The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: 120 Church Street Associates

File: B-232139

Date: November 21, 1988

DIGEST

1. Protest that solicitation language--that price is less important than other factors--is ambiguous is denied where solicitation adequately conveys that other factors combined are worth more than price.

2. Protest that most important evaluation factor for award--early delivery--is unduly restrictive of competition is denied where agency offers reasonable explanation for factor, and protester does not show that the requirement is clearly unreasonable.

3. Where agency shows that various technical requirements in solicitation are reasonably related to its minimum needs and protester alleges no more than that the requirements are burdensome, protester has failed to show that the requirements are unduly restrictive.

DECISION

120 Church Street Associates (CSA) protests the terms of solicitation for offers (SFO) No. MNY88-284, issued by the General Services Administration (GSA), for the acquisition of a leasehold interest in up to 385,000 square feet of office space in lower Manhattan for purposes of housing the Internal Revenue Service (IRS). CSA protests that the evaluation factors for award and certain of the solicitation's technical requirements are ambiguous or otherwise defective, and that certain SFO special requirements applicable only to the incumbent are prejudicial to it.

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

From 1962 to 1978, the IRS occupied the protester's building located at 120 Church Street. Prior to 1978, however, GSA, which is responsible for the government's real property

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procurements, decided not to exercise a second 5-year option under the original lease and instead solicited competitive proposals. The then-owners of the 120 Church Street building submitted the only acceptable proposal. The parties were unable to reach agreement on the terms of a new lease, however, and GSA then filed in federal District Court to prevent the owners of 120 Church Street from terminating services to the building and locking out IRS employees. Thereafter, the parties engaged in a protracted course of litigation.1/ Ultimately, as a result of that litigation, GSA acquired a leasehold interest in the premises by condemnation pursuant to 28 U.S.C. § 2409a (1982), which was comprised of a 92-month base period and two 60-month options exercisable at GSA's discretion.2/ The base period expired on October 31, 1988, and GSA elected not to exercise its option. After issuing and canceling two solicitations in 1987, GSA issued the current SFO on March 24, 1988.

With regard to evaluation and award, the solicitation provides that, after review of best and final offers (BAFOs), "award will be made to the offeror whose offer will be most advantageous to the government, price and other factors considered." The SFO also provides that "price is less important than other factors." The SFO further directs offerors to "see Attachment No. 2 for Award Factors." Attachment No. 2 is entitled "other factors" and lists four factors: early delivery date, quality of location and building, expansion space and parking and location of space for taxpayer assistance office. The protester argues that this solicitation fails to clearly indicate the relative importance of price vis-a-vis the other award factors. According to CSA, offerors are left to speculate whether price is the least important of the articulated award factors or whether price is less important than all other

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1/ For a detailed discussion of the facts and circumstances surrounding this litigation, see United States v. Bedford Associates, 713 F.2 895 (2d Cir. 1983) and cases cited therein. In this connection, we note that one of the overall results of this litigation was that the Bowery Savings Bank, the mortgagee of Bedford Associates, the building owner at that time, foreclosed against Bedford and the government. CSA ultimately acquired title to the property in 1984.

2/ Under GSA's condemnation election, GSA was vested with exclusive possession of 120 Church Street and responsibility for maintenance and repair of the building.

award factors combined. The agency states that the language was intended to convey that price is less important than all of the other award factors combined. While the relationship of price to "other factors" could have been stated better, we think the SFO reasonably indicates that price is less important than "other factors" combined. The solicitation states that price is less important than other factors and specifically references attachment No. 2, entitled "other factors." Attachment No. 2 lists four factors. Given the reference to attachment No. 2, we think that "other factors" was intended to mean the four factors collectively listed on attachment No. 2, and that price, therefore, is less important than all the other factors listed in the attachment combined.

CSA also argues that GSA improperly has "eliminated award factors" which were contained in the two prior SFOs. The factors include moving costs, proximity to mass transit facilities, and use of space on contiguous floors. Initially, we note that, by amendment, moving costs, one of the factors omitted, has been added to the award factors, and, thus, CSA's protest in this regard is academic. Concerning the proposed building's proximity to mass transit facilities, we also note that SFO paragraph 3 entitled "location" requires that "[r]egularly scheduled public transportation and/or employee parking [be available] within 4 blocks . . . ." With regard to GSA's consideration of whether the space is located on contiguous floors, we find that the SFO permits consideration of this factor. Evaluation subfactor B entitled "Structure" states offers will be evaluated based on, among other things, ". . . the efficiency of the structural layout of the space offered." We think that this subfactor reasonably encompasses consideration of whether the offered space is or is not located on contiguous floors and also communicates that an efficient structural layout will be an evaluation factor. Thus, while we are not clear on what legal basis CSA seeks to object to the omission of award factors, these areas appear to be generally addressed by the SFO.

CSA next argues that the current SFO is unduly restrictive of competition in that it makes early delivery of the space for occupancy the most important evaluation factor for award. We note that the solicitation provides that floor plans will be delivered to the successful offeror no later than 120 days after lease award and requires the awardee firm to deliver the premises ready for occupancy no later than 24 months after the floor plans have been delivered. The SFO also provides that the most important consideration for award purposes is an offering firm's ability to deliver the premises earlier than the required delivery date.

The protester objects to the early delivery award criterion on grounds that GSA cannot reasonably justify it in light of the time which thus far has been spent on this procurement and in light of the fact that, in the protester's opinion, the criterion specifically prejudices it as the incumbent. Specifically, CSA argues that GSA has already spent approximately 20 months in its effort to secure a new lease for the IRS and that if in fact early delivery were essential to GSA's minimum needs it would have already completed its efforts. CSA notes in this regard that early delivery was not the paramount award criterion under the two previous solicitations. In addition, the protester argues that the early delivery requirement works to its prejudice since (1) the IRS remains in exclusive possession of CSA's building under the terms of the condemnation, thereby precluding the protester from performing any current work on the premises and (2) any remodeling work which CSA would need to perform under a new lease would have to be performed in an ad hoc fashion (rather than a wholesale remodeling of the building) because of the IRS's continued presence in the building. CSA also argues that the time required to move the IRS from its present location to a new one (approximately 6 months according to CSA) should be added on to the accelerated delivery schedule offered by any other firm.

GSA responds that the early delivery award criterion reflects its actual minimum needs. In particular, the agency argues that it is essential for it to either relocate the IRS or to have the protester's building refurbished as quickly as possible because of numerous safety and fire hazards which currently exist at 120 Church Street. In support of this argument, GSA points out that the 120 Church Street building has been cited by the New York Fire Department for various violations of the New York City fire code, that the elevators need to be substantially repaired or overhauled, that fires have occurred recently at the building as a result of faulty wiring and that heating and air conditioning are "barely adequate."3/ The agency also argues that the time spent thus far on this procurement

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3/ In this connection, CSA points out that GSA has been entirely responsible for maintaining the building since 1984, has known about the deficiencies for some time and has, through its own inaction, failed to take steps to ensure the overall suitability of the 120 Church Street building.

action is not at all unusual for an acquisition of this size.4/

In preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition. Consequently, when a solicitation provision is challenged as unduly restrictive of competition or as exceeding the agency's actual needs, the initial burden is on the procuring agency to establish support for its contention that the provision is justified. Abel Converting Inc., B-224223, Feb. 6, 1987, 87-1 CPD ¶ 130; Daniel H. Wagner, Associates, Inc., 65 Comp. Gen. 305 (1986), 86-1 CPD ¶ 166. We determine the adequacy of the agency's justification by examining whether its explanation can withstand logical scrutiny. R.R. Mongeau Engineers, Inc., B-218356 et al., July 8, 1985, 85-2 CPD ¶ 29. Once the agency establishes support for the challenged provisions, the burden shifts to the protester to show that the provisions in dispute are unreasonable. Information Ventures, Inc., B-221287, Mar. 10, 1986, 86-1 CPD ¶ 234. Moreover, the determinative consideration regarding the propriety of a challenged method of proposal evaluation is whether it reasonably relates to the government's minimum needs and not whether or not it works to the prejudice of one or another offeror. Carter Chevrolet Agency, Inc., B-228151, Dec. 14, 1987, 87-2 CPD ¶ 584.

In this case, we conclude that GSA has offered adequate rationale for the early delivery evaluation criterion and that it does not exceed its actual minimum needs. As noted above, conditions in the 120 Church Street building are barely adequate and a number of serious safety and fire deficiencies currently exist in the building. The protester does not rebut these facts, but argues in essence that the deficiencies are the fault of GSA's actions and, presumably, that GSA must therefore bear the inconvenience of the deficiencies. We disagree. We point out that several of these deficiencies concerning asbestos and the air distribution system were the result of the building's original construction and design, and not caused by GSA's alleged inaction. Further, the fact that some deficiencies may exist as a result of GSA's failure to adequately maintain

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4/ The protester notes that GSA is currently trying to negotiate an interim lease with it but that failing a successful negotiation, the agency intends to seek a 3-year condemnation of the premises. According to CSA, this is further evidence of GSA's lack of a reasonable basis for making early delivery the most important award criterion.

the building is, in our opinion, irrelevant since the existence of these conditions and not their origin is what dictates GSA's minimum needs. Additionally, we think that the agency's procurement actions in this case are neither extraordinary nor unexplained by the record. The current SFO as well as the two previous SFO's were all issued by GSA in a good faith attempt to satisfy its minimum requirements for IRS office space in Manhattan, and the protester has not shown that GSA has acted in bad faith or with undue delay. Consequently, we think that GSA has proffered a reasonable rationale for its early delivery requirement. We therefore deny CSA's protest in this regard.

CSA next argues that various technical requirements of the solicitation are either unduly restrictive or ambiguous. In particular the protester alleges that two of the equipment performance requirements are ambiguous. SFO Paragraph No. 68 requires heating and air conditioning equipment to "maintain space temperature control over a range of internal load fluctuations . . . from initial design requirements of the tenant." SFO paragraph 103.G.2 requires the offeror to provide electrical capacity for office automation equipment "above standard levels specified elsewhere. The protester points out that the "initial design requirements of the tenant" and "standard levels" are not specified in the SFO. In this regard, GSA advises that its engineers have explained in detail what these phrases mean, and the perceived ambiguities have been clarified with the protester during negotiations. The protester admits it has been orally advised of the meaning of these terms. CSA thus has received clarification of these terms and has not explained why the specific information provided by GSA is inadequate.

CSA also alleges that the requirements of SFO paragraph No. 58, which specifies the acoustical properties the building is to possess, and SFO paragraph No. 69, which specifies GSA's requirements with regard to building ventilation, are unduly restrictive because most existing buildings do not meet these standards. CSA specifically alleges that SFO paragraph No. 58 will require it to restructure the perimeter of its building and that SFO paragraph No. 69 exceeds the requirements of the New York City code for ventilation requirements. GSA responds that the acoustical requirements specified are those of ASHRAE 5/

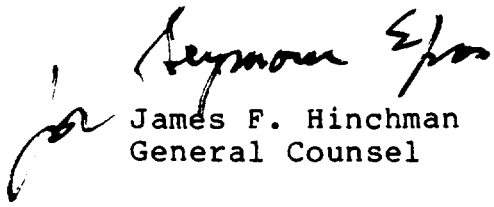
5/ ASHRAE is the American Society of Heating Refrigeration and Air Conditioning Engineers, a trade association which promulgates and recommends national standards to which buildings must conform.

and are national standards which it uniformly employs in all solicitations for leasehold acquisitions, and that the ventilation provision reflects a special IRS requirement relating to the extensive office automation required by the activity.

GSA reports that the disputed provisions are either national standards supported by industry recommendations or special requirements peculiar to the nature of the IRS' operations. In response, CSA has not proffered evidence to show that they overstate the agency's minimum needs, but only argues that the provisions are onerous. Consequently, we cannot say that, based upon the record, CSA has shown that the challenged provisions are unduly restrictive.

Finally, the protester argues that SFO special section No. 6 (which relates to the requirement for "turnaround" space to be provided by the incumbent) should be either deleted or modified. In particular, CSA argued in its initial letter of protest that the SFO's demands regarding the specifications for turnaround space6/ were prejudicial to it because it required the offered space to meet all the requirements of the SFO. GSA has subsequently issued an amendment which only requires that turnaround space "substantially" comply with the SFO's requirements and only basic fire, safety and handicapped requirements are explicitly noted therein. We are satisfied that, in regard to this issue, GSA has met the primary demands of CSA and accordingly we dismiss the issue as academic.

The protest is denied in part and dismissed in part.



James F. Hinchman
General Counsel

6/ Turnaround space is a limited amount of space to be used as temporary offices for IRS while various portions of the 120 Church Street building are being renovated and remodeled.