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

Decision

Matter of: Aero Realty Company

File: B-250985

Date: March 2, 1993

Edward A. McConwell, Esq., for the protester.
Olivia J. Valentine, Esq., Department of Transportation, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Awardee's proposed property satisfied requirement in solicitation for offers for a 10-year lease that the property be "at" the airport, where the proposed property is located immediately adjacent to the airport; geographic restrictions are inherently restrictive of competition and should not be read in a way that unnecessarily further restricts competition.

2. In a negotiated procurement for the lease of office space, where the solicitation for offers set forth the price and technical evaluation factors without stating their relative importance, the procuring agency properly evaluated all the factors as being of approximately equal weight, and determined that award should be based upon the lowest evaluated price because the offerors were essentially equal considering all the technical factors.

3. Where the solicitation for offers for rental office space allows offerors to offer varying amounts of square footage and provides that the evaluation of price would be dependent upon actual amount of square footage offered, the agency reasonably did not normalize the protester's and awardee's offers of different amounts of square feet of space.

4. Protest allegation that the agency used the wrong total square footage figure to calculate the protester's net present value price per square foot is denied, where, although the agency did use the wrong square footage figure, the protester was not prejudiced thereby because application of the correct figure would not result in the protester being lower priced than the awardee.

5. Protest allegation that the agency in its price evaluation should not have escalated the protester's future service charges per annum because the protester, as the incumbent lessor, assertedly had rarely increased service charges, is denied, where the solicitation informed offerors that price escalations would be evaluated using a net present value analysis and the protester proposed an escalation that effectively assigned the risk of increased service charges to the government.

DECISION

Aero Realty Company protests the award of a 10-year lease by the Federal Aviation Administration (FAA), Department of Transportation, to Odnum Two USA, Inc., under solicitation for offers (SFO) No. DTFA08-91-L-13266, for office space to house FAA's Flight Standard District Office (FSDO) at Long Beach Airport, California. Aero contends that FAA's technical and price evaluations were unreasonable.

We deny the protest in part and dismiss it in part.[1]

The SFO requested offers for the lease of between 8,500 and 9,800 net usable square feet (NUSF) of office space at the Long Beach Airport, along with 55 off-street parking spaces, for a lease term of 10 years. The solicitation provided specific requirements, concerning the general architectural quality and appearance of the building, as well as mechanical, electrical and plumbing requirements. The SFO, as amended, required that the "space offered . . . be located at Long Beach Airport."[2]

The SFO provided that award would be made to the offeror whose offer was the most advantageous to the government, price and other factors considered. In addition to price, the following evaluation factors were stated: (1) early occupancy; (2) ease of public accessibility; and (3) efficiency of layout. The SFO did not state the relative importance of the evaluation factors. Offerors were informed

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[1]Portions of the protest record are subject to a General Accounting Office protective order to which counsel for Aero has been admitted. Our decision, based upon protected, confidential information, is therefore general.

[2]The SFO originally required that the space not only be located at Long Beach Airport but be "within reasonable walking distance of general aviation parking to allow the FSDO to conduct flight tests and inspections for the flying public." In response to complaints from potential offerors, the SFO was amended to delete this "walking distance" requirement.

that price would be evaluated on the basis of the offerors' annual price per square foot and that offers that provided for escalations in price would be evaluated under a present value analysis.[3]

FAA received five offers by the closing date for receipt of best and final offers (BAFO), including offers from Aero and Odnum.[4] Aero, the incumbent lessor for the space the Long Beach FSDO currently occupied, proposed to expand its building from 4,840 square feet to 9,415 square feet, and to make this expanded space available 1 year after the agency's approval of its layout (space) plan. Odnum proposed to let 9,800 square feet of space in its existing building and proposed that this space would be available within 120 days from the government's approval of Odnum's space plan.

The agency found both Aero's and Odnum's proposals to be acceptable and essentially technically equal. Odnum's offer was found to be superior under the early occupancy evaluation factor, while Aero's proposal was found to be superior under the ease of public accessibility factor; both offers were found to be equal under the efficiency of layout factor. The agency concluded that "application of non-price award factors did not favor one offeror over another, [and] therefore, award [would] be made to the offeror with the lowest price per square foot, as calculated using net present value analysis."

Both offerors proposed price escalation factors in their lease offers. Odnum proposed a fixed rent and service charge price per square foot for the first 5 years and a fixed increased price per square foot after 5 years for the balance of the lease. Aero proposed a fixed rent and service charge per square foot for the first 2 years of the lease and thereafter provided that the rent and service charge could be adjusted bi-annually, based upon the Consumer Price Index for rent and upon the actual operating costs for the service charges.[5]

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[3]A "present value analysis" expresses projected future expenditures in terms of current dollars.

[4]The SFO set forth the standard General Services Administration "Late Submissions, Modifications and Withdrawal of Offers" clause for SFOs for leased space that provided that proposals could be received and considered until the time set for the receipt of BAFOs. See 48 C.F.R. § 552.270-3 (1991).

[5]Aero proposed that rent increases would not exceed 5 percent per annum, but did not propose an overall "cap" on possible future service charge increases.

FAA evaluated the offerors' lease prices under a present value analysis, as provided for in the solicitation. Odnum's total lease price was calculated using its offered price per square foot, including the fixed escalation. Aero's total lease price was calculated by increasing its rent and service charges bi-annually, after the first 2 years, at the rate of 4 percent per year. The offerors' proposed total lease prices were then discounted to calculate a current dollar figure. This discounted lease price was divided by the 10-year lease term and by the amount of NUSF offered by each firm to arrive at a present value price per NUSF. As a result of this present value calculation, FAA determined that Odnum offered the lowest price per NUSF, and made award to Odnum, as the lowest priced, technically equal offeror. Aero was notified of the award and of the termination of its present lease, and this protest followed.

Aero first protests FAA's termination of its lease to make award to Odnum because Aero made significant improvements to its building in reliance upon the agency's promises of a long-term lease extending until 1999. Essentially, Aero challenges FAA's issuance of a competitive SFO for new lease space. Our Bid Protest Regulations require protests of alleged apparent solicitation improprieties to be filed by the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1992). Aero's protest of FAA's competitive procurement was only filed after it was notified of award to Odnum; therefore, its post-closing date protest is untimely and will not be considered.[6]

Aero protests that Odnum's property is not located "at" Long Beach Airport as required by the solicitation. The protester argues that the requirement that the property be "at the Long Beach Airport means that the leased space must be on the airport." Aero states that Odnum's proposed space is approximately 1.3 miles from the general aviation ramp at the airport, while Aero's proposed building is within walking distance of the airport tarmac. FAA responds that, in view of the solicitation amendment that deleted the requirement that offered space be within walking distance of general aviation parking, offerors were on notice that space near the airport would be considered for award. FAA also

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[6]To the extent that Aero asserts that it is entitled to damages for the agency's breach of its lease or that the agency could not properly terminate the lease, these allegations concern disputes between the lessor and the agency that must be resolved under the Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq. (1988), and are not reviewed by our Office. See 4 C.F.R. § 21.3(m)(1).

claimed that Odnum's property was located on property owned by the airport authority.[7]

Where a dispute exists as to the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Lithos Restoration, Ltd., 71 Comp. Gen. 367 (1992), 92-1 CPD ¶ 379. We will not read solicitation provisions in a manner that restricts competition, unless it is clear from the solicitation that such a restrictive interpretation was intended. MAR, Inc., B-242465, May 6, 1991, 91-1 CPD ¶ 437. Geographic restrictions are inherently restrictive of competition, and should not be read in a way that unnecessarily further restricts the competition. See generally Pamela A. Lambert, B-227849, Sept. 28, 1987, 87-2 CPD ¶ 308.

While the meaning of the term "at" in this context is not entirely clear, the agency's interpretation of the geographic restriction--that reference to the site location "at" Long Beach Airport means that it be in the immediate vicinity of the Airport--is the less restrictive one and is not inconsistent with the solicitation when read as a whole.[8] The maps submitted by the parties during the protest both show that Odnum's building is located immediately adjacent to the airport, which we find satisfies the SFO site requirements.[9]

Aero also protests that, even if Odnum's property was properly determined to be at the airport, the agency failed to consider which "site [is] the most advantageous to the government"; that is, Aero argues that its site, which is within walking distance of the airport, should have been found more advantageous than Odnum's building that is approximately 1.3 miles from the airport. In this regard, Aero argues that public accessibility of the offered sites should have been more "heavily weighted" than the other

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[7]Aero asserts that Odnum's property is not located on property owned by the airport authority.

[8]The fact that the initial SFO requirement that offered sites be within walking distance of the general aviation parking was deleted, is evidence that the SFO was intended to allow for buildings, which are not in the immediate vicinity of the aviation parking ramp. This suggests that buildings otherwise "at" the airport would be acceptable.

[9]From our review of the maps, it is apparent that Odnum's building is much closer than 1.3 miles from the general aviation ramp when measured in linear distance, as opposed to a driving distance.

evaluation factors in determining which offer was the most advantageous to the government.[10] We disagree.

Where, as here, the solicitation does not state the relative weight to be accorded price and the technical evaluation factors, these factors are considered to be approximately equal in weight. See Wetlands Research Assocs., Inc., 71 Comp. Gen. 289 (1992), 92-1 CPD ¶ 257. Thus, contrary to Aero's arguments, the public accessibility factor could not be considered of greater importance than the other stated evaluation factors, and the agency appropriately evaluated all the factors as being of equal weight. Here, the advantages of Aero's site were considered in accordance with the evaluation criteria; specifically, the fact that Aero's site was closer to the airport than Odnum's site was evaluated under the public accessibility factor, and Aero's offer was considered to be superior to Odnum's under this factor.[11] However, as noted above, Odnum's offer was found superior under the early occupancy factor, and both offers were found to be equal under the efficiency of layout factor. We find that the agency reasonably determined that the firms' offers were essentially technically equal under the stated evaluation factors.

Aero also argues that the agency unreasonably determined that Odnum's offer of occupancy within 120 days of the agency's approval of the firm's space plan was superior to Aero's offer of full occupancy within 1 year. Specifically, Aero complains that the SFO only required full occupancy within 1 year and that the agency did not tell Aero during discussions that the agency sought early occupancy.

While it is true that the SFO only required full occupancy within 1 year, the solicitation also expressly informed

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[10]To the extent Aero argues that advantages apart from the stated evaluation criteria should have been considered in determining which offer was the most advantageous to the government, a procuring agency can consider only price and the technical evaluation factors stated in the solicitation in determining which offer is the most advantageous to the government. See George A. and Peter A. Palivos, B-245878.2; B-245878.3, Mar. 16, 1992, 92-1 CPD ¶ 286.

[11]While Aero's offer was higher rated under the public accessibility factor because of its direct airport access, the agency also noted that Aero's public parking, in addition to the 55 parking spaces required by the SFO, was limited to street parking. While Odnum did not offer direct tarmac access, like Aero, Odnum's site offered plenty of public parking and the building was considered easy to locate.

offerors that early occupancy would be evaluated. Thus, offerors were on notice that the agency would make qualitative judgments about the relative merits of the offerors' proposed occupancy schedule. See RAI, Inc.; Endmark Corp., B-250663 et al., Feb. 16, 1993, 93-1 CPD ¶ ___ (where weighted evaluation criteria are stated in a solicitation, an offeror is on notice that the agency may make qualitative judgments about the relative merits of the proposals under the various evaluation factors). We find that Odnum's offer of earlier occupancy was reasonably found superior to Aero's offer.

Aero also challenges the agency's price evaluation. Specifically, Aero protests that the agency (1) did not account for the "excess" square footage proposed by Odnum; (2) used the wrong square footage figure in calculating Aero's proposed present value price; (3) increased its proposed service charges by 4 percent per year even though Aero assertedly had rarely increased its service charges; (4) failed to consider moving costs; and (5) failed to consider the offerors' relative termination provisions.[12]

First, we disagree with Aero's contention that FAA was required to normalize in its price evaluation the difference between the firms' offered NUSF; that is, we do not find, as Aero contends, that the agency was required to evaluate offers based upon some common square footage figure. The SFO informed offerers that the "[e]valuation of offers will be based on the basis of the annual price per square foot," and that the rental to be paid under the contract would be based upon the actual square footage offered, but in no event more than the maximum square footage solicited. Also, the pricing sheet, provided by the SFO, required offerors to calculate their annual rental amount by multiplying their offered rental price per square foot by the actual amount of NUSF offered. Thus, the solicitation provided that the evaluation of offerors' proposed rental would be dependent upon each offeror's proposed amount of NUSF. See VA

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[12]Aero also complains that the agency's present value analysis is insufficiently documented. We disagree. The record contains the agency's contemporaneous price negotiation memorandum that details the respective prices bid by the offerors and the agency's net present value analysis, including price calculations and adjustments. In addition, the agency provided more detailed explanation of its present value analysis in the contracting officer's response to the protest. The agency's contemporaneous documentation, along with its later explanation, provides sufficient detail to judge the reasonableness of the agency's price evaluation. See Hydraudyne Sys. and Eng'g B.V., B-241236; B-241236.2, Jan. 30, 1991, 91-1 CPD ¶ 88.

Venture; St. Anthony Medical Center, Inc., B-222622; B-222622.2, Sept. 12, 1986, 86-2 CPD ¶ 289.

The record confirms that the agency used the wrong square footage figure to calculate Aero's proposed present value price. While Aero proposed 9,415 square feet, FAA used the 9,715 square feet in its present value calculation of Aero's proposal. Nevertheless, we find, from our recalculation of Aero's present value price per square foot using the correct figure, that application of the correct square foot figure does not result in Aero's price per square foot becoming lower than Odnum's. Accordingly this error provides no basis to sustain Aero's protest, since Aero was not prejudiced thereby. See Lucas Place, Ltd., B-238008; B-238008.2, Apr. 18, 1990, 90-1 CPD ¶ 398.

We find reasonable FAA's increase of Aero's proposed service charges in the agency's present value analysis. The SFO informed offerors that any provision for price escalations would be evaluated using a present value analysis, and Aero was specifically informed during discussions that, if it provided for escalations in its service charges, these service charge escalations would be evaluated using a present value analysis. Aero proposed uncertain price escalations on its service charges (to be based upon actual usage). Therefore, FAA reasonably adjusted the service charges in its present value analysis to account for possible future increases. While Aero now complains that it rarely increased the service charges in the past, its offer expressly reserved the right to increase the service charge prices in the future. Thus, Aero assigned the risk of possible future price increases to the government and the agency could properly account for these possible increases in the present value analysis. See generally PRC, Inc., B-247036, Apr. 27, 1992, 92-1 CPD ¶ 396, aff'd, Science Application Int'l Corp.; Dep't of the Navy--Recon., 71 Comp. Gen. 481 (1992), 92-2 CPD ¶ 73 (agency should reasonably account for uncapped charges in a cost evaluation). While Aero disagrees with the agency's 4 percent per annum evaluation adjustment for its service charges, it has not demonstrated that these adjustments are unreasonable.

Finally, we find untimely Aero's contentions that the agency was required to account in its price evaluation for the offerors' relative proposed moving costs and termination provisions. The SFO did not provide for the evaluation of moving or termination costs; rather, the solicitation only provided that the agency would evaluate each offeror's proposed lease price, and separate service charges, if any, per square foot offered. Therefore, the agency could not

evaluate moving or termination costs, as suggested by Aero. Aero's post-closing date protest that the SFO should have provided for consideration of moving and termination costs is untimely. See Thomasz Shidler Investment Corp., B-250855; B-250855.2, Feb. 23, 1993, 93-1 CPD ¶ ___.

The protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel