

Decision

Matter of: Eskanos Enterprises

File: B-419391

Date: February 1, 2021

Barry Eskanos for the protester.
Mikhail Petersen, 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

Protest that the agency improperly rejected lease proposal is denied where the record shows that the agency's evaluation was reasonable and consistent with the terms of the solicitation.

DECISION

Eskanos Enterprises, a women-owned small business of Colorado Springs, Colorado, protests the rejection of its proposal under request for lease proposals (RLP) No. 9CO2518, issued by the General Services Administration (GSA), for a 16-year lease of office and related space in Colorado Springs, Colorado. The protester argues that the agency improperly determined that its proposal was unacceptable.

We deny the protest.

BACKGROUND

Prior to issuing the RLP, on June 5, 2020, GSA posted an advertisement on the System for Award Management (SAM) seeking expressions of interest for a lease of office space in a delineated area within Colorado Springs, Colorado, on behalf of the Air Force Space Command. Agency Report (AR), Exh. 1, Advertisement Posted in SAM at 3-4. GSA received 13 responses, 6 of which fell outside of the delineated area and were consequently excluded from further participation in the procurement process. Contracting Officer's Statement (COS) at 2. The remaining responses included the one submitted by Eskanos.

On July 14, 2020, GSA and Air Force Space Command representatives visited the seven remaining sites, including the protester's site. *Id.* Based on that site survey, the

GSA contracting officer chose to issue the RLP to only some of the firms, either because the other potential offerors chose not to compete, or because the agency found they were unable to meet the requirements as outlined in the RLP. *Id.* The contracting officer determined that the protester's site could not meet the RLP requirements.

However, in response to a phone call the protester initiated with the agency on August 3, the agency provided "an informational copy" of the RLP to the protester on August 12.¹ *Id.* at 3-4. With this copy, the agency included a previously transmitted email that informed the protester its site did not meet the solicitation requirements for a professional setting or campus-like atmosphere. COS at 4; AR, Exh. 5, Email Transmission of RLP and Initial Declination Letter at 4. On August 12, GSA also issued the RLP to the remaining offerors whose sites the contracting officer believed could meet the solicitation requirements.

The RLP provided for the award of a 10-year lease of office space within the delineated area in Colorado Springs.² AR, Exh. 6, RLP § 1.02. GSA sought to lease a minimum of 107,500 to a maximum of 113,000 American National Standards Institute/Building Owners and Managers Association Office Area square feet (ABOA SF) of contiguous space for use by the tenant agency.³ *Id.*; COS at 2. The solicitation advised that the lease would be issued to the offeror that submitted the lowest-priced, technically acceptable lease proposal. RLP § 4.03.

As relevant here, the RLP contained the following requirements for the leased space:

Space shall be located 1) in an office, research, technology, or business park that is modern in design with a campus-like atmosphere; or, 2) on an attractively landscaped site containing one or more modern office Buildings that are professional and prestigious in appearance with the surrounding development well maintained and in consonance with a professional image.

RLP § 1.05

In addition, the RLP advised offerors of certain documents and submissions required by the solicitation for a proposal to be considered acceptable for award. For example, the

¹ The contracting officer states that she "reviewed the deficiencies of [Eskanos's] site" during the phone conversation, and that Eskanos requested a copy of the RLP during the call. COS at 2.

² The RLP provided that the term of the lease was 10 years, with government termination rights effective after 6 years. RLP § 1.02.

³ 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 2 n.2.

solicitation required a “test fit layout” of the offeror’s site so that the agency could determine if the offered space would accommodate the tenant agency’s requirements. RLP § 2.01. The solicitation also required “[s]atisfactory evidence of at least a conditional commitment of funds,” as well as “[e]vidence of ownership or control of [the] [b]uilding or site” in the form of either the deed to the property, lease documentation, or “a fully executed copy of the written agreement [between the owner of the property and the offeror] with its offer.” RLP § 3.06.

On August 28, 2020, GSA issued an amendment to the RLP, changing the lease term to 15 years with government termination rights after an initial 10-year term, and extending the proposal due date to September 15. AR, Exh. 9, RLP Amendment at 3. The agency sent “an informational copy” of the amendment to the protester. COS at 4. On September 15, 2020, the protester submitted a lease proposal based on the site that the agency had previously visited, and found unacceptable. *Id.*

On September 30, the contracting officer and the protester had a telephone conversation during which the protester requested a written statement excluding its proposal from consideration for award. *Id.* at 5. On October 27, the agency sent the protester an email explaining that the protester’s offer had been “eliminated from further consideration” due to its failure to meet the solicitation requirements for a professional setting. AR, Exh. 12, Email to Eskanos with Declination Letter at 3. On October 28, this protest followed.

DISCUSSION

Eskanos challenges the agency’s evaluation of its proposal and asserts that its proposal was wrongfully excluded from the lease procurement process. Protest at 1. As discussed below, we deny the protest.

The protester objects to the agency’s determination that its site was unacceptable, insisting that its offered site meets the solicitation requirements for a professional setting or campus-like atmosphere. Protest at 4.

In response, the agency raises two arguments. First, the agency asserts that the protest should be dismissed as untimely because GSA informed Eskanos that its proposed site did not meet the solicitation’s professional setting requirements on August 3, in a phone call, and on August 12, in an email. Memorandum of Law (MOL) at 7. Second, the agency argues that its rejection of the protester’s site was reasonable and consistent with the terms of the RLP. *Id.* at 9. The agency asserts that the building site location did not meet the solicitation requirements for a professional image; and that the protester’s proposal was incomplete and failed to include documents required by the RLP, such as “evidence of a commitment of funds, ownership and control, and an executed copy of the draft lease.” *Id.* at 5 n.5.

In response, the protester alleges that its protest was timely because the agency made statements that caused Eskanos to believe the agency was still considering its offer.⁴ Comments at 3-4, 15-16. The protester also reiterates its view that its site meets the requirements for a professional image or a campus-like setting. Comments at 5-6.

We turn first to the agency's assertion that Eskanos's protest is untimely. We resolve doubt surrounding timeliness of a protest in favor of the protester where there is disagreement as to when the protester first knew the basis of its protest. *Handyman Exch., Inc.*, B-224188, Jan. 7, 1987, 87-1 CPD ¶ 228 at 2. .

Here, the record shows that the agency's actions and statements did not present a consistent agency position with respect to whether the protester was eligible to compete. The agency told the protester in its August 12 email that the protester's site did not meet the solicitation requirements for a campus-like atmosphere or a professional image. However, the protester asserts that it received conflicting statements of its proposal's acceptability, as well as the fact that the agency sent copies of the RLP and the RLP amendment to the protester on August 12 and August 28, respectively.⁵ COS at 3-4. These actions by the agency--initially stating that the protester's site was unacceptable, but also providing copies of the RLP and the amended RLP--could have reasonably allowed the protester to believe that its site had not been unequivocally rejected. The record shows that the agency unequivocally told the protester in its October 27 email that the protester's offer would not be accepted. Eskanos filed its protest the next day, within 10 calendar days of when it knew, or should have known, of the basis for protest. See 4 C.F.R. § 21.2(a)(2). As a result, we consider the protest timely filed.

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

⁴ To the extent the protester alleges that statements by the contracting officer indicate that its proposal was acceptable, our Office has frequently concluded that offerors rely upon oral advice from an agency at their own risk. *Douglas M. Andrews*, B-218687, May 17, 1985, 85-1 CPD ¶ 571 at 3.

⁵ On the one hand, the protester alleges that the agency made statements that could be construed as encouraging the protester to submit its lease proposal. For example, the protester asserts that the contracting officer told the protester on one occasion that "[i]t looks like I have a lot more homework to do before we make a decision." On another occasion, the protester claims that the contracting officer confirmed that Eskanos's proposal had not been rejected by stating that she would "have to do some more research" and that Eskanos was "still in the running." Comments at 15-16. On the other hand, the record shows that the agency expressly stated that the agency considered the protester's site to be non-compliant with the standard established in the solicitation. COS at 4; AR, Exh. 5, Email Transmission of RLP and Initial Declination Letter at 4.

determine whether the agency's judgment was reasonable and in accord with the evaluation criteria. *The Metropolitan Square Assocs., LLC, supra* at 6.

Here, the record shows that the agency reasonably determined that the protester's proposal was unacceptable: as the agency asserts, the protester's proposal was incomplete and "lacked most components of an offer" because it failed to include many of the documents required in sections 2.01 and 3.06 of the solicitation, such as a document showing evidence of a commitment of funds or an executed copy of the offeror's draft lease. MOL at 5 n.5. The protester does not rebut this argument, and the record confirms that the protester did not include these required submissions in its proposal. See Comments; AR, Exh. 10, Protester's Offer. Accordingly, we find no basis to question the agency's rejection of the protester's lease proposal as unacceptable. Given this conclusion, we need not also resolve whether the agency's conclusion that Eskanos's site failed to meet the RLP's standards for an acceptable site was reasonable.

The protest is denied.

Thomas H. Armstrong
General Counsel