



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

DOCUMENT FOR PUBLIC RELEASE

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Matter of: Bannum Inc.

File: B-415227

Date: December 1, 2017

Justin T. Huffman, Esq., Nancy M. Camardo, Esq., and Joseph A. Camardo, Jr., Esq., Camardo Law Firm, PC, for the protester.

Seth Begun, Esq., and Sarah Bloom, Esq., U.S. Department of Justice, for the agency. Lois Hanshaw, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's rejection of a proposal is denied where the protester did not possess the right to use the facility proposed by the protester to perform the contract 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-200-1235-ES, issued by the Department of Justice, Federal Bureau of Prisons, for residential reentry center (RRC) services for federal offenders in the vicinity of Dauphin County, Pennsylvania. Although Bannum has lost the right to use the proposed property, the protester argues that the 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 April 18, 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 RRC and home detention services. Agency Report (AR), Tab 3, RFP

at 000004.¹ RRC contractors were to provide services, including employment and residence development, as well as other self-improvement opportunities, to assist federal offenders in becoming law-abiding citizens. RFP, Statement of Work (SOW) at 000015. Additionally, contractors would be required to furnish all personnel, management, equipment, supplies, and services necessary to operate an RRC. Id.

The RFP provided for award on a best-value tradeoff basis, considering the following three factors, listed in descending order of importance: past performance, technical/management approach, and price. Id. at 000242. The technical/management factor consisted of several subfactors, including, as relevant here, site location and facility. Id. at 000245-46. Under these subfactors, the agency was to evaluate the proposed site location; consider the validity of the offeror's right to use the proposed site and its zoning approval; and assess the soundness and credibility of the offeror's plan for ensuring the proposed facility would be operationally available within 120 days of contract award. Id. Regarding site location, the RFP required offerors to provide documentation, such as a lease or options to lease, supporting its right to use the property it proposed. Id. at 000238. The RFP permitted offerors one request to change an initially proposed facility. Id. Such requests, however, had to be received by the contracting officer within 60 days of the initial proposal submission. Id. The amended closing date for the receipt of initial proposals was July 1, 2014.² AR, Tab 4, RFP, Amend. 1, at 000001.

In its proposal, Bannum included a contingent lease agreement for its proposed property. AR, Tab 5, Bannum Technical/Management Proposal at 000011. The lease indicated that it was contingent upon, among other things, Bannum's selection for award of the contract under the RFP. Id. at 000020. The lease agreement also gave the landlord the right to continue to market the property to other potential parties for sale or lease during the contingency period, and gave Bannum a right of first refusal to purchase or lease the property if a third party negotiated a sale or lease of the property. Id. at 0000021. The lease also stated that if contingencies were not met by August 1, 2014, Bannum had the option to extend the lease for an additional 90 days. Id. at 000012.

The agency evaluated proposals received from Bannum and [DELETED], engaged in four rounds of discussions with offerors between December 2014 and January 2016, and requested final proposal revisions (FPR) three times, the last of which was made in

¹ The agency used a Bates numbering system in preparing the agency report; citations in this decision use the Bates numbers assigned by the agency.

² This is the same date by which the solicitation originally stated that award would be made. RFP at 000152. The anticipated award date was not revised after the issuance of amendment 1. Memorandum of Law at 3 n.3. The protester did not challenge the revised award date.

August 2017.³ As relevant here, the agency's August 4, 2017 request for FPRs asked that Bannum address a contradiction between the SOW requirement to accept all offenders, i.e., violent and nonviolent, for placement, and statements from the zoning board's approval letter indicating that the board understood that only non-violent offenders would be placed in facilities. AR, Tab 24, Request for FPR, Aug. 4, 2017, at 000002.

In response, Bannum stated that it had "lost [its] right to use the proposed property," and that the land owner had leased the property to another entity. AR, Tab 26, Email from Protester to Agency, Aug. 4, 2017. The protester then requested "the opportunity to seek and identify an alternate proposed property and additional time to obtain and prove appropriate zoning and use therefor." Id. Upon review of Bannum's response, the contracting officer determined that Bannum's request for a site change could not be considered because it was outside the 60 day time period contemplated by the RFP, and excluded Bannum's proposal from the competitive range because it no longer had a proposed site for the requirement. AR, Tab 27, Competitive Range Determination, at 2. The agency notified Bannum that its proposal had been excluded from the competitive range because it no longer possessed the right to use the proposed site, and thus had no realistic possibility of award. AR, Tab 28, Notice of Exclusion from Competitive Range, at 000001. 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 lease agreement it had for its proposed property. Protest at 3. Bannum also challenges the agency's refusal to allow the protester to submit an alternate performance site. Id. We have reviewed all of Bannum's challenges and find that none furnishes a basis to sustain the protest.

We will review an agency's evaluation and exclusion of a proposal from the competitive range for reasonableness and consistency with the solicitation criteria and applicable statutes and regulations. D&J Enters., Inc., B-310442, Dec. 13, 2007, 2008 CPD ¶ 8 at 2. It is the contracting agency's right to determine when the offer and negotiation stage of a procurement is finished, and an offeror has no legal right to insist that negotiations be reopened after final proposal revisions have been submitted. Bannum,

³ In response to a round of discussions held on March 3, 2015, Bannum submitted an updated lease, as its previous lease had expired. AR, Tab 12, Bannum Response to Discussions, March 10, 2015. Similar to the original lease, the updated lease included relevant contingencies, the landlord's right to market the property, and Bannum's right of first refusal, and stated that if contingencies were not met by August 1, 2015, Bannum had the option to extend the lease for an additional 90 days. Id. at 000004, 000012-13.

Inc., B-414336, May 15, 2017, 2017 CPD ¶ 170 at 3. Contracting agencies are not required to retain in the competitive range proposals that are not among the most highly rated or those that the agency otherwise concludes have no realistic prospect of being selected for award. Federal Acquisition Regulation § 15.306(c)(1); Beretta USA Corp., B-406376.2, B-406376.3, July 12, 2013, 2013 CPD ¶ 186 at 13.

We see nothing to support the protester's contention that the agency acted unreasonably in rejecting the proposal. The RFP stated that an offeror would be evaluated on the validity of its right to use the proposed property and whether the proposed facility would be operationally available within 120 days of contract award. RFP at 000245-46. The record shows that the protester lost its right to use the proposed facility and did not have a facility with which to perform the contract. The record also shows that based on this response, the agency excluded the protester's proposal from the competitive range because it had no realistic possibility of award. On this record, we find the agency's actions unobjectionable.

Additionally 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.⁴ By the express terms of the solicitation, an offeror could only request a site change within 60 days after initial proposals were submitted. RFP at 000238. This 60-day window had long passed when Bannum's property became unavailable. Accordingly, 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. An agency need not delay a procurement simply to accommodate an offeror'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.

The protest is denied.

Thomas H. Armstrong
General Counsel

⁴ We find the protester's argument that its right of use would have been enforceable if the agency had made award by the anticipated award date--July 1, 2014--to be unavailing considering the anticipated award date was the same as the revised date for submission of proposals, and Bannum did not challenge this issue prior to submission of its proposal.