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Decision

Matter of: 100 Westminster Partners, LLC

File: B-418216; B-418216.2; B-418216.3

Date: January 27, 2020

Mary Beth Bosco, Esq., and Gordon Griffin, Esq., Holland & Knight LLP, for the protester.

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Jessica Gunzel, Esq., General Services Administration, for the agency.

Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly awarded lease to offeror that proposed space on contiguous floors is denied where space was being procured for the United States Attorneys' Office and solicitation incorporated design guide which permitted space on contiguous floors.
2. Protest that agency improperly awarded lease to offeror that proposed space in a building where a firm specializing in criminal law was also a tenant, in violation of the terms of the lease solicitation, is denied where criminal law is just one of firm's 25 practice areas.
3. Protest that agency improperly awarded lease to offeror that failed to meet solicitation's energy efficiency requirements is denied where protester does not identify any specific energy efficiency requirements that awardee's proposed building will not meet.
4. Protest that agency is required to cancel lease because of a conflict of interest due to both protester and awardee being represented by agents that work for the same broker is denied where protester does not demonstrate it was competitively prejudiced.
5. Protest that agency performed improper present value price evaluation is denied where protester does not demonstrate that it was competitively prejudiced by error.

DECISION

100 Westminster Partners, LLC (Westminster), of Providence, Rhode Island, protests the award of a lease for office space to Providence Financial Plaza (Providence), LLC, of Brooklyn, New York, by the General Services Administration (GSA), under request for lease proposals (RLP) No. 6RI0019. The protester asserts that the building proposed by Providence does not meet all of the solicitation requirements and thus is ineligible for award. The protester also challenges the agency's price evaluation.

We deny the protest.

BACKGROUND

The RLP, issued on August 5, 2018, provided for the award of a 15-year lease of office space in Providence, Rhode Island, for the United States Attorneys' Office (USAO). Lease Contracting Officer's Statement (LCOS) at 1; Agency Report (AR), Exh. 1, RLP, at 1. GSA was seeking to lease between 19,950 and 22,050 of American National Standards Institute/Building Owners and Managers Association Office Area square feet (ABOA SF)¹ of contiguous space. RLP at 1. The RLP informed offerors that the lease would be issued to the offeror that submitted the lowest-priced, technically acceptable lease proposal. Id. at 14.

The RLP included a statement of requirements that the offered property must meet. As relevant here, space was required to be contiguous. Id. at 1. In addition, the RLP included: a prohibition on leasing space in a building that houses law firms specializing in criminal defense or immigration cases, RLP, Exh. B, Department of Justice (DOJ) Executive Office for the United States Attorneys Design Guide, at 27; a requirement for parking spaces, RLP at 2; and, energy efficiency requirements. Id. at 7. The RLP also provided that the agency was prohibited from awarding a lease in a 100-year flood plain unless there was no practicable alternative. Id. at 6. The solicitation also addressed potential conflicts of interest. Id. at 11. The solicitation advised offerors that the agency would determine the lowest price by conducting a present value price evaluation. Id. at 15.

GSA received technically acceptable lease proposals from Westminster and Providence. LCOS at 1. After conducting the present value price evaluation, the agency found that Providence's evaluated price was \$34.13 per ABOA square foot, and

¹ ABOA SF refers to the area available for use by a tenant for personnel, furnishings, and equipment. See The Metropolitan Square Assocs., LLC, B-409904, Sept. 10, 2014, 2014 CPD ¶ 272 at 2 n.2.

Westminster's was \$39.19 per ABOA square foot.² AR, Exh. 7, Final Evaluation Providence, at 8; Exh. 8, Final Evaluation Westminster, at 8. As Providence submitted the lowest-priced, technically acceptable proposal, the agency awarded it the lease. This protest followed.

DISCUSSION

Westminster protests that the property proposed by Providence does not meet the solicitation requirements for contiguous space, parking, and energy efficiency. Westminster also asserts that the property is located in a flood plain, and in a building with a firm specializing in criminal law, in violation of the solicitation's requirements. Finally, Westminster argues that the agency failed to conduct a reasonable present value price evaluation and that the procurement is tainted by a conflict of interest, and challenges the agency's evaluation and conduct of discussions as being unequal. Westminster concludes that it, and not Providence, is the proper awardee

In reviewing protests challenging the evaluation of proposals, we do not conduct a new evaluation or substitute our judgment for that of the agency but examine the record to determine whether the agency's judgment was reasonable and in accord with the evaluation criteria. The Metropolitan Square Assoc., LLC, *supra*, at 6. Where a dispute exists as to the meaning of a particular solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, an interpretation must be consistent with such a reading. Blue Origin, LLC, B-408823, Dec. 12, 2013, 2013 CPD ¶ 289 at 11. We have reviewed all of the protester's arguments and find that none provides a basis to sustain the protest.³ We address several issues below.

² In reviewing the present value price evaluation after the protest was filed, the lease contracting officer discovered that the incorrect tenant improvement allowance was used for the protester, and that it failed to include a reimbursable work authorization amount for both offerors. As corrected, the awardee's evaluated price is \$35.33 per ABOA square foot, and the protester's is \$43.04. AR, Exh. 11, Corrected Final Evaluation Providence, at 1; Exh. 12, Corrected Final Evaluation Westminster, at 1. The price evaluation will be discussed in further detail below.

³ For example, in its final proposal, Providence changed one of the floors, but not the building, it had originally offered. The protester argued that the agency did not review and evaluate the newly proposed floors. Comments and Supp. Protest, Dec. 2, 2019, at 16. Providence, however, provided computer aided design files for the agency to review which demonstrated that the new floor was acceptable. Agency Submission, Jan. 21, 2020, Exh. 1, at 1, Exh. 2, at 3; Supp. LCOS, Jan. 21, 2020, at 1.

Contiguous Space

As noted above, the solicitation sought to lease between 19,950 and 22,050 ABOA SF of contiguous space. RLP at 1. Westminster asserts that Providence does not meet the requirement for contiguous space because it is offering space on contiguous floors. Protest at 12. In this regard, Westminster points to the GSA Leasing Desk Guide which provides as follows:

The RLP states the type and amount of ABOA space and clearly defines office, storage, unique, or parking space requirements. When there is a necessity for contiguous space, or space on a specified number of contiguous floors, or space in a specific type of structure is required, the RLP must state so in clear, succinct terms.

Id. at 12-13 (quoting GSA Leasing Desk Guide, Chap. 3, § 9(b) at 3-8, available at <https://www.gsa.gov/real-estate/real-estate-services/leasing-policy-procedures/policy-and-tools/policy/leasing-desk-guide-and-other-policy-information/leasing-desk-guide-pdf> (last visited January 17, 2020)); Comments and Supp. Protest, Dec. 2, 2019, at 8. According to Westminster, since the GSA leasing guide distinguishes between contiguous space and space on contiguous floors, the solicitation's requirement for contiguous space cannot be met by providing space on contiguous floors.

In response, the agency explains that the solicitation incorporated the DOJ Executive Office for the United States Attorneys Design Guide (DOJ Design Guide). Specifically, the RLP lists several documents that are incorporated by reference "as part of this RLP package;" one document is the agency's requirements, which is set forth at exhibit B. RLP at 3. Exhibit B of the RLP is the DOJ Design Guide, which specifically provides that "[t]he USAO should also be in contiguous space on one or more floors". RLP, Exh. B, DOJ Design Guide, at 27. Since the DOJ Design Guide, which was incorporated into the solicitation specifically permits the space to be located on contiguous floors, this basis of protest is denied.⁴

⁴ We do not need to decide if, in this case, the GSA Leasing Desk Guide would prohibit leasing space on contiguous floors. To the extent Westminster believes that the GSA Leasing Desk Guide established a mandatory requirement for contiguous space on one floor, the DOJ Design Guide, not the GSA Leasing Desk Guide, was incorporated into the solicitation. In any case, even if the GSA Leasing Desk Guide is applicable to the procurement, and even if we agreed with Westminster that the guide clearly distinguishes between contiguous space and space on contiguous floors, the incorporation of the DOJ Design Guide with a more liberal definition gave rise to a patent ambiguity. Where a patent ambiguity is not challenged prior to the submission of proposals, we will dismiss the challenge as untimely. 4 C.F.R. § 21.2(a)(1); U.S. Facilities, Inc., B-293029, B-293029.2, Jan. 16, 2004, 2004 CPD ¶ 17 at 10.

Firm Specializing in Criminal Law

The RLP prohibited GSA from leasing space for the United States Attorneys' Office in a building that also houses law firms specializing in criminal defense law. RLP, Exh. B, at 27. Westminster complains that Providence is ineligible for award because it is proposing a building where a firm specializing in criminal law is also a tenant. Protest at 9-10. The agency explains that while there is a law firm that practices criminal law in the building that Providence proposed, that is only one of the 25 areas that the firm practices. Memorandum of Law (MOL) at 4. The agency therefore asserts that Providence is eligible to be awarded the lease because the firm does not specialize in criminal law. The agency also notes that two firms that practice criminal law also reside in the building offered by the protester. Id. at 5.

The protester supports its position that Providence is offering space in a building that houses a firm specializing in criminal law by selectively quoting from the law firm's website. Specifically, the protester only quotes the portion of the website that describes the firm's criminal defense practice as follows:

Barton Gilman's criminal defense practice. . . has a successful track record of providing results-oriented criminal defense representation for our clients. If you have been arrested or are currently being investigated for charges, our experienced team can help you navigate. . . Our knowledge extends beyond the law to local procedures. . . .

Protest at 10 (quoting Barton Gilman, available at <https://www.bglaw.com/services/criminal-defense>). However, as the agency notes, reading the entire website demonstrates that the firm has a more expansive practice. Specifically, the website lists and describes 25 services that the firm provides. Barton Gilman, available at <https://www.bglaw.com/our-services/> (last visited January 17, 2020). In addition, the website explains as follows:

Barton Gilman serves clients throughout the Northeast with offices in Boston, Providence and New York, offering legal services in a wide variety of matters, including medical and other professional liability defense, premises liability and business litigation, as well as education law, employment, family law, insurance coverage, trusts and estates, criminal defense, corporate formation and intellectual property.

Barton Gilman, available at <https://www.bglaw.com/about-bg/> (last visited January 17, 2020). In our view, given the multitude of areas in which the firm in the building proposed by Providence practices, the agency reasonably concluded that the firm does not specialize in criminal defense. We therefore deny this protest allegation.

Energy Efficiency Requirements

The protester asserts that the building proposed by Providence cannot meet the solicitation's requirements for energy efficiency. Protest at 13. The protester specifically asserts that the single paned windows in the proposed building which are of an older design, and have not been upgraded, are inefficient at capturing and maintaining heat. Id. The protester also asserts that based on conversations with former tenants, the heat ventilation air conditioning (HVAC) system in the building is in poor repair and the building has a history of leaks and water damage stemming from rain intrusion. Id.

This basis of protest is without merit. The protester fails to cite in its protest to a specific requirement in the RLP related to the energy efficiency requirement of windows, the HVAC system, or rain intrusion. Rather, with respect to energy efficiency, GSA is required to lease space in a building that has earned the ENERGY STAR label conferred by the Environmental Protection Agency, unless certain exceptions apply. RLP at 7. One exception, which applies to the instant solicitation, is where no space is offered in a building with an ENERGY STAR label.⁵ Id. If an exception applies, the offeror is required to include in its lease proposal an agreement to renovate the proposed building for all energy efficiency and conservation improvements that it has determined would be cost effective over the term of the lease. Id. Such improvements could concern HVAC upgrades, lighting improvements, and building envelope modifications. Id.

Providence met this requirement by providing an agreement to renovate its building for cost-effective energy efficiency improvements, including to the building envelope, lighting, and the HVAC system. MOL at 10; AR, Exh. 6, Energy Efficiency Memorandum, at 2-3; AR, Exh. 21, Emails to Agency, at 4-5.⁶ In contrast, the protester did not agree to make any energy efficient improvements because it determined that none would be cost-effective. Supp. MOL, Dec. 9, 2019, at 9; AR, Tab 17, Westminster Negotiation Call Memorandum, at 1 (Westminster informed agency that no cost effective improvements will be done for a lease of this size and that a capital

⁵ GSA explains, and the protester does not disagree, that neither building offered by the awardee or protester had an ENERGY STAR label. MOL at 10.

⁶ In its comments on the agency report, the protester points to RLP, Exh. A, GSA Form L100, Global Lease, § 6.11(A), to demonstrate solicitation requirements for energy efficiency. Comments and Supp. Protest at 9. This provision, however, concerns maintenance and testing of systems, and imposes responsibilities on the lessor to maintain and repair the leased premises, including ensuring that equipment and systems are maintained to provide reliable, energy efficient service. RLP, Exh. A, at 58 ("All equipment and systems shall be maintained to provide reliable, energy efficient service. . . ."). Contrary to the protester's assertion, it does not establish any specific energy efficiency requirements that an offeror was required to meet in its lease proposal.

improvement for HVAC is planned in 5-7 years). For these reasons, we deny this protest allegation.

Conflict of Interest

The protester asserts that the same agent represented both the protester and the awardee and did not disclose this to either firm. Protest at 13-14. According to the protester, this created a conflict of interest which requires termination of the lease awarded to Providence. Id. In this regard, the solicitation included the following provision:

If there is a potential for conflict of interest because of a single agent representing multiple owners, [submit] present evidence that the agent disclosed the multiple representation to each entity and has authorization from each ownership entity offering in response to this RLP package. Owners and agents in conflicting interest situations are advised to exercise due diligence with regard to ethics, independent pricing, and Government procurement integrity requirements. In such cases, the Government reserves the right to negotiate with the owner directly.

RLP at 11.

Competitive prejudice is an essential element of a viable protest, and where the protester fails to demonstrate prejudice, our Office will not sustain a protest. Next Tier Concepts, Inc., B-406620.3, B-406620.4, Nov. 13, 2012, 2013 CPD ¶ 5 at 5; Kemron Environmental Services, Inc., B-299880, Sept. 7, 2007, 2007 CPD ¶ 176 at 2 (GAO will not sustain a protest where agency inadvertently disclosed protester's proprietary information, but protester does not demonstrate prejudice). Here, based on the record before us, it appears that the protester and the awardee were represented by different individuals that were employed by the same company. Compare AR, Exh. 4, Westminster Final Proposal Revision, at 1 and Exh. 5, Providence Final Proposal Revision, at 10. It was the agent's responsibility to provide the protester and the awardee with notice that it was representing both parties. While the agent failed to do so, Westminster has provided no evidence to demonstrate that it was competitively prejudiced as a result. For example, Westminster has not demonstrated that either of the agents was aware of the rents proposed by its client's competitor, or any other information relative to the competitor's proposal. Accordingly we deny this basis of protest.

Present Value Price Evaluation

Westminster protests that the agency failed to include replication costs in its present value price evaluation. Westminster additionally complains that the agency conducted an unreasonable present value price evaluation because it used the same relocation costs for Westminster and Providence even though Westminster is moving tenants one floor while Providence is relocating tenants to a new building.

The solicitation provided that to determine which offeror proposed the lowest evaluated price, the agency would perform a present value price evaluation of the proposed rent per ABOA SF, which would result in a gross present value price. RLP at 14-15. The agency would then add certain costs to the gross present value price. Id. at 15. As relevant to this protest, the solicitation provided that the agency would add replication costs and the cost of relocation. Id.

The agency explains that replication costs were provided for in the solicitation as a tenant improvement allowance. Sup. MOL, Dec. 12, 2019, at 3; Decl. of Leasing Specialist at 1. Tenant improvements were defined as the finishes and fixtures that typically take space from the shell condition to a finished usable condition. RLP at 13. The solicitation provided that the tenant improvement allowance was \$65.22 per ABOA SF. Id. Relocation costs were included in the reimbursable work authorization allowance. Supp. MOL, Dec. 16, 2019, at 2 (citing RLP at 15).

The agency initially conducted a present value evaluation of the proposals of Providence and Westminster on June 19, 2019, which resulted in an evaluated price of \$34.13 ABOA SF for Providence and \$39.19 ABOA SF for Westminster. LCOS at 1. In the initial evaluation, the agency did not include relocation costs for either offeror because the tenant would be required to move whether the lease was awarded to Westminster or Providence. Decl. of Leasing Specialist at 1.

After the protest was filed, the agency reviewed the present value analysis. The agency determined that in conducting the analysis, it used \$30.55 per ABOA SF as the tenant improvement allowance for Westminster (the amount that Westminster included in its proposal) instead of the solicitation required \$65.22 per ABOA SF. LCOS at 2. The agency also discovered that it failed to include the lump sum reimbursable work authorization allowance (\$398,227) for either offeror. Id. The lump sum reimbursable work authorization included relocation costs, which were estimated to be \$7.97 ABOA SF. Supp. Decl. of Leasing Specialist at 1.

The agency recalculated the present value analysis using the full tenant improvement allowance of \$65.22 per ABOA SF for Westminster and the total lump sum reimbursable work authorization allowance for both offerors. LCOS at 2; Decl. of Leasing Specialist at 2. This resulted in an evaluated price of \$35.33 ABOA SF for Providence and \$43.04 ABOA SF for Westminster. Id. Thus, in its recalculation, the agency included both the replication and relocation costs and Providence remained the lowest-priced, technically acceptable offeror.⁷ See LCOS at 2; Supp. Decl. of Leasing Specialist at 1-2.

⁷ In its December 13 comments, Westminster protests that the agency used the full tenant improvement allowance of \$65.22 as replication costs for Westminster rather than Westminster's proposed cost of \$30.55. Protester's Response to Request for Information, Dec. 13, 2109, at 4. According to Westminster, since it was offering a space that was already configured to support the tenant, its replication costs should not

Regarding relocation costs, as discussed above, our Office will only sustain a protest where the protester demonstrates that it has been prejudiced. Next Tier Concepts, Inc., supra. The agency recomputed Westminster's present value cost--this time without any relocation costs--which resulted in an evaluated cost of \$42.51 per ABOA SF, still leaving Providence as the lowest-priced, technically acceptable offeror, and thus, the proper awardee. Supp. Decl. of Leasing Specialist at 1. Since the protester cannot demonstrate the agency's alleged errors were prejudicial, this allegation is denied.

The protest is denied.

Thomas H. Armstrong
General Counsel

be the same as Providence's replication costs. Id. The protester was aware that the tenant improvement allowance was included in the solicitation. The protester was also aware that the agency used the total amount in its recalculation on November 21, 2019. Since Westminster did not raise this allegation until December 13, 2019, it is untimely. 4 C.F.R. §§ 21.2(a)(1), (a)(2).