Van Schaik

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: NFI Management Company

File: B-238522; B-238522.2

Date: June 12, 1990

Philip Strawbridge, Esq., for the protester.
S. Lane Tucker, Esq., Office of General Counsel, General Services Administration, for the agency.
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DIGEST

1. Allegations that awardee of building lease contract cannot construct building in time for delivery date and that awardee has performed poorly on other contracts concern the awardee's ability to fulfill its contract obligations and thus relate to its responsibility. Agency's award of contract included an affirmative determination of responsibility which General Accounting Office will not challenge absent fraud or bad faith on the part of contracting officials or the failure to apply definitive responsibility criteria.

2. Information relating to offeror's ability to perform contract is a matter of responsibility and, even though solicitation required submission of information with proposals, requirements that relate to responsibility may be satisfied any time prior to award.

3. Since letters to agency from awardee concerned only matters of responsibility and not the acceptability of the awardee's proposal, letters did not constitute discussions.

4. General Accounting Office will review an agency's evaluation of the probable cost of a proposed lease to ensure that it has a reasonable basis and is consistent with stated evaluation criteria. While protester questions just about every aspect of agency's cost evaluation, including the cost of moving, utilities and parking, there is nothing in the record which shows that the evaluation did not have a reasonable basis or was inconsistent with the solicitation's evaluation criteria.

5. Arguments that agency should have considered building lease offer that included utilities, that solicitation should have contained preference for a central business district location, and should have provided for Brooks Act evaluation procedures are untimely since these matters are alleged solicitation improprieties and protest was not filed until after award.

DECISION

NFI Management Company protests the award of a lease to G.F. Cook Development Corporation under solicitation for offers (SFO) No. XM088157, issued by the General Services Administration (GSA) for office and laboratory space for the Food and Drug Administration (FDA). Among other allegations, NFI argues that Cook cannot construct the new building it proposed by the delivery date in its contract and GSA improperly evaluated moving costs and other costs required by the solicitation. We dismiss the protest in part and deny it in part.

GSA issued the solicitation in response to the FDA's request for 42,000 square feet of office and laboratory space and 75 parking spaces within the greater Kansas City area with an occupancy date of approximately January 1, 1991. The lease term is to be 20 years with the government having the right to cancel on or any time after 10 years. The SFO provided that award would be made based on price and such other factors as handicapped accessibility and the use of renewable energy. In addition, the solicitation contained a large number of requirements which must be met by the offered building and specified that "COSTS ASSOCIATED WITH MOVING THE AGENCY WILL BE CONSIDERED."

FDA currently occupies 28,548 square feet of space in a building owned by NFI; the protester proposed to expand its current building to meet the additional space requirements.

GSA received 18 proposals in response to the solicitation. After negotiations, submission of best and final offers (BAFO) and evaluation of the proposals, Cook's proposal to construct a new building in Lenexa, Kansas, was determined to be the low priced acceptable offer at $21.17 per square foot per year, with an evaluated price of $14.25 per net usable square foot (nusf), compared to NFI's next low offer of $29.69 for the first 10 years and $14.43 for the remaining 10 years, with an evaluated price of $16.47 nusf. GSA awarded the lease to Cook on January 26, 1990. NFI protested to this Office on February 7 and again on March 13.

Among other contentions, NFI argues that Cook cannot meet the January 1, 1991, occupancy date required by the solicitation because the firm offered to construct a new building. According to the protester, because the solicitation called for design and review of drawings in the first 90 days after contract award and Cook will have to obtain a local construction permit before starting construction, only 4 months may be available to construct the building. NFI argues that this is insufficient time and complains that the agency did not conduct a technical analysis of the proposals in order to determine whether the solicitation requirements could be met. Further, NFI argues that GSA has not provided evidence that Cook has performed satisfactorily on past contracts and states that other GSA regions have experienced problems with Cook's performance.

NFI also argues that Cook's proposal was unacceptable and should have been rejected because it did not include information required by the solicitation. In this respect, paragraph 28 of the SFO, "EVIDENCE OF CAPABILITY TO PERFORM," required offerors to submit with their proposals, among other things, the name of its proposed construction contractor, the state licence of its architect or engineer and evidence of compliance with local zoning laws. According to the protester, the record indicates that this information was not submitted with Cook's BAFO.

The record indicates that, contrary to the protester's contention, contracting officials analyzed each offerors' proposal as required by the solicitation. Under the solicitation, proposals were to include the net usable space offered, prices, information related to responsibility and building plans. With respect to the technical evaluation, the agency essentially was to verify, based on the information submitted, that a proposal took no exception to any of the numerous material solicitation requirements. There is no indication that this was not done here. Although NFI appears to believe that a more detailed evaluation of technical proposals should have been performed, the solicitation did not require offerors to submit, or the agency to evaluate, detailed technical proposals. In this regard, we note that the solicitation did not contain separate technical evaluation criteria which concerned such matters as the offeror's experience or its ability to meet the solicitation deadlines and NFI itself submitted nothing more than what the solicitation required. Thus, it should have been clear to the protester that no detailed evaluation of technical proposals was contemplated. Further, since Cook's offer did not take exception to any material solicitation requirements, including the occupancy date, it

was obligated by the submission of the offer to meet those requirements. G&W Laboratories, Inc., B-234543, May 3, 1989, 89-1 CPD ¶ 424.

Under the circumstances, NFI's allegations that Cook cannot construct a new building in time for the required occupancy date and that Cook has performed poorly in other GSA regions concern that firm's ability to fulfill its contract obligations and thus are matters related to Cook's responsibility.1/ Bullock Assocs. Architects, Planners, Inc., 64 Comp. Gen. 415 (1985), 85-1 CPD ¶ 340. GSA's decision to award a contract to Cook included an affirmative determination of responsibility, based largely on business judgment, which our office will not question absent evidence of possible fraud or bad faith on the part of contracting officials, or the failure to apply definitive responsibility criteria in the SFO. Id.

Although NFI argues that the affirmative determination of Cook's responsibility was made in bad faith, procurement authorities are presumed to act in good faith and, in order for our Office to conclude otherwise, the record must show that procuring officials had a specific and malicious intent to harm the protester. See Baldt, Inc., B-235102, May 11, 1989, 89-1 CPD ¶ 445. NFI merely argues that the affirmative responsibility determination must have been made in bad faith because, in its view, GSA unreasonably determined that Cook could meet the required delivery schedule; there is otherwise nothing in the record before us which indicates that the agency's decision was improperly motivated. We are thus unable to find that the agency acted in bad faith in finding the awardee responsible. Id.

NFI refers to solicitation requirements that proposals include the name of the offeror's construction contractor, the licence of its architect/engineer and evidence of

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1/ NFI also argues that the SFO indicated that only offers of existing buildings would be considered and thus Cook's offer to construct a new building was unacceptable. No section of the solicitation, including those referred to by NFI, included any such requirement. In fact, the SFO at paragraph 14 referred to "BUILDINGS TO BE CONSTRUCTED" in connection with handicapped accessibility requirements. The solicitation in our view allowed both existing buildings and new construction. In fact, although NFI argues in its later submissions that new construction was not permitted by the SFO, in its initial protest, NFI itself argued that the solicitation "contained several provisions that favor new construction."

compliance with zoning laws as a matter of "responsiveness," or technical acceptability. These requirements were not listed as technical evaluation criteria. They related to the ability of the successful offeror to perform rather than to whether the offer is acceptable and, therefore, are matters of responsibility. TRS Design & Consulting Servs., B-218668, Aug. 14, 1985, 85-2 CPD ¶ 168. Moreover, even though the solicitation called for submission of this information with proposals, requirements that relate to responsibility may be satisfied at any time prior to award. Northcoast Redwood Tours, B-231770, July 6, 1988, 88-2 CPD ¶ 14. Therefore, Cook's failure to submit the information with its BAFO had no bearing on the technical acceptability of its proposal and Cook only had to submit the information before award. Id.2/

In a related matter, NFI argues that after the due date for submission of BAFOs, GSA conducted discussions with Cook while not holding discussions with NFI and that Cook submitted information necessary to determine the acceptability of its proposal. Specifically, the protester argues that letters dated November 31,3/ December 19, 1989 and January 2, 1990, from Cook to GSA were all submitted after the November 30 due date for receipt of BAFOs and included information relating to an architect's license, a local permit and information in response to a solicitation amendment. NFI argues that this information was required to determine the acceptability of Cook's proposal and that it was submitted late and in response to discussions which were held with Cook and not other offerors.

We do not agree. First, the letter dated November 31 includes a GSA time/date stamp that indicates it was received by GSA on November 6, prior to the due date for BAFOs. Further, although the December 19 and January 2 letters were received by GSA after the due date for BAFOs, those letters did not concern the acceptability of Cook's proposal, but only related to whether Cook had local licenses and permits required under the contract and other

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2/ NFI also maintains that as of late March Cook did not have a building permit required under its contract. This is a matter of contract administration within the discretion of the contracting agency which we do not review under our protest function. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1) (1990). Therefore, we will not consider this contention.

3/ The November 31 date is obviously a mistake as there is no such date.

matters of responsibility. Requesting or obtaining information to ascertain a firm's responsibility does not constitute discussions so as to require that discussions be held with and revised proposals solicited from all other offerors in the competitive range. Eagle Technology, Inc., B-236255, Nov. 16, 1989, 89-2 CPD ¶ 468.

NFI also challenges numerous aspects of GSA's price evaluation. The solicitation provided that for evaluation purposes, an offeror's prices would be determined by adjusting the per square foot prices offered for moving and other costs to arrive at a per square foot present value price. Based on its analysis of prices, GSA determined that the present value cost of a lease of Cook's building was $14.25 nusf while the cost of a lease with NFI was evaluated at $16.47 nusf.

NFI contends that GSA's price evaluation was flawed and, as a result, the evaluated price per square foot of its own offer was too high and Cook's was too low and that, had the evaluation been performed correctly, NFI would have been the low priced offeror. For instance, according to NFI, since the solicitation stated that "COSTS ASSOCIATED WITH MOVING THE AGENCY WILL BE CONSIDERED," GSA's evaluation should have, but did not consider the cost of moving all existing government owned equipment and furniture, moving and installing FTS lines and telephones, permanent change of station (PCS) moves of government personnel, administrative costs for disruption of the agency and costs to restore the currently leased building to its previous condition. NFI also argues that GSA arbitrarily refused to consider NFI's offer to provide all utilities for a price of $2.00 per square foot but instead applied $5.00 per square foot to the evaluation of all offers including NFI's. The protester also argues that even ignoring its $2.00 per square foot "cap" on utilities, a $5.00 per square foot rate should not have been applied to its offer since, according to NFI, it was told by the local power company that utilities for a large user like the FDA can be up to 5 percent less expensive in Missouri, where its building is located, as opposed to Kansas where Cook's building will be constructed.

NFI also argues that on a form submitted with its offer Cook failed to check the blank that states that parking will be free of charge, indicating that Cook intends to charge for parking. Finally, NFI argues that Cook's offer, by stating that the agency would be responsible for display of the flag, took exception to the solicitation requirement that the lessor shall be responsible for flag display and concludes that "[t]his item could be costly considering the fact that an employee would be required to do this operation

twice a day. It is estimated that it would cost $0.10 per sq. ft. per year."

We will review an agency's evaluation of the probable cost of a proposed lease to ensure that it has a reasonable basis and is consistent with stated evaluation criteria. See Sixth and Virginia Properties, B-220584, Jan. 14, 1986, 86-1 CPD ¶ 37. For the reasons set forth is detail below, we do not agree that GSA's analysis of the cost of the leases was improper.

First, the record indicates that, contrary to the protester's allegation, GSA did not include in its evaluation of NFI's offer a charge for relocation of furniture and equipment while the evaluation of Cook's offer included $31,500 which, when amortized over the 20 year lease term and divided by the square footage of the proposed space, resulted in an increase of $0.04 per nusf in Cook's evaluated price.4/ Further, although NFI argues that the $0.75 per square foot used by GSA to estimate moving costs should have been $2.00 per square foot, the protester has submitted nothing in support of this assertion. We therefore have no reason to object to the $0.75 figure, which was supplied by GSA's Traffic and Travel Manager. Also, although NFI argues that GSA should have moved the existing government owned lab equipment in the currently leased space and added the cost to the evaluation of Cook's proposal, GSA explains that FDA is purchasing new equipment to be installed in the lab since the old equipment is outdated, has outlived its useful life and is inadequate for the current or future needs of FDA's laboratory. The protester has supplied us with no information which we could use to question whether the FDA needs new laboratory equipment. Thus, we have no basis upon which to object to GSA's failure to add costs for relocation of such equipment to the Cook offer.

4/ NFI argues that GSA did not present contemporaneous documents that show that the cost to move furniture and equipment was included in the evaluation of Cook's offer. The record includes GSA's calculations of the present value cost for both firms which in the case of Cook's offer includes a hand-written notation indicating that the $0.04 figure was added to that firm's evaluation. GSA explains that the $0.04 included in the calculation of Cook's total present value price represents the present value cost to relocate furniture and equipment.

With respect to FTS lines and telephone equipment and service, the record indicates that no amount was included in the evaluation of any offer for relocation of telephone instruments and FTS lines since these costs will apply equally to all locations. Also, $0.0033 was included in the present value analysis of Cook's offer but not NFI's to cover the cost of relocating the telephone service. While $0.32 was added to the analysis of NFI's offer a different amount, $0.2469, was added to the analysis of Cook's offer to cover a monthly telephone line usage charge that varies because the proposed building and the existing building are located in different states. NFI has not challenged any of these amounts but does argue that the cost of relocation of the telephones and lines should be added to any offer which proposes a new location. The record shows that in the case of either moving to a new location or renovating the present location, most of the phones will have to be moved and new lines installed. Since, according to the agency, the charges for moving the phones are not dependent on distance, we do not believe that the decision to treat both proposals the same as far as these items are concerned was unreasonable.

Next, GSA reports that it did not include PCS costs in the evaluation of Cook's offer because FDA will not authorize payment of these costs to its employees. Moreover, although GSA regulations allow the payment of such costs when the one-way commuting distance from the employee's old residence to the new duty station is at least 10 miles or greater, and in this case NFI argues that the new building will be 15 miles away from the current location, GSA explains that it does not pay relocation costs incident to a change of duty station within a metropolitan area. We have no basis to disagree with this decision.

Further, although NFI argues that GSA should have included in the evaluation of Cook's offer the cost of disruption of FDA operations resulting from the move, the protester cites no specific authority that requires consideration of such costs. Moreover, NFI provided no more than its own speculation as to the cost of disruption from the move and, as GSA points out, some disruption also would result from a lease with NFI since the office space in the protester's building will have to be expanded from approximately 28,000 square feet to 42,000 square feet to meet the new contract requirements.

GSA also explains that it did not include in the evaluation of Cook's offer the cost of restoring NFI's currently leased building to its previous condition because such cost is speculative and because, in the agency's view, there will be

no such costs here since the building was leased as a laboratory and is being returned as one. Although NFI argues that GSA will have to pay for restoring its building, we have no basis to disagree with GSA's decision not to include these costs.

With respect to utilities, a solicitation amendment, issued after initial proposals were submitted, stated:

> "OFFERORS ARE REQUESTED TO RE-SUBMIT THEIR OFFERS DELETING ALL UTILITY COSTS. THE GOVERNMENT IS NOT SOLICITING NOR WILL IT ACCEPT FULLY SERVICED OFFERS WHICH INCLUDE UTILITY COSTS AS A PART OF OPERATING EXPENSES AS WE ARE NOT IN A POSITION TO EVALUATE THEM EQUITABLY. GOVERNMENT SHALL PAY ALL UTILITIES."

Thus, under the terms of the solicitation, GSA could not accept NFI's offer to assume utility costs and NFI's argument that GSA should have allowed offers that included utilities is untimely. In this respect, under our Regulations, alleged improprieties which do not exist in the solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1). Here, since the amendment instructed offerors that proposals including utility costs would not be considered, and NFI did not protest this matter until after award, this issue is untimely and will not be considered. Hollingsead Int'l, B-227853, Oct. 19, 1987, 87-2 CPD ¶ 372.

With respect to NFI's contention that $5.00 per square foot used to evaluate utilities for all offers was too high a rate to apply to its offer, here again NFI submitted no evidence that utilities would cost significantly less for its building as a result of its location. Moreover, even accepting NFI's contention that utilities for its building should have been evaluated at 5 percent less than Cook's, NFI does not contend that this difference in utility costs would have resulted in a lower evaluated price for its offer than for Cook's.

NFI also argues that Cook will charge for parking since its proposal did not agree to provide parking free of charge. On the contrary, although Cook did not check the blank space on its offer form to indicate there would be no charge for parking, in the next blank, where offerors were to show the amount to be charged for parking, Cook entered "N/A" indicating there would no charge for parking.

Although NFI argues that Cook's BAFO failed to agree to raise and lower the flag as required by the solicitation, GSA explains that during negotiations Cook agreed to display the flag as required but because of a clerical error neglected to reflect that agreement in its BAFO and since flag display was not a material requirement it was waived by the agency. We have no basis to disagree with the agency on this matter. Moreover, again NFI has submitted no evidence to support its assertion that raising and lowering the flag will cost the government an additional $0.10 per square foot per year, or $4,200 per year over the life of the contract. We just do not believe that this matter could possibly have impacted the ranking of the offers.

In sum, while the protester has questioned just about every aspect of the agency's cost evaluation, there is nothing in the record which in our view shows that the evaluation did not have a reasonable basis or was inconsistent with the solicitation's evaluation criteria. Sixth and Virginia Properties, B-220584, supra.

NFI's raises numerous other arguments which we find lacking in merit or untimely. For instance, NFI argues that GSA failed to conduct a market survey of its building. Since the FDA laboratory is currently located in NFI's building, GSA was aware of it and, as NFI acknowledges, the purpose of the survey was to identify buildings to be solicited. Under the circumstances, we fail to see how NFI was prejudiced by GSA's failure to survey its building.

NFI also argues that GSA violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., (1982), since the agency failed to prepare an environmental impact statement. In response, GSA explains that it complied with applicable statutes and regulations by preparing an environmental assessment which resulted in a finding of no significant impact. Nonetheless, NFI further argues that under NEPA, the environmental assessment was required to include comments from federal, state and local officials. While we appreciate the protester's stated concern for compliance with the NEPA, it is not our function to enforce environmental legislation through our bid protest process. Allied Precious Metals Recycling Co.--Reconsideration, B-227126.2, June 18, 1987, 87-1 CPD ¶ 611.

NFI also argues that by failing to promptly notify unsuccessful offerors of the contract award, GSA sought to avoid the provisions of the Competition in Contracting Act (CICA) requiring a contracting agency to suspend contract performance if it receives notice of a protest within 10 days after contract award. 31 U.S.C. § 3553(d)(1) (1988). The

record indicates that GSA awarded the contract on January 26, 1990 and NFI was aware of the award 3 days later since, through its attorney, NFI filed a Freedom of Information Act request with GSA on January 29 for "information concerning the recent award." Under the circumstances, it is clear that the timing of the award notice had nothing to do with NFI's failure to protest in time to take advantage of the provisions of CICA for suspension of contract performance. In any event, since the protest is denied the protester has suffered no prejudice because of its failure to receive the stay.5/

Finally, NFI argues that the solicitation should have provided for evaluation of proposals as required by the Brooks Act for the award of contracts for architect and engineering (A&E) design services. As indicated earlier, the SFO provided that the lease would be awarded to the offeror whose proposal was most advantageous to the government, price and other factors considered, the SFO also stated that handicapped accessibility and use of renewable energy were among the "other factors" and that price would be considered of equal importance with technical considerations. There was no mention of an evaluation for A&E services and no provision for the submission and evaluation of qualification statements as required in a Brooks Act evaluation. See AAA Eng'g and Drafting, Inc. et al., 66 Comp. Gen. 436 (1987), 87-1 CPD ¶ 488. If NFI believed that the evaluation scheme set out in the solicitation was flawed, it was required to protest prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1). Since NFI did not do so, the issue is untimely and will not be considered.6/ NFI also contends

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5/ In its second protest filed on March 13 NFI also argued that GSA failed to safeguard bidding information since the agency "failed to provide a safe . . . to protect the information and as a result may have allowed the disclosure of such information." NFI provided no explanation of why it thought that any such information was disclosed. In any event, GSA reports that it kept all offers in a locked safe.

6/ NFI argues that these issues, and other untimely issues should be considered under the significant issue exception to our timeliness rules. 4 C.F.R. § 21.2 (b). We strictly construe the significant issue exception in order to avoid rendering our timeliness rules meaningless. The exception is limited to considering untimely protests only when we believe that the subject matter is of widespread importance or interest to the procurement community and involves a

(continued...)

that the solicitation included excessive requirements and did not provide a required preference for central business districts. These contentions also are untimely since these alleged defects also were apparent on the face of the solicitation and thus also should have been protested prior to the due date for receipt of proposals.

The protest is dismissed in part and denied in part.

Robert P. Murphy
for James F. Hinchman
General Counsel

6/(...continued)
matter that has not been considered on the merits in previous decisions. NASCO Aircraft Brake, Inc., B-237860, Mar. 26, 1990, 90-1 CPD ¶ 330. We fail to see how the issues raised here would be of widespread interest to the procurement community since those issues relate to the requirements and evaluation procedures of a single solicitation.