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Decision

Matter of: Bannum, Inc.

File: B-298281.2

Date: October 16, 2006

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DIGEST

Where solicitation provided for award on the basis of initial proposals to the offeror whose proposal was determined to be in the best interests of the government, agency properly awarded contract without discussions where record shows that discussions were not necessary to determine which proposal represented the best value to the government.

DECISION

Bannum, Inc. protests the award of a contract to Dismas Charities, Inc. under request for proposals (RFP) No. 200-0800-SE, issued by the Department of Justice, Federal Bureau of Prisons for community corrections center (CCC) services for federal offenders in the Orlando, Florida area. Bannum contends that the agency improperly awarded to Dismas on the basis of initial proposals.

We deny the protest.

The RFP, which was issued on November 30, 2005, contemplated the award of an indefinite-delivery requirements contracts for a 3-year base period and seven 1-year award terms.¹ The solicitation provided for award to the offeror whose proposal was

¹ The “award term” concept is intended as an incentive to the contractor that permits extensions to the base contract period based on the contractor’s performance. RFP § I.11.

determined to be in the “best interests” of the government, RFP § M.2, with proposals to be evaluated on the basis of the following three criteria, listed in descending order of importance: past performance, technical/management, and price. RFP § M.5. The RFP advised that past performance and technical/management, when combined, were significantly more important than price. Subfactors to be considered under the technical/management factor were site location, accountability, programs, facility, and personnel. The RFP advised offerors that the agency intended to evaluate proposals and make award without discussions, but reserved to the government the right to conduct discussions if the contracting officer determined them to be necessary. RFP § L.2(f)(4).²

Four proposals were received by the March 1, 2006 closing date. A source selection evaluation board evaluated the technical/management proposals and forwarded to the contracting officer a memorandum summarizing items to be discussed and/or clarified with the various offerors. After reviewing the memorandum, the contracting officer concluded that award could be made without discussions, as “at least one offeror had no deficiencies or major weaknesses that required discussions.” Agency Report, Aug. 11, 2006, at 4.

By letter dated May 3, the contracting officer notified the protester that its proposal had been eliminated from consideration because Bannum had failed to provide the contracting officer with valid proof of zoning within 60 days after the date of its initial proposal submission. Bannum protested the agency’s action to our Office on May 8, arguing that the solicitation required the submission of proof of zoning only if discussions were required, and that discussions had not been conducted in connection with the subject procurement.³ The protester further noted that, if and when reinstated, it intended to request a change in its proposed facility.⁴ Protest,

² Similarly, § M.4 advised offerors that “an award may be made without discussions,” and § L.7(f)(2) notified them that the “Bureau of Prisons may award a contract based on the initial submittal of offers.”

³ The RFP provision in question, § L.7(i), provides in relevant part as follows:

The Government reserves the right to conduct discussions if the Contracting Officer determines them necessary. If discussions are required, offerors shall provide the Contracting Officer with valid proof of all zoning and local ordinance requirements necessary for the operation of a Community Corrections Center . . . within sixty days after the date of the initial proposal submission.

⁴ The RFP permitted offerors to make one request for a change in facilities. In this regard, § L.7(f)(3) provided as follows:

Only one request for a change in an offeror’s proposed facility will be approved by the Contracting Officer. This request must be received by

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May 8, 2006, at 4. By letter dated May 12, the contracting officer notified the protester that “[t]he correspondence dated May 3, 2006 eliminating Bannum Inc.’s proposal . . . is rescinded and Bannum’s proposal is reinstated.” Bannum subsequently withdrew its protest.

In response to the contracting officer’s decision to make award without discussions, the SSEB reconvened and assigned the proposals color and risk ratings under each factor.⁵ The contracting officer evaluated offerors’ past performance and prices and memorialized her findings in memoranda dated May 26 (price analysis) and June 2 (past performance). Past performance ratings, technical/management factor ratings, and offeror prices were as follows:⁶

Offeror	Past Performance	Technical/Mgmt	Price
Bannum	Blue/Very Good	Green/Low Risk	[deleted]
Dismas	Blue/Very Good	Blue/Low Risk	\$16,087,527
Offeror A	Blue/Very Good	Green/Low Risk	[deleted]
Offeror B	Green/Acceptable	Green/Low Risk	[deleted]

On June 23, the agency amended the solicitation to incorporate a revised Department of Labor wage determination. In a cover letter accompanying the amendment, the contracting officer advised each offeror that it could “revisit [its] pricing schedule” if the revised wage determination affected its proposal, but to “keep in mind” that the amendment was “specific to pricing only” and was not “a form of written negotiations to open and conduct discussions.” Agency Report, Tab 13. Bannum responded with a letter dated June 28, in which it proposed a new performance site and reduced its pricing based on the new site. The contracting officer did not approve the change in performance site and did not consider the revised pricing.

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the Contracting Officer prior to offerors being given an opportunity to submit final proposal revisions. All requests for a site change must include all site information required herein. Contractor to reimburse the Government for all associated costs incurred in the pre-site inspection conducted by the Government for the change of location.

⁵ While the evaluation report is undated, e-mail correspondence under Tab 3 of the agency report indicates that it was circulated among board members for approval in late May.

⁶ The RFP provided for the assignment of the following color/adjectival ratings: Blue-Very Good; Green-Acceptable; Yellow-Poor; and Red-Unacceptable.

By decision dated June 30, the contracting officer, acting as the source selection authority, determined that Dismas's proposal represented the most advantageous offer to the government. The contracting officer noted that Dismas had the highest rated non-price proposal and concluded that the superiority of Dismas's proposal over Offeror B's in both the past performance and technical/management areas, and over Bannum's in the technical/management area, warranted the payment of a price premium.⁷ The agency awarded Dismas a contract on July 5.

Bannum protested to our Office on July 14, arguing that the contracting officer had abused her discretion in electing to award to Dismas on the basis of initial proposals rather than conducting discussions. The protester asserted that the awardee's proposal was materially deficient in that Dismas's proposed facility was subject to a restrictive covenant that would prohibit its use as a community corrections center. The protester further asserted that the agency's decision not to conduct discussions was the product of bad faith on the part of agency officials who did not want to give Bannum the opportunity to substitute a new place of performance for the one originally proposed and thereby improve its competitive standing. The protester also argued that the agency had conducted discussions with Offeror A, and, as a consequence, was required to conduct discussions with all offerors, and that the agency had violated Federal Acquisition Regulation (FAR) § 15.306(a) by failing to permit Bannum to clarify allegedly inaccurate negative past performance information.

Restrictive Covenants

Bannum argues that Dismas's proposal was materially deficient and thus that the agency should have rejected the proposal or, at a minimum, held discussions with Dismas and all other offerors. As explained below, we find this argument to be without merit.

Bannum contends that Dismas's proposal is deficient because the property that Dismas has proposed is subject to a restrictive covenant that prohibits its use as a community corrections center. In support of its position, the protester cites the following language from a document entitled Declaration of Covenants and Restrictions for Edgewater North Commerce Park:⁸

⁷ The contracting officer noted that no trade-off determination was required to select Dismas's proposal over Offeror A's because Dismas's proposal was both higher-rated on the technical/management factor and lower in price than Offeror A's.

⁸ As neither counsel for Dismas nor counsel for the agency has argued that the property offered by Dismas is not part of the Edgewater North Commerce Park, we assume that this is the case.

Land Use and Building Type. No lot shall be used except for commercial, warehouse, and industrial purposes, including office buildings and office space. . . .

Protester's Comments, Sept. 1, 2006, exh. A, Declaration of Covenants and Restrictions at 13. The protester argues that this language precludes use of the property for residential purposes, such as operation of a CCC. In this connection, Bannum asserts (without citing any support for its position) that "[a] CCC is a residential use." Protester's Comments, Aug. 21, 2006, at 10.

In response to the protester's argument, the agency asserts that "a CCC is an industrial use, and not a residential use" as alleged by Bannum. Agency Reply Comments, Aug. 25, 2006, at 3. The Bureau of Prisons cites as support for its position a letter from the Orange County Zoning Division included by Dismas in its offer. The letter provides in relevant part as follows:

This is in response to your November 7, 2005 inquiry relating to the appropriate Orange County zoning district for the operation of a residential community correction center or "half-way house."

We have reviewed the operation as described in your inquiry and have determined that the activities are consistent with Standard Industrial Classification (SIC) Group #8361 as applied to the Orange County Zoning Regulations.

Uses listed in SIC Group #8361 are a permitted use in the following industrial districts: I-1/I-5, I-2/I-3 and I-4. But not in the I-1A, Restricted Industrial District (sic).

Agency Report, Tab 17.

The protester takes issue with the agency's response, maintaining that the Zoning Division's letter states that CCCs are a permitted use in an industrial zone, not that operation of a CCC is an industrial use. The protester further asserts that, in any event, it was the prerogative of the Edgewater North Commerce Park Property Owner's Association, and not the county, to determine whether operation of a CCC was an industrial use permitted by the covenant. According to the protester, it knows--from its own investigation of a building within the Edgewater North Commerce Park as a potential site--that the Association will not approve such a use.

As a preliminary matter, even assuming that the covenant the protester cites has a material bearing on the acceptability of the awardee's proposal, it is clear that the agency was not on notice of the covenant since it was not referenced in Dismas's proposal. In this regard, the agency asserts that, as submitted, Dismas's proposal satisfied all the requirements of the RFP with respect to demonstrating that it has the

right to use the site in question, Agency Reply Comments, Aug. 25, 2006, at 3, and Bannum does not take issue with this assertion. Accordingly, based on the record here, we see no basis to question the agency's determination that Dismas's proposal complied with the RFP requirements, or to conclude that the agency was required to hold discussions before making award to the firm.

To the extent that the protester argues that the awardee's proposal now should be disqualified based on Dismas's failure to disclose the covenant in its proposal, this argument is without merit. There simply is no support in the record for the underlying premise of any such argument--that the awardee is barred from using the proposed site for operation of a CCC; Bannum merely states in a conclusory fashion that a CCC is a residential use, and therefore is not an authorized use of the proposed site. The protester's argument, as well as any assumption that the property owners' association will interpret the covenant in question as prohibiting the operation of a CCC and will choose to take legal action to enforce such an interpretation, amount to unsupported speculation, and thus do not give rise to a valid basis of protest.⁹ See Janico Bldg. Servs., B-290683, July 1, 2002, 2002 CPD ¶ 119 at 2. In any event, whether Dismas succeeds in performing in the manner that it has proposed is a matter of contract administration not for review by our Office. Bid Protest Regulations, 4 C.F.R. § 21.5(a) (2006).

Decision to award on the basis of initial proposals

The protester contends that the contracting officer decided to award on the basis of initial proposals rather than to conduct discussions in order to deny it the opportunity to improve its proposal. According to the protester, this action is the

⁹ Bannum also cites language from the Declaration of Covenants and Restrictions providing as follows:

Opening Blank Walls; Removing Fences. No owner shall make or permit any opening to be made in any masonry wall or fence, except as such opening is installed by the Developer. No such masonry wall or fence shall be demolished or removed without, nor shall any opening be made therein without the prior written consent of the Architectural Control Board.

Protester's Comments, Sept. 1, 2006, exh. A, supra, at 13. As noted above, the agency was unaware of this covenant. Moreover, while the protester argues that the prohibition on the destruction of masonry walls "would likely prevent Dismas' ability to carry out its planned renovation," Protester's Comments, Aug. 21, 2006, at 10, the protester has cited nothing from Dismas's proposal that would indicate an intent to destroy a masonry wall.

latest of a series of actions undertaken by the agency to retaliate against it for filing grievances against Bureau of Prisons officials in connection with an earlier contract and for protesting to our Office.

Where, as here, an RFP provides for award on the basis of initial proposals without discussions, an agency may make award without discussions, unless discussions are determined to be necessary. 41 U.S.C. § 253b(d)(1)(B) (2000). While discussions are necessary where the solicitation provides for award on a best value basis and the source selection official is unable to determine without further information which proposal represents the best value to the government, see Sierra Military Health Servs., Inc.; Aetna Gov't Health Plan, B-292780 et al., Dec. 5, 2003, 2004 CPD ¶ 55 at 6-7 n.5, an agency may dispense with discussions where there is a reasonable basis to conclude that the proposal of the intended awardee represents the best overall value. Facilities Mgmt. Co., Inc., B-259731.2, May 23, 1995, 95-1 CPD ¶ 274 at 8; see also Lloyd-Lamont Design, Inc., B-270090.3, Feb. 13, 1996, 96-1 CPD ¶ 71 at 6.

Here, the agency clearly had a reasonable basis to conclude that the proposal of Dismas represented the best overall value to the government. In this regard, Dismas's proposal contained no deficiencies requiring discussions; was the only proposal to receive the highest rating under both non-price evaluation factors; and was lower in price than Offeror A's and only slightly higher in price than Bannum's. Moreover, while the protester contends that the agency's objective in awarding on the basis of initial proposals was to deny it the opportunity to improve its proposal through discussions to the point where it would have been in line for award, this argument presumes bad faith on the agency's part. To show bad faith, a protester must submit convincing proof that the procuring agency directed its actions with the malicious and specific intent to injure the protester. Strategic Resources, Inc., B-287398, B-287398.2, June 18, 2001, 2001 CPD ¶ 131 at 6 n.8. The protester has made no such showing here.

Discussions with Offeror A

The protester argues that it is clear from the record that the agency in fact conducted discussions with Offeror A, and that, as a consequence, the agency had an obligation to conduct discussions with all offerors. Bannum cites as evidence that the agency conducted discussions with Offeror A the fact that in its April 4 memorandum to the contracting officer, the evaluation board identified a deficiency in Offeror A's technical proposal, while in its evaluation report of late May, the board stated that Offeror A's proposal had no deficiencies.¹⁰ According to the protester, the only

¹⁰ The deficiency identified in the April 4 memorandum was as follows:

Zoning: Offeror shall submit revised zoning letter to accept all offenders, regardless of their offenses.

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explanation for the elimination of the deficiency is that the agency gave Offeror A the opportunity to cure it through discussions.

The agency denies that it conducted discussions with Offeror A. According to the agency, the reason that the item was not mentioned as a deficiency in the second evaluation report was that subsequent to the April 4 memorandum, the evaluators decided that it was not actually a deficiency. The agency further argues that even assuming that it had conducted discussions with Offeror A, the protester suffered no prejudice as a result because award was not ultimately made to Offeror A.

In its comments on the agency report, Bannum does not rebut the agency's assertion that it did not conduct discussions with Offeror A. Instead, Bannum disputes the agency's finding that Offeror A's proposal did not have a deficiency and the agency's position that Bannum was not prejudiced as a result of the elimination of the alleged deficiency. Both of these arguments are wholly unpersuasive. First, since Offeror A was not in line for award in any event, any deficiency in its proposal which would have resulted in lowering its rating would have had no effect on the ranking of the offerors. Second, Bannum argues that it was prejudiced by the agency's failure to recognize the deficiency in Offeror A's proposal because the agency would not have elected to award on the basis of initial proposals if it had not thought that it had two technically acceptable proposals (i.e., those of Dismas and Offeror A) to trade off against one another in a best value determination.¹¹ This theory is simply too speculative to warrant questioning the agency's actions here.

Adverse past performance information

Finally, the protester argues that the agency violated FAR § 15.306(a) by denying it the opportunity to address adverse information pertaining to its performance under the preceding contract for the effort solicited here. In this regard, FAR § 15.306(a)(2) provides as follows:

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Agency Report, Tab 3, Memorandum to the Contracting Officer, Apr. 4, 2006, at 4.

¹¹ While the evaluators assigned the proposals of the other two offerors, Bannum and Offeror B, overall technical ratings of Green, they also characterized both as containing significant weaknesses that would need to be resolved for the proposals to be considered acceptable. Agency Report, Tab 5, Technical/Management Evaluation, at 1. While the agency does not explain this discrepancy in the record, it has no effect on our analysis here. Moreover, as noted above, the contracting officer in fact considered both Bannum's and Offeror B's proposals in her best value tradeoff decision.

If award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors.

The agency acknowledges that it considered adverse information pertaining to Bannum's performance under the predecessor contract, but maintains that it was not information to which the protester had not previously had an opportunity to respond. In this connection, the agency contends that Bannum was furnished with a copy of the Contractor's Evaluation Form containing the adverse information and given the opportunity to comment on it, but that Bannum chose not to respond. While the protester disputes the agency's assertion that it had been given the opportunity to respond to the negative information, this is not a matter that we need to resolve because it is clear from the record that the protester, which received the highest overall past performance rating of blue, suffered no prejudice as a result of the agency's consideration of the adverse past performance information at issue. Moreover, to the extent that Bannum argues that, if the agency had given it the opportunity to address adverse past performance information pursuant to FAR § 15.306(a)(2), the agency would have decided to conduct discussions, we fail to see the logic of Bannum's argument since that FAR provision explicitly permits agencies to give offerors the opportunity to address such matters where award is to be made without conducting discussions.

The protest is denied.

Gary L. Kepplinger
General Counsel