



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Atrium Building Partnership
File: B-228958
Date: November 17, 1987

DIGEST

1. Where procuring agency advises the protester of the deficiency in its initial offer concerning fire safety, which was a mandatory requirement, and protester fails to address the deficiency in its best and final offer, the final offer was technically unacceptable and properly should not have been considered for award.
2. Where protester's offer was technically unacceptable, it is not an interested party to raise issues concerning the award because it does not have the requisite direct economic interest to be considered an interested party under the Bid Protest Regulations.

DECISION

Atrium Building Partnership protests the rejection of its offer under solicitation for offers (SFO) No. 9PEL10-87-10, issued by the General Services Administration (GSA), for the lease of between 5,000 and 5,300 square feet of office space in the central business district area of Eugene, Oregon. Atrium alleges that GSA improperly applied the solicitation's fire safety criteria to its offer and made several errors in evaluating its offer.

We dismiss in part and deny in part the protest.

On May 11, 1987, GSA issued the SFO to provide space for the Social Security Administration, Office of Hearings and Appeals (OHA). Currently, Atrium is leasing space to GSA under the option term of a 5-year lease agreement which gives GSA the right to terminate the agreement with 60 days notice. Shortly before the expiration of the first 5-year term under Atrium's lease, GSA conducted a market survey of the prevailing rental rates in Eugene. GSA determined that it was more appropriate to resolicit its requirements than to exercise the option under Atrium's lease. Prior to issuing the SFO, GSA inspected several buildings of which

seven were identified as acceptable to OHA. Atrium was among these, however, the acceptance of its building was conditioned upon the correction of fire safety and handicap access deficiencies.

Regarding fire safety, GSA determined that the atrium style interior of Atrium's building did not meet fire safety standards for fire rated exits, and that the north and south exits which entered the atrium were required to be separated by 1 hour fire rated walls. GSA Fire Safety Regulations PBS P 5900.2B, chapter 14, paragraph 9(d), which was a mandatory term of the SFO, states that "offices or other rooms used for human occupancy must not open into an atrium, nor may exit routes pass through an atrium." Therefore, by letter dated May 7, 1987, GSA informed Atrium of the fire safety deficiency found in its building and of the need to include a detailed description of how it intended to rectify the deficiency to comply with the mandatory terms of the solicitation.

On June 15, the day offers were due, GSA received four offers, including Atrium's. Negotiations were conducted with each offeror. On June 26 GSA advised Atrium that its offer did not contain sufficient detail with respect to the fire safety and handicap access deficiencies noted. GSA and Atrium differ as to the substance of these discussions. Atrium alleges that GSA advised that it had not conducted a formal survey of its building for fire safety, that there were no blueprints available on the building, and that a formal survey was appropriate. Further, Atrium alleges that GSA agreed to permit it to provide appropriate blueprints and plans showing the fire safety and mitigation systems and to conduct a formal survey with a fire safety professional. However, GSA reports that it never agreed to perform a formal survey because it would have been inappropriate. Rather, GSA states that Atrium proposed that its sprinkler system mitigated the fire safety deficiencies in its building. GSA states that it contacted the fire safety engineer who advised that a sprinkler system did not cure Atrium's fire safety deficiency and on June 26, GSA so advised Atrium and, further, that its best and final offer (BAFO) must include information describing how it intended to correct its fire safety deficiency, as well as the other weaknesses in its initial offer.

Despite these discussions, Atrium did not submit information in its BAFO showing how it planned to comply with the fire safety requirements. However, GSA continued to evaluate

Atrium's proposal. The result of the evaluation was that of the four offers received, Atrium's offer was rated the third highest regarding quality and the third lowest with respect to price. Award was made to Hubert J. Perkins, who GSA rated second highest in quality and second lowest in price.

Atrium contends that GSA misapplied the fire safety regulations. It argues that, prior to determining that its building did not meet the regulations, GSA was required to conduct a risk assessment of its building with a fire safety professional. Further, Atrium contends that the determination that its offer did not satisfy the fire safety requirements was inappropriate because its offer contained a statement advising that it intended to meet the SFO's fire safety requirements. Moreover, Atrium contends that the evaluation process was improper because GSA did not examine relocation cost, made errors concerning the frame, access points and space planning of its building, permitted the awardee to substitute a new offer which did not meet the terms of the SFO and permitted all offers to expire before the award.

Initially, we note that GSA argues that Atrium's protest is untimely because Atrium was aware of the decision of GSA to treat its building as deficient in fire safety after July 1 as evidenced by letters mailed to the GSA, Realty Specialist concerning its compliance with fire safety requirements. Our Bid Protest Regulations provide that protest shall be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1987). While Atrium's letters indicate that Atrium disagreed with the fire safety assessment of its building, we do not find that Atrium had sufficient information to form its protest until August 11, 1987, when GSA informed it that award was being made to Perkins.

GSA reports that deviation from the fire safety regulations is permitted only if no other space is available and program professionals determine that the basic safety requirements have been met. PBS P 5900.2B, chapter 1, paragraphs 3(a) and (b). GSA states that because other offers were received in response to the SFO, a risk assessment of Atrium's building would have been inappropriate. Furthermore, GSA contends that due to the fire safety engineer's determination that a sprinkler system would not rectify Atrium's fire safety deficiency, the decision that Atrium did not comply with the fire safety requirements was reasonable.

In our opinion, Atrium has failed to establish that GSA acted unreasonably in evaluating its offer. Atrium does not dispute GSA's conclusion that the Atrium building did not meet the requirements of the regulations; rather it argues

that GSA was required to perform a risk assessment with a fire safety professional. However, the fire safety regulations only permit deviation and a risk assessment where there are no other available spaces, which was not the case here. Indeed, section 12 of the SFO provides that offers which include alternate fire protection features must include a written analysis by a certified fire protection engineer fully describing any exceptions taken to the fire safety requirements. Therefore, Atrium had the burden of demonstrating compliance with the fire safety requirements of the SFO. By including a blanket statement that it intended to comply with fire safety, Atrium did not overcome this burden. We have held that a blanket offer to meet mandatory requirements does not substitute for a detailed description of how a firm plans to do so. XYZTEK Corp., B-214704, Aug. 21, 1984, 84-2 C.P.D. ¶ 204.

Further, during negotiations GSA specifically called Atrium's attention to the fire safety deficiency found in its offer, after consulting the fire safety engineer. In view of the fact that Atrium elected not to include this information in its BAFO, we find that Atrium's offer was technically unacceptable and that GSA should have rejected it as such, instead of continuing its evaluation. A proposal that has not been made acceptable after discussions properly may be rejected after BAFO's and the proposal may not be considered for award. See Louisiana Foundation for Medical Care, B-225576, Apr. 29, 1987, 87-1 C.P.D. ¶ 451.

Given that Atrium's offer properly should have been rejected as technically unacceptable, we find that whether GSA allegedly made errors in the evaluation of the offer to be irrelevant. Moreover, Atrium is not an interested party to raise issues about the award to Perkins. Our Bid Protest Regulations require that a protester be an interested party, which is defined as a party having a direct economic interest in the award of a contract or proposed award of a contract, before we will consider its protest. 4 C.F.R. §§ 21.0 (a) and 21.1 (a) (1987). A protester is not an interested party where it would not be in line for award if its protest were upheld. Communications Facility Automation Systems International, B-224181, Jan. 9, 1987, 87-1 C.P.D. ¶ 40. Since Atrium's offer was technically unacceptable, we find that it is not an interested party to pursue this aspect of its protest.

Finally, regarding Atrium's allegation that offers were permitted to expire, we note that it is not improper for an agency to accept an expired offer without reopening negotiations. We have held that where, as here, the acceptance period has expired on all proposals, the contracting officer may allow the successful offeror to waive

the expiration of its proposal acceptance period without reopening negotiations to make an award on the basis of the offer as submitted since waiver under these circumstances is not prejudicial to the competitive system. Protective Materials Co., Inc., B-225495, Mar. 18, 1987, 87-1 C.P.D. ¶ 303. Therefore, award to Perkins on August 11 was proper even though the offer had expired on August 1, 1987.

The protest is dismissed in part and denied in part.


for James F. Hinchman
General Counsel