



DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: FP-FAA Seattle, LLC

File: B-411544; B-411544.2

Date: August 26, 2015

Dorn C. McGrath III, Esq., Holly A. Roth, Esq., William M. Jack, Esq., and Amba M. Datta, Esq., Kelley Drye & Warren LLP, and Vince L. Crivella, Esq., Sinkin & Crivella PC, for the protester.

Richard J. Conway, Esq., Michael J. Slattery, Esq., and Philip E. Beshara, Esq., Dickstein Shapiro LLP, for Des Moines Creek Business Park Phase II, LLC, an intervenor.

M. Leah Wright, Esq., and Claire L. O'Donnell, Esq., General Services Administration, for the agency.

Gary R. Allen, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the evaluation of technical proposals is denied where the record establishes that the agency's evaluation was reasonable and consistent with the evaluation criteria, and that offerors were treated equally.
2. Protest that agency failed to conduct meaningful discussions is denied where offeror introduced new information after submitting its FPR; the agency is not required to re-open discussions to address the new information.
3. Protest concerning certain price evaluation issues, raised for the first time in a supplemental protest, is untimely where the protester learned of the facts on which the new issues are based during its debriefing.
4. Protest challenging the source selection authority's best value tradeoff decision is denied where the record shows that the decision to select a higher-rated, higher-priced offeror was reasonable and adequately documented.

DECISION

FP-FAA Seattle, LLC, of Washington, District of Columbia, protests the intended award of a lease to Des Moines Creek Business Park Phase II c/o Panattoni Development Company, Inc. (Des Moines), of Sacramento, California, under request for lease proposals (RLP) No. 3WA0392, issued by the General Services Administration (GSA) for the lease of office space in Renton, Washington, for the Federal Aviation Administration (FAA).

We dismiss the protest in part and deny the remainder of the protest.

BACKGROUND

On August 1, 2014, GSA issued the RLP for the procurement of office and related space for the FAA within a ten-mile radius of the FAA's current office at 1601 Lind Avenue, SW, Renton, Washington, which is owned (and being leased to FAA) by FP. RLP at 2. The RLP sought to lease a maximum of 300,000 square feet, yielding a minimum of approximately 259,500 to a maximum of 262,100 American National Standards Institute, Inc. /Building Owners and Managers Association (ANSI/BOMA) Office Area (ABOA) square feet (SF)¹ for a 20-year lease term, with a target value of \$210 million. Id. at 1; Agency Report (AR), Tab 24, Price Negotiation Memorandum, at 5. The expected date for 100 percent occupancy was August 24, 2017. Id. at 24. Special space requirements included a fitness center, cafeteria, conference center, as well as rooftop antennae and generators for 24/7 emergency power. Id. at 1.

The RLP required offerors to submit proposals as separate technical and pricing volumes. RLP at 20. The technical volume was to contain information concerning the offeror's technical approach to the following award factors, in descending order of importance: (1) site layout and security; (2) quality of location; (3) proposed design approach and technical quality; (4) project management plan; and (5) past performance of relevant experience. Id. at 19-20. The technical factors, when combined, were slightly more important than price. Id. In the event that two very similar proposals represented the best value to the government, then the contracting officer (CO) could choose the proposal that would not result in potential relocation expenses for FAA employees. Id.

¹ "ABOA square feet" refers to the area available for use by a tenant for personnel, furnishings, and equipment, and, as a commercial leasing term, is generally synonymous with useable square feet. See The Metropolitan Square Assocs., LLC, B-409904, Sept. 10, 2014, 2014 CPD ¶ 272 at 2 n.2. The RLP required at least 75,000 contiguous ABOA SF, with the remaining space provided on separate full floor occupancies to the extent practicable given the floor plate sizes. RLP at 1.

The RLP informed offerors that the pricing volume should identify the shell rent, amortization of the [tenant improvement (TI)] allowance, real estate taxes, and operating services, as well as any other concessions (e.g., free rent) that may impact pricing analyses. Id. For each technical factor, the RLP provided detailed descriptions, minimum standards, and submittal instructions.²

As relevant here, under factor 4, the RLP advised offerors that proposals were required to include a risk management plan that was realistic and addressed any risks related to the specific offer. RLP at 22. In this regard, the RLP stated that this plan “should identify the risk event, probability of occurrence, the impact of the event if it occurs and a description of the mitigation strategy used to manage the risk.” Id.

Proposals were received from nine offerors by the October 3, 2014 proposal due date. Agency Memorandum of Law (MOL) at 3. The CO reviewed the proposals and established a competitive range of four firms, including FP and Des Moines, on December 11, 2014. CO Statement at 5. GSA held multiple rounds of discussions with the competitive range offerors during the evaluation, beginning on January 6, 2015. See, e.g., AR, Vol. V, Tab 15, Agency Discussions with FP, at 1-65. For example, with FP the agency noted that FP had proposed [deleted], and stated that FP would need to provide more specific information in this regard and request any [deleted] prior to submitting its final proposal revisions (FPR). Id. at 19-20; CO Statement at t5.

The agency expressed particular concern about FP’s proposed language that would require the agency to [deleted]. CO Statement at 6. FP responded that its intention was to meet the requirements of the RLP, and it would revise its proposal if it deemed it to be appropriate. Id.

GSA also provided comments and suggestions for improving FP’s proposal. For example, the agency noted that for factor 4, although FP’s project management/risk

² For example, with regard to factor 1--site layout and security--the RLP stated that offers would be evaluated on their demonstrated plans to meet certain minimum standards. RLP at 20. Under these standards, proposals were required to provide a building with (1) a medium level of façade protection designed to prevent progressive or disproportionate collapse; (2) a combination of site lighting and landscaping to create a potentially crime-free environment; (3) a parking plan that included 60 on-site parking spaces and 1,140 parking spaces within a quarter mile walking distance, controlled by a parking pass or other system to identify authorized vehicles upon entry and during parking; (4) loading docks meeting access requirements for trucks with specified dimensions; and (5) reduced vehicle access points to minimize vulnerability and control access to the site. RLP at 23.

management plan met the requirements of the RLP, it could be improved by detailing and addressing the risks associated with an occupied building, such as [deleted], among other things. AR, Vol. V, Tab 15, Agency Discussions with FP, at 23; CO Statement at 7.

Competitive range offerors submitted proposal revisions on January 9, and after more discussions, submitted final proposal revisions (FPRs) on February 6, 2015. CO Statement at 8. FP included changes in its pricing proposal, but made no changes to its technical proposal in its FPR. Id., Agency MOL at 4. Following submission of FPRs, offerors made oral presentations, during which the agency sought clarifications. CO Statement at 8. As relevant here, the topics for FP included [deleted]. Id.

During its oral presentation, FP stated, for the first time, that in order to meet the occupation schedule in late summer of 2017, as required by the RLP, it would require that [deleted]. AR, Vol. V, Tab 25, Source Selection Decision SSD, at 23; see also AR, Vol. V, Tab 23, Agency Notes from FP Oral Presentation, at 2, 5 10, 11. For example, FP stated that [deleted]. AR, Vol. V, Tab 25, SSD, at 23.

Following FP's oral presentation, GSA's CO requested additional clarifications from FP. AR, Vol. V, Tab 15, Agency Discussions/Negotiations with FP, at 45-65. For example, GSA again sought information from FP concerning the exception that FP had taken to the RLP and lease language, requiring the government to accept the current space "as existing," and appearing to place responsibility for certain requirements with the government, as discussed above. Id. at 58-59. As noted above, FP did not file a technical FPR, but as part of its price FPR, it included a clarifications form L201C, which still required the agency to accept the leased premises in their existing condition. See AR, Vol. III, Tab C.2, FP Price FPR, Form L201C, at 1. The CO advised FP that GSA remained uncertain about what FP meant by the language in this apparent exception, and about FP's intent. FP simply replied in an email, dated April 10, 2015, that it would meet the shell requirements in the new lease. AR, Vol. V, Tab 15, Agency Discussions/Negotiations with FP, at 65.

A source selection evaluation board (SSEB) made up of two GSA representatives and two FAA representatives evaluated the FPRs individually, producing individual scores, and then met to reach a consensus for each proposal's rating. The consensus technical scores, ratings, and prices for Des Moines's and FP's proposals were as follows:

	Des Moines	FP
Technical Factor 1 (site layout and security)	126.0 (excellent)	91.0 (very good)
Technical Factor 2 (quality of location)	56.4 (very good)	49.4 (acceptable)
Technical Factor 3 (design approach and tech'l quality)	64.4 (very good)	56.0 (very good)
Technical Factor 4 (project management plan)	52.5 (acceptable)	28.5 (marginal)
Technical Factor 5 (relevant past performance)	36.0 (marginal)	33.0 (marginal)
Overall Technical Score	335.3	260.9
Adjectival Rating	Very Good	Acceptable
Present-Value Price	\$196,517,569.43	\$176,079,003.96

AR, Tab 22, SSEB Consensus Scoring & Technical Ranking Report, Chart 1; Tab 24, Price Negotiation Memorandum, at 33; Tab 25, SSD, at 21.

Based on the evaluation results for the four competitive range offers, the CO determined that FP's and Des Moines's proposals represented the two most competitive offers.³ The CO based his source selection recommendation on a comparison of these two proposals, analyzing each technical and cost evaluation factor. AR, Tab 25, SSD, at 7, 8. Among the various things considered in determining which offer to recommend for selection, the CO took into account that FP's approach required FAA, as the current tenant, to [deleted], and that FP did not provide any alternative plans for [deleted]. *Id.* at 23-25. The CO concluded that FP's lack of planning for these, and other issues, created a substantial risk to successful performance, which FP failed to address in any robust risk management plan as part of its FPR. *Id.* at 26. The CO also observed that FP, in its post-FPR oral presentation, stated that it would require concessions from the government with respect to FAA's existing lease contract, in order to deliver the space required by the new lease. *Id.* at 23-24. The CO recommended that, notwithstanding Des Moines' higher price, its substantially higher-rated technical proposal should be selected as offering the best value to the government. *Id.* at 27.

³Among the competitive range offers, FP's proposal was ranked third for technical merit, whereas Des Moines' proposal was ranked first. The present value price of FP's FPR was the lowest at \$176,079,003.96, while Des Moines' FPR price was the next lowest at \$196,517,569.43--a difference of \$22,438,565.47 or 7.18%. AR, Tab 25, SSD, at 21. The proposal that received the second-highest technical score--only slightly lower in points than Des Moines' proposal, and also rated as very good--offered the highest price, \$215,193,750. The proposal that received the lowest technical score offered the second-highest price, \$208,031,250.

The source selection authority approved the CO's recommendation, and on April 29, 2015, the agency notified FP of the agency's intention to award a lease to Des Moines. This protest followed an oral debriefing.

DISCUSSION

Unstated Evaluation Criteria and Discussions

The protester argues that GSA improperly evaluated FP's technical proposal by considering FP's responsibilities concerning FP's existing lease obligations.⁴ Protest at 9. FP contends that the RLP did not contain any evaluation factors related to responsibilities or requirements under existing leases, and that GSA's consideration of this matter in its evaluation of FP's technical proposal therefore amounts to an application of an unstated evaluation criterion.⁵ Id.

Noting that FP intended to perform renovations to a currently-occupied building, GSA asserts that the issues concerning FP's obligations under the current lease related to the area of risk management. Agency MOL at 11. In this regard, the agency points out that the RLP, under technical factor 4, project management plan, provided that offers were to be evaluated, in part, on the risk management plan they included. Id., citing RLP at 22. The RLP provides that the agency would evaluate:

[T]he Offeror's ability to develop a risk management plan that is realistic and addresses the risks related to their specific offer. The plan should identify the risk event, probability of occurrence, the impact of the event if it occurs and a description of the mitigation strategy used to manage the risk.

⁴ We have reviewed and considered all of the protester's arguments in both its initial and supplemental protests. Although we do not here specifically address all of them, we find that they provide no basis to sustain the protest.

⁵ As part of this argument, FP claims that GSA improperly conflated a responsibility determination with the required technical evaluation, apparently because GSA uses the word "responsibility" in the context of FP's existing contract obligations. In response, GSA states that, while it did make a responsibility determination, taking into consideration all of FP's existing commercial and governmental business commitments, this analysis was not part of the technical evaluation. GSA points out that the responsibility determination was made by the CO, who was not a voting member of the TET, and that it is in a separate section of the SSD. Agency MOL at 10-11. We find nothing in the technical evaluation record to indicate that FP was evaluated as to its responsibility in meeting current lease obligations.

RLP at 22.

Here, the issues concerning risk management related to the fact that FP, during its oral presentation, conditioned its timely performance under the new lease on [deleted]. AR, Tab 25, SSD, at 23. As noted above, the CO found that FP's requirement that FAA [deleted], without providing any alternative plans for [deleted], created a substantial risk to successful performance. Id. at 23-26. We agree.

In reviewing a protest against an agency's evaluation of proposals, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. IPlus, Inc., B-298020, B-298020.2, June 5, 2006, 2006 CPD ¶ 90 at 7, 13; Shumaker Trucking & Excavating Contractors, Inc., B-290732, Sept. 25, 2002, 2002 CPD ¶ 169 at 3. An agency may properly take into account specific, albeit not expressly identified, matters that are logically encompassed, or related to, the stated evaluation criteria. Kellogg Brown & Root Servs., Inc., B-298694.7, June 22, 2007, 2007 CPD ¶ 124 at 7. Furthermore, an agency's decision to evaluate risk associated with an offeror's proposal is appropriate, whether or not risk is specifically stated as an evaluation factor. In short, consideration of risk is inherent in an agency's evaluation of technical proposals. See, e.g., Tri-Starr Mgmt. Servs., Inc., B-408827.2, B-408827.4, Jan. 15, 2015, 2015 CPD ¶ 43 at 10; Avaya Government Solutions, Inc., B-410387, Dec. 15, 2014, 2014 CPD ¶ 372 at 5.

Here, GSA concluded that FP's statement that it could timely perform only if it were released from certain [deleted] created a risk. See AR, Vol. V, Tab 25, SSD, at 23-26. Again, under technical factor 4, the RLP requires an offeror to address specific risks of the particular site offered, the potential impacts of those risks, and strategies for mitigation--a requirement that FP failed to meet when it did not submit a risk management plan.⁶ RLP at 22.

Here, because FP is the incumbent lessor, its proposal necessitated that the renovation and construction work occur while its tenant, FAA, still occupies the space. In our view, the risks associated with working in occupied space represent unique aspects of FP's proposal that the agency had to consider in its evaluation.

⁶ The SSD addresses the concessions required by FP as risks that should have been addressed in FP's risk management plan. AR, Tab 25, SSD, at 23-26. In its responsibility determination, the SSD cites the technical evaluation as indicating that FP would comply with the delivery schedule, taking into consideration its existing commitments. Id. at 22. However, the SSD also notes that there is risk involved for FP, and that FP did not offer a robust risk management plan as part of its FPR. Id. In fact, as noted above, FP did not submit a technical FPR at all.

Moreover, in this circumstance the RLP requires FP to address any risk of disruption of the existing lease, and FP's plans for mitigation. RLP at 22. FP simply provided nothing in its risk management plans to address [deleted]. See AR, Tab 25, SSD, at 26. Accordingly, we find no basis to question the reasonableness of the agency's consideration of these risks.

FP argues, alternatively, that the agency failed to conduct meaningful discussions with FP because the agency failed to raise these concerns about FP's existing lease obligations. Protest at 10. We find no merit to this contention. The record shows that FP did not introduce the issues regarding its obligations under the ongoing obligations in any of its proposal submissions, including its FPR. Where an offeror first introduces new information in its FPR, or--as here--after FPRs are submitted, the offeror runs the risk that this new information will receive negative treatment in the final evaluation without the opportunity to be resolved in discussions. An agency is not required to re-open discussions to address this new information. See e.g., The Boeing Co., B-409941, B-409941.2, Sept. 18, 2014, 2014 CPD ¶ 290 at 3 (reaching the same conclusion where the weakness was first introduced in an offeror's FPR after discussions were concluded).

Evaluation In Accordance with Evaluation Criteria

FP challenges the agency's evaluation of its technical proposal with respect to a number of technical factors, arguing that the evaluation was not consistent with the RLP evaluation criteria. Protest at 10-17. In this regard, FP first contends that its proposal met or exceeded the requirements and should have received the highest technical rating under all of these factors.

The evaluation of an offeror's proposal is a matter within the agency's discretion. IPlus, Inc., supra, at 13. In reviewing a protest against an agency's evaluation of proposals, our Office will not reevaluate proposals but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable procurement statutes and regulations. See Id.; Shumaker Trucking & Excavating Contractors, Inc., supra. A protester's disagreement with the agency's judgment or in its determination of the relative merit of competing proposals does not establish that the evaluation was unreasonable. Kellogg Brown & Root Servs., Inc., supra.; VT Griffin Servs, Inc., B-299869.2, Nov. 10, 2008, 2008 CPD ¶ 219 at 4.

Here, the SSEB used the RLP's evaluation criteria to identify multiple strengths and weaknesses for each factor in evaluating FP's proposal. AR, Tab 19, SSEB Report, at 13-14. The SSEB provided narrative descriptions that corresponded to the adjectival rating it assigned for each factor. For example, under factor 1, the SSEB described eight strengths, five weaknesses, and three risks, and concluded that

FP's proposal for this factor merited a very good rating.⁷ Id. at 13. Based on our review of the record, we find that the SSEB's assignments of adjectival ratings for this and the other factors were reasonable and consistent with the criteria set forth in the RLP and source selection plan. The fact that FP disagrees with the agency's judgment concerning these factors is not a valid basis for our Office to consider them unreasonable.⁸

Evaluation of Awardee's Proposal

As a supplemental protest issue, FP argues that the agency relaxed a material solicitation requirement by allowing Des Moines to propose [deleted] established in the RLP. Supp. Protest at 2-4.

It is a fundamental principle in a negotiated procurement that a proposal that fails to conform to a material solicitation requirement is technically unacceptable and cannot form the basis for award. See The Boeing Company, B-311344 et al., June 18, 2008, 2008 CPD ¶ 114 at 54; Special Operations Group, Inc., B-287013, B-287013.2, Mar. 30, 2001, 2001 CPD ¶ 73 at 4.

The protester's contentions are without merit. While it is true that Des Moines' initial and revised proposals sought to provide [deleted] ABOA SF, the awardee's FPR specifically revised the proposed [deleted] to conform to the [deleted]. AR, Vol. IV, Tab 4.C.1, Des Moines FPR, at 17-22. Both the revised narrative summarizing and tracking the [deleted], and the [deleted] contained in the awardee's FPR, indicate a [deleted] requirement.⁹ Id. at 17 [deleted], and 18-22 [deleted]. This aspect of the protest, premised on inaccurate facts, is therefore denied.¹⁰

⁷ The source selection plan provides for a very good rating when an offer meets and to some extent exceeds the standard, with no deficiencies, where strengths outweigh any weaknesses, and there is a low risk of unsuccessful contract performance. AR, Tab 7, Source Selection Plan, at 17.

⁸ FP also argues that the agency evaluated proposals disparately by unreasonably discounting many strengths in FP's proposal, and improperly crediting Des Moines' proposal. Protest at 13-14. We find no merit to this aspect of FP's protest. We have reviewed all of FP's arguments regarding the agency's alleged disparate treatment and find that these contentions amount to no more than disagreement with the agency's conclusions. Accordingly, they do not provide a basis upon which to sustain the protest. See VT Griffin Servs., Inc., supra.

⁹ The protester also makes much of the fact that Des Moines stated that [deleted], arguing on this basis that the awardee did not conform to the requirement of providing [deleted]. Supp. Protest at 4-9. We disagree. Des Moines's FPR contained [deleted] references showing its proposed [deleted]. While the word [deleted] may not denote [deleted], the RLP allows for a range of ABOA SF, and the references in Des Moines's [deleted] provide assurance that the [deleted]-allowed

(continued...)

Price Evaluation

As part of its supplemental protest, dated June 26, 2015, FP also argues that the agency conducted an improper cost realism analysis, evaluating and adjusting prices based upon perceived issues concerning the real estate tax base in FP's proposal and a comparison of offerors' fees. Supp. Protest at 5-9. However, the agency discussed this issue with the protester in a debriefing six days before the initial protest was filed. AR, Tab 26, Agency Contemporaneous Notes from FP Debriefing, May 12, 2015, at 4. Our Bid Protest Regulations require that protests based upon other than alleged improprieties in a solicitation be filed not later than 10 days after the basis of the protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). Here, the protester did not challenge the agency's consideration of the real estate tax base until more than a month after it learned of the agency's actions at its debriefing.¹¹ Accordingly, we dismiss this protest ground as untimely.

As regards FP's contention that the agency improperly adjusted certain fees, the agency argues, without dispute from the protester, that this adjustment resulted in less than a 1 percent difference in the present value prices. Agency Supp. MOL, at 14. Accordingly, the agency argues that FP did not suffer any prejudice because of the agency's actions. We agree with the agency. There is nothing in the record here to support a conclusion that the less than one percent change in the offerors' prices, standing alone, would alter the agency's cost/technical tradeoff decision.

(...continued)

ABOA SF was proposed. Accordingly, we deny this protest ground. Although we do not specifically address the protester's other arguments concerning Des Moines's proposal's alleged failure to conform to the [deleted] ABOA SF requirement, we have considered them all and find that they do not provide a basis for sustaining the protest.

¹⁰ FP also contends that this alleged relaxation of a material solicitation requirement by the agency caused the agency to evaluate the awardee's and FP's proposals disparately. Supp. Protest at 15. Because we have concluded that the requirement was not relaxed, we need not consider this protest ground.

¹¹ Although GSA challenged the timeliness of this aspect of FP's protest, FP did not deny that its debriefing included discussion of this issue. Instead, FP merely states that a summary of notes taken by one of its representatives who was present at the debriefing does not mention this matter. Protester's Supp. Comments at 10. In this circumstance, where the protester is aware of the agency's position on a factual matter concerning the timeliness of a protest issue, for which both parties have direct knowledge, and the protester does not expressly rebut the agency's position, the protester has not met its obligation to establish the timeliness of the protest.

Instead, we consider any such change to be de minimis, and not, in itself, sufficient to support a decision to sustain FP's protest. See Textron Marine Sys., B-243693, Aug. 19, 1991, 91-2 CPD ¶ 162 at 12-13.

Best-Value Decision

FP challenges GSA's source selection, primarily arguing that the errors FP alleged in the technical evaluations of both FP and Des Moines, as well as the asserted lack of meaningful discussions, precluded a reasonable best-value determination. Protest at 18. FP also contends that the agency failed to provide adequate documentation or rationale for its best-value decision. Id. Given our conclusions, above, concerning the reasonableness of GSA's technical evaluations and conduct of discussions, we do not address FP's contention that the best-value determination was founded on errors.

We find that FP's second contention lacks merit. With regard to source selection decisions, agencies enjoy discretion in making cost/technical tradeoffs where the solicitation provides for the award of a contract on a best-value basis; the agency's selection decision is governed only by the test of rationality and consistency with the solicitation's stated evaluation scheme. Marine Hydraulics Int'l, Inc., B-403386.3, May 5, 2011, 2011 CPD ¶ 98 at 4.

Here, the CO qualitatively assessed the merits of the firms' proposals, and recognized the technical superiority of Des Moines' proposal in the cost/technical tradeoff analysis. The CO found, further, that Des Moines's higher technical merit justified its associated 7.18 percent price premium, given that technical merit was slightly more important than price considerations. Although FP disagrees with this judgment, this does not demonstrate that the CO's selection decision was unreasonable. See Weber Cafeteria Servs., Inc., B-290085.2, June 17, 2002, 2002 CPD ¶ 99 at 4 (disagreement with an agency's judgment as to the relative merit of competing proposals and which proposal offers the best-value to the agency does not establish that the source selection was unreasonable). Where, as here, the CO's decision provides substantive consideration of the relative merits of the proposals that would justify whether a higher-rated, higher-priced proposal was a better value to the government than a lower-rated, lower-priced proposal, the cost/technical tradeoff decision is reasonably justified.

The protest dismissed in part and denied in part.

Susan A. Poling
General Counsel