise their right of first refusal.

\* \* \* \* \*

Awarding of Contract: This option to lease and the subsequent lease agreement are contingent upon Bannum, Inc. being awarded a government contract . . . Lease shall run concurrent with BOP contract. Lessee expects to know whether or not they have been awarded the contract by November 1, 2014. Upon the award of the contract the Lessee and Lessor shall execute a lease agreement with the following items outlined in this option agreement.

AR, Tab 9, Bannum Proposal, at 12. The option to lease agreement further provided that if Bannum's contract was "terminated for any reason . . . then the lease shall terminate on the date Bannum, Inc.'s performance ceases." Id. at 13.

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<sup>4</sup> Bannum protested the agency's decision to terminate its contract. AR, Tab 22, Bannum Protest, Aug. 10, 2015, at 1-5. Our Office dismissed the protest on the basis that the filing failed to establish a valid basis for challenging the agency's actions; Bannum had failed to demonstrate that any violation of procurement statute or regulation had occurred. Bannum Inc., B-411074.4, Nov. 2, 2015 (unpublished decision).

<sup>5</sup> Because Bannum declined to sign a bilateral modification to effect the termination, BOP ultimately issued a unilateral modification terminating the contract in November 2015. COS at 2; AR, Tab 24, Termination for Convenience, Nov. 5, 2015, at 1-2.

In May 2017, the contracting officer again reopened discussions.<sup>6</sup> Among other things, the contracting officer expressly requested that Bannum provide updated right-to-use documentation. AR, Tab 30, DN No. 4, at 1-2. In response, Bannum pointed out that it had signed an option to lease agreement, as well as a lease agreement, and that the agreements were contingent on Bannum being awarded a contract. AR, Tab 31, Bannum Response to DN No. 4, at 1. Bannum maintained that the “contingency remains open.” Id. Bannum further explained that the documentation it submitted to BOP was in “full force and effect” since proposals were still being evaluated and “no formal final decision has been made.” Id. Notwithstanding this representation, Bannum also explained that it was contacting the owner of the property to reconfirm. Id. at 2. Bannum did not provide any updated right-to-use documentation.

The contracting officer then researched the property online, which revealed that Bannum’s proposed property had been sold to a new owner in October 2016. COS at 3; see AR, Tab 29, The Times Picayune, New Orleans Real Estate Transfers for Oct. 8-14, 2016, at 2. The contracting officer’s internet search further revealed that a Cabinets to Go retail store appeared to be operating out of the property Bannum proposed for performance. COS at 3; see AR, Tab 32, Screenshot of Cabinets to Go Website, at 2; see also Intervenor’s Comments, exh. 1, Photographs of Bannum Site Location, at 1 (depicting a Cabinets to Go retail store at Bannum’s proposed site location on Aug. 15, 2017). In light of this, and given that Bannum’s option to lease agreement stated that the lease would cease if Bannum’s contract was terminated, the contracting officer provided Bannum with yet another discussion notice on the topic.<sup>7</sup> The contracting officer pointed out what the internet research revealed and, again, requested updated right-to-use documentation. AR, Tab 33, DN No. 5, at 1-2. The contracting officer warned Bannum that “[f]ailure to provide the requested documentation may result in Bannum being removed from the Competitive Range.” Id. at 2.

Once again, Bannum did not provide the requested updated right-to-use documentation. Instead, Bannum complained that the contracting officer’s request appeared to be

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<sup>6</sup> In explaining the time lapse between the decision to take corrective action and the reopening of discussions, the contracting officer explained that due to “staffing constraints,” he was “assigned a heavy workload and was working on this procurement along with the many others . . . .” COS at 2. He further explained that residential reentry center procurements “can take a lot of time” because of their “technical nature and the number of procurements or contracts each Contracting Officer is working on at one time.” Id.

<sup>7</sup> In addition, the contracting officer was aware of two other BOP procurements where Bannum proposed a specific location for performance, but subsequently lost the right to use the site due to the property being sold to a third party. Bannum had failed to inform BOP that it no longer could use the property for performance until discussions were reopened. COS at 2-3; see Bannum, Inc., B-414336, May 15, 2017, 2017 CPD ¶ 170.

“extremely hostile in nature, argumentative,” and in violation of procurement regulations. AR, Tab 34, Bannum Response to DN No. 5, at 1. Over several pages, Bannum further complained that BOP was trying to “eradicate” Bannum’s contract and steer the work to VOA. Id. at 1-4. Bannum also represented that its lease was still in effect because it was contingent on the award of a contract pursuant to the RFP. Id. at 4.

For a third time, the contracting officer requested updated right-to-use documentation from Bannum. AR, Tab 35, DN No. 6, at 1-2. Bannum again accused the contracting officer of being hostile and argumentative and attempting to improperly exclude Bannum from the competition. AR, Tab 36, Bannum Response to DN No. 6, at 1-2. Bannum also responded that it had not received any notice of termination of the lease from the property owner and that that it still had a “valid and binding lease.” Id. at 2. More specifically, Bannum cited to portions of a purported lease agreement that provided that the agreement would be binding on successors. Id. Bannum did not provide the lease agreement to the contracting officer, nor any other updated right-to-use documentation.<sup>8</sup>

By letter of June 23, the contracting officer excluded Bannum from the competitive range because the firm failed to provide updated right-to-use documentation. AR, Tab 39, Notice of Exclusion from Competitive Range, at 2-3. Bannum requested and received a written pre-award debriefing on July 7. AR, Tab 42, Bannum Debriefing, at 1-2. This protest followed.

## DISCUSSION

Bannum protests its exclusion from the competitive range. The protester maintains that the solicitation did not contemplate the submission of updated right-to-use documentation, and that the contracting officer’s request for such documentation reflects, in essence, bad faith. Protest at 4-5. Bannum also argues that it still has a valid lease for the property proposed for performance.<sup>9</sup>

The agency responds that its request for updated right-to-use documentation from Bannum was within its discretion under the solicitation, and the requests were particularly reasonable under the circumstances here. In addition, the agency maintains that despite three requests for the updated information, Bannum’s failure to provide the documents justified the exclusion of Bannum’s proposal. We agree.

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<sup>8</sup> On June 2--the same day it responded to discussion notice No. 6--Bannum filed a protest with BOP based on the contracting officer’s allegedly “improper efforts to exclude Bannum from the . . . procurement.” AR, Tab 37, Bannum Agency-Level Protest, at 1-3. BOP subsequently denied the protest on June 22. AR, Tab 38, BOP Decision on Bannum Protest, at 1-3.

<sup>9</sup> The protester raises arguments that are iterations of, or in addition to, its primary objections. We have considered them all and find none provides a basis to sustain the protest.

Where a protest challenges an agency's evaluation of an offeror's proposal and its decision to exclude a proposal from a competitive range, we first review the propriety of the agency's evaluation of the proposal, and then turn to the competitive range determination. PTSI Managed Servs. Inc., B-411412, July 20, 2015, 2015 CPD ¶ 236 at 3. In doing so, our Office does not conduct a new evaluation or substitute our judgment for that of the agency; rather, we examine the record to determine whether the agency's judgment was reasonable and in accord with the solicitation's evaluation criteria. Beretta USA Corp., B-406376.2, B-406376.3, July 12, 2013, 2013 CPD ¶ 186 at 5. In this regard, contracting agencies are not required to retain in the competitive range proposals that are not among the most highly rated or that the agency otherwise reasonably concludes have no realistic prospect of being selected for award. Federal Acquisition Regulation (FAR) § 15.306(c); Wahkontah Servs., Inc., B-292768, Nov. 18, 2003, 2003 CPD ¶ 214 at 4. Proposals with significant informational deficiencies may be excluded, whether the deficiencies are attributable to omitted or merely inadequate information addressing fundamental factors. ABM Gov't Servs., LLC, B-410991.2, Apr. 17, 2015, 2015 CPD ¶ 130 at 5; American Med. Depot, B-285060 et al., July 12, 2000, 2002 CPD ¶ 7 at 6-7.

Here, we have no basis to question the agency's actions. In this respect, the RFP required the agency to assess the validity of the offeror's right to use the proposed site location, as well as permitted the agency to conduct discussions with offerors. RFP at 225, 229. As noted above, the option to lease agreement that Bannum submitted in its proposal was contingent on the firm being awarded a contract under this solicitation; would cease in the event Bannum's contract was terminated; and permitted the landlord to continue to market the property for sale or lease. AR, Tab 9, Bannum Proposal, at 12-13. Although Bannum was awarded the contract in January 2015, the agency subsequently terminated the contract, consistent with its decision to reevaluate proposals and issue a new award decision. COS at 1-2. In addition, public records showed that the property had been sold and a Cabinets to Go retail store was operating out of the site at the time of the contracting officer's review. See Intervenor's Comments, exh. 1, Photographs of Bannum Site Location, at 1.

On this record, we agree with the agency that later information and events raised "substantial concerns" and called into question the validity of Bannum's right to use the proposed site location. See MOL at 9-10. Given this, we find unobjectionable the agency's request that Bannum provide updated right-to-use documentation. Despite its protest arguments, Bannum cites to no provision in the RFP, or other authority, to support its claim that the agency was precluded from seeking the requested updated documentation.

In addition, given that the RFP contemplated the evaluation of an offeror's right to use the proposed site location, and because Bannum failed to comply with the contracting officer's reasonable requests for updated right-to-use documentation--all three of them--we see nothing improper with the agency's decision to exclude Bannum from the competition. In this respect, it is an offeror's responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates compliance

with the solicitation and allows a meaningful review by the procuring agency. Mike Kesler Enters., B-401633, Oct. 23, 2009, 2009 CPD ¶ 205 at 2-3. Despite multiple requests from the contracting officer, Bannum's agency-level protest, and a protest with our Office, Bannum has still yet to produce any updated right-to-use documentation to support its contention that its exclusion was unreasonable. Accordingly, the record supports the agency's decision to exclude Bannum from the competition. See Bannum, Inc., B-414336, May 15, 2017, 2017 CPD ¶ 170 (finding reasonable the agency's rejection of Bannum's proposal where the agency discovered that the facility proposed by Bannum to perform the contract was no longer available due to it having been sold to a third party more than a year prior).

Lastly, despite its contentions of agency animus, Bannum has failed to provide sufficient support for its allegations that the contracting officer acted in bad faith or was otherwise biased against the protester. In this respect, government officials are presumed to act in good faith, and we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8. Where a protester alleges bias, it must not only provide credible evidence clearly demonstrating bias against the protester or in favor of the awardee, but must also show that this bias translated into action that unfairly affected the protester's competitive position. Global Integrated Sec. (USA) Inc., B-408916.3 et al., Dec. 18, 2014, 2014 CPD ¶ 375 at 14. Bannum has not met that threshold here. Regardless, even if we were to assume that there may have been some personal animus or bias towards Bannum on the part of some agency personnel, this does not provide a basis to conclude that the exclusion of the firm's proposal was improper, where, as here, the exclusion was otherwise reasonably justified. See Starry Assocs., Inc., B-410968.3, Dec. 23, 2015, 2015 CPD ¶ 401 at 6.

The protest is denied.

Susan A. Poling  
General Counsel