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Decision

Matter of: Hoover Properties

File: B-418844; B-418844.2

Date: September 28, 2020

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Gregory M. Swartzberg, Esq., and Jessica A. Gunzel, Esq., General Services Administration, for the agency.

Katherine I. Riback, Esq., and Evan C. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In a procurement for the lease of office space, protest that the agency improperly included relocation and move-related costs in the agency's price evaluation of the protester's proposal is denied where the agency's consideration of such costs is reasonable and consistent with the solicitation evaluation criteria.

2. Protest that agency unreasonably evaluated protester's proposal in a procurement conducted via the Automated Advanced Acquisition Program is sustained where the agency inadequately documented the basis of the relocation and move-related costs that it added to the protester's proposal during its price evaluation.

DECISION

Toni and Vin Hoover Property Management, LLC, doing business as Hoover Properties, a small business of Tampa, Florida, protests the award of a lease to MSDG Frankfort, LLC, of Brentwood, Tennessee, by the General Services Administration (GSA) under request for lease proposals (RLP) No. 8KY2102, for the lease of general purpose office space in Frankfort, Kentucky. The protester contends that the agency's price evaluation was unreasonable and inadequately documented.

We sustain the protest.

BACKGROUND

On October 1, 2019, GSA issued the RLP and an advertisement for the award of a 10-year lease of office space in Frankfort, Kentucky.¹ RLP at 5; AR, Tab 2, Oct. 2019, Initial Advertisement at 2. The agency issued the RLP, using the Automated Advanced Acquisition Program (AAP), which provides building owners and their authorized representatives the opportunity to offer general purpose office space for lease to the federal government.²

GSA was seeking to lease 1,160 of American National Standards Institute/Building Owners and Managers Association Office Area square feet (ABOA SF)³ of office space. *Id.* at 1. The RLP informed offerors that the lease would be issued to the offeror that submitted the lowest-priced, technically acceptable lease proposal. RLP at 23.

The solicitation advised offerors that the agency would determine the lowest price by conducting a net present value (NPV) price evaluation.⁴ *Id.* As relevant here, the RLP

¹ The RLP provided that the term of the lease was 10 years, with government termination rights effective any time after an 8-year firm term of the lease. Agency Report (AR), Tab 1, RLP at 8; Tab 4, Mar. 2020, Revised Advertisement at 3. The RLP included that the open period was the 1st through the 7th of each month, unless the 7th fell on a weekend or a federal holiday. RLP at 1. The RLP covered the general terms of the procurement, such as how the agency would conduct the price evaluation (*Id.* at 23-24), and the advertisement provided the specifics, such as the amount and type of space sought by the agency, as well as the location.

² The AAP is a GSA on-line procurement vehicle that allows offerors to electronically offer space for lease to the federal government. Participants that register in the program are allowed to submit and update offers to lease space to the federal government within specified timeframes, in response to the standard RLP issued annually. See <https://www.gsa.gov/real-estate/real-estate-services/leasing-policy-procedures/lease-offer-platform-lop/automated-advanced-acquisition-program> (last visited Sept. 25, 2020); see also *The Metropolitan Square Assocs., LLC*, B-409904, Sept. 10, 2014, 2014 CPD ¶ 272 at 2 n.1. Under the process, the agency only permits offerors to add missing information or to correct apparent mistakes. Memorandum of Law (MOL) at 11. Participants agree to comply with GSA's standard lease terms, allowing for the evaluation of offers based on the same criteria with price being the only discriminator. *Id.*

³ ABOA SF refers to the area available for use by a tenant for personnel, furnishings, and equipment, and is generally synonymous with useable square feet. See *The Metropolitan Square Assocs., LLC*, *supra* at 2 n.2.

⁴ The RLP refers to a present value price evaluation (RLP at 23), and the agency record refers to a net present value (NPV) price (MOL at 1). Throughout this decision, in referring to the agency's price evaluation, we shall refer to the NPV price evaluation.

provided that the agency would add certain costs to the offerors' gross present value cost, including "[t]he cost of relocation of furniture, telecommunications, replications costs, and other move-related costs, if applicable," and the tenant improvement allowance (TIA).⁵ *Id.* at 24. The TIA encompasses the finishes and fixtures that typically take space from the shell condition to a finished usable condition. *Id.* at 21. According to the RLP, the TIA shall include all of the offeror's administrative costs, general contractor fees, subcontractor's profit and overhead costs, offeror's project management fee, design costs, and other associated project fees necessary to prepare construction documents and complete the tenant improvements. *Id.* at 24.

The advertisement was re-issued on December 18, included a TIA of \$34.27 per ABOA SF for the existing leased space, \$34.37 per ABOA SF for new leased space, and stated that the agency was seeking to lease 11,807 ABOA SF of office space. AR, Tab 3, Dec. 2019, Revised Advertisement at 2-3. The advertisement was re-issued once again on March 11, 2020, and the TIA was adjusted down to \$5.85 per ABOA SF for the existing leased space, and adjusted up to \$41.13 per ABOA SF for new leased space. AR, Tab 4, Mar. 2020, Revised Advertisement at 3.

GSA received technically acceptable lease proposals from Hoover and MSDG, the incumbent offeror. COS at 2. Separately, Hoover contacted the contracting officer and offered to cover all physical costs associated with relocation from the current space to the protester's building. Protest at 14-15; Exh. R, Hoover's Proposal Cover Letter (Apr. 6, 2020); Exh. Z, Decl. of Hoover Official at 3. The offer that Hoover submitted to the AAAP system during the April Open Period did not include an offer to cover physical relocation costs. AR, Tab 6, Hoover AAAP Offer (Apr. 7, 2020); COS at 2.

On April 23, the agency notified Hoover that award was made to MSDG as the lowest-priced proposal with an evaluated NPV price of \$19.39 per ABOA SF. AR, Tab 9, Agency Notice of Unsuccessful Offer to Hoover (Apr. 23, 2020). Hoover was informed that its evaluated NPV price was \$21.12 per ABOA SF. *Id.*

On April 30, Hoover filed with the agency what it designated as an agency-level protest, alleging that the agency utilized an incorrect net present value calculation which resulted in a higher than intended present value calculation of its offer. AR, Tab 10, Hoover Agency-Level Protest (Apr. 30, 2020). On May 11, the agency provided Hoover a collection of emails between the agency and Hoover, and stated that "we have provided the sufficient amount of information and detail in regards to your questions below." Protest, Exh. J, GSA Response (May 11, 2020) at 1. On May 18, the agency presented its response in a legal brief to the official designated to decide the agency-level protest. AR, Tab 11, GSA Response (May 18, 2020). In this response, the agency explained that, as an automated procurement, the agency's award decision

⁵ The agency advises that the AAAP manager enters the pre-established relocation and move-related costs into the AAAP system for purposes of the NPV price evaluation. Supp. Contracting Officer Statement (COS) at 2. Here, the contracting officer was also the AAAP manager. COS at 1.

was made to the lowest-priced technically acceptable offeror, as determined by the AAAP. *Id.* at 3.

On June 10, the agency denied the agency-level protest, advising that the costs used to calculate Hoover's net present value "[e]ll well within" the terms of the RLP. AR, Tab 13, GSA Agency-Level Protest Decision (June 10, 2020) at 7. On June 19, Hoover filed this protest with our Office.

DISCUSSION

Hoover contends that the agency's NPV evaluation of its offered price was unreasonable for numerous reasons. First, Hoover argues that it was not on notice that relocation and move-related costs would be added to the agency's price evaluation of its proposal. Second, Hoover contends that the relocation and move-related costs, factored into its proposal by the agency, were unreasonably high. Third, Hoover asserts that the agency failed to adequately document or explain how the TIA costs and relocation and move-related costs worked together to approximate the actual cost of moving from the incumbent building to Hoover's offered building. For the reasons discussed below, we sustain the protest.⁶

Timeliness

We first address the timeliness of Hoover's protest to GAO following its agency-level protest. The agency argues that the protest is untimely and should be dismissed under 4 C.F.R. § 21.2(a)(3). Agency Resp. to Req. for Addl. Briefing (July 22, 2020) at 1. Specifically, the agency contends that its May 11 and May 18 responses to the agency-level protest constitute adverse agency actions sufficient to trigger GAO's 10-day filing deadline. *Id.* at 4. In support of this argument, the agency relies on our decision in *Impact Res., Inc.*, B-416093, June 11, 2018, 2018 CPD ¶ 207, where our Office concluded that "[t]imeliness is thus measured from when the protester is on notice that the contracting activity will not undertake the requested corrective action rather than from the receipt of a subsequent formal denial of the agency-level protest." *Id.* at 5.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. In this respect, our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Dominion Aviation, Inc.-Recon.*, B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Where a protest first has been filed with a contracting

⁶ Although we do not address every issue raised by the protester, we have reviewed each issue and find that with the exception of those discussed in this decision, none provides a basis to sustain the protest.

activity, any subsequent protest to our Office, to be considered timely, must be filed within 10 calendar days of “actual or constructive knowledge of initial adverse agency action.” 4 C.F.R. § 21.2(a)(3). The term “adverse agency action” means any action or inaction on the part of a contracting agency that is prejudicial to the position taken in a protest filed there. 4 C.F.R. § 21.0(e)

Based upon our review of the record, we disagree with the agency’s contention that Hoover’s protest is untimely. In the decision cited by the agency, *Impact Res., Inc.*, the protester was notified that another firm was the apparent successful offeror and that an award would be forthcoming, thus putting the protester on notice that the agency would not undertake the requested action, *i.e.*, amending the solicitation. Here, in contrast, the agency’s two responses to Hoover’s agency-level protest were not firm statements that the agency would not take corrective action.

First, the initial May 11 agency response was a collection of emails concerning the agency’s methods of calculating the offerors’ present value price evaluation. Protest, Exh. J, GSA Response (May 11, 2020) at 1. However, the agency’s production of these emails, without an accompanying statement about the agency’s intent to proceed with the lease award, cannot be reasonably viewed as agency action that is prejudicial to the protester’s position. The second agency response, the May 18 legal memorandum from agency counsel to the official deciding the agency-level protest, likewise should not be considered initial adverse action. AR, Tab 11, GSA Response (May 18, 2020).

Rather, when viewed in the context of the adversarial process in which it was submitted, it becomes clear that this legal memorandum advocated for the position that the agency-level protest be denied, and was not an indication that the agency was taking action adverse to the protester. Indeed, this interpretation of the agency’s May 18 response is confirmed by a May 12 email from the agency to protester’s counsel in which agency counsel acknowledges receipt of the agency-level protest and states that “GSA does not intend to proceed with award until your protest has been fully adjudicated.” Hoover Resp. to Req. for Dismissal, Exh. 5, Emails between Hoover and Agency at 1.

Thus, the record demonstrates that initial adverse agency action did not occur until the deciding official issued a decision denying Hoover’s agency-level protest on June 10. Therefore, we find that Hoover’s protest at GAO, filed within 10 days of the issuance of the agency-level decision is timely.⁷

⁷ In its protest to our Office, however, Hoover raises two protest grounds which are, in effect, untimely challenges to the solicitation. First, the protester alleges that the agency improperly failed to disclose the exact values of the relocation and move-related costs that the agency intended to use during its NPV price evaluation. Second, the protester also contends that the TIA value contained in the solicitation, as amended, was unreasonably high. Alleged improprieties that do not exist in the initial solicitation but which are subsequently incorporated into it must be protested not later than the next closing time for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1);

Relocation and Move-Related Costs

The protester contends that the agency's NPV evaluation of its offered price was unreasonable because the agency added relocation and move-related costs. Specifically, the protester argues that while the RLP stated that certain costs would be added, if applicable, it did not believe that relocation and move-related costs would be separately included in the agency's price evaluation of its proposal. Protest at 12. In this regard, Hoover states that it was told by the contracting officer that move-related costs were already included in the March revised advertisement. *Id.* at 12; Exh. Z, Decl. of Hoover Official at 3. In response, addressing the protester's allegation, the contracting officer denies that she informed Hoover that move-related costs were already included in the RLP, as amended, and would not be added during evaluation. COS at 2.

As stated above, the RLP specified that "[t]he cost of relocation of furniture, telecommunications, replications costs, and other move-related costs, if applicable," would be added to the gross present value calculation. RLP at 24. Thus, as an initial matter, we find that the RLP clearly put offerors on notice that relocation and move-related costs were to be added during the agency's NPV price evaluation.

Additionally, we reject the protester's contention that it reasonably believed that move-related costs were included in the TIA, when the non-incumbent TIA was increased from \$34.37 to \$41.13. AR, Tab 3, Dec. 2019, Revised Advertisement at 3; Tab 4, Mar. 2020, Revised Advertisement at 3; Protest at 6; Exh. Z, Decl. of Hoover Official at 3. Here, even assuming the contracting officer informed Hoover that the TIA included move-related costs, the protester could not reasonably disregard the plain language of the RLP stating that relocation and other move-related costs would be added to the present value price evaluation. RLP at 24.

In this regard, any such assurances from the contracting officer would have been inconsistent with the RLP which provided for relocation/move-related costs and the TIA as separate and distinct costs. We have repeatedly stated that oral advice that would have the effect of altering the written terms of a solicitation, even from the contracting officer, does not operate to amend a solicitation or otherwise bind the agency, and that an offeror relies on such oral advice at its own risk. *Noble Supply and Logistics*, B-404731, Mar. 4, 2011, 2011 CPD ¶ 67 at 2-3. Thus, we find that the agency's consideration of relocation and move-related costs was reasonable and consistent with the solicitation.

Present Value Price Evaluation

Having found that the solicitation sufficiently put offerors on notice that the agency would add relocation and move-related costs during its NPV price evaluation, we next

Draeger, Inc., B-414938, Sept. 21, 2017, 2017 CPD ¶ 308 at 4. Both of these alleged solicitation defects were apparent from the face of the solicitation, as amended. Consequently, we dismiss these protest allegations, raised post-award, as untimely challenges to the solicitation.

address the protester's allegations that the agency unreasonably performed its evaluation. As discussed below, we find that the record is inadequate to support a finding that the agency's NPV price evaluation was reasonable, and on that basis, we sustain the protest.

In reviewing an agency's evaluation of proposals and source selection decision, it is not our role to reevaluate submissions; rather, we examine the supporting record to determine whether the decision was reasonable, consistent with the stated evaluation criteria, and adequately documented. *Federal Builders, LLC – The James R. Belk Trust*, B-409952; B-409952.2, Sept. 26, 2014, 2014 CPD ¶ 285 at 3. Where an agency fails to document or retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its evaluation conclusions. *Navistar Def., LLC, BAE Sys., Tactical Vehicle Sys. LP*, B-401865 *et al.*, Dec. 14, 2009, 2009 CPD ¶ 258 at 13.

Our Office will not limit its review of an agency's evaluation to contemporaneously documented evidence, but instead will consider all the information provided, including a party's arguments and explanations. *CRAssociates, Inc.*, B-418194, Jan. 23, 2020, 2020 CPD ¶ 80 at 5. While post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details will generally be considered in our review as long as those explanations are credible and consistent with the contemporaneous record; when an agency's post-protest defense of its evaluation is not supported by the contemporaneous record, or is inconsistent with the record, such explanations are unpersuasive and will be afforded little weight. *Avionic Instruments LLC*, B-418604, B-418604.2, June 30, 2020, 2020 CPD ¶ 225 at 6; *Boeing Sikorsky Aircraft Support*, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15.

First, the protester generally argues that the agency's evaluation utilized relocation and move-related costs that were unreasonably high. Specifically, Hoover contends that to the extent it can discern the relocation and move-related costs factored into its proposal by the agency for an 11,807 ABOA SF office move of thirty workstations for thirty employees a distance of five miles, these costs are unreasonably high on their face. Supp. Comments at 12. Hoover calculates the agency's move costs, exclusive of buildout costs, at \$7.66 per ABOA SF multiplied by 11,807 ABOA SF or \$90,441.⁸ *Id.* at 13-14. In support of its contentions, the protester submitted bids from local movers for this move that ranged from \$11,000 to \$15,000. Supp. Comments at 13; Exh. DD, Moving Estimate from Local Mover A; Exh. FF, Moving Estimate from Local Mover B.

⁸ The protester calculated the agency's move costs at \$7.66 per ABOA SF by adding the move-related factors that the AAAP manager input into the AAAP system for the evaluation of its proposal of \$3.96 for physical move cost per ABOA SF, and \$3.70 for telecom cost per ABOA SF. AR, Tab 7, Agency NPV Price Evaluation of Hoover Proposal at 1.

Second, the protester contends that the agency failed to adequately document or explain how the TIA costs and relocation and move-related costs worked together to approximate the actual cost of moving from the incumbent building to the Hoover-offered building. In this regard, Hoover argues that some relocation and move-related costs were included in the TIA and that some TIA costs were added as relocation and move-related costs during the agency's NPV price evaluation. Supp. Comments at 11. Specifically, the protester states that the agency's statement that "TIA does not cover all relocation and move-related costs," implies that the TIA covers some relocation and move-related costs. Supp. Comments at 7 (quoting Supp. COS at 1). The protester also notes that it reasonably understood TIA costs to include all build out costs and that it does not believe the agency can assess additional build out cost under the auspices of relocation and move-related costs. For these reasons, Hoover asserts that our Office cannot discern whether the agency added reasonable costs to Hoover's proposal during its price evaluation.

Based on the lack of documentation and analysis in the record, including the agency's post-protest submissions, we are unable to determine that the agency reasonably evaluated Hoover's NPV price. In this regard, the agency has failed to provide adequate documentation to support the reasonableness of the relocation and move-related costs that it added to Hoover's NPV price.

In response to the protester's contention that the agency's relocation and move-related costs are unreasonably high, the agency states that the specific relocation and move-related costs used during its evaluation were not created by the contracting office, but rather provided by the GSA's Central Office. Supp. COS at 1-2. The agency further explains that the estimated relocation and move-related costs are confidential, used only within GSA, and are established prior to the fiscal year by the agency. COS at 1-2. The agency states further that these costs are city-specific, "created using internal agency research on the associated move costs for the specified city," and were entered into the AAAP system by the AAAP manager before offerors submit their offers into the AAAP system. Supp. COS at 2. Notably absent from the record, however, is documentation that substantiates the validity of the estimates used by the agency.

Based upon the agency's representations, our Office understands that the AAAP system is an automated procurement process that calculates the NPV price from information input by the offeror and the AAAP manager (here, the contracting officer). Notwithstanding the agency's use of the AAAP program, however, it is a fundamental principle of government accountability that an agency be able to produce a record sufficient to allow for a meaningful review when its procurement actions are challenged. See *Global Aerospace Corp.*, B-414514, July 3, 2017, 2017 CPD ¶ 198 at 10; *e-LYNXX Corp.*, B-292761, Dec. 3, 2003, 2003 CPD ¶ 219 at 8. As stated above, where an agency fails to adequately document its evaluation, it bears the risk that there may not be an adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its evaluation and award decision. *Systems Research & Apps. Corp.*; *Booz Allen Hamilton, Inc.*, B-299818 *et al.*, Sept. 6, 2007, 2008 CPD ¶ 28 at 12.

Based upon our review, the record is devoid of documentation sufficient for us to conclude that the relocation and move-related costs added to Hoover's NPV price were reasonable. See *TriCenturion, Inc.; SafeGuard Servs., LLC*, B-406032 *et al.*, Jan. 25, 2012, 2012 CPD ¶ 52 at 13 (sustaining protest because the record was inadequate to conclude that the agency's cost realism analysis was reasonable). Here, the agency invites us to simply accept the figures that the agency input into the AAAP system regarding relocation and move-related costs, which were then used by the AAAP system to calculate Hoover's evaluated NPV price. While the agency described, at a high level, how the agency formulates its estimates of relocation and move-related costs, the agency did not provide documentary support demonstrating how the estimates used in this procurement were derived. Without providing the underlying basis for the estimates used, the reasonableness of which were directly challenged by the protester, the agency fails to provide us with a basis to conclude that the relocation and move-related costs added to Hoover's NPV price were not unreasonably high. Thus, we sustain Hoover's protest on this basis.⁹

Competitive Prejudice

Competitive prejudice is an essential element of every viable protest; we will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions; that is, unless the protester demonstrates that, but for the agency's actions, it would have a substantial chance of receiving an award. *Octo Consulting Grp., Inc.*, B-413116.53, B-413116.55, May 9, 2017, 2017 CPD ¶ 139 at 10. When performing this analysis, GAO will resolve doubts regarding prejudice in favor of the protester; a reasonable possibility of prejudice is sufficient to sustain a protest. *Alutiiq-Banner Joint Venture*, B-412952 *et al.*, July 15, 2016, 2016 CPD ¶ 205 at 11.

Here, we have found that the record is inadequate for us to conclude that the agency's evaluation of Hoover's NPV price is reasonable. As stated above, the awardee's evaluated NPV price was \$19.39 per ABOA SF, and Hoover's evaluated NPV price was \$21.12 per ABOA SF. *Id.* Since we have no basis to conclude that the relocation and move-related costs added to Hoover's NPV price were not unreasonably high, we find that Hoover has met its burden of showing a reasonable possibility of prejudice.

⁹ Further, in response to the protester's arguments regarding the TIA, the agency asserts that while the TIA includes the cost of building out the space in accordance with government approved drawings, additional build out costs were added as relocation and move-related costs during the agency price evaluation. Here, the record before us does not provide us with enough information to determine whether the agency reasonably added build out costs in addition to those already included in the TIA established by the solicitation. Because the record is unclear as to whether certain build out costs were "double-counted," the agency may wish to examine this issue, and document its findings, as appropriate, when implementing the corrective action recommended in this decision.

RECOMMENDATION

We recommend that the agency conduct and adequately document a new NPV price evaluation in a manner consistent with this decision, and make a new source selection decision based on that reevaluation. We also recommend that Hoover be reimbursed its reasonable costs of filing and pursuing its protest at GAO. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision. *Id.* § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel