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Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: GOV National Healthcare Drive, LLC

File: B-419258; B-419258.2; B-419258.3

Date: January 13, 2021

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DIGEST

Protest that agency failed to engage in meaningful discussions is sustained where the record shows that, although agency engaged in discussions, it failed to discuss with the protester any of the weaknesses or deficiencies identified by the agency in the protester's proposal.

DECISION

GOV National Healthcare Drive, LLC (GNHD), of Huntington, New York, protests the award of a lease to Carnegie Management and Development Corporation, of Westlake, Ohio, under request for lease proposals (RFP) No. 36C10F18R0659, issued by the Department of Veterans Affairs (VA) for the lease of premises to be used for a community-based outpatient clinic in Daytona Beach, Florida. GNHD argues that the agency misevaluated proposals, failed to engage in meaningful discussions, and made an unreasonable source selection decision.

We sustain the protest.

BACKGROUND

The RFP contemplates the award of a 20-year lease on a best-value tradeoff basis for approximately 123,000 square feet of rental space located in either an existing building or a newly-constructed building to house a community-based outpatient clinic in

Daytona Beach, Florida.[1] Firms were advised that proposals would be evaluated considering price and several non-price considerations. The non-price considerations collectively were approximately equal in importance to price, but, as proposals were deemed more equal in technical merit, price would become the more important consideration. RFP at 25. The non-price factors, in descending order of importance, were: technical quality; offeror qualifications and past performance; operation and maintenance plan; and socioeconomic status.[2] RFP at 25-33. For price evaluation purposes, the RFP specified that the VA would calculate a present value cost per ABOA square foot, which it would use to calculate an overall present value cost, and included detailed information about how the VA would make those calculations. RFP at 33-34.

In response to the RFP, the agency received six proposals, two of which were eliminated without detailed consideration because the land proposed was within a floodplain. Agency Report (AR), exh. 57, Source Selection Decision Document (SSDD), at 7. The agency engaged in what it describes as "interchanges" (discussed in detail below) with the firms submitting the remaining proposals. After concluding these interchanges, the VA evaluated the proposals and made price calculations with the following results:[3]

	Carnegie	GNHD	Offeror A	Offeror B
Technical Quality	Highly Successful	Marginal	Marginal	Poor
Qualifications and Past Performance	Highly Successful	Successful	Marginal	Marginal
Operations and Maintenance Plan	Highly Successful	Successful	Successful	Marginal
Socioeconomic Status	Successful	Successful	Successful	Successful
Average Technical Rating	Highly Successful	Successful	Marginal	Marginal
Price Per Square Foot/Total Price	$43.18/ $106,125,968	$43.39/ $106,649,107	$45.07/ $110,781,652	$41.19/ $101,242,819

[1] The RFP specified the requirement as being for 122,900 American National Standards Institute/Building Owners and Managers Association Office Area (referred to in the solicitation as ABOA) square feet. RFP at 4.

[2] Each evaluation factor included several "areas of consideration" that were not ranked in terms of importance. RFP at 25-33. For example, under the technical quality factor, there were three areas of consideration, architectural concept and building design, quality of site characteristics and development, and sustainable design and energy efficiency. RFP at 26. The areas of consideration are not germane here.

[3] In evaluating the non-price aspects of the proposals, the agency assigned ratings of superior, highly successful, successful, marginal, or poor and, in evaluating the socioeconomic status factor, neutral. AR, exh. 57, SSDD, at 9-10.

AR, exh. 57, SSDD, at 10, 14. On the basis of these evaluation results, the agency selected Carnegie for award, concluding that its proposal offered the best value to the government. AR, exh. 57, SSDD, at 18-19. Shortly thereafter, the agency executed a lease with Carnegie. AR, exh. 64, Lease Agreement. After being advised of the agency's selection decision and requesting and receiving a debriefing, GNHD filed the instant protest.

DISCUSSION

GNHD raises various allegations in connection with the agency's evaluation of proposals and source selection decision. GNHD also argues that the agency failed to engage in meaningful discussions. We have considered all of GHND's allegations and sustain its protest as to the adequacy of discussions. We need not consider in detail any of GNHD's protest allegations relating to the agency's evaluation of proposals (except for one issue relating to the acceptability of the awardee's proposal discussed below) since we conclude that the agency failed to engage in adequate discussions; any challenge to the agency's earlier evaluation is largely academic in light of that conclusion. We discuss our findings in detail below.

Adequacy of Discussions

GNHD argues that the agency failed to engage in meaningful discussions with the company. As noted above, the record shows that the agency engaged in certain exchanges with the offerors. GNHD maintains that these exchanges constituted discussions, thereby triggering the legal requirement that the agency engage in meaningful discussions. GNHD argues that its discussions were not meaningful because the agency failed to discuss all deficiencies that the agency had identified in GNHD's proposal.

In response, the agency maintains that the exchanges it conducted with the offerors did not constitute discussions but, rather, constituted what it describes as "due diligence clarifications." According to the agency, it did not establish a competitive range or allow offerors to revise their proposals, and instead only requested certain 'due diligence" studies required to be submitted with initial proposals. In this connection, the agency argues that it only requested information relating to the offerors' compliance with various statutory requirements (such as the National Environmental Policy Act), and that any additional information provided in response to the agency's requests for information did not alter the proposals as submitted.

We sustain this aspect of GNHD's protest. Federal Acquisition Regulation (FAR) 15.306(b)(2) permits exchanges with offerors prior to the establishment of a competitive range that enable the government to obtain information necessary to enhance the government's understanding of proposals; allow reasonable interpretation of the proposal; or facilitate the government's evaluation process. This same FAR provision also states that such communications may not be used to cure proposal deficiencies or

material omissions, materially alter the technical or cost elements of the proposal and/or otherwise revise the proposal. *Id.*

On the other hand, where an agency engages in communications with an offeror for the purpose of obtaining information essential to determining the acceptability of a proposal, or otherwise provides the offeror with an opportunity to revise or modify its proposal in some material respect, discussions have occurred. *Tipton Textile Rental, Inc.*, B-406372, May 9, 2012, 2012 CPD ¶ 156 at 12. Our Office looks to the actions of the parties--not the agency's characterization of the exchanges--to determine whether discussions have occurred. *Id.* Where discussions have occurred, they must be meaningful; that is, they must lead the offeror into those areas of its proposal that require modification, amplification, or explanation. *DynCorp International LLC*, B-409874.2, B-409874.3, May 13, 2015, 2015 CPD ¶ 348 at 6. At a minimum, the agency must discuss all deficiencies, significant weaknesses and adverse past performance information to which the offeror has not had an opportunity to respond. FAR 15.306(d)(3).

Here, the record shows that the RFP's instructions included a lengthy list of required submissions. In addition, the RFP expressly advised offerors that this information was mandatory and--where the information was not included--the lack of the required information could provide a basis for rejection of the proposal as "non-responsive." Specifically, the RFP provides as follows:

> Offers shall consist of the following documents, organized as set forth in this subsection and adhering to a reasonable, efficient page limit. *To the extent items are missing, not adequately addressed, or page limits are unreasonable in a proposal, the Contracting Officer may determine the proposal to be non-responsive and therefore excluded from the competition*, at the sole discretion of the Contracting Officer.

RFP at 17 (emphasis supplied). Among other requirements, offerors were instructed to provide a phase I cultural resources assessment survey; a letter or letters from the local authority having jurisdiction demonstrating that there are adequate public services and utilities serving the offered property to support the agency's use; and a Federal Emergency Management Agency map showing the site location and demonstrating that the proposed property lies outside of a 100-year floodplain. RFP at 18.

The record shows that, during its exchanges with the offerors, the agency asked for all three of these enumerated items because they were missing from one or another of the proposals, or were not otherwise adequate. Specifically, the record shows that, among other documentation, the agency requested that the awardee provide a cultural resources assessment survey and letters from the local utilities demonstrating that adequate utilities would be available for the agency's use (the agency also requested that Carnegie provide a biological survey and a wetlands survey and delineation documentation). AR, exh. 22, Letter to Carnegie, Apr. 8, 2020. In a similar vein, the agency requested a cultural resources survey from GNHD. AR, exh. 21, Letter to

GNHD, Apr. 8, 2020. Similar letters also were sent to the remaining two offerors. AR, exh. 23, Letter to Offeror A, Apr. 8, 2020; exh. 24, Letter to Offeror B, Apr. 8, 2020.

The record therefore shows that each offeror was asked to provide essential information necessary for the agency to determine the acceptability of their respective proposals. On this record, we conclude that the agency engaged in discussions with the offerors. *Tipton Textile Rental, Inc.*, *supra.*

Against this backdrop, the record shows that the agency identified some eight deficiencies in the protester's proposal, along with a larger number of weaknesses. AR, exh. 20, Technical Evaluation Board Report, at 7-9. None of these deficiencies or weaknesses were brought to the protester's attention during the agency's discussions. On this record, we conclude that the agency failed to engage in meaningful discussions with GNHD. We therefore sustain this aspect of GNHD's protest.[4]

Evaluation of the Carnegie Proposal

GNHD also challenges the agency's evaluation of the awardee's proposal based on several allegations. We discuss one of these allegations because, according to GNHD, the alleged deficiency in the awardee's proposal provides a basis for our Office to conclude that the lease awarded to Carnegie should be voided.

The record shows that the agency's award of the lease was authorized by a resolution passed by the House of Representatives Committee on Transportation and Infrastructure. AR, exh. 62, Committee Resolution. (There is a corresponding resolution passed by the Senate Committee on Environment and Public Works that was not included in the record. AR, exh. 57, SSDD, at 1, 4.) The protester points out that the resolutions limited the agency's authority to enter into the lease based on the number of square feet to be rented. In effect, the protester maintains that, based upon the express terms of the Committees' resolutions, the agency is only legally authorized to enter into a lease for 106,826 net useable square feet. *Id.* at 1.

The protester points out that the entire building proposed by Carnegie is larger than the number of square feet authorized by the Committees for lease by the agency. The record shows that Carnegie's proposed structure includes space that was not included

[4] The agency suggests that, to the extent that it did not engage in meaningful discussions with GNHD, the error was not prejudicial because the other offerors, had they been afforded an opportunity to engage in further discussions, also could have improved their proposals. When an agency fails to hold meaningful discussions, our Office will resolve any doubts concerning the prejudicial effect of the agency's improper actions in favor of the protester. *YWCA of Greater Los Angeles*, B414596, *et al.*, July 24, 2017, 2017 CPD ¶ 245 at 6. Beyond its speculation about the possible outcome of any discussions that might be held, the agency has failed to demonstrate that its failure to engage in meaningful discussions with GNHD was not prejudicial.

in the lease, such as a building manager's office and a shop. The awardee's proposal also expressly states that the space for these facilities was not included in the calculation of the rentable area.[5] AR, exh. 16, Carnegie Technical Proposal, at 115. GNHD argues that the lease executed by the agency is improper when compared to the Committees' authorization because the total square feet in Carnegie's building exceeds the number of square feet authorized to be let.

We find no merit to this allegation. Our Office has previously adopted the judicially-expressed view that an awarded contract should not be treated as void or voidable, even if improperly awarded, unless the illegality of the award is plain or palpable. *Peter N.G. Schwartz Cos. Judiciary Square Ltd. Partnership,* B-293007.3, Oct. 31, 1990, 90-2 CPD ¶ 353 at 11*, citing John Reiner & Co. v. United States*, 324 F.2d 438 (Ct.Cl.1963), cert. denied, 377 U.S. 931 (1964). The test in determining whether an award is plainly or palpably illegal is whether the award was made contrary to statute or regulation due to improper action by the contractor, or whether the contractor was on direct notice that the procedures followed were violative of statutory or regulatory requirements. *Southwest Marine, Inc.--Request for Recon.,* B-219423.2, Nov. 25, 1985, 85-2 CPD ¶ 594.

As an initial matter, the Committee Resolutions at issue are not statutes, and as a result, cannot form the basis for a conclusion that the award here was made contrary to statute or regulation, as required by the decision in *Southwest Marine--Recon.* Moreover, there is nothing in either of these resolutions or in the RFP that prohibits the agency from entering into a lease agreement for some portion of a building that is less than the entire building. In fact, the RFP itself includes at least two provisions that envision the possibility that the agency could lease space in a building where other entities have a legal right to space in the building. First, the RFP provides: "The Government will not compete with other facilities having exclusive rights in the Building. The Offeror shall advise the Government if such rights exist." RFP at 1. Second, the RFP conditions this overall proviso on another clause that excludes from consideration space offered in a building that includes residential uses: "Space will not be considered where apartment space or other living quarters are located within the same building." RFP at 2.

The RFP therefore anticipated that the agency would consider space offered in a building where other entities have a legal right to occupancy, as long as the space did not include apartments or other living quarters. Also, there is nothing in the RFP prohibiting firms from offering buildings that include space occupied or controlled by

[5] There is no suggestion by the protester (or evidence in the record) that the conversion of the figure of 122,900 ABOA square feet to 106,826 net useable square feet is incorrect or otherwise inaccurate. The protester's allegation is only that the number of square feet included in the awardee's building (calculated by either measurement) exceeds the number of square feet authorized by the Committees for the agency to lease.

other entities. Thus, for example, if a firm owned a 1 million square foot building and offered an appropriately-configured and appropriately-sized space within that building, there would be no basis for our Office to object to the agency's execution of a lease for that portion of the building, even though the entire building is larger than the leased portion. It follows that this objection by the protester provides no basis for our Office to conclude that the lease executed between the agency and Carnegie is void or voidable; simply stated, there is nothing in the record to show that Carnegie's offer of appropriately-configured and appropriately-sized space within its larger building constituted improper action on the part of Carnegie, or that Carnegie knew that the procedures followed for the award of the lease violated applicable statutes or regulations.

RECOMMENDATION

In light of the foregoing discussion, we sustain GNHD's protest based on our finding that the agency failed to provide GNHD with meaningful discussions. Ordinarily in these circumstances, we would recommend that the agency reopen the acquisition, conduct discussions, solicit, obtain, and evaluate revised proposals, and make a new source selection decision, terminating the lease awarded to Carnegie for the convenience of the government, if appropriate. However, such a recommendation is not practicable here. The lease executed between the agency and Carnegie, AR, exh. 64, Lease Agreement, does not include a termination for convenience clause, thereby eliminating any realistic possibility that the agency could terminate Carnegie's lease and make a new award. Under these circumstances, we recommend that the protester be reimbursed its proposal preparation costs, along with the costs associated with filing and pursuing its protest with our Office, including reasonable attorneys' fees. *Federal Builders, LLC--The James R. Belk Trust*, B-409952, B-409952.2, Sept. 26, 2014, 2014 CPD ¶ 285. The protester should submit its certified claim for such costs, detailing the time spent and the costs incurred, directly with the agency within 60 days of receiving this decision.

The protest is sustained.

Thomas H. Armstrong
General Counsel