



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

## Decision

**Matter of:** LHL Realty Company--Protest and Request for Reconsideration

**File:** B-249073.2; B-249073.3; B-249073.5;  
B-249073.6

**Date:** November 23, 1992

Richard J. Conway, Esq., and William M. Rosen, Esq., Dickstein, Shapiro & Morin, for the protester. Gary F. Davis, Esq., Patricia S. Grady, Esq., and Jeffrey M. Hysen, Esq., General Services Administration, for the agency. Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Under Bid Protest Regulations, 4 C.F.R. § 21.3(j) (1992), comments must be related to the protest issues addressed in the agency's report; submission that only raises new protest grounds based on the information in the report, but does not report on original protest issues, does not constitute comments, and thus there is no basis for reconsidering dismissal of original protest for failure to file comments.
2. Protest that contracting agency was predisposed to reject protester's offer of incumbent building is denied where record shows protester's proposed space required major renovations to meet the minimum requirements of the solicitation and protester's proposed renovation plan was reasonably determined to be too disruptive to the tenant agencies and incapable of meeting the solicitation occupancy date.

### DECISION

LHL Realty Company, owner of the Patrick Henry Building located at 601 D Street, N.W., Washington, D.C., protests the rejection of its proposal under solicitation for offers (SFO) No. 92-030, issued by the General Services Administration (GSA) for a minimum of 208,200 to a maximum of 218,600 net usable square feet of office space to house offices of the Department of Justice (DOJ). DOJ currently occupies 218,600 net usable square feet in the Patrick Henry

Building under a lease between GSA and LHL, LHL contends that the government predetermined that the Patrick Henry Building would not be the awardee and engaged in disparate treatment of offerors. LHL also requests that we reconsider our previous dismissal of several protest issues.

We deny the protest and the request for reconsideration.

The solicitation provided for a lease term of 10 years with occupancy to commence October 21, 1993, and designated a specific area of consideration in downtown Washington, D.C. Award was to be made, after offers were evaluated, basically to the low-cost offeror meeting SFO requirements, including those for handicapped accessibility of the building.

By letter dated December 20, 1991, LHL proposed the Patrick Henry Building, which is located within the delineated area. At a meeting held on February 27, 1992, the contracting officer informed the protester that its facility did not meet the standards set forth in the solicitation. LHL was informed that a building evaluation report indicated numerous deficiencies in the Patrick Henry Building which included major problems with respect to the architectural structure, handicapped accessibility, heating and air conditioning, plumbing, fire safety, elevators and stairwells. LHL stated it was willing to correct these deficiencies in order to comply with the SFO requirements; LHL was then requested to provide a schedule for completing the work.

By letter dated March 5, the contracting officer notified LHL of outstanding issues concerning its ability to meet the requirements of the SFO. These issues related to the following: (1) handicapped accessibility; (2) building improvement construction schedule; and (3) receipt of updated floor plans. GSA stated it was concerned about the amount and duration of possible disruptions which would likely occur when LHL corrected "the extensive list of deficiencies." GSA requested LHL to provide specific information on whether such renovations would require swing space.

Also, on March 30, the contracting officer advised LHL that a recent fire protection survey of the Patrick Henry Building identified a number of building fire deficiencies requiring correction and provided LHL with a list of all deficiencies. This list included automatic sprinklers for certain areas, emergency operation features for elevators, and a new fire alarm system with a secondary power supply. LHL was requested to provide a response on whether or not these deficiencies would be corrected and to provide a comprehensive schedule for their correction by April 10. LHL furnished a proposed renovation schedule.

On April 2, the contracting officer was notified by the GSA Real Estate Division's Alterations Branch that the Patrick Henry Building renovation schedule had been reviewed and found unacceptable. Due to the number of major tasks including replacement of chillers, cooling towers, heating/air conditioning units and ductwork and restroom modifications, GSA was doubtful that the renovations could be completed within the 18 month timeframe proposed by LHL without causing a major disruption to the building tenants. GSA also determined that all work would have to be scheduled for evenings and weekends to avoid tenant disruption and would take between 24 to 30 months to accomplish, which would go well beyond the October 1993 occupancy date.

At a meeting between GSA and LHL on the same day, LHL was advised that the government was dissatisfied with the current level of lease performance and that the government would require concrete evidence that a number of long-standing lease administration problems would be corrected under any new lease. GSA also related its concerns with the renovation schedule. LHL was asked to clarify all of the tasks that would be performed and to provide another schedule. The contracting officer stated that once LHL had revised its schedule, a meeting would be held with not only DOJ, but the other major occupant of the building, the United States Information Agency (USIA), to determine the impact on their operations. During this meeting, LHL advised GSA that if swing space was needed, LHL could not provide it in the delineated downtown area but could provide it in the Van Buren Building in Arlington, Virginia.

By letter dated April 6, LHL advised the contracting officer that LHL would correct all fire safety deficiencies by October 1, 1993, and provided a revised renovation schedule.

On April 10, a meeting was held with LHL and representatives of USIA and DOJ to discuss LHL's proposal for accomplishing required renovations in the Patrick Henry Building. LHL's proposal included the phased renovations of floors and would require moving occupants from the building, two floors at a time, to proposed swing space in the Van Buren Building in Arlington, Virginia. LHL stated that all of the DOJ space renovation work would be completed in 30 weeks and that the USIA space would be completed in an additional 20 weeks for a total of approximately 1 year. LHL also provided information on how work would be accomplished with respect to elevators, air conditioning, electricity, and architectural features.

DOJ's response to LHL's proposal was that swing space in Arlington was unacceptable since all four DOJ components currently in the Patrick Henry Building require close proximity to the Main Justice Building, which is four blocks

from the present location. DOJ stated that any swing space would be unacceptable since it would require two moves that would be unduly disruptive to agency operations and would create problems with respect to the security of records maintained by DOJ's Civil Division. DOJ further stated that LHL's description of the renovation work and their proposal for accomplishing the work during the day was too lengthy, too massive, too noisy and too disruptive to their operations. DOJ also stated that the work could not be performed during evening hours, since their space was secured and only those personnel with a "need to know" clearance could enter the premises.

On April 24, GSA asked LHL to provide alternatives to performing renovations that would meet DOJ requirements. GSA was informed by LHL that it was having difficulty in being able to provide a schedule to perform work that would not conflict with DOJ's ability to function without disruption.

On May 1, a letter was sent to all offerors, including LHL, requesting preliminary best and final offers (BAFO) and requiring clarification of certain items. GSA requested a comprehensive schedule for the renovations which was realistic and met DOJ's unique requirements. In response, by letter dated May 5, LHL advised GSA that it would retain several guards to supervise and control workers during renovation at the DOJ premises and would schedule all construction work after office hours so as not to interfere with the functioning of the office. LHL stated that it would use great care to minimize dirt, dust or debris resulting from construction work and would coordinate work with all tenant agencies. According to the agency, LHL did not provide an acceptable construction schedule, did not state that it could meet the security clearance level required by DOJ, and did not mention swing space.

On May 8, GSA notified LHL that the building contained numerous deficiencies which would have to be corrected to meet the SFO minimum requirements and would require major renovations. GSA also found that these renovations would be disruptive to DOJ operations and numerous visitors during normal business hours and that renovations could not be performed after normal business hours due to DOJ's security requirements. LHL was further notified that if LHL was unable to offer any alternate proposals for performing the work other than those previously provided, its offer would no longer be considered for award. The May 8 letter also included Amendment No. 2 which provided the following:

"Any offered location requiring renovations in order to meet the minimum requirements of the Solicitation For Offers must provide evidence,

acceptable to the contracting officer, that said renovations will not result in a disruption to any present GSA tenants that would jeopardize the agency's ability to successfully complete its mission. Renovations requiring temporary relocation of any GSA tenants to swing space are unacceptable."

On May 22, a request for BAFOs was sent to all offerors except LHL. On May 26, LHL submitted a protest to the contracting officer and argued that the contracting officer unlawfully denied LHL an opportunity to correct deficiencies in its proposal and that Amendment No. 2 was unduly restrictive. On June 11, GSA denied LHL's agency-level protest.

By letter dated June 16 (docketed as B-249073), LHL protested to our Office reasserting its grounds raised in its agency-level protest. Additionally, LHL argued that the contracting officer's reasons for eliminating LHL were improper and that GSA unlawfully delegated its procurement authority to DOJ. GSA responded to the protest in a report filed on July 23. On August 5, LHL filed a letter in our Office entitled "Amended Protest . . ." setting forth two new protest grounds based upon LHL's review of the agency report. While LHL asserted that these new protest issues were separate and distinct from its initial protest, LHL requested that we consolidate this letter with its protest of June 16. We docketed this letter as a new protest (B-249073.2) and requested an agency report responding to it.

On August 10, GSA requested dismissal of LHL's initial protest for failure to timely file comments. We subsequently dismissed the June 16 protest on the ground that the firm had failed to timely file either comments responding to the agency report or a statement requesting that the matter be decided based upon the existing record as required by our Bid Protest Regulations, 4 C.F.R. § 21.3(j) (1992). On September 11, the agency responded to the new allegations and on September 25, LHL filed a letter commenting on the issues addressed in this second report.

#### RECONSIDERATION

LHL requests reconsideration of our decision dismissing the June 16 protest. LHL believes that although it specifically stated in its amended protest that the allegations raised were distinct from the allegations previously raised, its request that its amended protest be consolidated with the first protest "to permit these protests to be developed properly" showed its continued interest in the initial protest and fulfilled its obligation to establish that it had no intention of abandoning its initial protest.

When a protester makes a submission in response to the agency report and fails to address issues raised in the protest and responded to in the report, we consider these issues abandoned; where a protester's submissions fail to refer in any way to the issues originally raised and the agency's response, they do not constitute comments on the agency report. See Birch & Davis Assocs., Inc.--Protest and Recon., B-246120.4 et al., Apr. 20, 1992, 92-1 CPD ¶ 372. Since LHL's August 5 filing exclusively discussed new arguments based on the information released in the agency's report, and did not address the agency report with respect to its original basis for protest, the submission could not reasonably be considered to be either comments on the report or a request for resolution of the initial issues raised based on the existing record. LHL's request that the protests be consolidated and developed together notwithstanding, LHL did not respond in any way to the agency's position as set forth in the report. As stated above, under such circumstances, we consider protesters to have abandoned the issues to which they did not respond.

LHL argues that because it had a hearing request pending, it should have been allowed some additional time to file comments. Our Bid Protest Regulations provide that if a hearing is held, no separate comments are required. See 4 C.F.R. § 21.5(h). LHL's request for a hearing was never granted and in accordance with our regulations LHL's comments on the agency report were due in our Office on August 6. In fact, 3 days prior to LHL's comment due date, LHL was specifically advised that notwithstanding the filing of a new protest, our Office was expecting comments on August 6. There thus is no basis for reconsidering the dismissal.

#### PROTESTER'S CONTENTIONS

LHL raised two new protest issues in its August 5 amended protest, which we consider below.

#### Predetermination not to award to the Patrick Henry Building

LHL contends that the government had predetermined that the Patrick Henry tenants would move to a different building. In support of this argument LHL references certain documents contained in the agency report. LHL specifically references a document entitled "Minutes of Weekly Progress Meeting-Patrick Henry Lease" dated March 20, 1992, in which GSA explained that there were no plans to extend the current lease at the Patrick Henry Building. LHL also maintains that its position is further supported by a DOJ status report dated April 23 which referred to the "Patrick Henry Lease Expiration Project" as the "Patrick Henry Replacement Project" and a letter dated April 28 in which a DOJ official

stated that "we are confident that GSA will select a suitable new facility for the replacement of the Patrick Henry Building when the lease for that building expires."

There is no evidence in the record to show that GSA acted intentionally to preclude LHL from competing for or receiving the award. On the contrary, the record establishes that the GSA gave LHL a reasonable opportunity to submit an acceptable proposal and had a reasonable basis for rejecting LHL's proposal. As stated above, the Patrick Henry Building was considered unacceptable because major renovation work was required and the renovation plan and construction schedule proposed by LHL would have disrupted the normal daily operations of the tenants, particularly DOJ. LHL also was unable to provide the level of security required by DOJ and could only offer swing space that was unacceptable.

With respect to the government's intention not to extend the protester's current lease, the record shows that GSA's schedule was based on completing negotiations for a facility that met the requirement of the SFO without having to request a short term extension of the current lease because of a delayed procurement. There is no evidence of an intention not to award a new lease for the Patrick Henry Building, if the building owner could meet the SFO requirements timely and with minimal disruption to tenants.

While the record reflects DOJ's preference not to remain tenant in the Patrick Henry Building, there is nothing in the record which shows that GSA in its evaluation of LHL's offer considered anything other than the legitimate concerns of DOJ concerning the effect the building renovations would have on DOJ's daily operations. The protester was given repeated opportunities to submit a proposal that would meet the SFO requirements without severely disrupting DOJ's daily operations. LHL simply failed to do so.

#### Disparate Treatment of Offerors

LHL argues that the government unlawfully engaged in disparate treatment of offerors in a manner that prejudiced LHL. In support of this argument LHL relies on several documents contained in the agency report. Specifically, LHL cites an internal GSA memorandum dated June 2, which recognized that renovations were performed at a building in which the tenant was the Secret Service while the Secret Service occupied the building. LHL argues that, notwithstanding the fact that this memorandum expressly

recognized that building renovations are performed where the government occupants "have special security requirements and 24-hour a day operations," the GSA rejected LHL's renovation plans because the DOJ's Civil Division was concerned with "security of its files."

We do not find the fact that another building managed by GSA has undergone renovation while a government tenant occupied the building is evidence of disparate treatment of offerors with respect to this procurement.<sup>1</sup> First, the building referenced by LHL is not being offered under this SFO and DOJ was not a tenant of that building. We have no way of knowing from this record whether the Secret Service operation in that building had the same concerns for security and disruption of daily operations as DOJ had in this procurement. Moreover, although LHL implies that the Secret Service should be more concerned about security than DOJ, LHL does not argue that DOJ's concerns were not legitimate. Second, there is no evidence in the record demonstrating that offerors on this procurement were evaluated on different standards. Rather, by amendment No. 2, the disruption of the daily operations of DOJ or any other GSA tenant became a factor for selection of any offered building.

As another example of disparate treatment, LHL maintains that the Bicentennial Building, an offered facility, is currently occupied by government tenants and has been allowed to be renovated so that it can compete under this solicitation.

As stated above, under Amendment No. 2, any offeror whose building required renovations to meet the minimum requirements of the SFO was to provide evidence that the renovations would not result in any serious disruption to any present GSA tenants. DOJ is not a tenant in the Bicentennial Building and there is no showing that the current tenants have the same security or operational concerns as DOJ. Also, it is not clear that the Bicentennial Building renovations are similar in magnitude to those in the Patrick Henry Building. Most significantly, the Bicentennial Building renovation schedule provides that it will be able to meet the October 1993 occupancy date because its current tenants will have vacated the premises by the spring of 1993, thereby permitting completion of renovations in a timely fashion with no disruption to


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<sup>1</sup>The record shows that while the Secret Service occupied this building in which a sprinkler/fire alarm system was being installed, the contractor had not finished the work after 2 years.



tenants' daily operation. LHL's proposal was rejected because its building could not meet SFO requirements without serious disruption of its tenants. We see no disparity of treatment here.

The protest and request for reconsideration are denied.<sup>2</sup>

  
for James F. Hinchman  
General Counsel

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<sup>2</sup>On September 25, LHL filed an amended protest with our Office (docketed as B-249073.4) arguing that the agency improperly selected an awardee without properly documenting its selection decision. We dismissed this protest on September 30, because it merely anticipated improper action that had not yet taken place. The record showed that no evaluation of BAFOS and no award selection had occurred. By letters dated October 9 (B-249073.5) and October 13 (B-249073.6), LHL seeks reconsideration of our September 30 dismissal. GSA advises that no awardee has been selected. In any event, since we have concluded that LHL was properly found technically unacceptable, LHL is not an interested party to challenge the ultimate award since LHL would not be in line for award if its protest were sustained. See Dick Young Prods. Ltd., B-246837, Apr. 1, 1992, 92-1 CPD ¶ 336.