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441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Brown Developments, LLC--Costs

File: B-419279.2

Date: April 7, 2021

Sigmund D. Schutz, Esq., and Sara N. Moppin, Esq., Preti, Flaherty, Beliveau & Pachios, LLP, for the protester.
Eric N. Weber, Esq., and Nancy O'Connell, Esq., General Services Administration, for the agency.
Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Reimbursement of protest and proposal preparation costs is not recommended where underlying protest was not clearly meritorious, and thus the agency's corrective action was not unduly delayed.

DECISION

Brown Developments, LLC, a small business located in Houlton, Maine, requests that our Office recommend that the General Services Administration (GSA) pay the firm the reasonable costs of filing and pursuing its protest. Brown's protest challenged the award of a lease to Terrance Beals pursuant to request for lease proposals (RLP) No. 9ME2126, issued by GSA for garage and office space within Houlton, Maine, for use by the Department of Homeland Security, Customs and Border Patrol (CBP). In addition, the protester requests that we recommend the agency pay proposal preparation costs. We dismissed the underlying protest as academic after GSA stated that it would take corrective action in response to the protest by reevaluating the award decision and making a new source selection decision.

We deny the request.

BACKGROUND

On October 21, 2019, GSA posted a request for interest on the Federal Business Opportunities website regarding a lease requirement for CBP for garage and office space in Houlton, Maine. Agency Resp. at 2. The agency determined that two responding parties, Beals and Brown, had properties capable of meeting the

requirement. *Id.* On January 21, 2020, the agency provided both offerors with a copy of the RLP. *Id.* The RLP included requirements for office and related space, warehouse storage, parking spaces, and specialized shop space for the storage of lumber, metal, building supplies, all-terrain vehicles, and snowmobiles. *Id.* at 3.

Both offerors submitted proposals in response to the RLP with Beals proposing to use a 0.73 acre property located within the confines of the Houlton International Airport in Houlton, Maine.

On March 18, 2020, GSA sent Beals a letter stating that the agency could not enter into a lease with Beals due to a restrictive covenant in Beals's deed that states "[u]se of this property shall be restricted to aviation and aviation related purposes only." Brown Resp., ex. 3, Mar. 18, 2020 Email at 1. On March 19, Beals responded to this letter by providing a notarized letter from the town manager for the Town of Houlton, which stated that:

> The Town of Houlton will not consider the lease between Terrance E. Beals and General Services Administration pursuant to Solicitation 9 ME 2126 to be a violation of any deed restriction set forth in the deed from the Town of Houlton to Terrance E. Beals dated November 3, 2010 and recorded in the Southern Aroostook Registry of Deed in Vol. 4881, Page 322 for which the Town would undertake any enforcement actions.

Brown Resp., ex. 8, Town Manager Letter at 1.

On September 8, the agency responded by letter to the town manager, stating that GSA's legal counsel looked at the town charter but "was unable to find in the [c]harter the express authority to allow for this approval without a motion to and a vote in favor of a resolution by the Town Council for this to be issued." Brown Resp., ex. 4, September 8, 2020 Email at 1. Accordingly, GSA asked the town council to respond either by a motion and a vote, or by a written representation signed by the town council president, that the town manager is "delegated the unilateral authority to make the approval as represented in your letter dated March 19, 2020." *Id.* In a subsequent phone conversation, the town manager assured GSA's lease contracting officer that approval by the town council was not necessary, an assurance GSA accepted. Contracting Officer's Statement (COS) at 3.[1]

On October 14, GSA's lease contracting officer sent an email to a Federal Aviation Administration (FAA) compliance and land use specialist for the New England region regarding the Beals property, stating:

> I left you a voice message a few minutes ago on a verification I believe you provided when we spoke on Sept 15. It is related to the US Gov't leasing this

[1] References to the COS or to the agency report (AR) refer to documents provided in the underlying protest, B-419279.1.

> building for non-aviation based business (US Customs and Border Protection) - CBP). It is my understanding from the call that the FAA has no issue with this type of use and that there are no aviation use restrictions prohibiting our occupancy to conduct the mission of the CBP.

AR, Tab 6, October 14, 2020 Email at 2.[2] In response, the FAA compliance and land use specialist stated:

> You are correct, the hangar is private property and thus, can be used for non-aviation purposes. CBP will need to drive across airport property as the owner now does. We would ask that the owner and CBP work with the airport and Town to delineate the access points and route. That way there will be no conflicts with aviation uses.

Id. at 1.

On September 23, GSA awarded Lease LME04033, with a total value of $4,969,725, to Beals. COS at 6.

On October 7, Brown timely filed a protest of the lease award with our Office (B-419279.1). The protester alleged that the awardee submitted a technically unacceptable proposal due to the deed restriction, among other reasons, and that GSA conducted an unreasonable present value analysis of proposals.

Following extensions of the applicable deadline, GSA submitted its agency report on November 16 at 4:44 p.m. Approximately three hours later, an attorney from the FAA's Environmental Law Field Branch emailed Beals, Brown and GSA advising that, according to his initial due diligence review, the Beals property is "encumbered by the following permanent restrictive covenant . . . '[u]se of this property shall be restricted to aviation and aviation purposes only.'" Agency Resp., attach. 1, Nov. 16, 2020 Email at 1. The FAA attorney requested additional documents and information from the parties and stated that the FAA "has responsibility for ensuring compliance with applicable grant assurances and other related legal requirements [and] reserves its obligations to conduct applicable inspections and take enforcement action, to include withholding discretionary grant funds, if deemed appropriate." *Id.* at 2.[3]

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[2] This email was part of an ongoing email discussion between these two individuals, dating back to September 15, regarding the Beals property.

[3] In subsequent communications, the FAA adopted the position that the Town of Houlton should enforce the deed restriction and take actions to ensure that Beals's lease with GSA is terminated. *See*, *e.g.*, Protester's Supp. Info., attach 4, March 25, 2021 FAA Corrective Action Letter at 1. In turn, the Town of Houlton has stated that, while it initially relied on communications from the FAA's compliance and land use specialist, it is now taking actions to enforce the covenant due to the FAA's communications expressing the FAA's view that the lease violates the restrictive

Two days after the November 16 FAA letter, the agency notified our Office that it would take corrective action and requested that we dismiss the protest as academic. On November 23, our Office dismissed the protest as academic based on the agency's decision to reevaluate the award decision and make a new source selection decision.

This request for a recommendation on the reimbursement of protest and proposal preparation costs followed.[4]

DISCUSSION

The protester contends that the agency unduly delayed taking corrective action in response to Brown's clearly meritorious protest challenge. In this respect, the protester asserts that a reasonable inquiry into the merits of Brown's protest would have revealed that the deed for the Beals property does not allow GSA's proposed non-aviation use, meaning that the property should not have been offered and GSA should not have found the proposal technically acceptable. The protester also argues that Beals could not provide roadway access to the property to GSA due to an FAA-approved "Through the Fence" agreement between Beals and the Town of Houlton, which provided for access to be used for aviation purposes only. Protester Resp. at 2.

In support of these arguments, the protester notes that the agency was on notice of the restrictive covenant, having emailed Beals in March 2020 to advise the firm that GSA could not enter into the lease due to the restriction. Brown Resp., ex. 3, Mar. 18, 2020 Email at 1. In response to this email, Beals provided a notarized letter from the Houlton town manager. As the protester points out, GSA reviewed this letter and advised the town manager that "GSA legal counsel looked at the Town Charter and was unable to find in the Charter the express authority to allow for this approval without a motion to and a vote in favor of a resolution by the Town Council for this to be issued." Brown Resp., ex. 4, September 8, 2020 Email at 1. The protester further argues that FAA's efforts to enforce the restrictive covenant, which began on November 16, establish the unreasonableness of the agency's initial determination that the restrictive covenant posed no problem to GSA's ability to use the Beals property.

The agency argues that its initial determination on these issues was reasonable. In this respect, GSA asserts that it flagged the issue of the restrictive covenant in Beals's deed, but then reasonably relied on representations from the Houlton town manager and the FAA's compliance and land use specialist that the property could nonetheless be used for the GSA lease and that there would be roadway access to the property.

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covenant on the property. Protester's Supp. Info, attach. 2, Town of Houlton Proposed Corrective Action Plan at 1.

[4] On April 1, 2021, the agency notified our Office that it had completed the corrective action and that Brown had been advised that it was the awardee.

Our Bid Protest Regulations, 4 C.F.R. § 21.8(e), provide we may recommend that an agency pay protest costs where the agency decides to take corrective action in response to the protest. We will make such a recommendation, however, only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. *CSL Birmingham Assocs.; IRS Partners--Birmingham--Entitlement to Costs*, B-251931.4, B-251931.5, Aug. 29, 1994, 94-2 CPD ¶ 82 at 3. We consider a protest to be clearly meritorious when a reasonable agency inquiry into the protester's allegations would show that the agency lacked a defensible legal position. *First Fed. Corp.--Costs*, B-293373.2, Apr. 21, 2004, 2004 CPD ¶ 94 at 2.

Here, the protester argues that the restrictive covenant means that Beals cannot successfully perform the lease, and that Beals's proposal violated a required solicitation warranty that the agency would have the full use of the premises in accordance with the provisions of the lease. In the latter respect, the protester argues that the deed restriction violated the warranty requirement found at 48 C.F.R. § 552.270-23,[5] which was incorporated in the RLP. Under 48 C.F.R. § 552.270-23, the lessor warrants that it "holds such title to or other interest in the premises and other property as is necessary to the [g]overnment's access to the premises and full use and enjoyment thereof in accordance with the provisions of this lease."

Because this challenge primarily relates to whether Beals can successfully perform the contract, it relates to a matter of responsibility. *See Western Alternative Corrections, Inc.,* B-409315, B-409315.2, Mar. 10, 2014, 2014 CPD ¶ 94 at 6 (finding that zoning law issues gave rise to a matter of responsibility). An agency's affirmative determination of a contractor's responsibility will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied. *Id.* A definitive responsibility criterion is a specific and objective standard, qualitative or quantitative, that is established by a contracting agency in a solicitation to measure an offeror's ability to perform a contract. *The Mary Kathleen Collins Trust*, B-261019.2, Sept. 29, 1995, 96-1 CPD ¶ 164 at 3. In our view, the above warranty requirement meets the definition of a definitive responsibility criterion.

Where a protester alleges that a definitive responsibility criterion has not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting official reasonably could conclude that the criterion has been met. *Carter Chevrolet Agency, Inc.*, B-270962, B-270962.2, May 1, 1996, 96-1 CPD ¶ 210 at 4. Generally, a contracting agency has broad discretion in determining whether offerors meet definitive responsibility criteria since the agency must bear the burden of any difficulties experienced in obtaining the required performance. *Id.* The relative quality of the evidence is a matter for the judgment of the contracting officer, as is the determination of the extent to which an investigation of such

[5] The protester misidentifies this provision as 48 C.F.R. § 552.270-11, which was also incorporated in the RLP. Based on the language of the provision, as quoted in the protest, the protester meant to cite 48 C.F.R. § 552.270-23.

evidence may be required. *Motorola, Inc.*, B-234773, July 12, 1989, 89-2 CPD ¶ 39 at 5.

Here, we find the agency's initial reliance on the representations made by the Houlton Town Manager and the FAA compliance and land use specialist was reasonable, notwithstanding the fact that after GSA's submission of the agency report both the FAA and the Town of Houlton indicated that the lease violates the restrictive covenant. In this respect, we find that GSA properly flagged the issue and reasonably investigated it. For example, GSA received and relied upon a notarized letter from the Houlton Town Manager, which stated that the town would not consider the lease to be a violation of the deed restriction. When GSA investigated the authority for this representation, the Town Manager told it that a resolution from the town was not needed. COS at 2. With respect to the FAA, GSA had email and telephone communications with the regional compliance and land use specialist regarding the property and was told that the property was private property and could be used for non-aviation purposes and that GSA would be able to access it. AR, Tab 6, October 14 Email at 1.

While the protester contends that it was unreasonable for GSA to rely on these representations because they did not constitute legal waivers, we note that the quality of the evidence relied upon and the extent of the investigation of such evidence are matters for the judgment of the contracting officer. *See Motorola, Inc.*, *supra*. Here, the representations provided GSA with a reasonable basis to believe that the deed restriction would not impose an obstacle to Beals's ability to meet the requirements of the lease. Although subsequent events now call into question whether Beals actually can meet the lease requirements, these events occurred after these initial representations. In short, GSA made a reasonable determination based on the representations made to it at the time.

Accordingly, we conclude that GSA's legal position was reasonable at the time of Brown's initial protest filing. As a result, we do not recommend that Brown be reimbursed its protest costs as its protest was not clearly meritorious at the time it was filed.[6]

The request for a recommendation on the reimbursement of costs is denied.

Thomas H. Armstrong
General Counsel

[6] Similarly, we do not find that the protester is entitled to receive its proposal preparation costs. In any event, we note that such a recommendation would not be appropriate where, as here, GSA advised that, following the completion of the agency's corrective action, Brown was the awardee. *See AeroSage, LLC--Costs*, B-417803.2, Oct. 29, 2019, 2019 CPD ¶ 368 at 4 (our Office generally recommends recovery of bid and proposal preparation costs only in instances where the protester has been unreasonably excluded from competition and where other remedies as enumerated in our regulations are not appropriate).