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Decision

Matter of: RTD Middleburg Heights, LLC

File: B-421477.4

Date: November 29, 2023

Gordon Griffin, Esq., Hillary J. Freund, Esq., and Richard Ariel, Esq., Holland & Knight LLP, for the protester.

Robert W. Foltman, Esq., General Services Administration, for the agency.

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DIGEST

Protest that agency performed improper price evaluation is denied where the record shows that the evaluation was reasonable and consistent with the solicitation, and protester's contentions represent only its disagreement with the agency's evaluation.

DECISION

RTD Middleburg Heights, LLC, of Oklahoma City, Oklahoma, protests the award of a lease to Michael Downing Realty Ltd, of Warrensville Heights, Ohio, by the General Services Administration (GSA) under request for lease proposals (RLP) No. 7OH2414, for the lease of general purpose office space in a circumscribed area of Ohio. The protester contends that the agency's price evaluation was unreasonable and inadequately documented.

We deny the protest.

BACKGROUND

On October 23, 2019, GSA issued the RLP for the award of a 15-year lease of office space in the Middleburg Heights, Parma, North Royalton and Strongsville, Ohio area.¹ Agency Report (AR), Tab 1, RLP at 4.²

GSA was seeking to lease a minimum of 6,363, and a maximum of 6,681, of American National Standards Institute/Building Owners and Managers Association Office Area square feet (ABOA SF) of contiguous space.³ AR, Tab 1, RLP at 4. The RLP informed offerors that the lease would be issued to the offeror that submitted the lowest-priced, technically acceptable lease proposal. *Id.* at 20.

The solicitation advised offerors that the agency would determine the lowest price by conducting a present value price evaluation. As relevant here, the RLP provided that the agency would add certain costs to the offerors' gross present value cost, including "[t]he cost of relocation of furniture, telecommunications, replications costs, and other move-related costs, if applicable," and a tenant improvement allowance. *Id.* at 21. As we explained in our resolution of a prior protest of this procurement, this analysis, which is referred to as a present value analysis, provides a single cost representation of various inputs, such as variations in operating costs, amortizations, and tenant improvement overhead costs. *RTD Middleburg Heights, LLC*, B-421477, B-421477.2, May 31, 2023, 2023 CPD ¶ 154 at 2. This analysis enables the agency to understand the "true price of all offers in today's (present value) dollars." *Id.*

GSA received technically acceptable lease proposals from two offerors, Middleburg, the incumbent, and Michael Downing. The latter's proposal was for new construction on land next to the incumbent protester's property. B-421477, B-421477.2, AR, Tab 10, Contracting Officer's Statement (COS) at 2. Final proposal revisions were requested and neither offeror revised its proposal. *Id.*

After an initial evaluation, the agency provided both offerors an opportunity to update their proposals with any changes due by July 25, 2022. Revisions were made by the

¹ The RLP covered the general terms of the procurement, such as how the agency would conduct the price evaluation, RLP at 20, and provided the specific details of the requirement, such as the amount and type of space sought by the agency, as well as the location. The RLP provided that the term of the lease was 15 years, with government termination rights effective after a 10-year firm term of the lease. *Id.* at 4.

² Page numbers cited herein with regard to the agency report refer to the agency's pagination of the documents in its report. Citations to the parties' pleadings or agency exhibits without agency-provided page numbers refer to the Adobe PDF page numbers associated with those documents.

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. See *Hoover Properties*, B-418844; B-418844.2, Sept. 28, 2020, 2020 CPD ¶ 373 at 2 n.3.

protester, but not by Michael Downing. B-421477, B-421477.2, AR, Tab 10, COS at 1. The adjusted present value analysis indicated that the latter's proposal was the lowest-priced, technically acceptable proposal. *RTD Middleburg Heights, LLC, supra* at 2. The Social Security Administration, the tenant agency, delayed signing the lease and, in response, GSA provided a copy of a "cost benefit analysis" as "added confirmation" to illustrate that Michael Downing's offer was the lowest-priced technically acceptable proposal. *Id.* The tenant agency then allowed GSA to move forward with the proposed new lease. *Id.*

On February 13, 2023, the agency notified Middleburg that it had awarded the lease to Michael Downing as the lowest-priced proposal with an evaluated present value price of \$23.87 per ABOA SF. AR, Tab 9, Letter to Unsuccessful Offeror. The agency informed Middleburg that its evaluated present value analysis price was \$32.50. *Id.* Middleburg then protested to our Office.

Our Office sustained Middleburg's protest, on the grounds that the agency failed to provide adequate explanation and documentation to support the reasonableness of its price evaluation. *RTD Middleburg Heights, LLC, supra*. In this regard, our Office found that the agency had not provided adequate documentation or explanation for its failure to consider relocation and replication costs within its present value analysis. *Id.* at 4-5. In addition, we found that the agency had failed to explain, or adequately document, the cost benefit analysis it relied upon to support the reasonableness of its price evaluation. *Id.* at 5-6. The decision further noted that the lease had been awarded and that the RLP did not include a termination for convenience of the government clause. *Id.* at 7. In the absence of such a clause, the decision recommended that the protester be reimbursed its proposal preparation costs, as well as the costs of filing and pursuing its protest, including reasonable attorneys' fees. *Id.*; see also 4 C.F.R. § 21.8(d)(1).⁴

On June 6, 2023, Middleburg filed a pre-filing notice of its intent to file a bid protest in the United States Court of Federal Claims to seek injunctive relief precluding GSA from moving ahead with the award to Michael Downing. Memorandum of Law (MOL) at 2. At the suggestion of the Department of Justice, the agency took corrective action, which entailed agreeing to stay performance and reevaluate price. *Id.*

On July 18, Middleburg was informed that the agency had again chosen to award the lease to Michael Downing. *Id.* On July 28, Middleburg again filed a protest with our Office contesting the award to Michael Downing. *Id.* The agency stated that it would take corrective action, specifically it would reevaluate proposals and make a new award decision. *Id.* Accordingly, we dismissed Middleburg's protest as academic. *RTD Middleburg Heights, LLC, B-421477.3, Aug. 10, 2023* (unpublished decision).

⁴ The agency states that it has received an invoice from Middleburg for its bid and proposal costs, as well as attorneys' fees, and that the invoice has been forwarded to its finance department to facilitate payment. Agency Additional Briefing at 2.

On August 2, GSA conducted a present value analysis, factoring in estimated additional costs such as move costs, and calculated Michael Downing's present value price to be \$31.42 per ABOA. AR, Tab 10, COS at 2. This price was lower than Middleburg's present value price, which was calculated to be \$32.50 per ABOA. *Id.*

On August 14, the agency informed Middleburg that based on its reevaluation, Michael Downing's proposal remained the lowest-priced, technically acceptable offer, and that the agency would therefore maintain the lease award to Michael Downing. *Id.* at 2.

This protest of the lease award followed.

DISCUSSION

Middleburg argues that the agency relied on erroneous and outdated cost estimates, and a flawed cost benefit analysis in making the award. The protester further contends that the agency failed to document and explain its price evaluation, including what rates were relied upon in the agency's present value analysis of the proposals. Middleburg also states that, given the agency's flawed evaluation and the fact that the evaluated costs of Middleburg and Michael Downing were so close, there is no basis to conclude with certainty that Michael Downing's proposal was the lowest priced.

In reviewing a protest challenging the evaluation of proposals, we do not conduct a new evaluation or substitute our judgement for that of the agency but examine the record to determine whether the agency's judgment was reasonable and in accord with the evaluation criteria. *The Metropolitan Square Assocs., LLC*, B-409904, Sept. 10, 2014, 2014 CPD ¶ 272 at 6. A protester's disagreement, without more, provides no basis to question the reasonableness of the agency's evaluation. See *Citywide Managing Servs., of Port Wash., Inc.*, B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 10-11.

We have reviewed all of the protester's arguments and, while we do not address every argument, we find that none of the challenges provides a basis to sustain the protest.

GAO Review

The agency argues that GAO should not consider Middleburg's protest because the issues raised in this current protest are identical to the issues raised in the initial protest decided by GAO. The agency argues that as the record remains unchanged, and GAO has already issued its decision on the matter, "there is no reason to weigh in on it again." MOL at 4.

While we agree with the agency that the current protest repeats arguments raised in the initial protest, we disagree that the record in the initial and current protest are identical. Here, the agency chose to reevaluate Michael Downing's proposal and made its selection decision based on that reevaluation, and it is the reevaluation, and the agency's documentation of the reevaluation, which is new.

The agency's decision to reevaluate and make a new award decision triggers GAO's review of the agency's actions with regard to this protest. In other words, the subsequent agency conduct gives rise to a new basis for protest even if some of the issues raised by the subsequent action are the same as the issues raised under the earlier protest. *Envirosolve LLC*, B-294974.4, June 8, 2005, 2005 CPD ¶ 106 at 4.

Price Evaluation

The protester contends that the agency unreasonably used an outdated independent government cost estimate (IGCE) that was nearly a year old. Protest at 5. According to Middleburg, the agency's outdated IGCE did not take into account changes in property values, interest rates, and inflation over the past year. *Id.*

The agency responds that procurements are lengthy processes and that "procurements would never be completed" if contracting officers had to continuously solicit revised proposals and IGCEs throughout the procurement process. MOL at 4. The agency further explains that its estimate for the additional costs associated with Michael Downing's proposal included verified cost estimates, provided by GSA's cost estimators, based on the actual scope of work to build out the tenant agency's requirements at the new location. COS at 1-2.

Here, we are not persuaded that the IGCE was out of date, nor has Middleburg provided a detailed explanation of what elements were inaccurate or what might constitute a more realistic estimate.⁵ We note that the period of time that has elapsed since the IGCE was created, one year, is not particularly long. Accordingly, without more, we see no basis to question the agency's use of such estimated costs.

The protester further asserts that the agency failed to adequately document its consideration of building specific amortized capital (BSAC)⁶ in its price evaluation, and that the agency "has not included any indication of actually considering the BSAC costs in this procurement." Protest at 5. We disagree.

⁵ In a prior protest, Middleburg postulated that a "more realistic assessment" of Michael Downing's replication and relocation costs would be \$1,578,400. B-421477.2 Suppl. Protest at 8. As the agency notes, however, even using these costs, instead of the agency's costs, Michael Downing's status as the lowest-priced offeror would not change. COS at 2 (showing that using the protester's earlier cost estimates, Michael Downing's proposal would still result in a cost savings to the agency of \$36,813).

⁶ BSAC is a charge for security items that are a separate capital investment in a leased property and are not included in the building shell or tenant improvement rates for allowance or rate setting purposes. GSA, Pricing Desk Guide at 2-26 (5th ed. 2019) https://www.gsa.gov/cdnstatic/Pricing%20Desk%20Guide%205th%20Edition%20November%202016,%202019_0.pdf (last visited on Nov. 15, 2023).

In this regard, we note that the agency's estimate of replication and relocation costs (\$927,325.57) is comprised of its estimated BSAC costs (\$145,518.57) added to its estimate of the other construction costs at award (\$781,807). See AR, Tab 2, Cost Estimate at 1. The agency, in turn, used this \$927,325.57 estimate in its price evaluation to conclude that Michael Downing was still the lowest-priced offeror. See COS at 2.

The protester also contends that the agency's IGCE did not document its application of Davis-Bacon Act⁷ wages in its estimate of the additional construction costs applicable to Michael Downing's proposal. In response to this argument, the agency explains that wages in the relevant labor area were determined to be greater than the requirements of the Davis-Bacon Act, thereby making the Act inapplicable. MOL at 4 n.2. While the protester faults the agency for not providing further documentation of this determination, we note that the protester did not provide further explanation or support to rebut the agency's contention that area wages were above the Davis-Bacon Act minimums. Additionally, as noted above, the protester did not provide specific support for its claim that estimated cost elements were inaccurate, nor did it explain what might constitute a more realistic estimate. In sum, the protester has not provided us with a basis to sustain its protest allegation and thus, the allegation is denied.

Finally, the protester challenges the overall lack of documentation supporting the agency's evaluation. While we agree that the record provided by the agency is sparse in places, we find the record to be sufficient to explain how the agency calculated both offerors' present value prices, and to provide a reasonable basis for the agency's conclusion that Michael Downing's proposal was the lowest priced. In this regard, the contracting officer explained that GSA used estimated costs, such as replication and moving costs, to calculate the additional costs to the agency associated with Michael Downing's proposal. COS at 1-2. The agency then used GSA's Succeeding Lease Analysis Tool to conduct a present value analysis, which indicated a cost savings of \$291,868 from Michael Downing's proposal. *Id.* The agency further utilized a present value analysis worksheet to calculate lump sum prices for estimated additional costs, which again confirmed that Michael Downing was the lowest-priced offeror with a present value price of \$31.42 per ABOA. *Id.* at 2.

The record here is different from the record in the initial protest where GAO sustained Middleburg's protest largely due to the fact that the agency had not considered relocation and build out costs with regard to Michael Downing's proposal in the previous evaluation. While the evaluation record does not detail how every single element of the agency's cost estimates was calculated, this level of detail in the evaluation was not required. *EG & G Team*, B-259917, B-259917.2, July 5, 1995, 95-2 CPD ¶ 138 at 2; *Cf. Science Applications Int'l Corp.*, B-290971, *et al.*, Oct. 16, 2002, 2002 CPD ¶ 184 at 17 ("An agency need not achieve scientific certainty in analyzing costs proposed by

⁷ The Davis Bacon Act sets forth certain minimum wage requirements for laborers and mechanics performing contracts in excess of \$2,000 for construction, alteration, or repair of public buildings or public works. 40 U.S.C. § 3142.

offerors, or conduct an in-depth cost analysis.”). Here, we conclude that the record provided by the agency was sufficient for documenting the calculation of each offerors’ present value price, and for demonstrating a reasonable basis for GSA’s conclusion that Michael Downing’s proposal was the lowest priced.

The protest is denied.

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General Counsel