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Decision

Matter of: JER 370 Third Street, LLC

File: B-402025.3

Date: December 16, 2010

Richard J. Conway, Esq., and Pablo A. Nichols, Esq., Dickstein Shapiro LLP, for the protester.

Allan I. Aasmaa, Esq., General Services Administration, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's implementation of corrective action taken in response to GAO recommendation in prior sustained protest is denied where record demonstrates that agency had reasonable basis for taking corrective measures beyond those GAO recommended.

DECISION

JER 370 Third Street, LLC (JER) of Menlo Park, California, protests the corrective action that the General Services Administration is taking in response to our recommendation in JER 370 Third Street, LLC, B-402025.2, B-402541, June 1, 2010, 2010 CPD ¶ 120. In that decision, we sustained JER's protest of the cancellation of solicitation for offers (SFO) No. GS-09B-02312, for the lease of office space to be used by the Environmental Protection Agency in San Francisco, California, finding that the record failed to demonstrate a reasonable basis for the agency's decision to cancel. We recommended that the agency reinstate the cancelled solicitation and proceed with source selection; in connection with our recommendation, we explicitly recognized that the selection process might include further consideration of the technical acceptability of the offers in light of the concerns expressed by the agency in response to the protest. The agency responded to our recommendation by reinstating the cancelled SFO, amending it, and inviting offerors to submit revised proposals. The protester argues that these actions are inconsistent with our recommendation and thus are improper.

We deny the protest.

BACKGROUND

In our prior decision, we found that the record did not support the agency's rationale for cancellation, which was that competition under the solicitation had been inadequate. We noted that in support of its rationale, the agency had argued that the protester's offer was ineligible for award because its proposed building failed to meet critical solicitation requirements, specifically, the requirement that "space within the ceiling cavity should be sufficient (in no case less than 18") to provide ample room for the necessary services without the need for bulkheads or beam breaks," SFO at 41, and the requirement that no occupiable floor space be more than 50 feet from perimeter windows. We found that in responding to the protest, the agency had failed to produce a technical evaluation report endorsed by the evaluation panel members, and that the record thus lacked documentation as to the technical evaluation panel's conclusions regarding strengths, weaknesses, deficiencies, or risks in the protester's offer; we also found that neither the source selection authority's decision, nor any of the draft versions of the report produced by the agency, included a finding that the protester's offer had been determined technically unacceptable as a result of noncompliance with the above requirements. Because the record failed to demonstrate that the agency had a reasonable basis for canceling the SFO, we recommended, as noted above, that the agency reinstate the cancelled solicitation and proceed with the source selection process. We recognized that this process might include further consideration of the technical acceptability of the offers, in light of the concerns expressed by the agency in response to the protest regarding, in particular, the protester's compliance with the ceiling cavity and window distance specifications.

On July 7, 2010, the contracting officer notified the protester that the cancelled solicitation had been reinstated and that she expected to issue an amendment and reopen discussions. By letter dated July 16, the contracting officer transmitted to the protester a copy of Amendment No. 5 to the SFO, and, "to facilitate a review of [its] offer by the new Source Selection Board," requested that the protester resubmit portions of its offer pertaining to [deleted]. GSA letter to Protester at 1, Agency Report, Exh. 3. Amendment No. 5 relaxed the solicitation specification pertaining to space in the ceiling cavity to permit exceptions to the requirement for a minimum of 18" of space, provided that the offeror could demonstrate to the contracting officer's satisfaction that the space provided was sufficient for the services provided.¹ The

¹ Specifically, the amendment modified the specification to provide as follows:

Space within the ceiling cavity should be sufficient (in no case less than 18") to provide ample room for the necessary services without the need for bulkheads and beam breaks. If space between ceilings and the lowest obstruction doesn't meet the minimum 18", the offer must demonstrate to the Contracting Office's satisfaction that the space provided is ample room for the services provided. Submitted space

amendment also added a limitation on the width of the ducts permitted in the ceiling cavities.² In response to the protester's request for clarification of the forthcoming steps in the source selection process, the contracting officer explained that after the evaluation board had evaluated the requested documentation, she intended to hold discussions with the offerors, and that once discussions had been completed, she would request final proposals, which could include price revisions.

On July 29, the protester filed an agency-level protest objecting to issuance of the amendment and the decision to solicit revised proposals. JER argued that these actions were inconsistent with the recommendation of our Office; that the amendment created an ambiguity as to which specifications were mandatory minimum requirements; and that the agency lacked a valid justification for amending the SFO and requesting another round of final offers at this late stage in the process. In a decision transmitted to the protester on September 27, the contracting officer denied the agency-level protest. On October 7, JER protested to our Office.

DISCUSSION

The protester argues that by amending the solicitation and permitting offerors to submit revised proposals, the agency is in essence starting the procurement process over, which is contrary to our recommendation that the agency reinstate the cancelled SFO and proceed with source selection.³

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plans and design drawings must show all equipment being installed in the ceiling without the need for altering and/or removing structural elements. Amend. No. 5 at 8.

² The new limitation is as follows:

Duct aspect [i.e., width to depth] ratios shall not exceed 4:1.

Amend. No. 5 at 3. The agency explained that with relaxation of the requirement for a minimum of 18" of space in the ceiling cavity, it became necessary to impose limitations on the width of the ducts because wide, shallow ducts are less energy efficient than round or square ducts. That is, as we understand the agency's explanation, there was concern that offerors would seek to qualify for an exception to the requirement for a minimum of 18" of space in the ceiling cavity by proposing to install wide, shallow ducts in areas with less than 18" of cavity space, which raised separate concerns regarding the efficiency of heating, ventilation, and air conditioning systems incorporating such ducts.

³ In the opening section of its protest, JER also asserted that Amendment No. 5 added new, unduly restrictive requirements to the solicitation. The protester did not cite facts in support of, or further elaborate upon, this assertion in either the protest

As a general matter, the details of implementing our recommendations for correction action are within the discretion of the contracting agency.⁴ C2C Solutions, Inc.; TrustSolutions, LLC, B-401106.6, B-401106.7, June 21, 2010, 2010 CPD ¶ 145 at 3. The fact that an agency elects to take corrective measures beyond those recommended by our Office is not in and of itself objectionable so long as the measures taken address the underlying impropriety that led us to sustain the protest and are not otherwise improper. Id.; Consortium HSG Technischer Serv. GmbH and GeBe Gebäude- und Betriebstechnik GmbH Südwest Co., Mgmt. KG, B-292699.4, Feb. 24, 2004, 2004 CPD ¶ 44 at 3; see NavCom Defense Elec., Inc., B-276163.3, Oct. 31, 1997, 97-2 CPD ¶ 126 at 2-3.

Here, while the impropriety that led us to sustain the protest and recommend that the cancelled solicitation be reinstated was that the agency lacked a reasonable basis for its decision to cancel, the agency discovered another impropriety while implementing its corrective action, *i.e.*, the SFO overstated the agency's requirements by failing to provide for exceptions to the 18" ceiling cavity requirement. In addition, the newly-appointed contracting officer concluded that based on her review of the existing record, she could not be confident that meaningful discussions had been conducted with the offerors in the competitive range—that is, the existing record did not establish that the offers had been systematically evaluated for compliance with the solicitation requirements and that offerors had been advised of all significant weaknesses and deficiencies in their offers.⁵ Accordingly, in implementing its corrective action, the agency took steps to

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or its comments in response to the agency report; accordingly, we consider it to have abandoned the argument and will not consider it.

⁴ We also point out that, contrary to the protester's assertion, amending the solicitation and permitting offerors in the competitive range to submit revised offers is not essentially equivalent to canceling the solicitation and starting the procurement process over; in the latter, but not the former, case, offerors that had not previously submitted offers would be permitted to enter the competition.

⁵ The protester argues that we should not accept the contracting officer's finding regarding the inadequacy of the existing record because the agency has not produced contemporaneous documentation supporting her finding. We disagree. Absent evidence of bad faith on the part of the contracting officer in arriving at her conclusion, which the protester has not provided, we will not question the finding. See Designer Assocs., Inc., B-293226, Feb. 12, 2004, 2004 CPD ¶ 114 at 6.

address these improprieties in addition to the impropriety that led us to sustain the prior protest. This was, in our view, an appropriate exercise of its discretion.⁶

The protest is denied.

Lynn H. Gibson
Acting General Counsel

⁶ The protester cites a recent decision by the Court of Federal Claims, Sheridan Corp. v. United States, 2010 WL 4371372 (Fed. Cl. Nov. 5, 2010), in support of its argument that it was improper for the agency to solicit revised offers. Sheridan stands for the proposition that where the terms of a solicitation remain unchanged and there are no concerns regarding the manner in which the solicitation process was conducted, there is no rational basis for the agency to resolicit proposals. These facts are not present here, however—that is, the agency did change the terms of the SFO, and it did have concerns regarding the manner in which the process had been conducted. Thus, the Sheridan decision is clearly distinguishable from the case before us.