

Decision

Matter of: Property at 4545 Montgomery, LLC

File: B-420006

Date: October 12, 2021

Dr. Paul Sohi, Property at 4545 Montgomery, LLC, for the protester.
Adam Humphries, Esq., Department of Agriculture, for the agency.
Mary G. Curcio, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest that agency unreasonably rejected lease proposal is denied where protester proposed reimbursement of tenant improvement costs as a lump sum payment, and the solicitation stated that tenant improvement costs should be amortized and any lump sum payments for these costs were solely at the discretion of the government.

DECISION

Property at 4545 Montgomery Avenue, of Cincinnati, Ohio, protests the award of a lease to Scott Rasa, of Higginsville, Missouri, under request for lease proposals (RLP) No. 57-29107-20-FA, issued by the Department of Agriculture. Property at 4545 asserts that the agency unreasonably rejected its proposal, and failed to engage in meaningful discussions.

We deny the protest

BACKGROUND

The RLP, issued on February 12, 2020, provided that the lease would be awarded to the offeror that submitted the lowest-priced, technically acceptable offer, with a price that qualifies as an operating lease under Office of Management and Budget (OMB) guidance.¹ The RLP was comprised of 15 documents, including form L100, the lease template. Offers were due on April 20.

¹ An operating lease must meet the following criteria: ownership of the asset remains with the lessor during the term of the lease and is not transferred to the government at or shortly after the end of the lease term; the lease does not contain a bargain-price

As relevant to this protest, offerors were required to make certain tenant improvements for which the offeror would be reimbursed. The RLP required offerors to include the annual rent to amortize the tenant improvements in its price proposal for purposes of reimbursement. Agency Report (AR), RLP § 3.03.² The lease template required offerors to indicate the amount of the rent included for tenant improvements, the rate of amortization, and the period over which the payments would be amortized. AR, Lease Template § 1.03. The lease template also included the following with respect to reimbursement for tenant improvements:

A. The Lessor has agreed to total [tenant improvement] pricing of \$X. . . . This amount is amortized in the rent over the Firm Term of this Lease at an interest rate of X percent per year.

* * *

C. The Government may elect to make lump sum payments for any or all work covered by the [tenant improvements]. . . . At any time after occupancy and during the Full Term of the Lease, the Government, at its sole discretion, may elect to pay lump sum for any part or all of the remaining unpaid amortized balance of the tenant improvements.

* * *

AR, Lease Template § 1.08.

Three offerors responded to the solicitation.³ The agency evaluated the proposals and held two rounds of discussions. After each round of discussions the agency received and evaluated revised proposals. MOL at 3. In its initial proposal, and each of its revised proposals, Property at 4545 amortized the cost of tenant improvements. Contracting Officer's Statement (COS) at 2. On February 10, the agency requested the offerors submit final proposal revisions (FPRs) by February 17. *Id.* at 1. Property at 4545 submitted two versions of its final proposal, as follows:

purchase option; the lease term does not exceed 75 percent of the estimated economic life of the asset; the present value of the minimum contractually required payments over the life of the lease does not exceed 90 percent of the fair market value of the asset at the beginning of the lease term; the asset is a general purpose asset rather than being for a special purpose of the government and is not built to the unique specification of the government as lessee; and there is a private sector market for the asset. OMB Circular A-11, App. B at 6-7.

² Since the agency did not label the agency report documents in the decision we cite to the documents by name.

³ One offeror dropped out of the procurement. Memorandum of Law (MOL) at 3.

Version A assumes that Tenant Improvements (TIs) will be amortized over the term of the lease with a reimbursement of the outstanding TI amount if the lease is terminated early.

Version B is based upon the TIs being reimbursed when the premises are handed over to the [United States Department of Agriculture].

Response to Agency Request for Final Offer, FPR at 1.

On March 29, the contracting agency initiated a call with the protester to clarify which of the two FPR versions Property at 4545 wanted the agency to consider as its final proposal. COS at 1. Both parties agree that during the call the agency informed the protester that it had to select one of the offers as its final proposal. They disagree, however, on other aspects of the conversation. According to the agency, the protester requested that the contracting officer tell the protester which version of the proposal the protester should select, but the contracting officer refused to do so.⁴ *Id.* Also, according to the agency, the protester ultimately chose version B of the proposal, which the agency interpreted as requiring payment of a lump sum when the premises were provided to the agency. *Id.*

According to the protester, it never rescinded either of the versions of its proposal, and therefore both were still options available to the agency. Comments at 1. In any case, after the call the contracting officer sent a follow-up email to the protester which stated, "Just a follow up to our clarification call we just had. The lump sum offer is the offer you have selected to be your best and final offer for the Lafayette County, Higginsville, MO project." The protester did not respond to the email. AR, Email from Agency to Protester, Mar. 29, 2021. Subsequently the agency advised the protester that its proposal was rejected as unacceptable because Property at 4545 proposed to be reimbursed in a lump sum payment for tenant improvements, which was not allowed by the solicitation.

DISCUSSION

Property at 4545 protests that the agency unreasonably rejected its proposal. The protester explains that it submitted two versions of its proposal--one in which the protester would receive amortized payments over the term of the lease for tenant improvements and one in which the protester would receive a lump sum payment for tenant improvements when the property was turned over to the agency. The protester

⁴ The agency also asserts that during the conference call the contracting officer read section 1.08 C of the lease template, which provided that lump sum payments for tenant improvements were solely at the discretion of the government. The protester denies this. Since the solicitation included the lease template and therefore put offerors on notice that lump sum payments were at the discretion of the government, it is not relevant to our decision whether the agency again notified Property at 4545 of this provision during the call.

argues that the agency should have chosen the version that was acceptable. The protester also asserts that when the agency contacted the protester to ask which version it wanted to submit as its final proposal, it was incumbent upon the agency to advise Property at 4545 that one of the versions was acceptable, and the other was unacceptable. In other words, the protester argues the agency should have advised Property at 4545 that the version requesting a lump sum reimbursement for the cost of tenant improvements was unacceptable. The protester contends that the RLP did not expressly state that lump sum reimbursement was unacceptable, or preclude offers from proposing both amortized and lump sum payments for reimbursement of tenant improvement costs. The protester also maintains that it never withdrew either version of its proposal, and therefore the version amortizing the cost of tenant improvements was still available for the agency to accept.

The agency argues that it properly rejected Property at 4545's proposal because it proposed to be reimbursed for tenant improvements in a lump sum. The agency asserts that during the phone call, Property at 4545 selected the lump sum version of its proposal as the proposal the agency should consider. The agency explains that the solicitation clearly required offerors to submit an amortization schedule for tenant improvements, and that a decision to elect a lump sum payment for tenant improvements was at the sole discretion of the agency. MOL at 7-8. The agency denies that it had a responsibility to assist Property at 4545 during the clarification call in deciding which version of its proposal it should select for the agency to consider. In the agency's view, this would have been unfair to the other offeror. *Id.* at 7.

Based on our review of the record, we find no basis to conclude that the agency acted improperly when it rejected the proposal of Property at 4545. Where an evaluation is challenged, our Office will not reevaluate proposals, but instead will examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. Clearly stated solicitation requirements are considered material to the needs of the government, and a proposal or quotation that fails to conform to such material terms is unacceptable and may not form the basis for award. *See, e.g., Stewart Distributors*, B-298975, Jan. 17, 2007, 2007 CPD ¶ 27 at 3-4.

As an initial matter, we agree with the agency that the RLP required offerors to include the annual rent to amortize the tenant improvements. RLP § 3.03 at 13. The lease template also required offerors to indicate the rent for tenant improvements, the rate of amortization, and the period over which they would be amortized. AR, Lease Template § 1.03. The lease template further provided that the amount for tenant improvements, with interest at the rate proposed, would be amortized. *Id.* § 1.08.

While the lease template also provided that the government "at its sole discretion" could elect to make lump sum payments at any time, this option was reserved for the agency's discretion, and was not an option for offerors to impose. *Id.* We find that it was unreasonable for Property at 4545 to interpret

this provision as allowing offerors to submit a proposal, as the protester did here, that required the government to reimburse the cost of tenant improvements on a lump sum basis.⁵ As indicated above, the plain language of this solicitation calls for reimbursement of the costs of tenant improvements according to an amortized schedule, and permits reimbursement as a lump sum solely at the agency's discretion.⁶

Property at 4545 asserts in its comments that it did not rescind its offer of amortized payments during the conference call. According to Property at 4545, both versions of the proposal were still available and the agency could have accepted the version that amortized the payment for tenant improvements. The record does not support this position.

In its protest, Property at 4545 states that the government "demanded" that the protester select one version of the proposal. Protest at 3. Moreover, following the call the agency sent an email to the protester confirming the selection of the lump sum payment option as its final proposal. Property at 4545 did not respond to this email or otherwise dispute the agency's confirmation. This record supports the agency's position that Property at 4545 selected the lump sum version of its proposal as the version the agency should consider.

In any case, we also conclude that the agency properly rejected the proposal even if both versions of the proposal were still available, as the protester asserts. The agency was not required to choose which version of the proposal it should consider. The agency also was not required to ignore the selection decision made by the protester, and simply accept the alternative offer; indeed, selecting a different alternative than the one the protester chose for review--as the agency contends, and the confirming email supports--would likely have been improper. Where an offeror submits an acceptable, and an unacceptable version of its

⁵ The protester asserts that it submitted two versions of the same proposal, not two proposals. However, whatever nomenclature is used, the result is the same since the agency had to choose one version for purposes of making an award.

⁶ Property at 4545 argues that the agency, in the past, awarded it a different lease where the agency accepted a proposal for a lump sum payment for tenant improvements. The protester has not argued or demonstrated that the offerors in that procurement were permitted to submit a proposal for only lump sum reimbursement of tenant improvements costs. In any case, whether the agency allowed offerors to propose a lump sum payment for tenant improvements in another procurement is not relevant to our decision here since each procurement stands on its own. See *SDS Int'l*, B-285822, B-285822.2, Sept. 29, 2000, 2000 CPD ¶ 167 at 7 n.2.

proposal, we know of no basis to conclude that the agency must choose to consider only the acceptable alternative.⁷

Similarly, while Property at 4545 generally argues that the agency had an obligation to inform the protester during the clarification call that one version of its offer was not acceptable, it is not the responsibility of the agency to direct an offeror's business judgment. See generally *DynCorp International, LLC*, B-417506, B-417506.10, July 31, 2019, 2019 CPD ¶ 338 at 6 (agency is not required to hold discussions related to merits of offeror's business judgement). As noted above, the solicitation and lease template made clear that offerors had to amortize the amount for tenant improvements and that a lump sum payment was only at the discretion of the agency. Property at 4545 thus was on notice that proposing only a lump sum payment for the tenant improvements did not comply with the terms of the solicitation.

Moreover, Property at 4545 submitted this version of its proposal with its FPR, after discussions were completed. MOL at 8. The agency thus was not required to reopen discussions with Property at 4545 so that the protester could address a deficiency that was first introduced in its FPR. *Research Analysis & Maint., Inc.*, B-410570.6, B-410570.7, July 22, 2015, 2015 CPD ¶ 239 at 10.

The protest is denied.

Edda Emmanuelli Perez
General Counsel

⁷ As we conclude above, an agency reasonably may request that an offeror choose between the offeror's alternate proposals. On the other hand, in a situation where the offeror has not indicated which alternative approach it wants to submit, an agency also might elect to choose between alternate proposals. See, e.g., *Phoenix Air Group, Inc.*, B-412796.2, B-412796.3, Sept. 26,, 2016 2016 CPD ¶ 308 at 5; *OK Produce; Coast Citrus Distributors*, B-299058.1, B-299058.2, Feb.2, 2007, 2007 CPD ¶31 at 3 n.1.