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Decision

Matter of: BHB Limited Partnership & Indiana Associates Ltd. Partnership

File: B-417760; B-417760.2; B-417760.3; B-417760.4

Date: October 9, 2019

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DIGEST

Protest challenging a single-building requirement in the solicitation as unduly restrictive of competition is denied where the record shows that the provision is reasonably necessary to meet the agency's legitimate needs.

DECISION

BHB Limited Partnership & Indiana Associates Ltd. Partnership (BHB), of Washington, District of Columbia, protests the terms of Request for Lease Proposals (RLP) No. 6DC0335 issued by the U.S. General Services Administration (GSA) for the lease of office space. The protester challenges certain terms of the RLP as unduly restrictive of competition.

We deny the protest.

BACKGROUND

The RLP, issued on June 11, 2019, sought proposals for the lease of 180,985 rentable square feet of office space for a term of 20 years located in a defined area of consideration in downtown Washington, District of Columbia. RLP at 1-3. The resulting lease will satisfy the space needs of three agencies: Court Services and Offender Services Agency, Pre-Trial Services Agency, and the Public Defender Service. Contracting Officer's Statement at 1. These agencies currently occupy two properties owned by the protesters, as well as other locations. Id. According to the agency, this procurement is intended to consolidate all of the space needs for these agencies into a single location. Id.

As relevant to this protest, the RLP required that “[o]ffered space must be contiguous both horizontally and vertically and located within a single building.” RLP at 1. Also relevant to the protest, the RLP included GSA Form L100, which set forth the terms and conditions of the lease contemplated by the RLP. Id. The lease, when executed and returned by the offeror, was to constitute a firm offer. Id. One relevant lease requirement was that ceilings maintain a minimum height of eight feet measured from floor to the lowest obstruction. RLP, GSA Form L100, at 14. Proposals submitted by 4:00 p.m., on July 12, 2019, and conforming to the requirements of the RLP were to be considered for award. RLP at 12. Award was to be made to the lowest-priced, technically acceptable offer that conforms to the requirements of the RLP and lease documents. Id. at 18.

On July 12, BHB timely protested to our Office challenging the single-building requirement as unduly restrictive of competition. Protest at 6-9. On August 12, the protester submitted a supplemental protest challenging 10 deficiencies identified by the agency in BHB’s proposal.¹ First Supp. Protest at Exh. A; Agency Report (AR), Exh. 10, Letter Dated August 5, 2019. As relevant here, the protester challenged two deficiencies: (1) that the protester offered space in two buildings, the spaces were not contiguous vertically, and that it offered lower-level space; and (2) structural elements in one of the proposed buildings prevent the building from meeting the eight feet minimum ceiling height requirement. Id. The August 5th letter requested that the protester submit a final proposal revision (FPR) by August 12, and instructed BHB to correct the identified deficiencies in order to be considered for the lease award. Id. On August 12, BHB submitted a FPR. Third Supp. Protest, Exh. A., at 1.

On August 22, the agency sent a correspondence to the protester that its FPR was received late, and would not be considered for award. Agency Request for Dismissal, Exh. 3, at 1. The agency’s correspondence identified various deficiencies in BHB’s proposal, including the two discussed above, but informed the protester, “[w]e are not requesting a clarification, as you have been excluded from further consideration due to the lateness of your offer.” Id. at 2. The protester filed a supplemental protest on August 28th challenging the agency’s decision to exclude its proposal from further consideration due to being late, as well as various identified proposal deficiencies, and another supplemental protest on September 3rd challenging various aspects of the agency’s August 22nd letter. See generally Second Supp. Protest and Third Supp. Protest.

DISCUSSION

BHB primarily argues that the RLP’s single-building requirement is unduly restrictive of competition. The protester asserts that the requirement is restrictive because it

¹ During the pendency of BHB’s initial pre-award protest, the agency continued to evaluate proposals, and issued two correspondences, which formed the basis for subsequent protests.

“precludes any possible solution that would split the leased square-footage between two separate buildings.” Protest at 6. BHB argues that the requirement is unduly restrictive as evidenced by the existing twenty-year relationship, where the protester has largely met the spacing needs of these agencies utilizing its two buildings under incumbent leases.² Id. The protester asserts that its two-building solution is “at least one acceptable means of meeting the government’s legitimate needs.” Id. at 7. The firm concludes that the agency cannot carry its legal burden, “because it cannot show that the RLP’s restrictive single-building requirement, which would eliminate [its own] buildings as an option[,] is somehow ‘necessary’ to meet the government’s ‘legitimate needs.’” Id.

The agency responds that the requirement to house the needed space in a single location is a reasonable minimum requirement, which allows for full and open competition and is not unduly restrictive.³ Memorandum of Law (MOL) at 4. In support of its position, the agency points to market research that identified four locations that could house the requirement in a single location, and the agency’s view that the protester’s properties could not meet the minimum lease requirements notwithstanding the single-building requirement. Id. at 3. Our review of the record does not provide a basis to question the agency’s decision to move forward with a single-building requirement, as we conclude that the requirement is not unduly restrictive of competition.

² The protest explains the relationship of the properties as follows:

601 Indiana is owned by BHB Ltd. Partnership, and 633 Indiana is owned by Indiana Associates Ltd. Partnership. Throughout the past twenty years, the property management services for these buildings have been provided by Zuckerman Gravely Management, Inc., the property management company owned by two of the principals of the above-referenced limited partnerships that own the actual buildings.

Protest at 2.

³ Before submission of the agency report, GSA requested our Office dismiss the protest in its entirety. The agency argued that BHB was not an interested party to pursue its protest because BHB had submitted an untimely FPR, in response to GSA’s continuing proposal evaluation process. See generally Agency Request for Dismissal. We declined to dismiss the protest because the initial protest challenging the single-building requirement was timely filed. Therefore, the protester remained an interested party because its direct economic interest continued to be affected by the alleged unduly restrictive requirement challenged in the initial protest, without regard to later actions by the parties outside of the context of that protest. 4 C.F.R. § 21.0(a)(1); see Apex Support Servs. Inc., B-288936, B-288936.2, Dec. 12, 2001, 2001 CPD ¶ 202, at 1-2 (finding that protester need not submit proposal to be an interested party where challenge is to the terms of a solicitation, and remedy sought is opportunity to compete under a revised solicitation).

The determination of a contracting agency's needs and the best method of accommodating them are matters primarily within the agency's discretion. Trailboss Enterprises, Inc., B-415812.2, et al., May 7, 2018, 2018 CPD ¶ 171 at 4. Where a protester challenges a specification as unduly restrictive, that is, challenges both the restrictive nature of the specification and the agency's need for the restriction, the agency has the responsibility of establishing that the restrictive specification is reasonably necessary to meet its legitimate needs. GlobaFone, Inc., B-405238, Sept. 12, 2011, 2011 CPD ¶ 178 at 3. The adequacy of the agency's justification is ascertained through examining whether the explanation is reasonable, and withstands logical scrutiny. Id. Once the agency establishes support for the challenged solicitation term, the burden shifts to the protester to show that it is clearly unreasonable. Id.

The record shows that the agency commissioned a program of requirements (POR) study for each of the three tenant agencies to determine their needs for this procurement. Contracting Officer's Statement at 3. The POR explains that the three tenant agencies have common issues with their current leases, including difficulty in navigation due to large numbers of private offices, lack of efficient adjacencies, and lack of adequate conference and meeting spaces. AR, Exh. 5., POR, at 10. The POR explains that all three agencies are split across multiple buildings and floors, which results in unnecessary vertical and cross-building movement. Id. Other issues with the current configuration identified in the POR include such things as access to a separated training facility, which results in additional time spent traveling to locations, and duplicate "programmational" elements on floors. Id.

The agency also conducted market research, which showed that there were various potential single-building options in the delineated area that could meet the agency's space requirements. See generally AR, Exh. 8, Market Research Report. Stating that "the goal of this requirement has always been to consolidate the groups into as few buildings as possible," the market research found that the "number of options in the market exceeded expectations, and the procurement can be highly competitive without breaking up the functions of the three agencies and changing how they interact." Id. at 11. The market research also noted the "problematic" nature of separating administrative functions in two different locations, as this may result in duplication of services. Id. Finally, the market research recognized that moving forward with a single building requirement "effectively eliminate[d] the incumbent locations" from the competition. Id. The market research, however, noted that the incumbent locations "likely would have been eliminated even under a two building scenario," because of various known deficiencies with the buildings, including the failure of one of the buildings to meet the eight foot minimum ceiling height requirement. Id.

As discussed, the determination of a contracting agency's needs and the best method of accommodating them are matters primarily within the agency's discretion. Trailboss Enterprises, Inc., supra. The agency identifies various reasons supporting its decision to meet the needs of the three agencies through a single-building solution. Our review of the record does not cause us to question the agency's needs here. Moreover, given

the needs expressed by the agency, the record reasonably supports the necessity to meet its requirements through a single-building solution. See GlobaFone, Inc., supra. The protester has not presented sufficient evidence that, given the needs of these agencies, the determination to move forward with a single-building solution was clearly unreasonable. See generally Protester's Comments at 3-4; Protester's Supp. Comments at 3-6. Consequently, BHB's challenge to the solicitation's single-building requirement is denied.

The protester raises numerous other protest allegations based on deficiencies identified in BHB's proposal by the agency in the August 5th and August 22nd correspondence, discussed above. For example, one of the identified deficiencies was based on structural elements in one of the protester's proposed buildings that prevented the building from meeting the solicitation's eight feet minimum ceiling height requirement.⁴ First Supp. Protest at Exh. A; AR, Exh. 10, Letter Dated August 5, 2019. According to the agency, even absent a single-building requirement, BHB could not meet the terms of the RLP due to these various deficiencies identified in the firm's proposal.⁵ AR, Exh. 8, Market Research, at 11.

While we have considered all of the allegations raised, we need not resolve those challenges since we conclude that the solicitation's single-building requirement was not unduly restrictive of competition. As the record shows, and the protester acknowledges, BHB cannot meet the solicitation's single-building requirement. Protest at 7; AR, Exh. 8, Market Research Report, at 11. The firm, therefore, lacks the requisite status as an interested party to pursue its other grounds of protest. 4. C.F.R. § 21.0(a)(1); C-III Asset Mgmt., LLC, B-414498, June 27, 2017, 2017 CPD ¶ 207 at 5. In this regard, even were we to sustain its protest on another basis, BHB would not be able to offer a

⁴ In its supplemental protest, BHB challenged the RLP's eight feet minimum ceiling height requirement as unduly restrictive of competition. See First Supp. Protest at 5-6; RLP, GSA Form L100, at 14. The protester's challenge of this solicitation requirement is untimely as the firm protested on August 12, yet this requirement was apparent on the face of the initial solicitation. As such, BHB was required to protest this aspect of the RLP before the date set for receipt of initial proposals (July 12), which it did not. 4 C.F.R. § 21.2(a)(1).

⁵ With respect to the ceiling height requirement, BHB responded to the agency's concern in its FPR, stating that while it could meet the eight feet requirement in the majority of its building, "[i]n certain, limited areas such as hallways, ceilings are slightly less than 8 feet 0 inches to accommodate sprinkler bulkheads but this does not impact tenant functions." Third Supp. Protest, Exh. A, at 2. The protester's response, on its face, appears to affirm that, while it could generally meet the minimum height requirements by modifying aspects of its building layout, there are areas where it could not meet the requirement due to the need to accommodate sprinkler bulkheads. Id.

compliant building for lease and would, therefore, be ineligible for award. DAI, Inc., B-408625, B-408625.2, Nov. 6, 2013, 2013 CPD ¶ 259 at 5.

The protest is denied.

Thomas H. Armstrong
General Counsel