

Decision

Matter of: Command and Control Construction, LLC

File: B-419567

Date: April 22, 2021

Mathias C. Baasch, for the protester.

Deborah K. Morrell, Esq., and Natica Chapman Neely, Esq., Department of Veterans Affairs, for the agency.

Heather Self, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's evaluation of awardee's proposal is denied because the record shows that the alleged evaluation error did not result in competitive prejudice to the protester.

DECISION

Command and Control Construction, LLC, a service-disabled veteran-owned small business (SDVOSB) of Fargo, North Dakota, protests the award of a lease contract to G2 Construction, of Fairbanks, Alaska, under request for lease proposals (RLP) No. 36C26020R0031, issued by the Department of Veterans Affairs for the lease of approximately 15,000 square feet of office space in Fairbanks, Alaska. The protester contends that the agency should have found the awardee's proposal technically unacceptable.

We deny the protest.

BACKGROUND

The RLP, issued on April 15, 2020, provided for the award of a fully-serviced 20-year lease of office space in Fairbanks, Alaska.¹ Agency Report (AR), Tab 2, Contracting Officer's Statement (COS) at 4; Tab 3, RLP at 1, 16. The agency sought to lease between 15,111 and 15,867 American National Standards Institute/Building Owners and Managers Association Office Area square feet (ABOA SF) of contiguous space and 50

¹ The RLP provided that the term of the lease would be 20 years, with government termination rights effective after a 10-year firm term of the lease. RLP at 1.

surface parking spaces for use as a community based outpatient clinic.² RLP at 1; COS at 1. The solicitation advised that the lease would be awarded to the offeror that submitted the lowest-priced, technically acceptable proposal. RLP at 17.

The agency received timely proposals from six offerors, including the awardee and the protester. AR, Tab 7, Source Selection Decision Document (SSDD) at 2. Based on initial evaluations, the agency concluded that all six proposals contained deficiencies, and, as a result, the agency opened discussions with all six offerors. *Id.* at 2-3. Following receipt and evaluation of revised proposals, the agency concluded that each offeror corrected their initial proposal deficiencies, and assessed all six proposals as technically acceptable. *Id.* at 5-6. The agency eliminated one of the six proposals from further consideration for award, however, on the basis of its price. *Id.* at 6. The remaining five proposals, including the proposal submitted by Command and Control, ranged in price from \$25.48 to \$46.19 per USF. *Id.* at 6-7. The protester submitted the highest-priced proposal at \$46.19 per USF. *Id.* at 7.

Based on its evaluation, the agency selected for award the lowest-priced, technically acceptable proposal submitted by Offeror A at a price of \$25.48 per USF. AR, Tab 7, SSDD at 7. Offeror A refused to accept the award, however, instead attempting to revise its price upward to \$29.37 per USF. *Id.* The agency rejected Offeror A's attempt to revise its price, and moved on to the second lowest-priced, technically acceptable proposal submitted by the awardee, G2 Construction at a price of \$29.20 per USF. *Id.* at 7-8. On January 29, 2021, the agency notified the protester of the award decision, and this protest followed. AR, Tab 8, Email from Agency to Protester at 1.

DISCUSSION

The protester argues that the agency should have evaluated the awardee's proposal as technically unacceptable because the awardee's property fails to meet two solicitation requirements. Protest at 1. Specifically, the protester contends that the awardee's proposed property is not located within "attractive, prestigious and professional surroundings[,] and does not have building entrances "connected to public sidewalks by continuous, accessible sidewalks."³ *Id.*, citing RLP §§ 1.05 A, 1.05 B, 1.05 C.1.

² ABOA SF refers to the area available for use by a tenant for personnel, furnishings, and equipment, and generally is synonymous with usable square feet (USF). *The Metropolitan Square Assocs., LLC*, B-409904, Sept. 10, 2014, 2014 CPD ¶ 272 at 2 n.2.

³ In addition to challenging the agency's evaluation of the awardee's proposal, the protester argued that the solicitation should have been set aside for SDVOSBs. Protest at 1. Prior to the date set for submission of its report responding to the protest, the agency requested that we dismiss the protest in its entirety as untimely in part and speculative in part. Req. for Dismissal at 1-4. We declined to dismiss the protester's evaluation challenge, but granted the agency's request for dismissal of the protester's set-aside challenge. Notice of Partial Dismissal, Feb. 17, 2021, at 1. In granting the request, we noted that the protester was aware from the face of the solicitation as

Substantively, the agency responds that the protester is misinterpreting the solicitation, and the awardee's proposal met the requirements of the solicitation as correctly interpreted. *Id.* at 7-12. The agency also contends that if the agency had applied the solicitation interpretations advanced by the protester, then the firm's own proposal also would have been deemed technically unacceptable, rendering it ineligible for award. As discussed below, the agency also requests that we dismiss the protest because the protester is not an interested party. AR, Tab 1, Memorandum of Law (MOL) at 5-7. We decline to dismiss the protest on the basis that the protester is not an interested party. We deny the protest, however, because the alleged evaluation errors did not competitively prejudice the protester.

Interested Party Status

As stated, the agency requests that we dismiss the protest asserting that the protester is not an interested party. In this regard, and consistent with the terms of the solicitation, the agency made award on a lowest-priced, technically acceptable basis. RLP at 17; AR, Tab 7, SSDD at 7-8. The record reflects that the protester submitted the highest-priced offer. AR, Tab 7, SSDD at 6-7. The agency notes that two offerors submitted technically acceptable proposals with lower prices than the protester's proposal, and that the protester did not challenge the agency's evaluation of either offerors' proposal in the initial protest filing. MOL at 6. The agency argues that because the protester did not challenge the intervening offerors, it would not be next in line for award even if its protest were sustained, and, thus, is not an interested party. *Id.* at 6-7.

Under the bid protest provisions of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3557, only an "interested party" may protest a federal procurement. Our regulations implementing CICA define an interested party as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). Determining whether a protester is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit of relief sought by the protester, and the protester's status in relation to the procurement. *RELM Wireless Corp.*, B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. A protester is not an interested party if it would not be in line for contract award were its protest to be sustained. *Id.*

Generally, if a protester does not challenge an intervening offeror that would precede its own eligibility for award under the terms of a solicitation, the protester lacks the direct economic interest required to maintain a protest challenging the agency's evaluation of an awardee. See *e.g.*, *Joint Mgmt. Tech. Servs.*, B-294229, B-294229.2, Sept. 22,

amended that the procurement was not set aside for SDVOSBs. *Id.* at 2. Our Bid Protest Regulations require that a protest based on alleged improprieties in a solicitation be filed prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). Accordingly, we dismissed as untimely the protester's set-aside argument. Notice of Partial Dismissal, Feb. 17, 2021, at 2.

2004, 2004 CPD ¶ 208 at 9 (concluding that protester was not an interested party to challenge evaluation of awardee's proposal when protester's challenge to the evaluation of its own proposal was denied and protester did not challenge the evaluation of intervening offeror that would have been next in line for award).

Here, the protester did not challenge the agency's evaluation of the two intervening offerors' proposals in its initial protest filing. See *generally* Protest. The record reflects that the protester received only the following information in the notice of award from the agency: (1) the awardee's name, property location, and price; (2) the number of offers received--6; and (3) a sentence providing "Reason your Offer Not Accepted: Not the Lowest Price[.]" AR, Tab 8, Email from Agency to Protester at 1. Based on this information, the protester had no way of knowing that there were intervening offerors.

It was not until the protester received the agency's report responding to the protest that the firm learned there were intervening offerors that were both technically acceptable and lower-priced than the protester. See COS at 5; MOL at 6. After learning this information, the protester timely challenged the technical acceptability of both firms in its comments on the agency report. Comments at 1 (arguing that both intervening offerors' proposals should have been deemed technically unacceptable due to a lack of public sidewalk connectivity).

Based on this record, we conclude that the protester challenged the agency's evaluation of the two intervening offerors within ten days of when the protester knew, or should have known, the basis for its protest. See 4 C.F.R. § 21.2(a)(2). Accordingly, we decline to dismiss the protest on the basis that the protester is not an interested party. Cf., *Panum Telecom, LLC*, B-418202, Jan. 17, 2020, 2020 CPD ¶ 34 at 4 (dismissing protest for lack of interested party status because the protester did not timely challenge the evaluation of an intervening offeror whose existence the protester learned of from the agency's report).

Technical Evaluation--Property Location

The protester argues that the awardee's proposed property fails to meet the neighborhood-characteristic requirements set forth in sections 1.05 A and B of the solicitation. Protest at 1. The agency responds that the requirements of section 1.05 A did not apply, and that the evaluators concluded the awardee's property did meet the requirements of section 1.05 B. COS at 7-8; MOL at 7. The agency further argues that if the awardee's proposed property was deemed noncompliant with section 1.05 B because of the property's location, the protester's proposed property also would be deemed noncompliant because it is located "in the same area and within approximately 300 linear feet from" the awardee's proposed property. COS at 7-8; COS, exh. 1, Overhead View of Awardee and Protesters' Proposed Locations; COS, exh. 2, Street View West to East of Awardee and Protesters' Proposed Locations; COS, exh. 3, Street View East to West of Awardee and Protesters' Proposed Locations; MOL at 7-8. In reviewing an agency's evaluation of proposals, it is not our role to reevaluate submissions; rather we, examine the supporting record to determine whether the

decision was reasonable, consistent with the stated evaluation criteria, and adequately documented. *Federal Builders, LLC-The James R. Belk Trust*, B-409952, B-409952.2, Sept. 26, 2014, 2014 CPD ¶ 285 at 3. While we will not substitute our judgment for that of the agency, we will question the agency's conclusions when they are inconsistent with the solicitation criteria and applicable procurement statutes and regulations, undocumented, or not reasonably based. *Poplar Point RBBR, LLC*, B-417006.2, B-417006.3, Sept. 3, 2019, 2019 CPD ¶ 302 at 5-6. When an agency fails to document or retain evaluation materials, it bears the risk that there may not be adequate supporting rationale in the record for us to conclude that the agency had a reasonable basis for its evaluation conclusions. *Hoover Properties*, B-418844, B-418844.2, Sept. 28, 2020, 2020 CPD ¶ 372 at 7.

Here, sections 1.05 A and B of the solicitation established the neighborhood and parking requirements for offered properties located inside the city center and outside the city center, respectively; the solicitation, however, does not define the term "city center." RLP at 2. For offered properties located inside the city center, the solicitation required that the property "be located in a prime commercial office district with attractive, prestigious, and professional surroundings with a prevalence of modern design and/or tasteful rehabilitation in modern use." *Id.* For offered properties located outside the city center, the solicitation required that the property 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.

Id.

In support of its contention that the awardee's proposed property should have been deemed technically unacceptable, the protester cites to both sections 1.05 A and B, though its argument focuses on the "attractive, prestigious and professional surroundings" language of section 1.05 A. Protest at 1. The protester contends that the awardee's proposed property fails to meet the solicitation requirements because the property is next door to "an abundance of run-down industrial property." *Id.* In further support of its argument, the protester submitted a photograph of the awardee's proposed property showing that it is next door to what appears to be a steel workshop. Protest, attach. 2 at 3. In its comments on the agency's report, the protester submitted a second image showing that: to the left of the awardee's proposed property are a door service shop and a hardware store; to the right are a restaurant supply store and the protester's proposed property; and diagonally across the street from the awardee (and directly across the street from the protester) is a used car dealership. Comments, exh. A.

In response, the agency explains that section 1.05 B, rather than 1.05 A, applied to both the awardee's and protester's properties because the locations offered by both firms

“are outside the city limits.” COS at 7. The agency further explains that “[b]oth properties were rated acceptable as it relates to 1.05 B because both properties fall outside the city limits.”⁴ *Id.* at 8. Our Office does not limit its review of an agency’s evaluation to contemporaneously documented evidence, and will consider an agency’s post-protest explanations that provide a detailed rationale for contemporaneous conclusions by filling in previously unrecorded details so long as those explanations are credible and consistent with the contemporaneous record. *Hoover Properties, supra* at 7. We will find unpersuasive and afford little weight, however, to post-protest explanations that are not supported by the contemporaneous record or are inconsistent with the record. *Id.*; *Avionic Instruments LLC*, B-418604, B-418604.2, June 30, 2020, 2020 CPD ¶ 225 at 6.

Here, the agency’s post-protest explanations are inconsistent with the contemporaneous record. The record reflects that the agency’s evaluation consisted of a series of worksheets listing each solicitation requirement, upon which the evaluators indicated whether an offeror’s proposal met each requirement by marking Y, N, or N/A (yes, no, or not applicable). See AR, Tabs 6a and 6b, Technical Evaluation Worksheets. For some of the requirements, the evaluators also included brief notes next to their Y or N indications. *Id.*

With respect to the requirements of solicitation section 1.05 B (outside city center), the record shows that all of the evaluators marked their worksheets to indicate that the section was N/A (not applicable) for any of the offered properties, including those proposed by the awardee and protester. AR, Tab 6a, Technical Evaluation Worksheets at 1-2; Tab 6b Additional Technical Evaluation Worksheets at 1. Rather, the evaluators deemed section 1.05 A to be applicable, as indicated by their marking a Y (yes) next to this requirement for the properties proposed by both the awardee and protester. *Id.*

The evaluation worksheets, SSDD, and other documents in the record, however, are devoid of any analysis or explanation of how or why the evaluators concluded that the awardee and protesters’ proposed properties met the solicitation requirement to “be located in a prime commercial office district with attractive, prestigious, and professional surroundings with a prevalence of modern design and/or tasteful rehabilitation in modern use.” See *generally* AR Tabs 6a and 6b Technical Evaluation Worksheets; Tab 7, SSDD. Accordingly, the record here is insufficient for us to conclude that the agency’s evaluation of either the awardee’s or protester’s proposal as technically acceptable was reasonable. See *e.g.*, *Avionics Instruments LLC, supra* at 6 (sustaining protest because record contained no contemporaneous evaluation of whether proposals satisfied the many prior experience requirements in the performance work statement); *Federal Buildings, LLC-The James R. Belk Trust, supra* at 5 (sustaining protest because record provided an insufficient basis for the agency’s conclusion that the awardee’s proposal complied with the wage requirements set forth in the solicitation).

⁴ In fact, the agency points out that the offered properties from the awardee and the protester are located on the same street and are “within walking distance” of each other. COS at 7.

Nevertheless, we find that the agency's error does not provide a basis to sustain the protest. Competitive prejudice is an essential element of a viable protest; when the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the agency's evaluation of proposals are found. *Up-Side Mgmt. Co.*, B-417440, B-417440.2, July 8, 2019, 2019 CPD ¶ 249 at 7.

Here, the protester is not competitively prejudiced because, as discussed above, its proposed property is in close proximity to the awardee's, and is located near the same type of neighboring properties, such as a used car dealership. Accordingly, to the extent the agency may have erred in deeming the awardee's proposal technically acceptable, the same error would apply to the agency's evaluation of the protester's own proposal, because both offered properties are essentially located in the same area; in which case, both the awardee and protester would be rendered ineligible for award.⁵

Technical Evaluation--Sidewalks

The protester also challenges the agency's evaluation of the awardee's proposal with respect to solicitation section 1.05 C.1. Protest at 1. This section of the solicitation required that "[e]mployee and visitor entrances of the [b]uilding must be connected to public sidewalks by continuous, accessible sidewalks." RLP at 2. The protester contends that the awardee's proposed property does not have sidewalks. Protest at 1.

The agency responds that the solicitation it issued was an RLP template provided by the General Services Administration (GSA), and that while "the GSA RLP template language contemplates the existence of public sidewalks, it does not require" the existence of such. MOL at 10. The agency maintains that because there are no public sidewalks available at the awardee's proposed property, "there is in turn no requirement for connecting continuous, accessible sidewalks." *Id.* The protester maintains that the agency's interpretation is "invalid and unreasonable" because if it's correct then "the same could be said about any requirement of the RLP." Comments at 2 (emphasis

⁵ The protester contends that its proposed property is capable of meeting the requirements of solicitation section 1.05 A, because the awardee's proposed property "creates a buffer" between the protester's property and the "run down industrial property" bordering the awardee's property. Comments at 2. The protester's contention is not supported by the record, which includes images submitted by the agency in its report as well as images submitted by the protester in support of its argument. A review of the images shows that the two properties are visible from one another and that both properties, among other things, are located across the street from the same used car dealership. COS, exh. 1, Overhead View of Awardee and Protesters' Proposed Locations; COS, exh. 2, Street View West to East of Awardee and Protesters' Proposed Locations; COS, exh. 3, Street View East to West of Awardee and Protesters' Proposed Locations; Comments, exh. A.

omitted). For the reasons explained below, we do not need to resolve the dispute between the parties as to the solicitation's requirements.

The agency represents that public sidewalks do not exist at either the awardee's proposed property or the protester's, and submits several images of the proposed properties in support of its representation. COS at 5; COS, exh. 2, Street View West to East of Awardee and Protesters' Proposed Locations; COS, exh. 3, Street View East to West of Awardee and Protesters' Proposed Locations; COS, exh. 4, Street View of Awardee's Proposed Location; COS, exh. 5, Street View of Protester's Proposed Location. The agency also represents that public sidewalks are absent from the properties proposed by the two intervening offerors as well. COS at 5.

The protester maintains that its proposed property is near a "public sidewalk/bike path," and that in its proposal it offered to build a connecting walkway to this sidewalk/bike path. Comments at 2; exh. B, Design Drawing. The protester's design drawing shows the parking lot of the protester's proposed property bordered on one side by a road named Chief Thomas Drive, which is in turn bordered by what appears to be a grassy median, on the other side of which is Pegger Road, another thoroughfare. Comments, exh. B, Design Drawing. Drawn on Pegger Road is what the protester identifies as "Existing Sidewalk," to which the protester drew a connecting path crossing over Chief Thomas Drive and the grassy median. *Id.* The images submitted by the agency of the area surrounding the protester's property, however, do not show the sidewalk identified by the protester in its design drawing. Moreover, the protester's own categorization of the route as a combination sidewalk and bike path causes confusion as to the existence of a public sidewalk, given that bike paths and sidewalks are typically, though not always, separate thoroughfares.

Based on the record here, we find reasonable the agency's assessment that both the awardee and protester proposed properties in an area without public sidewalks. Thus, even if we agreed with the protester's interpretation of the solicitation as requiring offered properties to both have and be connected to public sidewalks, the record reflects that the agency waived the requirement for the protester in addition to the awardee and the two intervening offerors. COS at 5.

If there is a discrepancy between the offered product and the stated requirement, when, as here, a solicitation sets forth requirements in very specific terms, a deviation may be waived if there is no prejudice to the other offerors and the offered product will meet the agency's needs. *Up-Side Mgmt. Co., supra* at 7. Even when an agency waives a material solicitation requirement, our Office will not sustain a protest unless the protester can demonstrate that it was prejudiced by the waiver, *i.e.*, that the protester would have submitted a different proposal or that it could have done something else to improve its chances for award had it known that the agency would waive the requirement. *Id.* Here, the protester does not assert that it would have done anything differently had it known the agency would waive the public sidewalk requirement. We therefore find no basis to sustain the protest.

The protest is denied.

Thomas H. Armstrong
General Counsel