



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Mecca Investments, L.L.C.

File: B-277375; B-277375.2

Date: October 8, 1997

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DIGEST

Protest that evaluation of offers and agency's subsequent award of a lease for office space were improper because awardee's offer failed to meet material requirements of the solicitation is denied where awardee's offer reasonably was found acceptable and record shows that, even if agency did relax minimum space requirement for awardee, as protester contends, protester was not competitively prejudiced by agency's actions.

DECISION

Mecca Investments, L.L.C. protests the award of a lease by the General Services Administration (GSA) to ARC Construction under solicitation for offers (SFO) No. GS-05B-16162 for space for Social Security Administration (SSA) offices in Evansville, Indiana. Mecca contends that ARC's offer should have been rejected for failure to comply with material requirements of the SFO regarding public transportation, location/amenities, and minimum occupiable space.

We deny the protest.

The agency evaluated the acceptability of potential sites in the Evansville area for the SSA office space and issued the SFO to prospective offerors whose sites were deemed acceptable. The factors for consideration in assessing a site's acceptability were set out in the SFO, which provided, among other things, that "[a]dequate public transportation is required to the proposed location." The following property location requirements (for properties located outside of the city center area) were also set out in the SFO:

Space must be located in an office, research, technology, or business park that is modern in design with a campus-like atmosphere, or on an attractively landscaped site containing one or more modern office buildings that are professional and prestigious in appearance with

surrounding development well-maintained and in consonance with a professional image. . . . Adequate eating facilities are to be located within 2 city blocks and other employee services, such as retail shops, cleaners, banks, etc. should be located within 2 city blocks.

The SFO advised offerors that GSA was interested in leasing approximately 10,929 square feet of net rentable space and that the rentable space "must yield a minimum of 9,935 occupiable square feet to a maximum of 10,432 occupiable square feet." The SFO defined "rentable space" as "the area for which a tenant is charged rent" and listed those areas within a proposed building that may or may not be included in the calculation of rentable space. "Occupiable space" was defined in the SFO as:

that portion of rentable space that is available for a tenant's personnel, equipment and furnishings and is the method of measurement for the area for which the Government will evaluate offers. Net usable [space] and [occupiable space], for purposes of this solicitation, are identical.

The SFO provided that for space on a single tenancy floor, occupiable space was to be determined by computing "the inside gross area by measuring between the inside finish of the permanent exterior building walls," and then deducting, among others, the following areas and their enclosing walls from the gross area: equipment/service areas; corridors in place or required for access or safety; vestibules; and visitor rest rooms. For price evaluation purposes, the SFO provided:

Offerors are required to submit plans and any other information to demonstrate that the rentable space yields occupiable space within the required occupiable range. The Government will verify the amount of occupiable square footage and convert the rentable prices offered to occupiable prices, which will subsequently be used in the price evaluation.

The SFO provided that an award of the 10-year lease would be made to the responsible offeror whose proposal conformed to the requirements of the SFO and offered the lowest price.

Mecca's and ARC's offers were among those submitted in response to the SFO and each proposed to construct a new building on its offered site. Mecca, on its best and final offer's (BAFO) GSA Form 1364 (entitled "proposal to lease space"), offered 10,432 square feet of "net usable" (i.e., occupiable) space at a square foot rate per year of \$24.34, for a total amount of \$253,914.88. ARC, on its BAFO's GSA Form 1364, proposed 10,418 square feet of net usable space at a square foot rate per year of \$23.50, for a total amount of \$244,823. Having found both offerors' proposed sites and facilities acceptable, the agency awarded a lease to ARC on June 18, 1997, on the basis of that firm's lower proposed price. This protest followed.

Mecca initially protests the evaluation of the awardee's proposed site. Mecca contends that the site proposed by the awardee, ARC, does not comply with the transportation and location requirements of the SFO and thus should not have been considered for award. The evaluation of offers is primarily within the discretion of the contracting agency, and our Office will review the evaluation to ensure that it was reasonable and consistent with the stated evaluation factors. Buffalo Central Terminal, Ltd., B-241210, Jan. 29, 1991, 91-1 CPD ¶ 82 at 5. Here, the record provides no basis to question the agency's determination of the acceptability of the awardee's proposed site.

The protester first contends that since the bus stop that GSA considers to provide "adequate public transportation" to ARC's site is difficult to locate, is two blocks away from the awardee's site, is on a block without sidewalks, and requires passengers visiting the SSA offices at ARC's site to cross a street with heavy vehicular traffic, the offer did not meet the SFO requirement for "adequate public transportation." The agency points out that the SFO did not define the phrase "adequate public transportation," and that all proposed sites were to be evaluated only on a pass/fail basis for compliance with this transportation requirement. GSA reports that the bus stop (marked with an appropriate sign) is on the city's bus route and that vehicular traffic on that street during SSA office hours (which are not heavy traffic commuter hours) is reasonable.

Our review of the record supports the reasonableness of the agency's evaluation of ARC's offer and the determination that "adequate public transportation" was provided. The SFO describes the transportation requirement in broad terms only--"adequate public transportation"--without specifying any particular features. Thus, to take one example of the features Mecca points to as lacking from ARC's site--sidewalks--while a sidewalk at the bus stop may be beneficial, it was not required. Given the SFO's generally worded pass/fail transportation requirement, and since it is undisputed that the city bus transportation system services the area of the proposed site, we see no basis to question the agency's determination that ARC's offer was acceptable in this regard.

The protester next alleges that ARC's proposed site does not meet the location and eating facilities requirements of the SFO since the neighboring area is not attractive or professional in appearance and since the one eating facility (a Chinese restaurant) in the required two-block range of the site cannot satisfy the SFO's requirement for more than one such facility (since the SFO requires "adequate eating facilities"). In its report responding to the protest, the agency submitted photographs of the ARC site surroundings (as well as of Mecca's proposed site). Our review of the record confirms the reasonableness of the agency's determination that the location requirements were met by the ARC offer. As the agency reports, the photographs show that there are attractive, professional-looking buildings within the vicinity of the ARC site which reasonably meet the stated location requirement. Further, the record shows that a neighboring grocery store has a delicatessen. We

believe the delicatessen could reasonably be considered (in addition to the referenced restaurant) in the evaluation of eating facilities since food availability is the crux of the generally worded SFO requirement, rather than eating accommodations with seating, as the protester suggests.¹ The record thus does not support Mecca's contentions that the agency's evaluation and acceptance of the ARC site's location were unreasonable or inconsistent with the SFO requirements.

Mecca next protests the acceptance of ARC's offer of occupiable space, contending that: forms and drawings submitted with the offer were ambiguous regarding rentable versus occupiable space proposed; the contracting officer improperly failed to verify that a drawing submitted with the ARC offer supported the awardee's statement of its proposed amount of occupiable space; and since ARC's preliminary drawing shows that ARC did not offer the requisite minimum occupiable space, the offer must be rejected for failure to comply with a material requirement.

The SFO included two forms to be completed by offerors--GSA Form 1217, which requires each offeror to report the amount of "rentable space" in the entire building and the "rentable space" to be leased by the government, as well as the lessor's costs associated with those building space amounts (to be considered by the agency for comparative purposes where a multiple-tenant building is proposed); and GSA Form 1364, which is entitled "proposal to lease space" and which requires the offeror to state the square footage of "net usable" (or occupiable) space proposed, the "net usable" (or occupiable) space square foot price proposed, and the extended proposed lease price. This latter form, GSA Form 1364, which the offeror is required to sign, also states that upon acceptance by the government, the offeror agrees to provide the stated occupiable space at the amount indicated on that form. Mecca alleges that the ARC offer was ambiguous because ARC listed the same square footage (10,418 square feet) on its GSA Form 1217 as both the entire building's rentable space and the rentable space to be leased by the government, and then listed, on its GSA Form 1364, that it was proposing the same amount (10,418 square feet) of occupiable space. Mecca also states that since the preliminary drawing submitted with the ARC offer does not verify the occupiable space (10,418 square feet) listed on ARC's GSA Form 1364, the offer must be rejected as ambiguous.

¹The agency points out that both the ARC site and the Mecca site are "less than perfect" but were found to be acceptable. The record confirms that Mecca's site was found to be acceptable despite the existence of areas near the site having a less than attractive, professional appearance, and despite having only one eating facility (a sandwich shop) open to the public (which would include all SSA visitors) in the requisite two-block area. Thus, the record shows that the agency in fact relaxed the SFO's location/amenities terms for the protester. Under these circumstances, we fail to see how the protester was prejudiced by any alleged relaxation of the terms for the awardee.

Our review of the record shows inconsistencies in both offerors' forms. Mecca, on its GSA Form 1217, indicated that the "rentable area" to be leased by the government was 10,432 square feet and then, on its GSA Form 1364, stated that the same footage was proposed as "net usable" (i.e., occupiable) space. As Mecca contends, pursuant to the SFO's terms, rentable and occupiable space footage were to refer to different amounts of space. Mecca's offer was accepted, however, despite this flaw. Mecca's argument that the ARC offer should be rejected as ambiguous because of its forms' inconsistent information therefore provides no basis to sustain the protest--the protester's own offer suffers from the same flaw. Rather, we believe it was reasonable for the agency to discount each of the offeror's GSA Form 1217s, and to instead consider the proposed occupiable space and price information listed on each offeror's GSA Form 1364 "proposal to lease space." As noted above, the information on the GSA Form 1217 was to be used for comparative purposes in cases where a multiple-tenant building is proposed. Since both offerors here proposed single-tenant buildings which effectively eliminated the agency's need for the offerors' GSA Form 1217 pricing information, the GSA Form 1217 was not material to the award selection. Instead, the agency reasonably relied in its evaluation on the information in the GSA Form 1364, the signed form on which the offerors agreed to provide a stated amount of occupiable space at the price indicated.

As for Mecca's contention that the drawing in ARC's offer is inconsistent with its "proposal to lease space" (GSA Form 1364), the SFO advised that the requirement for drawings to be submitted with the offers (illustrating building layout) was to enable the agency to review the drawings to confirm occupiable space for the purpose of converting rentable space prices to occupiable space prices. As the protester notes, there is no evidence in the record that the agency closely reviewed these drawings for this purpose. Occupiable space prices, however, were already calculated by each offeror in its GSA Form 1364. The record shows that the agency accepted each offeror's proposed occupiable space and occupiable space square foot (and extended) prices as offered on the GSA Form 1364, and that those occupiable space prices served as the basis of the evaluation for award, as required by the SFO, without the need for conversion to such prices from the drawing information. In light of the agency's across-the-board evaluation of offers on the basis of each offeror's GSA Form 1364 information, we cannot conclude that the agency's failure to verify that the offeror's drawings supported the occupiable space proposed shows that the evaluation was unequal, as the protester contends. In sum, award was made on the basis stated in the SFO--the low occupiable space price offered.

To the extent Mecca contends that the agency relaxed or waived for ARC a material requirement for minimum occupiable space, Mecca has not demonstrated that ARC failed to comply with the stated minimum of 9,935 square feet occupiable space requirement. The protester's various calculations, for instance, are flawed in regard to an allegedly required deduction for a "janitorial room" (not required by the SFO

or proposed by ARC) and "interior partitions" (the SFO only included deductions for enclosing walls of specifically itemized areas) and thus do not conclusively show that the minimum requirement was not met. The importance of the claimed inconsistency between the awardee's GSA Form 1364 and the drawing in its offer is also minimized here since that drawing was only preliminary in nature and can be read as offering expansion space to allow for the occupiable space proposed.

In any event, even if the awardee's preliminary drawing fails to show the requisite minimum occupiable space, and even if the agency had relaxed the minimum space requirement to the extent alleged by the protester, the record shows that any such relaxation here was de minimis (accounting for only 17 square feet of the entire building). The protester, although it alleges prejudice because ARC offered to construct a lower cost building with slightly less than the required minimum occupiable space, has not stated that it would have prepared its offer any differently had it known that slightly less than the stated minimum occupiable space would be acceptable to the agency.² See Canberra Indus., Inc., B-271016, June 5, 1996, 96-1 CPD ¶ 269 at 4. All offerors knew that the basis of award here was low price (among conforming offers), and that the minimum occupiable space limit was substantially (almost 500 square feet) less than the stated maximum amount (which maximum amount was proposed by Mecca). The protester, in its own business judgment, chose to offer a building which exceeds the SFO's statement of rentable space sought by the GSA (including additional space not required to meet the SFO's occupiable space requirements). In other words, the protester at all times knew that it could offer almost 500 square feet less of occupiable space and substantially less rentable space than offered, and decrease its price accordingly, but instead proposed to construct a larger building than required (with higher associated building costs) at a higher price, despite the low price basis for award. Prejudice is an essential element of a viable protest and here, the record simply does not

²We also note that taking exception to the minimum space requirement here was not specifically prohibited by the SFO, which stated only that any exceptions taken to stated requirements were to be set forth in the offers; the SFO also provided that payment under the lease would be made for delivered occupiable space less than agreed to at the occupiable square foot rate stated in the lease, suggesting that the agency was prepared to allow some flexibility in meeting the space requirement. We also are not persuaded by Mecca's contention that by proposing a higher amount of occupiable square feet than is available within the gross or rentable space of the building depicted in ARC's preliminary drawing, ARC was unfairly able to spread its costs over a larger building area and decrease its square foot price, because, as stated above, ARC proposed and is obligated by the terms of the lease to provide the 10,418 square feet of occupiable space, as defined in the SFO, at the firm's offer/lease price. To the extent that Mecca questions whether ARC will comply with the lease terms, the matter is one of contract administration not for our review. See 4 C.F.R. § 21.5(a) (1997).

demonstrate a reasonable possibility that Mecca was prejudiced by the agency's actions, that is, there is no demonstration here that, had the agency's alleged relaxation of the minimum space requirement applied to Mecca as well, the protester would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc., v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

The protest is denied.

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