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Decision

Matter of: Metro Offices, Inc.

File: B-408477; B-408477.2

Date: September 27, 2013

Terrence M. O'Connor, Esq., and Sara Dajani, Esq., Berenzweig Leonard, LLP, for the protester.

Bryan R. King, Esq., General Counsel, P.C., for Cross Acquisitions, LLC, the intervenor.

Krishon Gill-Edmond, Esq., William Sexton, Esq., and Barbara Stuetzer, Esq., Department of Veterans Affairs, for the agency.

Nora K. Adkins, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that the agency improperly evaluated the awardee's building class status is denied where the record shows that the agency's evaluation was reasonable and consistent with the terms of the solicitation.
 2. Protest alleging that the agency knowingly awarded a contract to a company substantially owned or controlled by a government employee in violation of Federal Acquisition Regulation § 3.601 is denied where the record shows that the contracting officer did not know of the facts alleged by the protester until after award.
 3. Protest challenging the agency's selection decision is denied where the record shows that the agency's evaluation was reasonable and consistent with the solicitation's best value evaluation scheme.
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DECISION

Metro Offices, Inc., of Reston, Virginia, protests the award of a contract to Cross Acquisitions, LLC, of Frederick, Maryland, issued by the Department of Veterans Affairs (VA), under request for proposals No. VA798-13-R-0059 for office hoteling

services in Frederick, Maryland.¹ The protester contends that the agency failed to evaluate the awardee's building class status consistent with the terms of the solicitation, awarded the contract to a company owned or controlled by a government employee in violation of Federal Acquisition Regulation (FAR) § 3.601, and unreasonably concluded that Cross was the best value offeror.

We deny the protest.

BACKGROUND

The RFP, issued on March 22, 2013 as a commercial item solicitation, contemplated the award of a fixed-price contract for a base year and two 12-month and four 6-month options. RFP 8-9. The solicitation sought a turnkey hoteling services solution consisting of "Class A" office space, within five miles of the Frederick County courthouse, to include appropriately equipped office and common areas, conference facilities, and all standard maintenance and infrastructure support services. Id. at 9.

The RFP stated that the award would be issued on best-value basis considering the following four factors, which were listed in descending order of importance: (1) technical approach, (2) past performance, (3) socioeconomic considerations, and (4) price. Id. at 40. For purposes of award, the non-price factors, when combined, were equal in importance to price. Id.

On April 22, the VA received proposals in response to the solicitation from two offerors, Metro and Cross. Based upon the agency's evaluation of initial offers, the agency included both offerors in the competitive range, and opened discussions on May 24. The offerors provided written responses to the agency's discussion questions, and a final price proposal, on June 3.

The agency's final evaluation of the proposals resulted in the following ratings:

¹ Hoteling is an office services solution in which a contractor provides office space, ancillary services, and furnishings for the user to perform normal work functions. RFP at 8. Hoteling contracts provide federal agencies with limited contractual rights to occupy and use the contractor's space. Agency Report at 2. Such contracts do not grant the agency with any lease rights, tenancy rights, or a recordable interest in the underlying space; the hoteling space remains within the legal tenancy of the contractor. Id.

	Metro	Cross
Technical Approach	Excellent	Good
Past Performance	Excellent	Satisfactory
Socioeconomic Considerations	No Credit	No Credit
Price	\$9,534,274	\$7,982,720

Agency Report (AR), Tab 8, Business Clearance Memorandum, at Section V.²

The agency awarded the contract to Cross as the best-value offeror concluding that the added benefits of the protester's offer did not merit the 16-percent price premium. Id. On June 12, Metro was notified of the award to Cross. Metro filed a protest with our Office, after receipt of its debriefing, on June 24.

DISCUSSION

Metro raises three primary arguments: (1) the VA's evaluation of Cross' building class status was improper; (2) the agency awarded the contract to Cross in violation of FAR § 3.601; and (3) the VA unreasonably concluded that Cross was the best value offeror.³ Although our decision does not specifically address all of Metro's arguments, we have fully considered each of them and find that none provides a basis to sustain the protest.

Building Class Status Evaluation

Metro argues that the agency's evaluation of the building class status of Cross' offered building failed to follow the requirements of the solicitation. In this regard,

² The Business Clearance Memorandum contains the agency's final evaluations and the rationale for the award, which was made by the contracting officer, who also acted as the source selection authority. The Business Clearance Memorandum was not paginated, and citations herein are to the relevant sections of that document.

³ The protester also alleged that the agency failed to conduct meaningful discussions with Metro. The agency in its report addressed Metro's claims in this regard, and Metro did not respond to the agency's explanation in its comments. Thus, Metro has abandoned this aspect of its protest. See Symplicity Corp., B-297060, Nov. 8, 2005, 2005 CPD ¶ 203 at 5 n.6.

Metro argues that the agency unreasonably concluded that Cross offered a Class A building, or that the agency improperly waived the requirement for a Class A building.

In reviewing an agency's evaluation, we will not reevaluate offerors' proposals; instead, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria and procurement statutes and regulations. The Elore Corp., B-402696, B-402696.2, July 16, 2010, 2010 CPD ¶ 182 at 12. An offeror's mere disagreement with the agency's evaluation is not sufficient to render the evaluation unreasonable. Id.

The solicitation stated that the agency would evaluate the technical approach factor based in part upon the degree to which the proposed hoteling space meets the requirements listed in two statement of objectives sections: performance objectives and operating constraints. RFP at 40. As relevant here, the performance objectives section required the contractor to provide a turnkey office services solution consisting of "Class A" office space. Id., Statement of Objectives, at 9. The operating constraints section required the office space to meet "common standards for Class A office space in the greater Washington DC area," and be located in a building defined by the "Urban Land Institute as 'Class A.'" Id. at 10.

In response to an offeror's question requesting the Urban Land Institute definition of a Class A building, the agency provided the following response with solicitation amendment No. 2:

The definition of "Class A" is actually provided by the Building Owners and Managers Association (BOMA). BOMA defines "Class A" as follows:

Most prestigious buildings competing for premier office users with rents above average for the area. Buildings have high quality standard finishes, state of the art systems, exceptional accessibility and a definite market presence.

RFP Amend. No. 2, at Response 11. This amendment also advised offerors that the agency would utilize the BOMA definition of Class A buildings when evaluating the building class status of the proposed building. Id.

Metro argues that the agency's evaluation was not consistent with the terms of the solicitation because the building offered by Cross does not meet the BOMA definition of a Class A building. In response, the agency asserts that it followed the solicitation criteria and reasonably concluded that the building proposed by Cross is a Class A building.

Based upon our review of the record, we find that the agency's evaluation was consistent with the solicitation. In this regard, the agency states that based upon the information provided in Cross' proposal, as well as multiple site visits to the facility, the evaluators concluded that the building has "infrastructure capable of supporting modern office technological needs;" "is highly accessible and in good condition;" offers "high quality finishes and architecture consistent with other area office buildings;" "provides exceptional access to commercial services and establishments;" is provisioned with "state of the art systems, which include secure entry with key card access, closed circuit surveillance with digital video recording, and excellent internet connectivity;" and currently leases to other Federal agencies and high quality tenants. Contracting Officer Statement at 3. The evaluation team did not find anything that would call into question Cross' representation of its BOMA Class A status. Id.

We find nothing unreasonable about the agency's conclusion. While Metro disagrees with the agency's assessment and asserts that the commercial value and age of the building are inconsistent with a Class A rating under BOMA, the protester has not provided evidence to refute the agency's assessment. In fact, the protester's argument is largely undercut by its own consultant. In this regard, the protester's consultant cites an independent commercial real estate research company (CoStar) that the consultant represents is the "gold standard in Washington, DC and Suburban Maryland." Protester Comments (Aug. 5, 2013), at 8; Id., Attach. No 2, Declaration of Expert, at unnumbered page 3; Id., Exh. 1, CoStar rating, at 4. The CoStar data cited by the consultant, however, lists the building offered by Cross as Class A. Id. On this record, we deny the protester's challenge to the agency's evaluation of Cross' building class status.

Alleged Award to Government Employee

Next, Metro challenges the agency's award to Cross alleging that the agency improperly awarded the contract to a company substantially owned or controlled by a government employee in violation of FAR § 3.601. The agency asserts that it did not violate FAR § 3.601 because the contracting officer did not know that the owner of Cross was a government employee until after award of the contract.⁴ We agree with the agency that no violation took place here.

⁴ The agency also asserts that the owner of Cross is not a government employee, and is instead, a special government employee for which the exemption of FAR § 3.601(b) applies. Since we find that the contracting officer did not knowingly award the contract in violation of FAR § 3.601, we will not address whether the owner is exempted from FAR § 3.601 as a special government employee.

In relevant part, FAR § 3.601 provides the following concerning the award of contracts to firms owned or controlled by government employees:

Policy.

(a) Except as specified in 3.602, a contracting officer shall not knowingly award a contract to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more Government employees. This policy is intended to avoid any conflict of interest that may arise between the employees' interests and their Government duties, and to avoid the appearance of favoritism or preferential treatment by the Government toward its employees.

(b) For purposes of this subpart, special Government employees (as defined in 18 U.S.C. 202) performing services as experts, advisors, or consultants, or as members of advisory committees, are not considered Government employees

FAR § 3.601.

On June 12, the agency awarded the contract to Cross and notified Metro of the award. Metro requested a debriefing via email on June 13. In its email to the agency, Metro stated that the owner of Cross lists his employer--on the website LinkedIn⁵--as the "Under Secretary of Defense (Intelligence)." Protest, Exh. 5, Request for Debriefing (June 13, 2013), at 1-2. Metro's email referred the agency to FAR § 3.601, and requested that the agency provide as part of its debriefing the agency's rationale for the award of a "government contract using appropriated funds to a government employee." Id. Finally, Metro's email requested that the matter be brought to the attention of the contracting officer. Id.

The VA states that the contracting officer first "became aware of [Cross' owner's] employment with the Office of the Under Secretary of Defense on June 13, 2013;" that is, after the award of the contract. AR, Tab 17, Agency Response to GAO Interrogatory (August 23, 2013), at 1. Upon receipt of the protester's debriefing request alleging that Cross' owner was a government employee, the contracting officer "reviewed the status of [the owner]" and found that he is not a "government employee per FAR 3.601(b) and in accordance with 18 U.S.C. 202." Id., Exh. 6, Debriefing (June 14, 2013), at 2. The contracting officer included these findings as part of Metro's written debriefing on June 14.

⁵ LinkedIn is a social networking website for people in professional occupations, which it is mainly used for professional networking.

We find that the record here clearly establishes that, prior to award, the contracting officer was not aware of the building owner's employment with the Office of the Under Secretary of Defense. Thus, the contracting officer cannot be said to have "knowingly" awarded a contract to a firm owned by a government employee in violation of FAR § 3.601. Maywood Closure Co., LLC, B-408343, et al., Aug. 23, 2013, 2013 ¶ 199 (protest denied where neither the selection official nor the contracting officer knew that the awardee was partially owned by a government employee at the time of award); TPMC-Energy Solutions Envtl. Servs. 2009, LLC, B-408343.2, et. al, Aug. 23, 2013, 2013 CPD ¶ __ (reaching same conclusion); see, e.g., Biosystems Analysis, Inc., B-198846, Aug. 25, 1980, 80-2 CPD ¶ 149 at 4 (reaching same conclusion as under the Federal Procurement Regulations, which were applicable to civilian agencies prior to implementation of the FAR, which became effective in 1984). On this record, we find no basis to conclude that the agency awarded the contract to Cross in violation of FAR § 3.601.

In addition, on September 3, 2013, Metro filed a supplemental protest with our Office asserting--for the first time--that the contracting officer had "reason to believe" that award to Cross would be in violation of FAR § 3.603 because Cross' offer states that the owner and managing member is a Captain in the U.S. Navy (Reserve Component). In relevant part, FAR § 3.603 provides:

(a) Before awarding a contract, the contracting officer shall obtain an authorization under 3.602 if: (1) [t]he contracting officer knows, or has reason to believe, that a prospective contractor is one to which award is otherwise prohibited under 3.601; and (2) [t]here is a most compelling reason to make an award to that prospective contractor.

FAR § 3.603.⁶

Here, Metro argues that, even if the contracting officer did not know at the time of award that Cross' owner was employed by the Department of Defense, the contracting officer should have known based on the awardee's proposal that the owner listed himself as a Captain in the U.S. Navy Reserves.

⁶ FAR § 3.602 provides, "[t]he agency head, or a designee not below the level of the head of the contracting activity, may authorize an exception to the policy in 3.601 only if there is a most compelling reason to do so, such as when the Government's needs cannot reasonably be otherwise met." FAR § 3.602.

We find that Metro's supplemental protest is untimely. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2013). In this regard, Metro was provided Cross' proposal in the agency report on July 25, and thus became aware at that time that the awardee's owner and managing member is a Naval Reserve Officer. Metro argues, however, that it first became aware of the basis for its supplemental protest on August 23--upon receiving the contracting officer's statement that he was unaware of any information regarding Cross' owners' alleged status as a government employee until after the award. We disagree. Metro was aware that the owner of Cross was a Naval Reserve Officer upon receipt of the agency's report. Because Metro did not file its protest alleging that the contracting officer had reason to believe Cross' owner was a government employee and that the award would be in violation of FAR § 3.603 within 10 days of discovery that Cross' proposal listed its owner as a Naval Reserve Officer, we dismiss this portion of the protest.

Selection Decision

Finally, Metro challenges the agency's selection decision, asserting that the agency unreasonably selected Cross as the lower-rated, lower-priced offeror. Metro also asserts that the agency's evaluation was unreasonable because the selection decision erroneously credits Cross with providing two extra conference rooms, when only one extra conference room was provided.

Generally, in a negotiated procurement, an agency may properly select a lower-rated, lower-priced proposal where it reasonably concludes that the price premium involved in selecting a higher-rated proposal is not justified in light of the acceptable level of technical competence available at a lower price. Bella Vista Landscaping, Inc., B-291310, Dec. 16, 2002, 2002 CPD ¶ 217 at 4. The extent of such tradeoffs is governed only by the test of rationality and consistency with the evaluation criteria. Best Temporaries, Inc., B-255677.3, May 13, 1994, 94-1 CPD ¶ 308 at 3. A protester's mere disagreement with the agency's determinations does not establish that the evaluation or source selection was unreasonable. Weber Cafeteria Servs., Inc., B-290085.2, June 17, 2002, 2002 CPD ¶ 99 at 4.

Our review of the record here confirms the reasonableness of the agency's evaluation of the proposals and its tradeoff determination. The selection document reflects the contracting officer's consideration of the technical evaluation consensus report, and details the contracting officer's independent assessment of the strengths and weaknesses for each offer, as well as the ratings assigned under each evaluation factor to Cross' and Metro's proposals. AR, Tab 8, Business Clearance Memorandum, at Section IV. The selection document also includes a comparative assessment of the offerors' strengths and weaknesses. For example, the contracting officer stated that the two weakness identified in Cross' proposal were "minor and should have little to no effect," and that both "weaknesses are more than offset by the noted strengths." Id. The contracting officer contrasted these findings to Metro's proposal, which had two strengths and no weaknesses. Id. Overall the

contracting officer found that the low risk associated with Cross' technical approach indicated only "negligibly more risk than the very low risk associated with Metro Offices' technical [a]pproach." Id. The contracting officer also noted that Cross received a satisfactory past performance rating with moderate risk, while Metro received an excellent rating with very low risk. Id. Because all three non-price factors, when combined, were equal in importance to price, the contracting officer found that Cross' significantly lower price outweighed the overall lower risk associated with Metro's proposal, concluding that "the reduced risk benefit of awarding to the higher priced offeror does not merit the significant price premium." Id.

Under the circumstances here, we see nothing improper about this selection decision. As set forth above, the selection decision reflects that the contracting officer was aware of and considered the strengths and weaknesses of the competing proposals, the proposals' ratings under the RFP's evaluation factors, and the proposals' evaluated prices consistent with the evaluation scheme.

Metro also asserts that the agency's best value determination is unreasonable because the contracting officer's selection decision credited Cross' with the offer of two extra conference rooms, when in fact only one extra conference room was provided. See id. In response to the protester's allegation, the agency explains that the contracting officer inadvertently wrote the wrong number (a two instead of a one) in the selection decision. Supp. AR (Sept. 9, 2013) at 4-5. The agency explains that despite this error, Cross did not receive extra credit for two additional conference rooms; rather it received only one strength for providing one additional conference room, as reflected in the evaluation documents. Id.

Our review of the selection decision shows that Cross was assigned a strength for proposing "an additional medium conference room," which "exceed[ed] the minimum requirement for two (2) medium conference rooms." Id. at Section III. This finding is consistent with the technical evaluators' consensus assessment of a strength for the awardee for proposing one more medium conference room than was required under the solicitation. AR, Tab 8.3, Cross Revised Technical Evacuation, Attach. B. In the tradeoff section of the selection decision, however, the contracting officer stated that "[t]he two additional conference rooms help ensure that conference rooms are available to personnel whenever needed." AR, Tab 8, Business Clearance Memorandum, at Section IV.

We find that the record reasonably supports the agency's explanation that the reference to two additional conference rooms was an error, and that the contracting officer did not believe that Cross would provide two additional conference rooms,

rather than one. We conclude therefore that this error did not affect the best value determination, or otherwise render the decision unreasonable.

The protest is denied.

Susan A. Poling
General Counsel