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**Comptroller General
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**United States Government Accountability Office
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Decision

Matter of: Bannum, Inc.

File: B-408838

Date: December 11, 2013

Nancy M. Camardo, Esq., Joseph A. Camardo, Jr., Esq., and Justin T. Huffman, Esq., Camardo Law Firm, PC, for the protester.
Alex D. Tomaszczuk, Esq., and Daniel S. Herzfeld, Esq., Pillsbury Winthrop Shaw Pittman LLP, for Dismas Charities, Inc., an intervenor.
William D. Robinson, Esq., and Seth Bogin, Esq., Department of Justice, for the agency.
Paul E. Jordan, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's unilateral decision to extend start date for operational facility is unobjectionable where awardee proposed and was prepared to meet original start date and incumbent protester was not prejudiced.
2. Protest challenging affirmative determination of responsibility is dismissed where the assertions on which protest is based do not constitute the type of allegation that triggers Government Accountability Office (GAO) review of affirmative responsibility determinations under GAO's Bid Protest Regulations.
3. Protest that awardee misrepresented its ownership and address of proposed property is dismissed as untimely where protester failed to diligently pursue information giving rise to this protest ground.

DECISION

Bannum, Inc., of Odessa, Florida, protests the Department of Justice, Federal Bureau of Prisons' award of a contract to Dismas Charities, Inc., of Louisville, Kentucky, under request for proposals (RFP) No. 200-1168-SE, for residential reentry center (RRC) services in Tupelo, Mississippi. Bannum challenges the source selection decision.

We deny the protest in part and dismiss the protest in part.

The RFP contemplated award of a fixed-price indefinite-delivery/indefinite-quantity contract, for a 2-year base period with three 1-year options, to furnish the personnel, management, equipment, supplies, and services necessary to operate a residential reentry center for an estimated 40 inmates. The center will provide employment and residence development and other self-improvement opportunities to assist federal offenders during their transition from prison to the community.

Award was to be made to the offeror whose proposal represented the best value considering three factors (in descending order of importance): past performance; technical/management, including equally-weighted subfactors for site location, accountability, programs, facility, and personnel; and price. The non-price factors, combined, were significantly more important than price. The agency used a color/adjectival rating system including blue/very good, green/acceptable, yellow/poor, and red/unacceptable. The agency also performed a risk assessment on each factor to determine the degree of confidence in the offeror's ability to perform the effort described in the proposal. With regard to price, the RFP called for an evaluation of each offeror's inmate day rate to ensure it was reasonable. RFP at 38.

As relevant to this protest, the RFP provided that contract performance would begin 120 days after the date of contract award, "unless otherwise specified by the Contracting Officer." RFP at 34. In this regard, the RFP also provided that the contractor's facility "must be fully operational and ready for performance to begin within 120 days after the date of contract award." RFP at 11. Under the facility subfactor, proposals were to be evaluated on the "soundness and credibility of the offeror's plan for ensuring operational availability within 120 days after contract award." RFP at 38, 205.

Bannum and Dismas submitted proposals in response to the RFP. The agency conducted three rounds of discussions and four times requested revised proposals. The final revised proposals were evaluated as follows:

	Bannum	Dismas
Past Performance	Very Good	Very Good
Technical/Management	Acceptable	Very Good
Price	\$5,339,200	\$5,212,222

Agency Report at 4-5.

Based on his detailed consideration of the offerors' respective proposals, evaluated ratings and strengths--no weaknesses remained--under each factor and subfactor, the contracting officer, as source selection official (SSO), determined that Dismas'

proposal represented the best overall value. Upon learning of the resulting award to Dismas, and after a debriefing, Bannum filed this protest.

Bannum Evaluation

In its initial protest, Bannum argued that the agency had improperly evaluated its proposal under the technical/management factor. Specifically, Bannum asserted that the agency failed to take into account various elements of its proposed approach ([deleted]) which, in the protester's view, warranted the highest (very good) ratings.

In its report, the agency responded that it had considered all of the elements identified by Bannum, and for some, including [deleted], had assigned significant strengths to the proposal. Contracting Officer's Statement at 4. As for the other proposed elements--[deleted]--the agency disagreed with Bannum as to their value as strengths, instead finding that the protester's proposal did not exceed contract requirements to the extent that they warranted assignment of strengths. Id. at 4-5.

In its comments on the agency report, Bannum focused on allegations that the evaluation of Dismas' price and technical proposal was unreasonable. Apart from a general assertion that it should have been assigned a very good rating under the technical/management factor based on a proper evaluation, Bannum provided no rebuttal to the agency's position on assigned ratings and strengths. Bannum Comments at 5. Where, as here, an agency specifically addresses an issue raised by the protester in its initial protest, and the protester fails to rebut the agency response in its comments, we consider the issue abandoned by the protester and will not consider it. Liberty Street East Assocs., B-299486.3, June 15, 2007, 2007 CPD ¶ 112 at 3.

Relaxation of Start Date

Although the RFP required the contractor to have a complete facility in order to commence work within 120 days of contract award, the contract signed by the contracting officer and Dismas specified a start date of February 1, 2014, 38 days after expiration of the RFP-specified 120 days. Protest at 4. Bannum asserts that the agency improperly relaxed the start date either because the awardee's proposal indicated it would be unable to meet the 120-day deadline, or because the proposal materially misrepresented Dismas' ability to timely perform and did not inform the government until after award. Id. In the protester's view, the agency was required to amend the RFP to account for the longer preparation period.

The agency explains, and Bannum does not dispute, that Dismas' proposal complied with the requirement to commence work within 120 days. The reason for the change was due to BOP's usual practice of commencing contract performance on the first day of the month following the 120-day deadline, as a method to

streamline contract administration tasks and simplify budgeting and accounting. Contracting Officer Statement at 3. Here, the 120 days ended the day before a federal holiday (Christmas) and the first day of the next month fell on another federal holiday (New Year's Day). Id. To avoid moving inmates on Christmas Eve or New Year's Day, and since Bannum's incumbent contract in Tupelo would run through February 1, 2014, the contracting officer unilaterally set February 1 as the start date. Id.

Even in cases where the record shows that the agency arguably may have relaxed a solicitation requirement, the protester still must show that it was prejudiced by the agency's actions, since prejudice is an element of every viable protest. See Joint Mgmt. & Tech. Servs., B-294229, B-294229.2, Sept. 22, 2004, 2004 CPD ¶ 208 at 7. It is not enough that the awardee alone was impacted by the relaxed specification; rather, the pertinent question is whether the protester would have submitted a different proposal, had it known that a requirement would be waived. See Orion Tech., Inc.; Chenega Integrated Mission Support, LLC, B-406769 et al., Aug. 22, 2012, 2012 CPD ¶ 268 at 7-8. Here, Bannum has neither alleged nor demonstrated that it was prejudiced by the date change. Further, as the incumbent contractor, with an existing facility, there is no reason to conclude that the 38-day extension of time would have impacted Bannum's proposal; absent prejudice, we have no basis for sustaining Bannum's protest on this ground.

Affirmative Determination of Responsibility

Bannum asserts that Dismas submitted a price that was unreasonably low, [deleted]. Protest at 6. It further challenges the contracting officer's affirmative determination of Dismas' responsibility [deleted]. Bannum Comments at 4.

Bannum's assertions are without merit. The RFP provided for an evaluation of the reasonableness of offerors' pricing. RFP at 38. Price reasonableness is a measure of whether a price is too high, not whether it is too low. See Sterling Servs., Inc., B-291625, B-291626, Jan. 14, 2003, 2003 CPD ¶ 26 at 3. Whether a proposed price is too low concerns price realism, an evaluation factor not included in the RFP. The submission of a below-cost offer is legally unobjectionable; whether an offeror can perform at its proposed price concerns the offeror's responsibility. Reliable Trash Serv., Inc., B-258208, Dec. 20, 1994, 94-2 CPD ¶ 252 at 5. Further, while the protester disagrees with the contracting officer's determination that Dismas is responsible, apart from its speculation, Bannum fails to provide any evidence that the awardee lacks the resources to perform a below-cost contract. Our Office will not disturb an affirmative determination of responsibility absent a showing of failure to properly apply definitive responsibility criteria, or where the protester identifies evidence raising serious concerns that, in reaching the responsibility determination, the agency unreasonably failed to consider available relevant information or otherwise violated statute or regulation. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2013); T.F. Boyle Transp., Inc., B-310708, B-310708.2, Jan. 29, 2008, 2008 CPD

¶ 52 at 5. We therefore dismiss Bannum's challenge to the affirmative determination of Dismas' responsibility.

Dismas' Building Permit

Bannum asserts that Dismas' construction permit application, on which an applicant certifies that all information is true and correct, contains "misrepresentations": the wrong tax parcel number (for Eason Street instead of Lot No. 5, Tishomingo Street, Dismas' proposed site), and misidentification of Dismas as the owner, when it was owned by Bonds Properties, LLC. Bannum Comments at 2. Due to the inclusion of this incorrect information, Bannum argues that the permit, issued by the City of Tupelo, is improper. Bannum maintains that Dismas' flawed permit fails to demonstrate that the awardee met the RFP's requirements that an offeror comply with local laws and regulations. RFP at 38. In the protester's view, the agency should have reviewed the permit application to ensure compliance. Bannum Comments at 3.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2). A protester may not passively await information providing a basis for protest. Rather, a protester has an affirmative obligation to diligently pursue such information, Automated Med. Prods. Corp., B-275835, Feb. 3, 1997, 97-1 CPD ¶ 52 at 2-3, and a protester's failure to utilize the most expeditious information-gathering approach under the circumstances may constitute a failure to meet its obligation in this regard. See, e.g., Thomas May Constr. Co., B-255683, Mar. 23, 1994, 94-1 CPD ¶ 210 at 2.

Here, Bannum asserts that it was not until it received the agency report that it learned that Dismas had complied with the 120-day completion deadline. It argues that it was only then that "public documentation bec[a]me relevant" in order for the protester to determine whether Dismas nevertheless was taking advantage of the extended schedule in some way. Supplemental Agency Report (SAR) Comments at 2. We disagree. Bannum learned of the award to Dismas on August 26 and, in its debriefing on August 30, learned that Dismas intended to perform the contract at Lot No. 5 on Tishomingo Street. SAR at 2. Based on this information, Bannum had an obligation to diligently pursue any related protest grounds (e.g., validity of Dismas' application and permit). Having waited until it learned that its speculation about Dismas' ability to meet the 120-day deadline was incorrect before seeking additional information, Bannum did not meet its obligation to utilize the most expeditious information-gathering approach under the circumstances. See Waterfront Techs., Inc., B-403638.3, Feb. 22, 2011, 2011 CPD ¶ 49 at 2; J&J Maintenance, Inc.--Recon., B-240779.4, B-240802.4, Apr. 10, 1991, 91-1 CPD ¶ 364 at 3 (protester who is challenging an award or proposed award on one ground

should diligently pursue information which may reveal additional grounds of protest).¹ Thus, its protest of the accuracy of Dismas' building permit is untimely and will not be considered.

The protest is denied in part and dismissed in part.

Susan A. Poling
General Counsel

¹ In any case, the record shows that the incorrect tax parcel number and address were due to a clerical error on the part of the City of Tupelo. City of Tupelo Letter, Nov. 8, 2013. [deleted] SAR at 3.