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

Comptroller General
of the United States

Decision

Matter of: MMI Capital, LLC

File: B-419335; B-419335.2

Date: January 21, 2021

Hadeel N. Masseoud, Esq., and Diana Parks, Esq., Curran Legal Services Group, Inc., for the protester.
Carisa L. LeClair, Esq., and Jessica Gunzel, Esq., General Services Administration, for the agency.
Hannah G. Barnes, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In a procurement for a lease of office space, protest that agency engaged in unequal treatment is denied where the alleged unequal treatment, if it occurred, would not have competitively prejudiced the protester.

2. Protest that agency performed an improper net present-value price evaluation is dismissed as untimely where the protest was filed more than ten days after the basis of protest was known or should have been known.

3. Protest that the awardee's proposal was ineligible for award because the awardee's registration in the System for Award Management was inaccurate and its online registration record did not list the applicable North American Industry Classification System code is dismissed as untimely where the protest was filed more than ten days after the basis of protest was known or should have been known.

DECISION

MMI Capital, LLC (MMI), a small business of Macon, Georgia, protests the award of a lease for office space to L.D. Hancock Family, LLC (Hancock), a small business of Tupelo, Mississippi, by the General Services Administration (GSA), under request for lease proposals (RLP) No. 4MS0138. The protester challenges the agency's net present-value (NPV) price evaluation and its award determination.

We deny the protest.

BACKGROUND

The RLP, issued on August 17, 2018, provided for the award of a 15-year lease of office space in Tupelo, Mississippi.[1] Agency Report (AR), Exh. 1, RLP § 1.02. GSA sought to lease 10,814 American National Standards Institute/Building Owners and Managers Association Office Area square feet (ABOA SF) of contiguous space for use by the tenant agency, the Social Security Administration.[2] *Id.*; Supp. Contracting Officer's Statement (COS) at 1. The solicitation advised that the lease would be issued to the offeror that submitted the lowest-priced, technically acceptable lease proposal. RLP § 4.03.

The solicitation provided that the agency would determine the lowest price by conducting a net present-value (NPV) price evaluation to reduce each offeror's lease rate to a composite annual ABOA SF price.[3] *Id*. § 4.09. The solicitation provided a specific formula to conduct this evaluation, and the agency refers to this resulting composite annual price as the NPV rate.[4] As advised in section 4.09 of the solicitation, the formula involved the agency taking an offeror's fully serviced lease rate, conducting calculations to yield a gross present-value cost, and adding certain costs to that gross present-value cost, including, as relevant here, "[t]he cost of relocation of furniture, telecommunications, replications costs, and other move-related costs, if applicable." RLP § 4.09.

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[1] The RLP provided that the term of the lease was 15 years, with government termination rights effective after 10 years. RLP § 1.02.

[2] ABOA SF refers to the area available for use by a tenant for personnel, furnishings, and equipment, and is generally synonymous with usable square feet. *The Metropolitan Square Assocs., LLC*, B-409904, Sept. 10, 2014, 2014 CPD ¶ 272 at 3 n.2. The agency further explains that "ABOA refers to the standard for measuring space recognized by the Government. It is the area where a tenant normally houses personnel and/or furniture." Memorandum of Law (MOL) at 2 n.1.

[3] The solicitation required offerors to submit a fully serviced lease rate, also termed a gross rate, per ABOA SF and per rentable square foot, that included shell rent, operating costs, and the annual rent to amortize tenant improvements and building-specific amortized capital costs, if any. RLP § 3.03. Rentable square foot refers to the area for which a tenant agency is charged rent, and it consists of the ABOA office area space measurement in addition to the associated share of floor common areas and building common areas. MOL at 2 n.2.

[4] The agency explains that the purpose of this NPV price evaluation is to provide "a single cost representation of various streams, variations in operation costs, lump sum payments, and amortizations that allows the Government to understand the true price of all offers." MOL at 4 n.3.

GSA received offers from MMI and Hancock on November 26, 2018. COS at 1. On March 13, 2019, the agency amended the solicitation to request revised offers and to change certain values that offerors were required to include in their fully serviced lease rates. As relevant here, the solicitation initially required offerors to include a tenant improvement allowance (TIA) of $37.86 per ABOA SF in their fully serviced lease rates.[5] RLP § 3.07. The amendment reduced the TIA from $37.86 per ABOA SF to $37.392 per ABOA SF and changed the total TIA value from $409,418.04 to $404,357.09. COS at 2; AR, Exh. 3, Amendment No. 1 to RLP.

Best and final offers were due on March 15, 2019. Protest, Exh. 2, Agency Protest Decision at 2. MMI and Hancock each submitted a lease proposal that was found to be technically acceptable. COS at 2. After conducting the NPV price evaluation, the agency found that Hancock's NPV rate was [REDACTED] per ABOA SF, and MMI's NPV rate was [REDACTED] per ABOA SF. Supp. COS at 2; Supp. AR, Exh. 1, MMI Present Value Analysis at 1; AR, Exh. 8, Present Value Price Analysis for Awardee at 1. As Hancock submitted the lowest-priced, technically acceptable proposal, the agency awarded it the lease on July 30, 2020, and sent a signed copy of the lease to Hancock on August 12. COS at 3. On September 9, the agency sent the protester a notice of award, informing the protester that the awardee's lease proposal presented the lowest-priced, technically acceptable offer. AR, Exh. 17, Notice of Unsuccessful Offeror at 2.

On August 19, 2020, prior to receiving the notice of award, the protester received an email from the agency with two attachments containing GSA's NPV price evaluations for the protester. Protest at 2; Protest, Exh. 7, Present Value Analysis Email. The email attachments showed two different calculations that utilized two different TIA numbers and yielded differing NPV rates. Protest at 2. The protester asserts that it assumed GSA planned to use the higher NPV. Protest at 3. Consequently, MMI filed a protest with the agency on August 28, 2020, arguing that the agency conducted the NPV price evaluation unreasonably and challenging award of the lease to Hancock. *Id.*; Protest, Exh. 1, Agency Level Protest at 3. On October 5, the agency dismissed one of MMI's protest grounds and denied the other. Protest, Exh. 2, Agency Protest Decision. On October 15, this protest was filed with our Office.

DISCUSSION

MMI, the incumbent lessor, argues that the agency failed to conduct a reasonable NPV price evaluation because the agency failed to consider the costs of relocation, which MMI contends was required by the RLP. Comments & Supp. Protest at 2-4. The protester also contends that the agency engaged in unequal treatment because it used an incorrect, outdated TIA when it conducted the protester's NPV price evaluation and used the correct, amended TIA when it conducted the awardee's NPV price evaluation.

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[5] The RLP explained that tenant improvements are "the finishes and fixtures that typically take [a] [s]pace from the shell condition to a finished, usable condition," and added that the TIA in this case would be used "for the build-out of the [s]pace in accordance with the Government approved design intent drawings." RLP § 3.07.

Id. at 5-6. Lastly, MMI asserts that the awardee's proposal was ineligible for award for two reasons: the awardee did not have an active registration in the System for Award Management (SAM) at the time of award, and did not meet the solicitation's North American Industry Classification System (NAICS) code requirements because the awardee's online registration record did not list the applicable NAICS code. *Id*. at 7.

As discussed below, we deny the protester's unequal treatment argument and dismiss the protester's arguments concerning relocation costs and the awardee's ineligibility to submit a proposal.[6]

Unequal Treatment

The protester alleges that GSA engaged in unequal treatment by applying an incorrect TIA to the protester's NPV price evaluation and using the correct, amended TIA value for the awardee's NPV price evaluation. Comments & Supp. Protest at 4. The protester specifically points to NPV price evaluation sheets provided as exhibits in the agency report, which show the higher TIA of $37.86 in the protester's evaluation sheet and the lower, amended TIA of $37.392 in the awardee's evaluation sheet. AR, Exh. 8, Present Value Price Analysis for Awardee at 1; Exh. 9, Present Value Analysis for Protester at 1.

The agency responds that it "inadvertently submitted a[n] NPV price evaluation as an exhibit to its [a]gency [r]eport using the original TIA," and that the lease contracting officer "unintentionally" referenced this incorrect TIA, which resulted in an NPV rate of [REDACTED] per ABOA SF for the protester, rather than the correct rate of [REDACTED]. Supp. MOL at 10; Supp. COS at 2. Nevertheless, the agency asserts that it did use the correct, amended TIA in its NPV price evaluation for the award determination. Supp. MOL at 10-11. In its supplemental agency report, the agency provided an NPV price evaluation sheet, dated September 9, 2020, showing the correct, amended TIA and the protester's resulting NPV rate. Supp. AR, Exh. 1, MMI Present

[6] We have reviewed all of the protester's arguments. In addition to the specific arguments discussed herein, MMI initially raised, but subsequently abandoned, a challenge to the agency's NPV price evaluation as being inconsistent with the solicitation, asserting that the NPV rates were measured in Rentable Square Feet instead of ABOA SF. *Compare* Protest at 4 *with* MOL at 7-8 *with* Comments and Supp. Protest. MMI also initially raised, but subsequently abandoned, a challenge to the award determination on the basis that the agency made award to a higher priced, ineligible offeror. *Compare* Protest at 4-6 *with* MOL at 8-13 *with* Comments and Supp. Protest. Specifically, the protester compared the awardee's rate as cited in the notice of award to its own NPV rate. Protest at 4-5. The agency responded that the rate listed in the notice of award was the awardee's total offered rate, and that comparing the awardee's total offered rate to the protester's NPV rate "is effectively comparing apples to oranges." MOL at 9. The protester subsequently failed to comment on this issue. We will not consider abandoned arguments. *IntelliDyne, LLC*, B-409107 *et al.*, Jan. 16, 2014, 2014 CPD ¶ 34 at 3 n.3.

Value Analysis at 1. This sheet shows that the protester's NPV rate, calculated in the same manner as Hancock's, was 39 percent higher than the awardee's.[7]

In addition, the agency argues that the difference in the protester's NPV rates when calculated with the two different TIA values was so negligible, and the difference between the protester's NPV rate and the awardee's NPV rate so significant, that using different TIA values for the protester and awardee would have had no impact on the award determination. Supp. MOL at 10. The agency also states that during the procurement process, the protester requested that the agency perform an NPV price evaluation using a different TIA for the protester, a value significantly lower than either the initial or amended TIA value in the solicitation, given the protester's status as the incumbent lessor. Agency's Supp. Briefing, Dec. 29, 2020, at 1. The agency states that it treated this request as an alternate proposal, performed the price evaluation with the lower TIA, and decided not to accept this alternate proposal because even with the lower TIA, MMI's NPV rate was still higher than Hancock's NPV rate. *Id*. As a result, GSA contends that no competitive prejudice exists. Supp. MOL at 15.

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 evaluation criteria. *The Metropolitan Square Assocs., LLC*, *supra* at 6. In addition, our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was competitively prejudiced by the agency's actions; that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. *McDonald-Bradley*, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3.

Here, the protester has not shown that the agency conducted an evaluation that was inconsistent with the solicitation or amounted to unequal treatment. We note the agency's explanation that it referenced an incorrect TIA and resulting NPV rate in its agency report, that it did so in error, and that it nonetheless used the correct, amended TIA when it made the award determination. Supp. MOL at 10-11. We also note that the agency provided calculations of the protester's NPV price evaluation that used the correct, amended TIA. Supp. AR, Exh. 1, MMI Present Value Analysis at 1. The protester has not meaningfully countered the agency's assertions.

Thus, the record shows that the protester's NPV rate, whether calculated with the original or amended TIA, was still significantly higher than the awardee's NPV rate. Supp. COS at 2-3. While the protester argues that "[b]ut for GSA's errors and

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[7] The difference between the incorrect NPV rate and the correct one is, as the agency notes, a matter of pennies. Supp. MOL at 3. With the correct rate, as stated above, the protester's NPV rate is 39 percent higher than the awardee's. With the inadvertently incorrect rate cited in the agency report, it is 40 percent higher. *See* AR, Exh. 8, Present Value Price Analysis for Awardee at 1; Exh. 9, Present Value Analysis for Protester at 1.

inconsistencies, MMI would have had a significantly lower NPV and stood a significant chance, and fair opportunity, to receive the award of the lease," Comments & Supp. Protest at 8, this assertion is belied by the record. MMI's speculation is insufficient to overcome the agency's documentation of the price evaluations it conducted and the NPV rates those evaluations yielded. Even accepting, for argument's sake, the protester's assertion that the incorrect TIA rate was used, the protester has not shown that it would have been competitively prejudiced by such error. This protest ground is denied.

NPV Price Evaluation and Relocation Costs

MMI argues in a supplemental filing that the agency conducted an unreasonable price evaluation because that evaluation did not include relocation costs for the awardee, despite section 4.09 of the RLP, which specified that "to the gross PVC will be added . . . the cost of relocation of furniture, telecommunications, replications costs, and other move-related costs, if applicable." Comments & Supp. Protest at 2 (citing RLP § 4.09.C.7). The protester asserts that relocation costs "are clearly applicable" because the protester is the incumbent for this contract, and award to Hancock will require the tenant agency to move from its location with MMI to the location provided by Hancock. *Id*. at 2-3.

In response, the agency argues that this protest ground is untimely, asserting that the facts forming the basis for the protester's argument were known to the protester more than 10 days before it filed its supplemental protest. Supp. MOL at 11. Specifically, the agency claims that on September 10, 2020, it included the awardee's NPV price evaluation sheet as an exhibit in a response to the protester's agency-level protest, and that it was clear from this exhibit that GSA did not factor relocation costs into the awardee's NPV price evaluation.[8] *Id*. at 11-12.

MMI responds that the relocation costs issue is not untimely. Supp. Comments at 5. The protester argues that the agency's redaction of the NPV price evaluation sheet provided in response to the protester's agency-level protest was so extensive that "there was no ability of the [p]rotester to discern anything from it in terms of values used by GSA in its NPV [price evaluation] of the Hancock offer." *Id*. MMI asserts that it did not know, and could not have known, that GSA did not include relocation costs in the awardee's NPV price evaluation until it viewed the agency report filed with our Office, which included exhibits showing the unredacted values of the NPV price evaluations for the protester and awardee. *Id*.

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[8] The agency also addressed this allegation on the merits in its response to the protest with our Office, contending that according to the terms of the RLP, relocation costs would only be added to the NPV analysis of proposals if deemed applicable, and explaining why such costs were not applicable under the circumstances here. Supp. MOL at 6.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. These rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 4. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). In order for us to consider a protest after an initial agency-level protest has been filed, the initial protest must have been filed with the agency within the 10-day requirement cited above, unless the agency imposes a more stringent time for filing. 4 C.F.R. § 21.2(a)(3); *see M2 Glob. Tech., Ltd.*, B-400946, Jan. 8, 2009, 2009 CPD ¶ 13 at 1-2.

Here, the NPV price evaluation sheets provided during the agency-level protest identified the various types of rates that were used in the agency's analysis; those rate type identifiers were not redacted from those sheets. In contrast, the dollar values of the awardee's rates were redacted from those evaluation sheets.[9] *See* Supp. AR, Exh. 3, Hancock Present Value Analysis.

In the report filed in response to this protest, the NPV price evaluation exhibits are completely unredacted, but they reveal nothing further about the types of costs or rates that were used in the evaluation; they do, however, identify the various numbers that were used for the calculations. *Compare* AR, Exh. 8, Present Value Price Analysis for Awardee *with* Supp. AR, Exh. 3, Hancock Present Value Analysis. Thus, it was apparent from the record produced in response to the agency-level protest that the awardee's NPV price evaluation did not include relocation costs in its price evaluation of the awardee, as there is no rate identifier associated with relocation costs in the agency exhibit provided in response to the agency-level protest. *Id.* As a result, the protester knew, or should have known, that the agency did not include relocation costs by looking at the identifiers in the awardee's redacted price evaluation sheet. Because the protester should have known on September 10 that the agency considered relocation costs inapplicable, but did not raise this argument until November 29, this protest ground is dismissed as untimely.

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[9] For example, the agency redacted all of the numbers associated with the TIA, but it lists the corresponding identifiers, or categories of rates for those numbers; thus, the agency identified rate types such as the total TIA rate, the lessor's amortization rate, and the total number for the lessor's overhead and fees. Supp. AR, Exh. 3, Hancock Present Value Analysis at 1. As another example, the exhibit includes the following identifiers for the numbers used in the NPV price evaluation: shell rental, tenant improvements, building-specific amortized capital, overtime utilities, structured parking, surface parking, and annual rent. *Id.* at 2.

Awardee Ineligibility

MMI also argues that Hancock is ineligible for award because its registration in SAM expired prior to the lease award, and its online registration record did not list the applicable NAICS code required by the solicitation. Protest at 6-7. On October 23, the agency requested partial dismissal of this ground, asserting that the protester's arguments were untimely. Request for Partial Dismissal at 2. The agency contends that the protester's agency-level protest, filed on August 28, 2020, failed to raise any protest ground concerning the awardee's SAM registration or NAICS code until September 28, in an additional filing under the agency-level protest process. *Id*. GSA argues that that the awardee's SAM registration status and registered NAICS code were both accessible on public databases as of September 9, when the agency notified the protester of the award determination. *Id*.

As set forth above, our timeliness regulations require a protest based on other than alleged improprieties in a solicitation to be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Further, a matter initially protested to the contracting agency will be considered by our Office only if the initial protest was filed within the time limits for filing a protest with our Office, unless the contracting agency imposes a more stringent time for filing, in which case the agency's time for filing will control. 4 C.F.R. § 21.2(a)(3); *see Raith Eng'g and Mfg. Co, W.L.L.,* B-298333.3, Jan. 9, 2007, 2007 CPD ¶ 9 at 2.

Here, MMI learned that Hancock was awarded the lease on September 9. Information concerning Hancock's SAM registration status and registered NAICS code was available on public databases, and the protester could have learned that information the same day. In order to be timely, these arguments needed to be filed within 10 days of the protester receiving notice of award, *i.e.*, by September 19. MMI raised these arguments in the agency-level proceeding on September 28 and with our Office on October 15. Accordingly, this protest ground is dismissed as untimely.

The protest is denied.

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General Counsel