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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Sherman Plaza, Inc.

File: B-402310.6

Date: August 4, 2010

David T. Ralston Jr., Esq., and Frank Murray, Esq., Foley & Lardner LLP, for the protester.

Scott Arnold, Esq., and Pablo Nichols, Esq., Dickstein Shapiro LLP, for FCS Partners, LLC, the intervenor.

Peter S. Kraemer, Esq., Department of Veterans Affairs, for the agency.

Paula A. Williams, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency's evaluation and selection decision were flawed is denied where the record shows that both the evaluation and the resulting selection decision were reasonable and consistent with the solicitation's evaluation factors.
 2. Where during the course of corrective action the agency called for submission of final revised offers and expressly advised offerors that it would not conduct clarifications, negotiations, or discussions, protest that agency should have conducted discussions is essentially an untimely challenge to the terms of the amended solicitation.
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DECISION

Sherman Plaza, Inc., of Madison, Wisconsin, protests the award of a lease by the Department of Veterans Affairs (VA) to FCS Partners, LLC, of Middleton, Wisconsin, under solicitation for offers (SFO) No. VA-101-09-RP-0064, for office space to be occupied by the VA's Consolidated Patient Account Center (CPAC). Sherman contends that the VA made various errors in the evaluation of offers and in the subsequent selection decision.

We deny the protest.

BACKGROUND

This protest involves the fifth challenge to the VA's decision to award a lease to FCS, and arises after the agency's implementation of corrective action which again resulted in the selection of FCS for award of the lease.

The SFO, initially issued on April 3, 2009, sought offers for the award of a 20-year lease for approximately 48,384 net usable square feet of office space in Madison, Wisconsin. SFO at 5. Offerors were to propose space in existing buildings that provides 380 dedicated parking spaces, access to public transportation, and other amenities. *Id.* at 5-6, 17; SFO amend. 2. The SFO advised that the lease would be awarded on a best value basis considering price and the following factors, listed in descending order of importance: (1) technical quality; (2) operations and maintenance plan; and (3) evidence of capability to perform prior to award. The non-price factors, when combined, were equal in importance to price. SFO at 9-12.

Seven firms, including Sherman Plaza and FCS, responded to the SFO, and all offerors were found to be in the competitive range and received discussions. As is relevant here, FCS submitted an offer for its two-story building at 8001 Terrace Avenue in Middleton, Wisconsin; this building is located in Middleton's business and shopping district, and FCS proposed to provide 389 parking spaces on this site. *See* Agency Report (AR), exh. 1A, FCS's Offer, Vol. 1, § 6 at 18. Sherman Plaza offered a one-story building at 2901 N. Sherman Avenue in Madison, Wisconsin; this building is located in a shopping center and Sherman Plaza proposed to provide 387 parking spaces on this site. AR, exh. 1C, Sherman Plaza's Offer, Vol. 1, § 4 at 1.

A five-member technical evaluation board (TEB) evaluated offers by assigning a raw point score for each evaluation subfactor.¹ To account for the differing relative weights of the evaluation factors, the raw point score for each subfactor was multiplied by an assigned weighted value to arrive at a weighted point score; the weighted point scores for the subfactors were then averaged to arrive at the weighted point score for the evaluation factor. AR, exh. 3, TEB Evaluation Criteria and Scoring. Upon completion of the evaluation, FCS's offer received a composite technical score of 34.084 points and a price score of 50 points, for a combined score of 84.084 points. Sherman Plaza's offer received a composite technical score of 33.114 points and a price score of 42.94 points, for a combined score of 76.054 points. The other offers received combined scores ranging from 52.824 to 71.112 points. AR, exh. 13, Pre-Corrective Action Price Negotiation Memorandum (PNM), at 20.

¹ Relevant to the protest here, the raw point scores corresponded to adjectival ratings as follows: 0.8 to 1.0--outstanding; 0.4 to 0.7--acceptable; and 0.0 to 0.3--marginal. AR, exh. 3, TEB Evaluation Criteria and Scoring.

By letter dated October 30, 2009 the agency notified offerors that the property offered by FCS was selected for award. AR, exh. 11, Notice of Selection. Following its debriefing, Sherman Plaza filed a protest with our Office on November 30, and three supplemental protests, in which it challenged the evaluation of offers and the selection of FCS's offered building for the lease.

The VA subsequently advised our Office that it would take corrective action, to include amending the SFO, seeking final revised offers, evaluating those offers, and making a new selection decision. On February 4, 2010, our Office dismissed Sherman Plaza's protests on the basis that the corrective action to be taken by the agency rendered the protests academic. Sherman Plaza, Inc., B-402310; B-402310.2; B-402310.3; B-402310.4.

To implement the corrective action, the VA issued amendment No. 3 on March 1, which, among other things, revised the award factors and subfactors as follows:

- Factor 1: Technical Quality (worth 26 total points)
 - Subfactor A: Quality of Building & Design Concept
 - Subfactor B: Architectural Concept
 - Subfactor C: Building Design
 - Subfactor D: Energy Efficiency
 - Subfactor E: Quality of Site

- Factor 2: Operations and Maintenance Plan (worth 13 total points)
 - Subfactor A: Interior and Exterior Maintenance of Building Grounds
 - Subfactor B: Routine and Emergency Calls--Procedures and Response Times
 - Subfactor C: Staffing Plan, Administrative Procedures, and Quality Control Plan

- Factor 3: Evidence of Capability to Perform Prior to Award (worth 11 total points)
 - Subfactor A: Past Performance
 - Subfactor B: Financial Resources
 - Subfactor C: Design Team Qualifications
 - Subfactor D: Contractor Qualifications

- Factor 4: Price (worth 50 total points)
 - Subfactor A: Present Value
 - Subfactor B: Operating Costs

SFO amend. 3, at 3-8; AR, exh. 3, Post-Corrective Action TEB Evaluation Criteria and Scoring Worksheets.²

The cover letter transmitting the amendment solicited final revised offers from three competitive range offerors, including Sherman Plaza and FCS, and also advised that “this is the **final** submission for this procurement, and there will be no modifications, clarifications, negotiations, or discussions upon receipt of your proposal.” SFO amend. 3, cover letter, at 1 (emphasis in original).

All three firms submitted final revised offers, which were evaluated under the revised evaluation factors. FCS’s final revised offer received a composite technical score of 44.45 points and a price score of 50 points, for a combined score of 94.45 points; Sherman Plaza’s final revised offer received a composite technical score of 24.18 points and a price score of 47.84 points, for a combined score of 72.02 points. AR, exh. 5, Post-Corrective Action PNM, at 18. Between the offers submitted by FCS and Sherman Plaza was a third offer. This offer received a composite technical score of 38.21 points and a price score of 47.60 points, for a combined score of 85.81 points. Id.

Of the three offers, FCS’s offer was ranked first overall, and first under both the price and non-price factors. The VA noted that FCS proposed the newest facility and highest quality site of the three offerors, and that FCS offered a design that provided for maximum functionality while paying particular attention to the departmental locations within the space. Id. at 19-20. In contrast, the VA found that Sherman Plaza’s design and departmental layout had “several issues and functional ‘failures’.” The VA concluded that Sherman Plaza’s site was the least desirable of the three offers because it was within an active retail shopping center on a major highway, which raised concerns about security, parking, and traffic congestion. Id. 20. The agency also noted that FCS’s offer was “far superior” to Sherman Plaza’s with regard to energy efficiency, and included a more detailed plan for operations and maintenance than any of the other offers. Id. at 20-21. With regard to qualifications and past performance, FCS’s offer was also rated superior to Sherman Plaza’s. Id. at 21.

Based on the evaluation results, the VA announced, in an April 20 email, that FCS’s offer again had been determined to be the best value to the government. After

² Amendment 3 to the SFO did not disclose the possible points for each factor, but advised offerors that the non-price factors were listed in descending order of importance and that the combination of non-price factors was equal in importance to the price factor. SFO amend. 3, at 1. The possible points per factor were reflected in the evaluation documents. AR, exh. 5, Post-Corrective Action PNM, at 18.

receiving a debriefing, Sherman Plaza filed this protest with our Office on April 26, which it supplemented on June 7.

DISCUSSION

Sherman Plaza challenges numerous aspects of the VA's evaluation where the protester's proposal received a lower point score than the other offers, and it alleges disparate and or unequal treatment in the evaluation. In addition, Sherman Plaza asserts that the agency failed to hold adequate discussions with the firm.

Our Office reviews challenges to an agency's evaluation of offers only to determine whether the agency's evaluation conclusions were reasonable and consistent with the solicitation's evaluation factors and applicable procurement laws and regulations. Savannah River Tank Closure, LLC, B-400953 et al., Mar. 30, 2009, 2009 CPD ¶ 78 at 16. The protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68 at 7. We address the protester's most significant arguments below.

Parking Requirements

Sherman Plaza argues that FCS's offer was materially deficient and thus the VA should have rejected the offer because FCS did not demonstrate its compliance with the SFO requirement for 380 dedicated parking spaces.

The protester asserts that although the property offered by FCS will have 389 parking spaces, FCS did not describe how these parking spaces would be allocated between its two tenants--the VA and Intelix, LLC, a company with at least 20 employees and publicly stated plans to expand its operations and, presumably, the number of employees. Thus, in the protester's view, the number of available parking spaces at the FCS property is insufficient to meet the SFO requirements and the needs of the other tenant. Protest at 15-19; Protester's Comments and Supplemental Protest at 7, 65.

As relevant here, the amended SFO states:

The Government requires 380 parking spaces. A minimum of 360 parking spaces must be adjacent. The remaining 20 spaces are preferred to be adjacent, but may be within a reasonable walking distance . . .

SFO amend. 2. In this regard, offerors were to submit "a plan and short narrative" to explain how they would meet the agency's needs. SFO at 16.

Here, the record shows that FCS did provide a plan and short narrative to show how it would satisfy the SFO parking requirements. Specifically, in its offer, FCS stated that it had obtained approval from the City of Middleton to redevelop the existing parking lot to provide a total of 389 parking spaces. AR, exh. 1A, FCS's Offer, Vol. 1, § 6.1 at 19; § 10.7 at 39. The record also shows that the agency was aware of the presence of another tenant in the offered building and nonetheless concluded that FCS's planned approach to meeting the parking requirements was acceptable, with individual evaluators noting "parking has been addressed," "easy in and out of parking lot," and "parking plan exceeds our needs." AR, exh. 3, Handwritten Evaluation Notes for FCS, at 2, 17. Based on this record, we find that the agency had a reasonable basis to conclude that FCS's offer demonstrated that it would meet the SFO parking requirements.

Next, the protester asserts that FCS would have to expand its parking site "beyond the currently-planned 389 spaces" to meet the needs of both tenants and that any further expansion would infringe on neighboring floodplain/wetland areas. Protester's Supplemental Comments at 6.

In response, the agency and the intervenor both assert that FCS's offered site was not within a floodplain/wetland area and that the parking plan--to provide 389 parking spaces--would have no adverse impact. As support, the VA has furnished a Federal Emergency Management Agency (FEMA) map for the affected floodplain/wetland area which confirms that the offered site was outside the floodplain/wetland areas. See AR, exh. 19, FEMA Map (Jan. 2, 2009). Sherman Plaza has not challenged the accuracy of the floodplain/wetland map published by FEMA, or provided any persuasive evidence to show that FCS will have to extend the parking into the neighboring floodplain/wetland area in order to accommodate the parking needs of both tenants. Sherman Plaza's speculation in this regard does not provide a basis to sustain the protest.

As further evidence that the agency's evaluation of FCS's offer was irrational and otherwise unreasonable, Sherman Plaza points to the fact that FCS received a "near perfect score" under the quality of site evaluation subfactor even though FCS allegedly did not guarantee the minimum of 380 parking spaces for the VA's use. Protester's Comments and Supplemental Protest at 66.

With regard to the subfactor at issue (quality of site evaluation), the SFO provided as follows:

This factor considers the site location, access to public transportation; distance to amenities; Offeror's development of the site to accommodate VA's space plan including the setbacks required by local code; the ingresses and egresses, and loading dock; accessible parking lots and walkways; traffic patterns to maximize the flow of vehicles to and from the main thoroughfare; and how the landscaping design fits

the surrounding park areas, adheres to local landscaping codes, and provides an aesthetically pleasing atmosphere.

SFO amend. 3, at 2.

Here, the record indicates that the score assigned to FCS's offer under the quality of site evaluation subfactor was based on the evaluators' consideration of variables in addition to FCS's plan to provide 389 dedicated parking spaces. Indeed, among other things, the TEB considered that the offered property (1) was located near a bus stop; (2) was adjacent to a major highway which would provide quick ingress and egress for vehicles; (3) was accessible to bike and walking trails; (4) was conveniently located to nearby restaurants; and that (5) the natural setting, with mature trees surrounding the property, provides an aesthetically pleasing atmosphere. AR, exh. 3, Handwritten Review Results for FCS, at 1, 6, 9, 13, 16-17. On this record, Sherman Plaza has not shown that the score assigned to FCS's final revised offer under the quality of site subfactor was solely attributable to its proposed parking plan. Nor has the protester shown that the evaluation of FCS's offer was unreasonable.

Discussions

Sherman Plaza's principal argument is that the agency could not reasonably re-award this lease without holding discussions with Sherman Plaza. It contends that the VA downgraded its final revised offer "for issues that were present in [its] pre-corrective action proposals, yet were never raised with Sherman Plaza in discussions." Protester's Supplemental Comments at 6. Both the agency and the intervenor argue that these contentions are untimely because Sherman Plaza was on notice that the agency was not planning to hold discussions. We agree.

Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of proposals be filed prior to that time. 4 C.F.R. § 21.2(a)(1) (2010); see also Continental Staffing, Inc., B-299054, Jan. 29, 2007, 2007 CPD ¶ 18 at 4-5. We think this protest issue, which challenges the announced ground rules for the post-corrective action competition constitutes a challenge to the terms of a solicitation.

As noted above, the cover letter transmitting amendment No. 3 solicited final revised offers from the competitive range offerors and stated that the agency would not hold discussions or seek additional submissions. Accordingly, we conclude that the protester's post-award allegations regarding the agency's decision not to hold discussions with Sherman Plaza, and to proceed with award to FCS without remedying alleged significant weaknesses or deficiencies identified in its final revised offer, are untimely. Continental Staffing, Inc., *supra*.

Sherman Plaza next alleges that the VA in fact conducted discussions with FCS, during which FCS was provided information about the agency's design preferences, to the detriment of the other offerors, including the protester. See Protester's Comments and Supplemental Protest at 33-36; Protester's Supplemental Comments at 8-19.

Contrary to the protester's contentions, the record indicates that discussions were not held with FCS. What the record does show, however, is that subsequent to the October 30, 2009, initial award decision and prior to notification by our Office that Sherman Plaza had filed a protest on November 30, the VA had begun "design discussions" with FCS concerning how to proceed with the actual process of designing the offices and related space. VA's Supplemental Legal Memorandum, at 11. These post-award communications are not prohibited discussions as defined by the Federal Acquisition Regulations § 15.306(d)(3); American States Utils. Servs., Inc., B-291307.3, June 30, 2004, 2004 CPD ¶ 150 at 6-7. Although the protester steadfastly believes that FCS gained greater knowledge of the VA's specific design requirements, the protester has not shown that the information discussed provided an unfair advantage. Nor has Sherman Plaza cited any statute or regulation that required the agency to disclose the same information to either Sherman Plaza or the other offerors in the competitive range either prior, or subsequent to, the issuance of amendment No. 3 to the SFO. As such, we have no basis to conclude that the VA's conduct violated applicable procurement statutes or regulations.

Unequal Treatment of Offerors

Throughout its protest submissions, Sherman Plaza alleges that the agency evaluators applied a "far harsher and more exacting standard" in evaluating its final revised offer under the technical factors. Protester's Comments and Supplemental Protest at 36. In doing so, the protester alleges, the agency impermissibly lowered its ratings under the non-price factors as compared to the other offerors.

For example, under the operations and maintenance plan evaluation factor, the protester contends that its offer unfairly received a lower score than the other offers under the interior and exterior maintenance of building grounds subfactor. The protester disputes the agency's findings that its plan lacked detail, arguing that it provided a detailed description of the interior and exterior site maintenance services it would perform, including the frequency with which these tasks would be performed. The protester complains that the other offerors' plans were less detailed, yet those offers received higher ratings than Sherman Plaza. Protester's Comments and Supplemental Protest at 37-40.

With respect to the operations and maintenance plan evaluation factor, amendment 3 to the SFO informed offerors that the evaluators

will consider the adequacy and efficiency of the proposed Operations and Maintenance Plan to maintain standards of cleanliness, orderliness, and repair for the entire proposed facility. Each sub-factor must be addressed in narrative or chart format. The Plan will be evaluated as a whole and must address at a minimum: Interior and Exterior Maintenance of Building and Grounds[;] Routine and Emergency Calls- Procedures and Response Times[;] Staffing Plan, Administrative Procedures, and Quality Control Plan.

SFO amend. 3, at 2. With regard to the first subfactor (interior and exterior maintenance), an acceptable rating was defined as follows:³

The Operations and Maintenance (O&M) Plan identifies those interior and exterior areas and systems that are the responsibility of the Lessor to maintain and/or clean. The Offeror provides some explanation in narrative form of how he will accomplish the tasks so that the interior of the building and its systems as well as the exterior of the building and grounds is kept in good condition. The Plan meets industry and local standards.

AR, exh. 7, Factor Quality Level Definitions, at 10.

The record shows that each of the three offerors described their varying approaches to satisfying the O&M requirement, which included a description of their approach to the interior and exterior maintenance of their offered property.

In describing its approach to the required interior and exterior maintenance services, the record shows that among other things, FCS proposed an on-site facility manager at least 50 percent of the time who would be responsible for coordinating the maintenance activities of the third party maintenance provider. In addition, FCS identified its cleaning services subcontractor and provided a biography for this company, outlined the frequency with which certain tasks would be performed, and furnished a sample quality assurance inspection form that would be used by the offeror to track when the identified maintenance tasks were performed and inspected. AR, exh. 1A, FCS's Offer, at 70-76. The TEB viewed FCS's approach very favorably, noting, among other things, that the cleaning subcontractor "is a well-established commercial cleaning company," "having [a] facility [manager] on-site is a great feature," "detailed O&M plan," and "[building] owner will be co-located, allowing for fast response." AR, exh. 3, Handwritten Review Results for FCS, at 3-4, 7, and 11. The TEB assigned overall point values of outstanding to

³ As noted above, an acceptable rating equated to a point score range of 0.4 to 0.7, which was then weighted and multiplied in accordance with the evaluation methodology. AR, exh. 7, Factor Quality Level Definitions, at 10.

FCS's offer under this evaluation (interior and exterior maintenance) subfactor. AR, exh. 3, Post-Corrective Action TEB Evaluation Criteria and Scoring Worksheets.

On the other hand, Sherman Plaza provided a less detailed explanation of its O&M plan as compared to FCS. The offer included such things a "Preventative Maintenance Checklist," and identified a director of maintenance and a cleaning subcontractor. However, Sherman Plaza merely included portions of the SFO, which depicts a schedule for some of the interior and exterior maintenance tasks, to illustrate that it has a schedule. AR, exh. 1C, Sherman Plaza's Offer, § 7. The TEB assigned overall point values of acceptable to Sherman Plaza's approach to interior and exterior maintenance of its offered property. Among other things, one evaluator noted that although the protester had provided timeframes for its identified janitorial services, certain of these services "seems too far apart;" another evaluator noted "limited explanation of O&M plan provided"; yet another evaluator noted that "no task schedule" was provided. AR, exh. 3, Handwritten Review Results for Sherman Plaza, at 3, 7, and 14.

We have seen no evidence in our review of this record that the agency evaluators did not understand or appreciate the quantitative or qualitative differences in the competing offerors' approaches.⁴ Although Sherman Plaza disagrees with the TEB's assessments and conclusions, we see nothing in the record, beyond Sherman Plaza's opinion of its own approach, to support a conclusion that the agency acted unreasonably in assigning point values of acceptable to Sherman Plaza's interior and exterior maintenance approach.

Other Issues

In its protest, Sherman Plaza challenges other aspects of the agency's evaluation of its final revised offer. The protester maintains, for example, that its offer was downgraded for offering roof penetrations designed to allow natural daylight into the building, and for including outdated financial statements for its general contractor. Protest at 27-29; Protester's Comments and Supplemental Protest at 29-31.

⁴ In reviewing protests alleging unequal treatment, our focus--as a matter of economy and efficiency--is usually limited to unequal treatment in the evaluations of the protester and the awardee. Here, because of the protester's allegations that its offer was evaluated more harshly than either of the other higher-rated offers, we also reviewed the evaluation of the offer submitted by the intervening offeror. Our review of this offeror's submissions and the evaluation results lead us to conclude that there was nothing unreasonable in the TEB's evaluation conclusions. An allegation of this kind--*i.e.*, that the protester was singled out and treated more harshly than other offerors--is, at its core, an assertion that the agency has acted in bad faith. We have seen no evidence of bad faith in this record.

There is no basis for objecting to the evaluation here. With regard to the proposed roof penetrations in Sherman Plaza's offered building, the record shows that the agency had some concerns that this approach to providing natural light created a potential for leaks in the building's roof. See e.g., AR exh. 3, Handwritten Review Results for Sherman Plaza, at 9. Although Sherman Plaza may believe that this concern was unsupported, we find no basis for our Office to conclude that the agency's exercise of its judgment in this regard was unreasonable. Nor has the protester shown that the agency's concern regarding the submittal of outdated financial statements was unreasonable since Sherman Plaza was obligated to furnish current financial statements for its general contractor. In any event, despite these concerns, the protester's final revised offer received overall point values of acceptable under each technical evaluation factor.

Based on our review of the entire record, we conclude that the agency's evaluation, and the award decision that resulted, were reasonable and in accordance with the terms of the solicitation.

The protest is denied.

Lynn H. Gibson
Acting General Counsel