

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

Decision

Matter of: Tomasz/Shidler Investment Corporation
File: B-250855; B-250855.2
Date: February 23, 1993

James A. Noone, Esq., Karalekas & McCahill, for the protester.
Barry D. Segal, Esq., General Services Administration, for the agency.
Christine F. Bednarz, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Neither protester's alleged oral complaints to the agency, nor notations accompanying its initial proposal identifying noncompliance with the specifications, suffice to constitute a timely agency-level protest of solicitation provisions.
2. Agency has properly justified the requirement included in a solicitation for leased space that offerors submit evidence of a conditional loan commitment in an amount sufficient for the offeror to prepare the leased premises for occupancy; such information was reasonably necessary to ensure award only to a firm that had the financial tools to satisfy the solicitation requirements.

DECISION

Tomasz/Shidler Investment Corporation (Shidler) protests various terms in solicitation for offers (SFO) No. GS-05B-15525, issued by the General Services Administration (GSA), for the acquisition of leased office space for the Nuclear Regulatory Commission (NRC) in the Chicago, Illinois area.

We dismiss the protests in part and deny them in part.

The protester manages and operates the Roosevelt Glen Corporate Center in the western suburbs of Chicago, where NRC has been a tenant since 1978. NRC currently occupies approximately 45,000 square feet of space in this facility, including basement-level space.

The SFO, as issued on February 18, 1992, requests proposals for a 10-year lease following the expiration of NRC's lease with the protester. The SFO calls for a minimum of 63,050 square feet and a maximum of 66,367 square feet of office space, which represents an expansion of some 20,000 square feet beyond the space that NRC now occupies at the protester's facility. The SFO also requires that the space be located at ground floor or above, also a departure from the basement-level space currently in use by NRC at the protester's facility. The SFO does not include a floor plan or design drawings, but provides that GSA shall deliver such drawings to the lessor within 30 to 60 days after award or after receipt of the lessor's proposed floor plans, whichever is later. The SFO provides for a present value price evaluation, based upon the gross annual price per square foot, a figure achieved by dividing the total annual rental by the total square footage, and by factoring in other expenses, such as operating costs.

The SFO, as issued, advised that offers were due on April 1, 1992, and were to remain open until September 1, 1992. Occupancy was required 4 months after the expiration of offers on January 1, 1993, at which time the offeror was to furnish 100 percent of the leased space. Shidler submitted an offer to lease its Roosevelt Glen Corporate Center, NRC's current quarters, by the April 1, 1992, proposal receipt date.

GSA issued two solicitation amendments, on July 10 and August 24, both of which made several changes to the SFO. Of relevance to this protest, amendment No. 1 changed the required occupancy date from January 1, 1993, to 120 days from the date of award or receipt of design drawings from GSA, whichever is later. Amendment No. 2 added a provision requiring evidence of the offeror's capability to perform, including pre-award evidence of a conditional bank loan in an amount sufficient to prepare the premises.

On October 9, 1992, Shidler protested various solicitation provisions to our Office, including the amended occupancy date and the requirement to deliver 100 percent of the space at that time; certain SFO space requirements, such as the total amount of space specified, the proscription on basement level space and an alleged requirement for 100 percent new interior space; GSA's exclusion of agency moving costs from the SFO's price evaluation formula; and the amended responsibility requirement that sought from offerors pre-award evidence of a conditional loan commitment. In a supplemental protest filed on October 22, 1992, Shidler made further arguments in support of its initial protest and also claimed that the SFO's price evaluation methodology did not

realistically project real estate tax expenses.¹ After filing these protests, Shidler submitted a best and final offer (BAFO) to GSA by the November 3, 1992, proposal receipt date.

Most of Shidler's protest issues are untimely, since they address provisions contained in the unamended SFO. Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation apparent prior to the time set for receipt of initial proposals must be filed, either with the contracting agency or our Office, prior to this proposal receipt date. 4 C.F.R. §§ 21.2(a)(1), (a)(3) (1992). The provisions contained in the unamended SFO include GSA's total space requirements, the prohibition of basement-level space, the SFO layout requirements, the requirement for delivery of 100 percent of the space at the time of occupancy, and the agency's price evaluation formula as applied to the consideration of moving costs and real estate tax expenses. None of these provisions is ambiguous insofar as Shidler's protest is concerned;² Shidler only objects to their inclusion in the SFO. Shidler's failure to protest these provisions until October 9 and October 22, 1992, well after the April 1 receipt date for initial proposals, renders its protest of these provisions untimely. Id.; Wheeler Bros., Inc., B-242061.2, Apr. 19, 1991, 91-1 CPD ¶ 387, aff'd, B-242061.3, June 7, 1991, 91-1 CPD ¶ 546; Englehard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324.

Shidler disagrees that these protest issues are untimely. In particular, Shidler argues that it timely protested the SFO space requirements through telephone calls to GSA before the proposal receipt date and through notations on the face of its initial proposal. GSA denies that it received any oral complaints from the protester objecting to any SFO provision. In any case, any oral complaints to the agency do not constitute a protest under the Federal Acquisition Regulation (FAR), which imposes a requirement for written protests, FAR § 33.101, to preclude exactly the sort of

¹Shidler's supplemental protest also included a contention that the other competitive range offerors did not comply with the SFO's geographic restrictions. As GSA correctly argued in its agency report, this protest ground is premature since the agency had not yet made any award decision. General Elec. Canada, Inc., B-230584, June 1, 1988, 88-1 CPD ¶ 512. Shidler appears to have abandoned these contentions at this time by failing to respond to the agency's explanation. See Precision Echo, Inc., B-232532, Jan. 10, 1989, 89-1 CPD ¶ 22.

²For example, the SFO does not list moving costs as part of the price evaluation.

controversy that now exists regarding the nature and timing of the issues protested. See Mantech Tech. Serv. Corp.--Recon., B-244240.5, Dec. 6, 1991, 91-2 CPD ¶ 517.

The notes accompanying Shidler's initial proposal also do not constitute an agency-level protest of the SFO requirement. Such a protest filed together with a proposal is untimely since the contracting agency has no obligation to review proposals until after the closing date. John Cuneo, Inc.--Recon., B-227983.2, Aug. 10, 1987, 87-2 CPD ¶ 147. In any event, the notes accompanying the protester's proposal merely identify where the proposal contradicts the specifications, e.g., "[a] fully finished basement space is included in our offer." This is insufficient to convey an intent to protest, which requires an expression of dissatisfaction with the solicitation provisions and a request for corrective action. See ILC Dover, Inc., B-244389, Aug. 22, 1991, 91-2 CPD ¶ 188.

The protester argues that its complaints regarding the alleged overstatement of the SFO's total space requirement and restrictiveness of the basement-level space proscription are timely because they are based, in part, on an NRC Environmental Assessment report that Shidler only received on October 8. The record, however, does not support the assertion that Shidler required the Environmental Assessment report to dispute the SFO's total space requirements or basement-level space proscription since Shidler obviously disagreed with these provisions from the outset. See Atlantic Sys. Research & Eng'g Int'l, Inc., B-239744, June 7, 1990, 90-1 CPD ¶ 537. Shidler was prepared to offer the building currently occupied by NRC, knew that it did not comply with the SFO's above-level space requirement and total space requirement, and questioned the alleged restrictiveness of these specifications on basically the same grounds during discussions with the agency and in letters to congressional representatives before it received the Environmental Assessment report.

Shidler also claims that it needed information in the Environmental Assessment report, identifying the other buildings under consideration by GSA for the NRC lease, to establish its protest basis against the SFO's price evaluation methodology. Shidler believes that these buildings are of recent construction and could be subject to significant increases in real estate tax assessments. According to Shidler, this information was necessary to appreciate that the SFO's method for calculating operating expenses may not

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realistically account for significant increases in real estate tax assessments.³

The identification of the other buildings under consideration for this lease adds nothing to the provision for calculating operating expenses, which was included in the SFO as originally issued and was thus amenable to protest prior to the April 1 proposal receipt date. A potential offeror could reasonably envision that the competition might include firms offering newer buildings, such that the alleged application of the SFO's operating expense formula with regard to real estate taxes should have been obvious on its face. We also note that the record belies Shidler's assertion that it did not anticipate competition from firms offering newer buildings; Shidler advised a congressional representative well before it received the Environmental Assessment report that GSA "drafted the specifications so as to exclude all but the newest and most expensive buildings."

Shidler's protest that the SFO improperly favors offers of new buildings by requiring 100 percent new interior space is meritless, since the SFO contains no such requirement. Shidler now admits that the SFO does not explicitly require 100 percent new interior space, but argues that the SFO's failure to include a floor plan or design drawings reasonably implies that the lessor must provide new construction. However, the SFO expressly provides that the lessor may use existing partitions to meet the government's layout requirements, and that GSA will supply these layout plans 30 to 60 days after award or after receipt of the lessor's proposed floor plan. In any case, the layout provisions in question were in the SFO as issued, and, as discussed above, the protester was required to protest their alleged restrictiveness prior to the initial proposal date.

Shidler protests the amended occupancy date in the SFO, requiring occupancy 120 days from the date of award or receipt of design drawings from GSA, whichever is later. We note that this provision is virtually identical to the occupancy date specified in the original SFO, which required occupancy on January 1, 1993, 4 months after the expiration of offers. Shidler did not timely protest, prior to the receipt of initial proposals, the original occupancy date to

³The SFO section dealing with the calculation of operating expenses provides that "operating expenses will be both escalated at 4 percent compounded annually and discounted annually at 8 percent, then added to the net [Present Value Cost] PVC to yield the gross PVC."

either the contracting agency or our Office.⁴ The amended occupancy date merely reflects the agency's guarantee to the lessor that it will receive the full 120 days accorded in the original SFO to prepare its premises, notwithstanding any delays in awarding the contract. We note that Shidler stated in its initial proposal that it would complete all alterations for occupancy within 120 days after award and receipt of drawings from GSA, which tracks the language contained in the amended occupancy date it now protests. It is also notable that Shidler's offer, in response to the amendment revising the occupancy date, removed the exception taken to the occupancy date in its initial proposal. Under the circumstances, since Shidler did not challenge the initial occupancy date, it cannot challenge the amended date that eases that requirement. See Wheeler Bros., Inc.--Recon., supra. In any case, the agency explains that it based the 120-day delivery requirement on the pending termination of GSA's current lease and a survey that disclosed numerous potential offerors who were willing to offer space meeting this requirement. Shidler does not rebut GSA's explanation, only asserting its own difficulties in meeting this requirement since NRC currently occupies the space offered.

Finally, Shidler timely protests the responsibility requirement added by SFO amendment that requires offerors to submit pre-award evidence of a conditional loan commitment, signed by an authorized bank officer, in an amount sufficient to prepare the premises. Shidler argues that the provision is unnecessarily restrictive because it discriminates against companies able to fund all or part of the cost of preparing the premises without loan assistance. For this reason, Shidler suggests that GSA should amend the SFO to allow offerors to submit a bank balance to demonstrate their ability to fund the construction.

We disagree with Shidler's interpretation that the SFO's responsibility requirement demands evidence of a loan commitment that an offeror does not need and, accordingly, does not intend to obtain. Rather, the SFO requires evidence of a conditional loan commitment in whatever "amount necessary to prepare the space"; this reasonably applies only to those funds an offeror intends to borrow. We do not believe that the SFO precludes an offeror from demonstrating the ability to fund all or part of the construction effort with its own resources. GSA confirms this interpretation of the SFO,

⁴Even if we accept, as Shidler urges, that a note on the face of its initial proposal questioning its ability to meet the occupancy schedule constitutes a protest, a protest of a solicitation provision accompanying a proposal is untimely. See John Cuneo, Inc.--Recon., supra.

stating that it would be amenable, for example, to establishing an escrow account for offerors who intend to finance the construction from their own resources. Although Shidler argues that GSA should permit offerors to submit bank balances as evidence of financial responsibility, the agency persuasively responds that a bank balance does not provide adequate assurance of financial capability in the context of this multi-million dollar contract award; as GSA states, a bank balance does not evidence whether the offeror has earmarked the stated funds for other purposes or whether funds will continue to be available over the period of several months needed to complete the construction effort. Based on our review, we believe that GSA has justified the responsibility requirement set forth in the SFO as reasonably necessary to ensure that award only be made to a firm that has the financial tools to satisfy the SFO requirements. See generally Prime Mortgage Corp., 69 Comp. Gen. 618 (1990), 90-2 CPD ¶ 48.

The protests are dismissed in part and denied in part.


James F. Hinchman
General Counsel

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