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Decision

Matter of: Bannum, Inc.

File: B-409831

Date: July 30, 2014

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Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that the agency held unequal discussions concerning price is denied where it is inherently within an agency's discretion to inform an offeror during discussions that its price appears to be high in comparison to other offeror's proposed prices, and where the discussions were reasonably and properly tailored to address the concerns associated with each firm's proposal.

2. Protest challenging contracting officer's affirmative determination of responsibility is dismissed where the assertion on which the protest is based does not constitute the type of allegation that triggers Government Accountability Office (GAO) review of affirmative responsibility determinations under GAO's Bid Protest Regulations.

DECISION

Bannum, Inc., of Odessa, Florida, protests the award of a contract to Dismas Charities, Inc., of Louisville, Kentucky, by the Department of Justice, Federal Bureau of Prisons (BOP), under request for proposals No. 200-1212-CS, for residential reentry center services in Nashville, Tennessee. Bannum asserts that

the agency held unequal discussions favoring Dismas, and failed to review relevant information in making an affirmative determination of Dismas' responsibility.¹

We deny the protest in part and dismiss it in part.

BACKGROUND

BOP issued the solicitation on April 9, 2013, seeking a contractor to provide residential reentry center services located inside the city limits of Nashville, Tennessee, with a guaranteed minimum of 70 inmate beds and an estimated maximum of 84 inmate beds. The services to be provided include employment and residence development, as well as other self-improvement opportunities, to assist federal offenders during the transition from prison to the community.

The RFP provided that award would be made on a best-value basis considering three factors: past performance, technical/management, and price. Agency Report (AR), Tab 4, RFP, at 42. Among the three factors, past performance was more important than technical/management, and the two non-price factors, taken together, were significantly more important than price. *Id.* The past performance and technical/management evaluation factors were each comprised of five equally weighted subfactors. For past performance, the RFP required offerors to submit their 5 most relevant contracts that were, or are currently being performed within the last 3 years. Each contract was to be evaluated under each subfactor, resulting in an overall past performance score for each past performance contract. The subfactors under the past performance factor included: (1) accountability, (2) programs, (3) community relations, (4) personnel, and (5) communications/responsiveness. *Id.* at 43. The subfactors under the technical/management factor were: (1) site location, (2) accountability, (3) programs, (4) facility, and (5) personnel. *Id.* at 43-44. The site location subfactor was also further divided into two considerations: site validity and community relations program. *Id.* at 43.

[DELETED]. Bannum's initial proposal set forth an estimated maximum price of [DELETED], while Dismas' initial proposal set forth an estimated maximum price of [DELETED]. After a review of the initial proposals, the agency conducted two rounds of discussions. In the first round of discussions, BOP advised Dismas that

¹ Bannum presented several additional arguments in its initial protest. However, we consider Bannum to have abandoned these challenges where the agency provided substantive responses in its report, and the protester did not further address the allegations in its comments. See Cedar Electric, Inc., B-402284.2, Mar. 19, 2010, 2010 CPD ¶ 79 at 3 n.4.

“the proposed pricing is high.” AR, Tab 13, Dismas Discussion Notice, at 2. The agency did not comment on Bannum’s proposed price during discussions. Both offerors submitted revised proposals in response to discussions. As relevant, Bannum lowered its estimated maximum price to \$11,197,032, while Dismas lowered its estimated maximum price to \$11,541,215.28. Although the agency conducted a second round of discussions, neither offer further revised its price in its final proposal.

After its evaluation of the final proposals, the agency rated the offerors as follows:

	Bannum	Dismas
Past Performance	Very Good	Very Good
Contract 1	Acceptable	Very Good
Contract 2	Very Good	Very Good
Contract 3	Very Good	Very Good
Contract 4	Very Good	Very Good
Contract 5	Acceptable	Very Good
Technical/Management	Acceptable/Low Risk	Very Good/Low Risk
Site Location	Acceptable/Low Risk	Very Good/Low Risk
Accountability	Very Good/Low Risk	Very Good/Low Risk
Programs	Acceptable/Low Risk	Very Good/Low Risk
Facility	Acceptable/Low Risk	Acceptable/Low Risk
Personnel	Very Good/Low Risk	Very Good/Low Risk
Price	\$11,197,032.00	\$11,541,215.28

See AR, Tab 25, Source Selection Decision. In light of these evaluation results, the source selection authority concluded that the benefits of Dismas’ proposal warranted payment of the roughly 3 percent price premium over Bannum’s proposal, where “Dismas’ past performance and Technical/Management proposals are superior to Bannum’s and will provide the BOP with the services it desires at a high quality and with low risk.” Id. at 32. The source selection authority concluded that this result was consistent with the solicitation’s award criteria providing that the non-price evaluation factors were significantly more important than price. Id.

BOP made the award to Dismas on May 9, 2014, and provided notice to Bannum that it had not been selected for the award. Bannum then requested a debriefing, which it received on May 12. This protest followed.

DISCUSSION

Bannum asserts that the agency conducted improper and unequal discussions by informing Dismas that its “proposed pricing is high,” without providing Bannum input on its own pricing. Bannum contends that this disparity was unreasonable and unequal where Bannum presumes that both offerors’ proposed prices were below the agency’s independent government estimate (IGE), which Bannum estimates as

\$12,408,765.60, by averaging the contract rates of multiple other residential reentry center services contracts discussed in the agency's price analysis.

The Federal Acquisition Regulation (FAR) requires agencies to address during discussions, "[a]t a minimum . . . deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond." FAR § 15.306(d)(3). Although discussions may not be conducted in a manner that favors one offeror over another, and offerors must be given an equal opportunity to revise their proposals, discussions need not be identical among offerors; rather, discussions need only be tailored to each offeror's proposal. See FAR §§ 15.306(d)(1), (e)(1); WorldTravelService, B-284155.3, Mar. 26, 2001, 2001 CPD ¶ 68 at 5-6.

Concerning prices, unless an offeror's proposed price is so high as to be unreasonable or unacceptable, an agency is not required to inform an offeror during discussions that its proposed price is high in comparison to a competitor's proposed price, even where price is the determinative factor for award. DeTekion Sec. Sys., Inc., B-298235, B-298235.2, July 13, 2006, 2006 CPD ¶ 130 at 15. Nonetheless, it is inherently within an agency's discretion to inform an offeror during discussions that its price appears to be high in comparison to other offeror's proposed prices, should an agency choose to do so. Id. at 13. This is true without regard to whether the offeror's price is higher or lower than the agency's IGE. Id.

In this case, we do not agree with Bannum that the agency acted improperly in informing Dismas that its "proposed pricing is high." As discussed above, notwithstanding the relationship between Dismas' initial price and the agency's IGE, it is within the agency's discretion during discussions to inform an offeror that its price is high in comparison to other offerors' proposed prices. Id.

As a further matter in this protest, we note that Bannum's estimate of the agency's IGE in this case is incorrect. The record demonstrates that the agency's actual IGE for this procurement was \$11,400,107.04. AR, Tab 33, IGE, at 4. Accordingly, Dismas' initial price in this case was higher than both Bannum's initial price, and the agency's IGE. In light of this record, we see no unequal or unfair treatment in the agency's decision to inform Dismas that its "proposed pricing is high," or in its decision to make no comment on Bannum's pricing, where Bannum's price was both the lowest price received, and was lower than the agency's IGE.² As stated

² Bannum also suggests that the agency's conduct in discussions reflects "the BOP's continuing animosity towards Bannum," and that "Dismas was obviously the preferred offeror from the outset." Comments at 7. To the extent Bannum contends that BOP was biased against it, this ground of protest essentially represents an allegation of bad faith. Government officials are presumed to act in good faith, and a protester's contention that procurement officials are motivated by bias or bad faith
(continued...)

above, discussions need not be identical among offerors; rather, discussions need only be tailored to each offeror's proposal. See FAR §§ 15.306(d)(1), (e)(1); WorldTravelService, supra.

Bannum also asserts that the agency erred in making an affirmative determination of responsibility concerning Dismas, where the agency did not review "numerous news stories" regarding an audit report by the Auditor of Public Accounts for the Commonwealth of Kentucky, questioning Dismas' financial management and personnel oversight.

There is no requirement that contracting officers explain the basis for an affirmative responsibility determination, FN Mfg., Inc., B-297172, B-297172.2, Dec. 1, 2005, 2005 CPD ¶ 212 at 7-8; a written explanation is only required when a CO makes a determination of nonresponsibility. FAR § 9.105-2(a)(1). Since an affirmative determination of responsibility is largely a matter within a CO's discretion and need not be documented, our Office, as a general matter, will not consider a protest challenging an affirmative determination of responsibility except under limited exceptions. 4 C.F.R. § 21.5.

Our Office will consider a protest of an affirmative determination of responsibility where the protest identifies evidence raising serious concerns that, in reaching the responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. 4 C.F.R. § 21.5(c); T. F. Boyle Transp., Inc., B-310708, B-310708.2, Jan. 29, 2008, 2008 CPD ¶ 52 at 5. In that context, we will review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. Verestar Gov't Servs. Group, B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 4-5.

Bannum's protest fails to meet the threshold for our review in this area, and is dismissed. The allegations that our Office has reviewed in the context of an affirmative determination of responsibility generally pertain to very serious matters such as potential criminal activity. See e.g., FN Mfg., Inc., supra (considering an

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must be supported by convincing proof; our Office will not consider allegations based on mere inference, supposition, or unsupported speculation. Career Innovations, LLC, B-404377.4, May 24, 2011, 2011 CPD ¶ 111 at 7-8; Shinwha Elecs., B-290603 et al., Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n.6. The protester's allegations in this case provide no more than mere inference, supposition, or unsupported speculation, and this basis of protest is therefore dismissed.

allegation that the agency failed to consider an ongoing investigation into whether the awardee defrauded the government on a prior contract for the same requirement).

In contrast, the audit report cited by the protester in challenging the agency's determination was largely a review of policies and procedures that recommended various actions to strengthen Dismas' controls and oversight procedures. Although the audit report does note that the scope of the audit was limited by Dismas' refusal to grant the auditors full access to financial records and to Dismas' employees, the audit report simply does not support the necessary threshold showing to trigger our Office's review of a challenge to an affirmative responsibility determination. See The GEO Group, Inc., B-405012, July 26, 2011, 2011 CPD ¶ 153 at 7; Hendry Corp., B-400224.2, Aug. 25, 2008, 2008 CPD ¶ 164 at 2-3. Accordingly, this basis of the protest is dismissed.

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel