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Comptroller General
of the United States
Washington, D.C. 20548

# Decision

**Matter of:** 12th & L Streets Limited Partnership

**File:** B-247941.3

**Date:** October 9, 1992

Kenneth S. Kramer, Esq., and Catherine H. Winterburn, Esq., Fried, Frank, Harris, Shriver & Jacobson, for the protester.
Wallace A. Christenson, Esq., Ross, Dixon, & Masback, for 800 North Capitol Limited Partnership, an interested party.
Patricia S. Grady, Esq., General Services Administration, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

1. Where solicitation for leased office space contained a preference for space that is in full compliance with the Uniform Federal Accessibility Standards handicapped accessibility requirements for new construction, the low-priced proposal of less than fully compliant space in an existing building was properly rejected where offers were received for space in newly constructed, existing buildings that fully complied with the handicapped accessibility requirements.

2. Protester was not reasonably misled by discussions with an agency on a solicitation for leased space, notwithstanding that the protester alleges that the agency apprised it that a particular configuration of handicapped accessible restrooms would make it fully compliant with the solicitation's handicapped accessibility preference provisions, where this alleged advice was inconsistent with the solicitation evaluation provisions, which specifically set forth the criteria regarding handicapped accessible restrooms that would make a proposal fully compliant.

3. Agency determination that a lease price was reasonable will not be disturbed where it was based upon an independent appraisal, market survey, and present value analysis.

4. The General Accounting Office will not consider a protest concerning the nature and equality of discussions, where the protested discussions do not relate to the reasons the protester's offer was not rejected--for which it was accorded meaningful discussions--and the protester therefore

would not be prejudiced even if the alleged improper discussions had occurred.

5. Protester, which was properly rejected as offering only minimally compliant handicapped accessible space on a solicitation for leased space that accorded a preference for fully compliant handicapped accessible space, is not an interested party under the Bid Protest Regulations eligible to protest the acceptability of the awardee's proposal, which offered fully compliant space, where there was a third offeror which also offered fully compliant space, since the protester would not be in line for award even if its protest were sustained.

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**DECISION**

12th & L Streets Limited Partnership protests the award of a lease to 800 North Capitol Limited Partnership under solicitation for offers (SFO) No. 91-086, issued by the General Services Administration (GSA), for between 230,000 and 265,000 net usable square feet of office space.

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

On May 6, 1991, GSA issued this SFO to obtain leased office and related space in a designated part of Washington, D.C. The lease is to be for a 10-year period starting from the SFO anticipated lease occupancy date of June 1, 1992.

Paragraph 1.13 in the "Summary" section of the SFO specified that buildings "to be constructed must fully meet" the requirements of the Uniform Federal Accessibility Standards (UFAS), 41 C.F.R. subpart 101-19.6, App. A (1991), for new construction. Among the UFAS new construction handicapped accessibility requirements is the requirement that all public and common use toilet facilities in the offered space comply with the detailed UFAS requirements for toilet facilities. See UFAS § 4.1.2(10).

Paragraph 2.1 in the "Award Factors" section of the SFO, entitled "Award Factors: General," provided that a competitive range would be established and negotiations conducted with competitive range offerors. Paragraph 2.2 in the same section of the SFO, entitled "Handicapped," stated:

> "Existing buildings shall be considered for award on the following basis:
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> "All offers received in response to the request for 'best and final' offers [BAFO] will be initially evaluated to determine whether the offers fully meet the handicapped accessibility requirements for new construction of the [UFAS].

> "All technical requirements for handicapped accessibility in this solicitation are the same as those in section 4.1.2 accessible buildings, new construction, of UFAS. When clarification is required, UFAS shall be consulted. If any offers are received which fully meet handicapped requirements of new construction, then other offers which do not fully meet these requirements will not be considered."

This paragraph of the SFO went on to state that if no offers fully complied with the UFAS new construction requirements, "substantially compliant" offers to the UFAS new construction requirements would be preferred over less than substantially compliant offers. A substantially compliant offer was defined in this paragraph; under this definition, toilet facilities must be in full compliance with the UFAS new construction requirements.

This paragraph next provided that if no fully or substantially compliant offers were received, only offers which met certain minimum accessibility requirements set forth in the SFO would be considered unless the requirements were waived. These minimum requirements with respect to toilet facilities were stated, in pertinent part, as follows:[1]

> "Where more than one toilet room for each sex is provided on a floor on which the government leases space, at least one toilet room for each sex on that floor shall be accessible.
>
> "Where only one toilet room for each sex is provided on a floor on which the government leases space, either one unisex toilet room or one toilet room for each sex on that floor shall be accessible."

Paragraph 2.3 in the "Award Factors" section of the SFO, entitled "Other Factors," stated that price was the most important evaluation factor. Price was to be evaluated under a present value formula on the basis of the offeror's annual price per square foot, including any option periods. Award of the lease was to be made to the offeror that GSA determined to be most advantageous to the government, price and other factors considered.

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[1]The standards in the SFO defining minimal compliance with regard to toilet facilities are basically those applicable to alterations of existing buildings or facilities in UFAS § 4.16.

On September 30, 1991, GSA received six offers in response to the SFO. After conducting several rounds of discussions, GSA received BAFOs on December 20 from only three of the six offerors (12th & L, 800 North Capitol, and Franklin Court). GSA viewed these BAFOs as proposing space in existing buildings. 12th & L, the incumbent contractor, proposed to renovate its building, while both 800 North Capitol and Franklin Court proposed space in unoccupied, recently constructed buildings. GSA determined that both 800 North Capitol's and Franklin Court's BAFOs fully met UFAS requirements for new construction. GSA rejected 12th & L's BAFO, even though it offered the lowest price, because it did not meet the UFAS requirements for new construction. 800 North Capitol was selected for award because it submitted the lower-priced offer of the two fully handicapped compliant BAFOs.

12th & L's space did not fully comply with the UFAS new construction requirements because of its proposed toilet facilities. While the UFAS for new construction required each public and common use toilet room to be handicapped accessible, 12th & L's BAFO proposed a separate accessible facility for each sex on each floor in its building in addition to the existing non-accessible toilet facilities for each sex on each floor. This met the standard for minimum compliance with the handicapped accessibility requirements under the SFO terms set out above.

12th & L does not argue that its space was fully compliant with the UFAS new construction standards. Rather, it argues that rejection of its proposal was inappropriate because the SFO preference scheme was to be used only to differentiate among existing buildings, and was not, according to 12th & L, to be used to differentiate between existing buildings and buildings "to be constructed." In this regard, the protester asserts that GSA erred in determining that 800 North Capitol and Franklin Court had proposed existing buildings, since the buildings were newly constructed and their offered space had not been "built out" for tenant occupancy; 12th & L contends that the buildings should have been categorized as "to be constructed." Under 12th & L's reasoning, only 12th & L proposed an existing building, with the result that no preference in favor of the proposals in the other category should have been applied against 12th & L. Instead, the protester asserts that all three BAFOs should have been considered acceptable and that the award decision should have been based on price.

GSA responds that 12th & L has misinterpreted the SFO. GSA explains that the SFO contemplated offers of existing buildings, either old or new, as well as buildings to be constructed, and that, contrary to 12th & L's assertion, the SFO preference scheme was to be applied to all offers.

We think that the SFO language is less than clear on this issue. The placement of the words "if any offers are received which fully meet handicapped requirements of new construction . . . other offers which do not fully meet these requirements will not be considered" in the paragraph immediately after "[e]xisting buildings shall be considered for award on the following basis" can be read as establishing a preference for buildings fully meeting the new construction standards only with respect to other existing buildings. On the other hand, the literal meaning of the "if any offers" statement in this paragraph clearly encompasses all offers, not just offers of existing buildings, and this statement also can be read as meaning that any offered existing building will be subject to a preference for any offered building, whether or not existing, if that building meets the new construction requirements.

We need not resolve the issue, however, as we think the agency's evaluation was proper, even under the protester's interpretation of the preference statement. That is, we think the agency correctly viewed the awardee's building as an existing one rather than as one to be constructed. In this regard, it is not disputed that the 800 North Capitol building, while recently constructed, was structurally fully constructed;[2] only the internal layout, to be built out to suit tenant needs, was left undone. Since the basic structure, including facilities such as stairs, elevators, toilet facilities, and entrances, were all in place, we think it reasonable to regard the building as an existing one. That being so, GSA's application of the preference was consistent with the protester's interpretation of the SFO as the buildings of both the protester and the awardee were properly treated as within the existing building category.[3] Thus, 12th & L's minimally compliant proposal was properly rejected.

12th & L argues that the reason it proposed to satisfy the handicapped accessibility requirements as it did was because GSA failed to conduct meaningful discussions with it. 12th & L asserts that during discussions GSA misled it to believe that its proposed restroom solution to the handicapped accessibility requirements would put 12th & L in competition for the award.

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[2]The record contains a building condition report of 800 North Capitol documenting the completion of construction as well as a certificate of completion from the District of Columbia government for the core of the building.

[3]For the same reasons, it is apparent that Franklin Square offers space in an existing building.

In negotiated procurements, contracting officers generally are required to conduct meaningful discussions with all offerors whose proposals are within the competitive range. See Federal Acquisition Regulation (FAR) § 15.610. In order for discussions to be meaningful, agencies are required to point out weaknesses, excesses, or deficiencies in proposals, unless doing so would result in technical leveling or technical transfusion. Columbia Research Corp., B-247631, June 22, 1992, 92-1 CPD ¶ 539. There is no requirement that agencies conduct all-encompassing discussions; rather, agencies are only required to lead offerors into the areas of their proposals which require amplification or correction. Son's Quality Food Co., B-244528.2, Nov. 4, 1991, 91-2 CPD ¶ 424. An agency, however, may not mislead an offeror during discussions into responding in a manner that does not address the agency's concerns. Id.

As discussed above, in 12th & L's building, there was one toilet facility for each sex on each floor; these toilet facilities did not meet the UFAS handicapped accessibility standards. In its initial offer, 12th & L proposed to meet the SFO minimum handicapped accessibility requirements by offering to install one unisex handicapped restroom facility on each floor. The record reflects that, prior to calling for BAFOs, GSA conducted oral discussions with 12th & L on October 17, November 8, and December 6, where, among other things, the issue of handicapped accessibility was discussed. After these discussions, 12th & L offered one handicapped accessible toilet facility on each floor for each sex in addition to the existing non-handicapped accessible facilities;[4] under the SFO, this would be minimally compliant with the handicapped accessibility requirements.

12th & L maintains that GSA affirmatively misled it to believe that providing two handicapped restrooms on each floor would make it "fully compliant" with the SFO's handicapped accessibility requirements and competitive for the award. In this regard, 12th & L asserts that GSA, during the discussions in the middle of November and on December 6, specifically directed it to make the change from one separate unisex handicapped accessible toilet facility to separate facilities for each sex in order to bring its space into full compliance. 12th & L states that it was misled because GSA failed to point out that this solution was insufficient to put it in line for award.[5]

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[4]This offer was first made in 12th & L's December 16 submission. BAFOs were submitted on December 20.

[5]12th & L also notes that its December 16 proposal of this solution contained a specific request that GSA advise

(continued...)

GSA specifically denies that 12th & L was ever reasonably led to believe that the provision of two handicapped restrooms per floor would be sufficient to make 12th & L fully compliant with the handicapped accessibility requirements or put it in line for award.

The record does not conclusively show exactly what 12th & L was told during discussions. The detailed GSA notes do not show that GSA advised 12th & L to provide two remote handicapped accessible toilet facilities per floor instead of one, but do confirm that handicapped toilet facilities were a subject of repeated discussions. It is not clear why 12th & L would change its proposal from one solution that was only minimally compliant with the handicapped accessibility requirements to a more expensive solution that was still only minimally compliant. 12th & L apparently has no contemporary notes of the discussions. It has submitted an affidavit of its principal negotiator in support of its contentions while GSA has submitted a statement from the contracting officer and the contemporaneous notes of the discussions.

Even assuming that GSA did advise 12th & L that its two handicapped-accessible restroom solution would make it fully compliant, we find that 12th & L's reliance on such advice was misplaced and unreasonable. See generally Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16 (a protester was not reasonably misled during discussions where the protester's interpretation of the discussions was unreasonable); Capstone Corp., B-247902, July 9, 1992, 92-2 CPD ¶ 12 (protester was not reasonably misled by discussions based on agency characterization of proposal as acceptable, which the protester unreasonably interpreted to mean that the award would be based on cost); cf. Lucas Place Ltd., supra (evidence established that protester of a lease award was affirmatively misled during discussions on a matter that was not covered by the SFO terms). This is so because, as discussed above, the SFO clearly defined what constituted a fully compliant offer entitled to the requisite preference and what constituted a minimally compliant offer with regard to toilet facilities, and the alleged GSA advice would constitute a material deviation from the SFO evaluation criteria.

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[5](...continued)
12th & L of any remaining deficiencies in 12th & L's proposal before it submitted its BAFO on December 20. 12th & L apparently claims this statement put the burden on GSA to promptly apprise it if its space was not fully compliant.

12th & L is essentially asserting that GSA had a duty to advise 12th & L that it had to propose fully compliant toilet facilities and space in order to be in line for award because GSA knew that offers had been received for other space that fully complied with the handicapped accessibility requirements and these offers, under GSA's interpretation of the SFO, would therefore be entitled to the evaluation preference.[6] However, GSA was not required to advise 12th & L that it was in competition with fully compliant offerors, who would receive the requisite handicapped accessibility preference even if 12th & L's price were lowest, since this would be tantamount to disclosing the nature and relative ranking of the other offers. See Education Dev. Center, Inc., B-224205, Jan. 30, 1987, 87-1 CPD ¶ 99 (agency not required to advise an offeror that the technical scores were so close that price could be the determining award factor, since this related to the relative ranking of the offerors); see also Development Alternatives, Inc., B-235663, Sept. 29, 1989, 89-2 CPD ¶ 296 (agency conducted meaningful discussions when it imparted to the offeror enough information about areas of concern in a proposal but avoided "coaching" the offeror to a particular approach that it did not propose).

In sum, we find that GSA conducted meaningful discussions with 12th & L concerning its relative compliance with the handicapped accessibility requirements, and that those discussions were not misleading. 12th & L's minimally compliant proposal was properly rejected in the face of fully compliant proposals under an SFO, which accorded a preference for full compliance.

12th & L protests that GSA did not determine whether the award to 800 North Capitol was at a reasonable price. A determination concerning the reasonableness of price is a matter of administrative discretion involving the exercise of business judgment which we will not question unless the determination is unreasonable or there is a showing of bad faith or fraud. Leslie Bldg. Assocs., B-229815, Apr. 19, 1988, 88-1 CPD ¶ 381. Here, the record indicates that GSA determined that 800 North Capitol's price was reasonable, after an independent appraisal, market survey, and present value analysis that showed that the price was fair and reasonable. As documented in its price negotiation memorandum, GSA determined that the proposal from 800 North

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[6]12th & L's proposal of minimally compliant space may have been based on its unreasonable reading of the SFO that the evaluation preference would not be applied in comparing its space to space in newly constructed buildings and a belief that only newly constructed buildings would be offered by its competitors.

Capitol was fully responsive, was priced at 80 percent of the appraised value, and represented the most advantageous price and terms available to satisfy the government's requirements. Under the circumstances, we will not disturb GSA's price reasonableness determination. Id.

12th & L also raises numerous grounds of protest regarding the nature and equality of discussions with the offerors on matters not related to handicapped accessibility, and that "post-BAFO" discussions were conducted with it and presumably with the other offerors.[7] However, since 12th & L offered space that is only minimally compliant with the applicable handicapped accessibility requirements, despite being accorded meaningful discussions on this point, 12th & L could have suffered no prejudice, even assuming the protested discussions had either occurred or been in some way improper, since 12th & L was not in line for award under the SFO evaluation criteria in light of the fully compliant space offered by its competitors which offered space in existing buildings. Consequently, we will not consider 12th & L's protest grounds concerning these discussions. See Data Resources, B-228494, Feb. 1, 1988, 88-1 CPD ¶ 194.

12th & L finally protests the acceptability of 800 North Capitol's proposal, specifically with regard to its compliance with the fire, safety, and occupancy date requirements. Under our Bid Protest Regulations a party is not interested to maintain a protest if it would not be in line for award if the protest were sustained. 4 C.F.R. §§ 21.0(a), 21.1(a) (1992); Atrium Bldg. Partnership, 67 Comp. Gen. 93 (1987), 87-2 CPD ¶ 491. Since GSA properly rejected 12th & L's offer as only minimally compliant with the handicapped accessibility requirements and since there is a third offeror (Franklin Court) that also submitted a fully compliant, acceptable proposal, 12th & L does not have the requisite interest to maintain its protest of 800 North Capitol's acceptability, since 12th & L would not be in line for award even if this protest ground were sustained. Id.

The protest is denied in part and dismissed in part.

for James F. Hinchman
General Counsel

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[7]The alleged post-BAFO discussions occurred after 800 North Capitol was selected for award.