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Decision

Matter of: Bannum, Inc.

File: B-414336

Date: May 15, 2017

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Sarah Bloom, Esq., Seth Bogin, Esq., and William D. Robinson, Esq., Bureau of Prisons, for the agency.
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DIGEST

Protest challenging agency's rejection of proposal is denied where the agency discovered that the facility proposed by the protester to perform the contract was no longer available--it had been sold to a third party more than a year prior to the protester's elimination from the competition--and the agency was not required to provide the protester with additional time to find a new facility.

DECISION

Bannum, Inc., of Odessa, Florida, protests the rejection of its proposal under request for proposals (RFP) No. RFP-200-1256-CS, issued by the Federal Bureau of Prisons for residential community corrections center services in the vicinity of Benton Harbor or Kalamazoo, Michigan. Although the property the protester proposed to perform the contract had been sold to a third party, the protester argues that agency should have provided the protester with additional time to find a new site location since it was the agency's delay in making an award which resulted in the protester losing the right to use the property.

We deny the protest.

BACKGROUND

The RFP, issued on September 24, 2014, contemplated the award of an indefinite-delivery, indefinite-quantity contract based on fixed prices for a base year and four 1-year option periods for residential reentry center (RRC) services and home

confinement services for federal offenders located in the Benton Harbor or Kalamazoo, Michigan area. RFP at 3-4. RRC contractors provide services, including employment and residence development, as well as other self-improvement opportunities. Contracting Officer's (CO) Statement at 1. Contractors are required to furnish all personnel, management, equipment, supplies, and services necessary to operate a RRC. Id.

The RFP provided for award to the offeror with the proposal representing the best value to the government based on an evaluation of past performance, technical/management, and price. RFP at 36. As relevant, the technical/management factor consisted of several subfactors, including "facility" and "site location." RFP at 37-38. Under these subfactors, the agency was to evaluate the location of the facility proposed by an offeror and the validity of the offeror's right to use it. Id. Regarding the latter, the RFP required offerors to provide documentation supporting their right to use the property they proposed. RFP at 33. The RFP permitted offerors one request to change an initially proposed facility. RFP at 34. Such requests, however, had to be received by the contracting officer within 60 days of the initial proposal submission. Id. The extended closing date for the receipt of initial proposals was December 22, 2014. The RFP referenced an anticipated award date of June 3, 2015. RFP at 9.

In its proposal, Bannum included a purchase agreement for its proposed property. Bannum Proposal at 11. The agreement indicated that it was contingent upon, among other things, the protester's award of the contract under the RFP. Id. at 28. Under the agreement, the owner of the property retained the right to show the property to other buyers, and if an offer was received, the protester would have 10 days to remove the contingency. Id. at 29. That agreement further noted that if an offer was received after the RFP's anticipated award date of June 3, 2015, the protester would have 70 days to remove the contingency. Id. The agency reports that due to staffing constraints and the need to work on other procurements as well as this one, award under the current RFP was delayed beyond the RFP's anticipated award date. CO Statement at 3, 5.

Proposals were evaluated, two rounds of discussions were held with offerors in the competitive range, to include Bannum, on April 23, 2015 and December 18, 2015. On January 26, 2016, the agency requested final proposal revisions. Given the passage of time, however, and the contingencies in the protester's documentation regarding Bannum's proposed property, the contracting officer researched the property and learned that the property had apparently been sold to another entity in December 2015, prior to Bannum's submission of its response to the second round of discussions. The record reflects that the agency's second round of discussions with Bannum addressed issues involving the availability of the property. Agency Report (AR), Tab 8, Discussion Notice No. 2. For whatever reason, Bannum's discussions response, however, failed to alert the agency to the fact that the property had been sold. AR, Tab 9, Bannum Response to Discussion Notice No. 2. After learning of the sale of the property, the agency reopened discussions to allow the protester to update its right-to-use documentation. CO Statement at 3. In response, Bannum explained that its proposed property apparently had been sold, and that it had no viable property available for

performance. AR, Tab 15, Bannum Response to Discussion Notice No. 3. The protester then requested additional time to find a new property to propose. Upon review of Bannum's response, the contracting officer determined that the protester's proposal failed to document the protester's right to use the initially proposed property, and that the protester's request for a property change failed to meet the RFP requirement for such change since it was not made within 60 days of the submission of an initial proposal. CO Statement at 5. Accordingly, the protester's proposal was rejected. Id. Bannum requested and received a debriefing. This protest followed.

DISCUSSION

Bannum protests the rejection of its proposal, contending that the agency's delay in making award under the RFP caused the protester to lose its rights under the contingent agreement it had for its proposed property. Bannum also challenges the agency's refusal to provide the protester with additional time to find a new property after the submission of final proposal revisions. In support of its position, Bannum notes that the agency has previously issued interim contracts during the pendency of the current procurement and that issuing another interim award would allow Bannum the time it would need to find a new property.

In reviewing protests challenging the evaluation of proposals, we do not conduct a new evaluation or substitute our judgment for that of the agency, but examine the record to determine whether the agency's judgment was reasonable and in accord with the solicitation criteria. See Wahkontah Servs., Inc., B-292768, Nov. 18, 2003, 2003 CPD ¶ 214 at 4. Further, we have indicated that it is the contracting agency's right to determine when the offer and negotiation stage of a procurement is finished; an offeror has no legal right to insist that negotiations be reopened after final proposal revisions have been submitted. See Dismas Charities, Inc., B-291868, Apr. 23, 2003, 2003 CPD ¶ 98 at 2.

Here, the record shows that Bannum continued to offer the property identified in its initial proposal, through discussions and final proposal revisions, for approximately a year after the property apparently had been sold to another entity. We see nothing to support the protester's contention that the agency acted unreasonably in rejecting the proposal for failing to document a current right to use the facility. In this regard, we reject Bannum's contention that the agency acted unreasonably by not allowing the protester additional time to find a new location given the delay in the award. First, there was nothing in the solicitation establishing that the agency would make an award by a certain date, and the protester has failed to cite any law or regulation otherwise requiring the agency to have made award by an earlier date. Second, by the express terms of the solicitation, an offeror could only request a site change within 60 days after initial proposals were submitted. This 60-day window had long passed when Bannum's property became unavailable. Accordingly, the agency's delay in meeting procurement milestones in this case had no effect on the validity of the procurement or Bannum's ability to substitute a new facility. See Dismas Charities, Inc., supra at 3; Trim-Flite, Inc., B-229926.4, July 28, 1988, 88-2 CPD ¶ 124 at 2. Rather, Bannum's inability to

provide a facility was a direct consequence of the particular deal Bannum struck with the property owner, which ultimately rendered the property unavailable to Bannum, and it is Bannum that bore the risks of that agreement.

In reaching this conclusion, we expressly reject Bannum's contention that the agency should continue to enter into interim contracts in order to afford Bannum an opportunity to find a new property. As noted above, offering a site change at this point in time is not an option under the terms of the solicitation. Moreover, an agency need not delay a procurement simply to accommodate Bannum's choice of approach to meeting the agency's requirements. See Erickson Aero Tanker, B-411306.2, B-411306.5, July 29, 2015, 2015 CPD ¶ 226 at 11. Again, as previously indicated, the protester's business decision to enter into the contingent agreement with the property owner was the reason why it could not satisfy the solicitation's facility requirement.

The protest is denied.

Susan A. Poling
General Counsel