The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: 120 Church Street Associates -- Request for Reconsideration
File: B-232139.2

Date: March 7, 1989

DIGEST

1. Where subsequent facts concerning protested evaluation criterion show dispositively that protester will not be prejudiced by the protested evaluation criterion, request for reconsideration concerning that provision is dismissed.

2. Request for reconsideration of protest previously dismissed as academic challenging solicitation requirement relaxed by amendment is denied, where agency has reasonably justified solicitation requirement, as amended, and protester fails to rebut agency's showing.

DECISION

120 Church Street Associates (CSA) requests reconsideration of our decision in 120 Church Street Associates, B-232139, Nov. 21, 1988, 88-2 CPD ¶ 496. In that decision, we denied in part and dismissed in part CSA's protest against various terms of solicitation for offers (SFO) No. MNY-88-284, issued by the General Services Administration (GSA) to lease up to 385,000 square feet of office space in lower Manhattan for the Internal Revenue Service's (IRS) New York office.

We deny in part and dismiss in part the request for reconsideration.

In its initial protest, CSA had argued that the early delivery date evaluation criterion which made early delivery the most important evaluation criteria under the SFO was unduly restrictive of competition because it prejudiced the protester who is the current incumbent and because it overstated GSA's minimum requirements. Specifically, the protester had argued that the early delivery date criterion unfairly required it to compete against firms who could perform remodeling work on their entire building simultaneously whereas it could only remodel on a slower,

incremental basis because of the continued occupancy of its building by the IRS. In our original decision, we concluded that GSA had reasonably justified the early delivery date criterion and denied CSA's protest on this basis.

CSA now argues that we erred in our original decision in concluding that the early delivery date criterion reasonably represented GSA's minimum requirements. We dismiss this aspect of CSA's request for reconsideration. Subsequent to the filing of CSA's request for reconsideration, our Office was informally advised by GSA that best and final offers (BAFOs) have been submitted under the SFO and that no firm submitting a BAFO has proposed early delivery, that is, a delivery date which is earlier than the SFO's required delivery date. Under these circumstances, we see no useful purpose in deciding this issue since a showing of prejudice is an essential element of a viable protest and in this case CSA will suffer no competitive disadvantage by virtue of the early delivery date criterion. See generally American Mutual Protective Bureau, Inc., B-229967, Jan. 22, 1988, 88-1 CPD ¶ 65.

CSA also argues that we erred in dismissing that portion of its initial protest which objected to the SFO's requirement for "turnaround space." Turnaround space is a limited amount of space to be used by the IRS as temporary offices while various portions of the 120 Church Street building are being renovated and remodeled. Our initial dismissal was premised upon the fact that during the pendency of CSA's original protest, GSA had amended the SFO to relax the requirement for turnaround space. Specifically, the SFO, as originally drafted, required CSA to furnish turnaround space which met all of the SFO's requirements, including a requirement for "redundant computer hardware." By amendment, however, the requirements for turnaround space were relaxed and CSA was thereafter only required to furnish turnaround space which "substantially" met the requirements of the SFO. Our original decision further noted that the amended special requirements section only explicitly required CSA's offered turnaround space to meet basic fire, safety and handicapped access requirements. We concluded that CSA's primary demands concerning turnaround space had been met, and dismissed this protest issue as academic.

CSA continues to argue that the special requirements section, as currently drafted, is unduly restrictive of competition. According to the protester, the term "substantial compliance" is also ambiguous. CSA contends that it should only be required to supply space which is of the same quality as that currently being furnished which

presumably would be unrenovated space and which would not substantially comply with the new SFO requirements. The protester also argues that the agency has failed to justify the requirement for turnaround space. Finally, CSA argues that, to the extent that GSA is justified in its requirement for turnaround space, the requirement should be imposed upon all offerors. According to the protester, since the objective of providing turnaround space is the avoidance of disruption of IRS operations, all other firms should provide turnaround space for use during the move from 120 Church Street to another building.

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 so that all responsible sources are permitted to compete. Abel Converting Inc., B-224223, Feb. 6, 1987, 87-1 CPD ¶ 130. Consequently, when a protester challenges a solicitation provision as unduly restrictive of competition, the burden initially is on the procuring agency to proffer support for its position that the requirements imposed are necessary to satisfy its minimum needs. See Pacific Bell Telephone Company, B-231403, July 27, 1988, 88-2 CPD ¶ 93. Once the agency has established support for the challenged provisions, the burden shifts to the protester to show that the provisions in question are clearly unreasonable. Id.

Here, we conclude that GSA has provided adequate justification for the amended turnaround space requirement and that the protester has failed to rebut the agency's showing. Specifically, we note that GSA reports that the turnaround space is required in order to allow for continued IRS operations during all phases of any remodeling which will be required to be performed at 120 Church Street. In response, the protester has not offered any explanation as to why the turnaround space is unnecessary. In fact, it is difficult to understand how the occupied building could be renovated without turnaround space. In addition, we find that the term "substantial compliance" is not ambiguous when read with the special requirements section which requires that the space furnished meet basic fire and safety requirements and accommodate handicapped employees. Finally, we find the protester's argument that all other

firms should be required to furnish turnaround space to be without merit since turnaround space would not appear necessary for a move from 120 Church Street to a new location. In light of the foregoing, we dismiss in part and deny in part CSA's request for reconsideration.

James F. Hinchman
General Counsel