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Decision

Matter of: Bannum Inc. - Protest and Reconsideration

File: B-411074.2; B-411074.3

Date: June 12, 2015

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William D. Robinson, Esq., and Nihar Vora, Esq., U.S. Department of Justice, Federal Bureau of Prisons, for the agency.

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DIGEST

Agency reasonably decided to take corrective action in response to a previous protest, where the contracting officer identified flaws in the evaluation of proposals that warranted reevaluation of proposals, discussions, and revised proposals.

DECISION

Bannum Inc., of Odessa, Florida, protests the corrective action being taken by the Department of Justice, Federal Bureau of Prisons (BOP), under request for proposals (RFP) No. RFP-200-1244-WS, for residential re-entry center and home confinement services. Bannum argues that the corrective action is unwarranted or, in the alternative, that the BOP failed to properly limit the scope of the corrective action.

We deny the protest.

BACKGROUND

The solicitation provided for the award of a fixed-price, indefinite-delivery/indefinite-quantity contract for residential re-entry center and home confinement services in Jefferson, Orleans, St. Bernard, and St. Tammany Parishes, Louisiana, for a base year with four option years. The RFP advised offerors that “[c]ontract performance

will be 120 days after the date of contract award, unless otherwise specified by the Contracting Officer.” RFP § L.6, Agency Report (AR) at 225. The RFP provided that award would be made to the responsible offeror whose proposal is determined to be in the best interest of the government, considering price, past performance, and technical/management areas. Past performance was more important than technical/management, and when combined, the non-price factors were significantly more important than price. RFP §§ M.2, AR at 227, M.5, AR at 227-28.

The RFP identified six factors under the technical/management evaluation area: site location, accountability, programs, facility, personnel, and home detention.¹ As relevant here, the RFP stated that under the facility factor, proposals would be evaluated for: (1) overall quality; (2) degree of compliance with applicable local, state, and national health, safety, and environment laws, regulations, Executive Orders, and building codes; and (3) the soundness and credibility of the offeror’s plan for ensuring operational availability within 120 days after contract award. RFP § M.5, AR at 229. The RFP further provided that most of the evaluation factors and the overall proposal might be assigned a risk rating reflecting the government’s degree of confidence in the offeror’s ability to perform the effort described in its technical/management proposal.² The RFP also provided that proposal risk would consider whether any aspect of the proposal could pose the potential for adverse impacts on price, schedule or performance of the effort. Id. at 230.

BOP received proposals from Bannum and Volunteers of America Greater New Orleans, Inc. (VOA). After the evaluation team reviewed the proposals, the contracting officer, who also was the source selection authority, selected Bannum for award. VOA subsequently protested the award decision, arguing that Bannum’s proposal failed to comply with at least three mandatory solicitation requirements and definitive responsibility criteria; that BOP’s evaluation of proposals was unreasonable under the past performance and technical/management factors; and that these errors resulted in a faulty best-value trade-off decision. VOA’s Protest, B-411074, Jan. 26, 2015, at 8-12.

Prior to the submission of the agency’s report, the contracting officer identified four issues that necessitated the agency taking corrective action: (1) the language in the technical evaluation did not support the overall ratings and risk level for Bannum in the site location and facility evaluation factors; (2) the contracting officer

¹ The RFP stated that the non-price factors and subfactors would be rated exceptional, very good, satisfactory, marginal, or unsatisfactory. RFP § M.5, AR at 228.

² The RFP stated that site validity and suitability subfactor would not be assigned a separate risk factor as the risk level is inherent in the subfactor definition and would be reflected in the adjectival rating. RFP § M.5, AR at 230.

failed to consider a statement in Bannum's proposal that qualified its obligation to meet the 120-day availability requirement; (3) the source selection decision relied on an earlier draft of the technical evaluation report and as a result had assigned a higher risk level to Bannum's proposal than was assigned in the final technical evaluation report; and (4) the source selection decision did not fully consider the substance, relative merits, and ratings for each contract submitted for evaluation of past performance. AR, Tab 8, Contracting Officer's Memo, Feb. 25, 2015.

BOP advised our Office that it planned to fully reevaluate proposals; issue a new source selection decision; and if necessary, cancel the award, conduct another round of discussions, and request final proposal revisions. BOP Dismissal Request, Feb. 25, 2015. In light of BOP's proposed corrective action, we dismissed VOA's protest as academic. Volunteers of America Greater New Orleans, Inc., B-411074, Feb. 26, 2015. Bannum, as the intervenor in the original protest, thereupon filed this protest against BOP's corrective action and requested reconsideration of our earlier, February 26, dismissal.

DISCUSSION

Bannum presents various arguments challenging the agency's decision to take corrective action, as well as the scope of the corrective action.³ For example, Bannum argues that the evaluation errors BOP identified as warranting corrective action were either non-prejudicial or non-existent. With respect to the scope of BOP's corrective action, Bannum argues that the scope of the corrective action was overly broad.

Contracting officials in negotiated procurements have broad discretion to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition. Greentree Transp. Co., Inc., B-403556.2, Dec. 7, 2010, 2010 CPD ¶ 293 at 2. We generally will not object to the specific corrective action, so long as it is appropriate to remedy the concern that caused the agency to take corrective action. DGC Int'l, B-410364.2, Nov. 26, 2014, 2014 CPD ¶ 343 at 3.

Here, the record shows that the concerns raised by the contracting officer reasonably justified the agency's decision to take corrective action. For example, the contracting officer identified an inconsistency in assigning Bannum's proposal a satisfactory rating and low risk under the facility factor in light of the poor state of Bannum's proposed facility, which the technical evaluation described as showing signs of water damage that may require mold and mildew remediation; ankle-deep

³ We have considered all of Bannum's arguments and find that none provide a basis for sustaining the protest. We discuss the more significant arguments in this decision.

water on the first floor, which prevented inspection of that floor; and a fire sprinkler pump that had been spewing water for almost nine months, resulting in water saturating the wood framing. Moreover, the technical evaluation stated that the roof could not be inspected because of a lack of access. See AR, Tab 8, Contracting Officer's Memo, Feb. 25, 2015, at 2; AR, Tab 4, Final Technical Evaluation, at 16-17.

Bannum argues that the condition of its proposed facility is immaterial because it provided a "reasonable and workable" 120-day plan to meet the availability requirement. Bannum Comments at 11. The solicitation, however, provided for consideration of the overall quality of the facility, as well as consideration of potential adverse impacts on schedule or performance. See RFP § M.5 at 229. Given the poor condition of Bannum's proposed facility, as well as the relatively short period (120 days) after award for the contractor to correct potentially very serious water problems and bring the facility into compliance with the specification requirements and secure issuance of the necessary licenses and permits, the agency reasonably concluded that the assignment of a satisfactory rating with low risk under the facility evaluation factor was not warranted.

Further, we also find that BOP reasonably concluded that Bannum's proposal took exception to the requirement to meet the 120-day availability deadline. In this regard, the contracting officer noted that Bannum's 120-day availability plan included the following language:

This schedule is anticipated and cannot account for delays and forces that cause delay of any particular item or the whole schedule including: scheduling requirements/unforeseen impediments/delays of City/Parish/State/Federal officials (including but not limited to--building permits reviews, vacations schedules, inspection schedules, and others), weather, forces of nature, acts of war, terrorism, strikes, civil unrest and other issues of force majeure [sic].

AR, Tab 6, Bannum's 120-day Availability Plan, at 5.

The contracting officer states that he considered the above language to qualify Bannum's commitment to meeting the deadline. Based on this conclusion and the contracting officer's prior experience with litigation in another procurement, he determined that this issue needed to be raised with Bannum in discussions. Contracting Officer's Statement at 2.

Bannum argues that the language is not meant as a qualification of its commitment to meet the 120-day deadline, but merely reflects circumstances listed in Federal Acquisition Regulation (FAR) clause 52.249-14 as excusable delays. FAR clause 52.249-14 states in relevant part that

the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (a) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather.”

Bannum’s arguments are unpersuasive. First, the RFP did not include FAR clause 52.249-14. Second, even if the clause were included in the RFP, the language in Bannum’s availability plan identifies events, such as delays due to building permit reviews and inspection schedules, which are not specified in the FAR clause and arguably would not be considered an excusable delay.

Next, Bannum argues that any discussion of Bannum’s ability to begin performance within 120 days is a matter of contract administration not within our jurisdiction because the solicitation contained language that permitted the contracting officer to change the deadline for the start of performance. We find no merit to this argument. While the solicitation provided that contract performance would begin 120 days after contract award, unless otherwise specified by the contracting officer, RFP § L.6, AR at 225, the solicitation further provided that offerors in their proposals were required to present a “plan for ensuring operational availability within 120 days after contract award.” See RFP § M.5, AR at 229. Thus, while the contracting officer will retain the right under the contract to waive the 120-day requirement, offerors were required to base their proposed approach on meeting that schedule. Bannum, however, included language on the face of its proposal that the contracting officer reasonably found to raise a concern that Bannum was not fully committed to meeting the 120-day availability requirement. See, e.g., Emergency Vehicle Installations Corp., B-408682, Nov. 27, 2013, 2013 CPD ¶ 273 (government reasonably rejected as unacceptable quotation containing ambiguous language with respect to material solicitation term). Further, the poor condition of Bannum’s proposed facility, as well as the need to correct potentially very serious water problems, increased the risk that Bannum would be unable to meet the 120-day requirement.

In sum, we conclude that the contracting officer reasonably concluded that corrective action was necessary to correct identified problems with the evaluation of proposals.

Bannum also argues, in the alternative, that the scope of BOP’s corrective action is broader than necessary to correct any problems in the procurement. More specifically, Bannum asserts that BOP’s corrective action should be limited to the following: (1) comparing Bannum’s risk rating in the final evaluation with the rating the contracting officer used in his source selection decision and assessing the

prejudicial effect; (2) reviewing FAR clause 52.249-14 with respect to Bannum's alleged "qualification" of its 120-day plan; (3) addressing the competitive effect of the contracting officer relying on the draft rather than the final technical evaluation in his source selection decision and considering the prejudicial effect of the award decision; and (4) reevaluating Bannum's and VOA's proposal only in accordance with the terms of the RFP. Bannum's Comments at 13-14.

As a general matter, the details of a corrective action are within the sound discretion and judgment of the contracting agency. Hughes Network Sys., LLC, B-409666.3, B-409666.4, Aug. 11, 2014, 2014 CPD ¶ 237 at 3. Where an agency has reasonable concerns that there were errors in the procurement, corrective action may appropriately include reopening discussions and requesting revised proposals before reevaluating. See, e.g., Consortium HSG Technischer Serv. GmbH and GeBe Gebäude und Betriebstechnik GmbH Südwest Co., Mgmt. KG, B-292699.4, Feb. 24, 2004, 2004 CPD ¶ 44 at 3.

We see no basis to object to the scope BOP's corrective action here. As discussed above, we find that the concerns raised by the contracting officer reasonably justified the agency's decision to take corrective action. For example, the record supports the reasonableness of the contracting officer's decision to reevaluate proposals in response to his concerns that the evaluation of Bannum's proposal did not account for the poor condition of Bannum's proposed facility. Further, we find reasonable--and to Bannum's benefit--for the contracting officer to reopen discussions to address Bannum's apparent qualification of its 120-day availability plan. In this regard, to the extent that Bannum qualified its commitment with respect to meeting the 120-day availability requirement, or its proposal was ambiguous with respect to Bannum's commitment to meet this material solicitation requirement, its proposal as submitted could be found unacceptable. See, e.g., Kellogg Brown & Root Servs., Inc., B-400614.3, Feb. 10, 2009, 2009 CPD ¶ 50 at 6 (agency's rejection of proposal because of ambiguity is unobjectionable). Accordingly, we conclude that the agency's corrective action reasonably remedies the errors in the evaluation and selection decision identified by the agency. See Mid Pacific Envtl., B-283309.2, Jan. 10, 2000, 2000 CPD ¶ 40 at 6.

Request for Reconsideration

Bannum also requests reconsideration of our dismissal of VOA's protest. In this regard, Bannum argues that VOA's protest should not have been dismissed because the proposed corrective action did not render the protest academic. Bannum also asserts that VOA's protest lacked merit. Recon. Request at 3.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. 4 C.F.R. § 21.14(a). Repetition of arguments previously

made during our earlier consideration of the protest, or disagreement with our prior decision, do not provide a basis for our Office to reconsider our earlier decision. Vinculum Solutions, Inc.--Recon., B-408337.3, Dec. 3, 2013, 2013 CPD ¶ 274 at 2. Bannum has not met the standard for reconsideration.

With respect Bannum's contention that VOA's protest was not rendered academic by BOP's corrective action, we disagree. It is well established that the determination to reevaluate proposals and make a new award decision renders a protest of that award academic. See, e.g., A1C Partners, LLC-Costs, B-409189.3, Sept. 30, 2014, 2014 CPD ¶ 295 at 2.

Nor do we find any merit to Bannum's assertion that VOA's protest lacked merit and therefore did not require the agency to take corrective action. As an initial matter, we note that it is not necessary for an agency to conclude that the protest is certain to be sustained before it may take corrective action; rather, where the agency has reasonable concerns that there were errors in the procurement, we view it as within the agency's discretion to take corrective action, even if the protest could be denied. Main Bldg. Maintenance, Inc., B-279191.3, Aug. 5, 1998, 98-2 CPD ¶ 47 at 3. In any case, as discussed above, the contracting officer reasonably determined that corrective action was needed to address the concerns with the evaluation.

The protest and request for reconsideration are denied.

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General Counsel