



Decision

Matter of: TMM Investments, Ltd.

File: B-402016

Date: December 23, 2009

Frank M. Mason, Esq., for the protester.

Mary A. Mitchell, Esq., Department of Veterans Affairs, for the agency.

Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency conducted meaningful discussions with the protester concerning its proposed room sizes where protester was informed that it should clarify its room sizes in accordance with the solicitation.

DECISION

TMM Investments, Ltd. of Tyler, Texas, protests the award of a lease to Alpine 259 Partners, Ltd. under solicitation for offers (SFO) No. VA256-09-RP-0132, issued by the Department of Veterans Affairs (VA) for a community-based outpatient clinic (CBOC) in Longview, Texas. TMM challenges the VA's conduct of discussions and source selection decision.

We deny the protest.

The solicitation sought offers for the lease of a building shell of approximately 22,000 rental square feet along with a tenant improvement allowance for the design and construction of the CBOC.¹ SFO at 9. The SFO included numerous requirements and specifications for the CBOC (such as, corridor width requirements, door width requirements, exam room requirements, etc.), the cost of which was to be funded through the tenant improvement allowance. SFO at 7.

¹ According to the solicitation, tenant improvements are "all alterations for the Government-demised area above the building shell buildout." SFO at 10.

Offerors were informed that award would be made on a “best value” basis, considering three evaluation factors: price, technical quality, and offeror’s qualifications/past performance. The SFO stated that the technical quality and offeror’s qualifications/past performance factors, when combined, were more important than price.

With respect to the technical quality factor, offerors were informed that proposals would be evaluated in a number of areas, including the quality of the proposed building, site development, and design concept. SFO at 17. An offeror was required to “include[] sufficient detail describing [the] level of building improvements (i.e. refurbish or replace HVAC system, roof, etc.) to allow the Government to fully understand the quality of the space as proposed” and “must demonstrate how they are going to meet the identified space and square footage requirements and the room build-out details” contained in the SFO. *Id.* The SFO included two attachments: “Schedule A,” which listed special room and common space requirements (such as a minimum of 6-foot wide corridors), and “Longview CBOC – Space Room Plan,” which listed various characteristics of each room to be provided for the CBOC (such as each room’s square footage).

VA received proposals from four offerors, including TMM and Alpine. TMM, the incumbent contractor, proposed the same space that VA currently occupies; however, because TMM’s space was smaller than the square footage required under the SFO, TMM proposed to build out an additional 9,891 square feet to meet the agency’s needs. Comments at 4. TMM’s proposal specifically recognized that its current space did not meet all the SFO’s requirements, noting that one of TMM’s corridors was only 5 feet wide (and not 6-foot as required by the SFO), and that TMM’s doors were only 36 inches wide (and not 42 inches as required by the SFO). Agency Report (AR), Tab 4, Protester’s Proposal, attach. 5.

The agency determined that TMM’s, Alpine’s, and another firm’s offers should be included in the competitive range.² VA informed each of these firms that the agency had completed a technical evaluation of its proposal and that it was seeking “clarification” of its proposal in several areas. With regard to TMM’s proposal, VA asked the firm to “clarify actual room sizes in accordance with Schedule A,” and, with regard to the level of building improvements, TMM was asked to “clarify if [its] proposed build-out includes renovations to existing space.” AR, Tab 5, VA Email to

² Although the Contracting Officer’s statement refers to the agency’s negotiations with offerors as clarifications, the legal memorandum acknowledges that VA conducted discussions, and not clarifications, with the offerors. The record shows that these exchanges were discussions, given that the offerors were provided with an opportunity to address the agency’s technical evaluation concerns with the firms’ proposals and to make substantive changes to their offers. See Computer Sciences Corp., et al., B-298494.2 et al., May 10, 2007, 2007 CPD ¶ 103 at 9.

TMM. The agency requested that the competitive range offerors submit revised proposals.

In its revised proposal, TMM provided a revised drawing of its plan and a chart that compared the proposed size of TMM's rooms with that required by the SFO. TMM's chart showed that a number of TMM's proposed rooms were smaller than that specified by the SFO. TMM's Revised Proposal, Room Size Chart. With regard to renovations to its existing building, TMM informed VA that "[o]ther than painting, we do not believe there will be many renovations in the existing space." TMM also did not propose to widen the 5-foot corridor, but did offer that "[i]f the VA wants all the fifty doors to be enlarged from 36" doors to 42" doors, the cost would be an additional \$50,000 (\$1,000 per door)." AR, Tab 4, TMM Revised Proposal, at 2.

VA determined that TMM's revised proposal did not reflect the best value to the government, although TMM offered the lowest evaluated price of \$4,790,436. Specifically, VA noted that TMM failed to meet the contract requirements for corridor width, room square footage, and TMM "would only [be] making minor renovations (painting) to the existing . . . space."³ AR, Tab 6, Price Negotiation Memorandum, at 11. In contrast, the agency found that Alpine's proposal at an evaluated price of \$5,215,654 offered "the best proposed" layout for the space, meeting the specified room sizes. *Id.* at 10. Award was made to Alpine, and this protest followed.

TMM complains that VA did not conduct meaningful discussions with the firm. Specifically, TMM argues that the agency's request that TMM "clarify" its room sizes was inadequate to put the firm on notice that the agency had found TMM's room sizes to be a deficiency.⁴ We disagree.

Discussions, when conducted, must be meaningful; that is, discussions may not mislead offerors and must identify deficiencies and significant weaknesses in each offeror's proposal that could reasonably be addressed in a manner to materially enhance the offeror's potential for receiving award. *PAI Corp.*, B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 at 8.

³ Of the 61 rooms specified in the SFO, 31 of TMM's proposed rooms were smaller than that specified in the SFO. AR, Tab 6, Price Negotiation Memorandum, at 10. Elsewhere the agency noted that TMM's proposal did not address the need for heat/air conditioning, plumbing and major electrical revision to the existing space. *Id.* at 9.

⁴ The record shows that VA's concerns with TMM's proposal were not considered to be deficiencies, but weaknesses that the agency assessed in its source selection decision.

Here, we find that VA conducted meaningful discussions with TMM.⁵ Specifically, VA informed TMM that it should “clarify” its room sizes “in accordance with Schedule A.” This request should have informed TMM of the agency’s concern under the technical quality evaluation factor that TMM had not demonstrated “how they are going to meet the identified space and square footage requirements and room build-out details in Schedule A.” See SFO at 17. Although TMM believes that the agency should have been more specific about its concerns, an agency is not required to “spoon-feed” an offeror during discussions, but need only lead the offeror into the areas of its proposal that requires amplification. LaBarge Elecs., B-266210, Feb. 9, 1996, 96-1 CPD ¶ 58 at 6.

TMM also appears to argue that VA’s discussions were not meaningful because the agency did not inform TMM that the agency viewed the firm’s proposed build-out plans to be inadequate. The record indicates that TMM was also led into this area of its proposal that required amplification. In any event, the protester fails to show that it was prejudiced. Competitive prejudice is an essential element of a viable protest; where 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. Trauma Serv. Group, B-254674.2, Mar. 14, 1994, 94-1 CPD ¶ 199 at 6; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996). TMM does not state that, had it been notified of the agency’s concerns in this regard, it would have offered any renovations to its space or otherwise modified its proposal in any way.

TMM also complains that VA’s determination that Alpine’s proposal reflected the best value to the government was unreasonable, because TMM’s proposal “substantially met the space and square footage requirements of the solicitation” at a lower price. Comments at 3.

In reviewing protests of allegedly flawed “best value” determinations, our Office will examine the record to determine whether the agency’s judgments were reasonable and consistent with the solicitation’s stated evaluation criteria and applicable procurement laws. See, e.g., Abt Assocs. Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. Where, as here, a solicitation provides that technical factors are more

⁵ TMM also complains that VA engaged in unequal discussions, arguing that the Alpine was “very specifically advised that certain elements of [its] proposal[] would be deemed deficiencies.” Comments at 3. We disagree. The record shows that although Alpine was informed that the “[p]roposed layout [was] missing 3 restrooms, 1 office,” and that its “Utilities/Services cost seem high, please clarify,” it was not informed, as the protester believes, that these areas were “deficiencies.” See AR, Tab 5, VA Email to Alpine. Rather, both TMM and Alpine received the same instruction to “provide clarifications in the following areas.”

important than price, source selection officials have broad discretion in determining whether one proposal's technical superiority is worth its higher price. In this regard, a protester's mere disagreement with the agency's judgments provides no basis to question the reasonableness of those judgments, and we will not disturb awards based on higher-rated, higher-priced proposals, so long as the agency's decision is reasonable, consistent with the solicitation's stated criteria, and adequately documented. See, e.g., Structural Preservation Sys., Inc., B-285085, July 14, 2000, 2000 CPD ¶ 131 at 7; Citywide Managing Servs. of Port Washington, Inc., B-281287.12, B-281287.13, Nov. 15, 2000, 2001 CPD ¶ 6 at 10-11.

Here, in making the award determination, the agency specifically noted that the combined weight of the technical evaluation factors outweighed price. AR, Tab 6, Price Negotiation Memorandum, at 10. The agency found that the awardee had provided the best proposed layout and that, despite TMM's lower price, TMM had failed to meet certain space requirements, as well as failed to propose any significant renovations to approximately half the clinic space. The record demonstrates that the agency reasonably based its source selection decision on these considerations. Id. at 10-11. Although TMM disagrees with VA's decision, its disagreement does not show it to be unreasonable.⁶ See Entz Aerodyne, Inc., B-293531, Mar. 9, 2004, 2004 CPD ¶ 70 at 3.

The protest is denied.

Lynn H. Gibson
Acting General Counsel

⁶ TMM also complains that the SFO should have been amended to include evaluation factors to consider the expense of moving the clinic to another location and, according to the protester, the costs associated with shutting down the clinic while the VA waits for the new space to be available. These protest grounds are untimely, as they are challenges to the terms of the solicitation that were required to be filed before closing time for receipt of offers. 4 C.F.R. § 21.2(a)(1) (2009).