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Comptroller General
of the United States

Washington, D.C. 20548

1227226

Decision

Matter of: Richard S. Cohen

File: B-256017.4; B-256017.5

Date: June 27, 1994

Richard O. Duvall, Esq., and Richard L. Moorhouse, Esq., Holland and Knight; and Melinda L. Carmen, Esq., Carmen & Muss, for the protester.
Sharon A. Roach, Esq., and Barry D. Segal, Esq., General Services Administration, for the agency.
Thomas P. Humphrey, Esq., and Christopher M. Farris, Esq., Crowell & Moring, for C&P Telephone Company, an interested party.
David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency solicits offers for the acquisition of a building site under the Public Buildings Act of 1959 (PBA), 40 U.S.C. § 604 (1988), it cannot comply with the statutory requirement to acquire the site most advantageous to the United States unless it acts in such a way as to promote intelligent competition among offerors; the process by which the General Services Administration selected a building site under the PBA was fundamentally flawed and precluded maximizing the likelihood of receiving advantageous offers responsive to its needs where the agency failed to advise offerors of the evaluation factors used in evaluating the offers submitted and their relative importance.

DECISION

Richard S. Cohen protests the General Services Administration's (GSA) proposed acquisition of a building site in Washington, D.C. assembled from parcels owned by the C&P Telephone Company and others (the C&P offer). Cohen contends that the process by which GSA selected C&P's site for acquisition was flawed, and that GSA's evaluation of its proposed building site was unreasonable.

We sustain the protest.

On February 24, August 3, and December 21, 1992, GSA published in The Washington Post advertisements seeking "expressions of interest" in providing a building site in Washington, D.C., for the Department of the Treasury.

(Although not disclosed in the advertisement, the space is to be occupied by the headquarters of the United States Secret Service.) The December advertisement designated the delineated area where the site was to be located, and stated that "[t]he site must be adequately zoned to accommodate a building of approximately 461,000 gross square feet and be able to contain a minimum of 346,000 occupiable square feet of office, laboratory, and related space, exclusive of a minimum of 189 inside parking spaces." While the initial February advertisement did not specifically contemplate the offer of a site with an existing building, the December advertisement stated that "[t]he site may be improved with an existing building or two contiguous buildings able to be joined by an enclosed walkway which can meet the requirements of the Federal Government or may be vacant land on which the Government would undertake construction." In either case, indicated the advertisement, the offeror must present "full and free title that . . . is free of any encumbrances." In addition, the advertisement indicated that the site must be free of hazardous waste upon purchase, and "[s]ite zoning must [be] consistent with the Government's proposed usage." The advertisement cautioned offerors that it was "not a basis for negotiation and . . . sites other than those offered in response to this advertisement will be considered."

In response to the advertisements, GSA initially received expressions of interest from 11 potential offerors, including Cohen, for sites within the delineated area. The potential offerors were then requested to furnish specific information concerning their proposed sites. Under "Requirements 'General,'" offerors were requested to furnish scaled site drawings and site documentation "relevant to the evaluation of the site characteristics" and showing topography, floodplains, existing structures, basements, public streets, alleys and sidewalks, current zoning (including floor to area ratio (FAR) and planned urban development status, site access and current use). In addition, under "Requirements 'Specific,'" offerors were requested to furnish the following: (1) data concerning site and geo-technical conditions, including soils reports, extent of any floodplains, topological surveys, environmental issues, archaeological and historical preservation issues; (2) the tax assessment; (3) a location/boundary survey, indicating current improvements, easements, or rights of ways; (4) a title report; (5) evidence of ability "to obtain any required resources" and to "perform any necessary work to the site"; (6) a completed copy of a GSA standard form contract for the sale of real property; and (7) a proposal with a purchase price.

Following a site inspection, 4 of the 11 offerors withdrew their proposals. GSA then conducted discussions with the

remaining seven offerors in March 1993. After eliminating three offers from the competitive range, GSA requested the submission of final offers from the remaining offerors, including Cohen, by April 13, later extended to April 21. The final proposal of one of the four offerors was not reviewed because its price significantly exceeded the available funds. Although Cohen's proposal received the second-highest technical score among the remaining three proposals, it was ranked highest overall when price was considered.

On May 14, however, GSA received an offer from C&P, which had not previously participated in the acquisition. After inspection of C&P's site and evaluation of its proposal, GSA included the proposal in the competitive range and requested all offerors to submit offers on a new, amended GSA standard form contract for the sale of real property. Based upon evaluation of the revised proposals received, the C&P site, with a technical score of 66 points, was ranked first by GSA's site selection committee. Cohen's proposed site received 64 technical points and was ranked second. After a lengthy review, GSA approved the site selection committee's selection and, on December 8, signed a contract with C&P.

However, on December 8, shortly after award, Cohen, who had been offered the opportunity on August 18 to submit alternate offers, submitted four alternate offers. These alternate offers reduced the size of the offered site by up to 20.7 percent and also reduced the purchase price by up to approximately 31 percent. Although GSA agreed to consider Cohen's alternate offers, it ultimately rejected them, finding that each of the smaller sites reduced the flexibility and utility of the site for the Secret Service program and that none was as advantageous as the C&P site. Meanwhile, Cohen filed this protest with our Office.

PROTEST ALLEGATIONS

Cohen protests the process by which GSA selected the C&P site for acquisition. The protester complains that the agency did not advise offerors during the selection process of the evaluation criteria it actually used and the relative weight it assigned the criteria in making its determination as to which site would be acquired. The protester questions the acceptability of C&P's offer and contends that it was a late offer that should not have been considered. The protester further argues that GSA's application of the evaluation criteria was unreasonable and he challenges the overall determination that the C&P site was most advantageous to the government.

APPLICABLE LAW

GSA reports that this procurement was conducted for the acquisition of a site for the headquarters of the Secret Service under the site acquisition provisions of the Public Buildings Act of 1959 (PBA), 40 U.S.C. § 604 (1988), which provide that:

> "(a) The Administrator [of GSA] is authorized to acquire by purchase, condemnation, donation, exchange, or otherwise, such lands or interests in land as he deems necessary for use as sites, or additions to sites, for public buildings.
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> . . . . .
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> "(c) In selecting a site under this section the Administrator [of GSA] . . . is authorized to select such site as in his estimation is most advantageous to the United States, all factors considered, and to acquire such site without regard to title III of the Federal Property and Administrative Services Act of 1949, as amended."

Under authority of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3556 (1988), our Office considers protests that GSA did not comply with the PBA's requirements regarding site selection, since the PBA authorizes GSA to acquire building sites "most advantageous to the United States, all factors considered" and is thus a procurement statute. RJP Ltd., 71 Comp. Gen. 333 (1992), 92-1 CPD ¶ 310. As noted by GSA, the PBA expressly exempts acquisitions conducted thereunder from the competition requirements of the Federal Property and Administrative Services Act of 1949 (Property Act), 41 U.S.C. §§ 251 et seq. (1988), and the Property Act's implementing regulation does not apply to acquisitions of real property. 41 U.S.C. § 405(a) (1988); RJP Ltd., supra.

Cohen, however, contends that the applicable statutory authority for the acquisition was the building acquisition provisions of the PBA, 40 U.S.C. § 602. These provisions provide that "[t]he Administrator [of GSA] is authorized to acquire by purchase, condemnation, donation, exchange, or otherwise, any building and its site which he determines to be necessary to carry out his duties under this chapter." 40 U.S.C. § 602. Unlike the site acquisition provisions, the building acquisition provisions of the PBA do not specifically exempt acquisitions conducted thereunder from the provisions of the Property Act. In support of his claim that the procurement was governed by the building acquisition provisions of the PBA, rather than the site acquisition provisions, Cohen notes that while C&P initially

proposed to demolish both of the two existing structures on the property, because of concerns that historic preservation issues might preclude demolition of one of the buildings the contract signed with GSA only provided for demolition of the principal building. Cohen concludes that GSA therefore was in fact acquiring a building so that the building acquisition provisions of the PBA were applicable and the procurement thus was subject to the competition requirements of the Property Act.

We are not persuaded by Cohen's argument. Although the final December advertisement, unlike the initial February advertisement, specifically afforded offerors an opportunity to propose a site with an existing building site, the record shows that in selecting the C&P site GSA fundamentally sought to acquire a site upon which to construct a new building to house the Secret Service. In this regard, we note that C&P initially proposed to deliver a site without existing structures, and that but for potential historic preservation issues, it appears that the contract C&P signed with GSA would have provided for the demolition of both buildings on the site. Indeed, as a result of GSA's concern that historic preservation issues could prevent demolition of one of the existing buildings, C&P's proposal was downgraded in the evaluation under the historic preservation evaluation criteria. Further, C&P has already demolished the larger of the two buildings, and the remaining, potentially historic building occupies less than 5 percent of the C&P site. We think, therefore, that GSA's acquisition essentially was a building site acquisition coming under the site acquisitions provision of the PBA rather than the acquisition of a building--the remaining building on the C&P site is merely incidental to what is being acquired. Accordingly, the Property Act and its implementing regulation do not govern this acquisition.

EVALUATION CRITERIA

Cohen questions GSA's failure to provide offerors during the selection process with a statement of the evaluation criteria to be used and their relative weight. The protester notes that the Property Act, as amended by the CICA, specifically requires agencies to include in solicitations a statement of all significant evaluation factors and the relative importance assigned to those factors. As stated above, however, that provision is not controlling here.

Nevertheless, the fact that the competition requirements of the Property Act are not applicable here does not provide GSA with unfettered discretion to conduct the acquisition in any manner it sees fit. The PBA authorizes GSA to acquire sites "most advantageous to the United States, all factors

considered." In our view, GSA cannot comply with the requirement to acquire the site most advantageous to the United States unless, when soliciting offers, it informs offerors of the factors that GSA will use to determine what site is most advantageous and otherwise acts in such a way as to promote intelligent competition among offerors. See generally Fiber Materials, Inc., 57 Comp. Gen. 527 (1978), 78-1 CPD ¶ 422. It is through intelligent competition that the government maximizes vendor participation in procurements and thereby helps assure itself of receiving a sufficient number of offers responsive to its specific requirements and desires so that the government's needs can be satisfied through advantageous offers from both a price and technical standpoint.

Intelligent competition assumes the disclosure of the evaluation factors to be used by the procuring agency in evaluating offers submitted and the relative importance of those factors. See Fiber Materials, Inc., supra (while government prime contractor is not subject to the statutory or regulatory requirements governing direct procurements by the federal government, solicitation issued by government prime contractor is defective where it fails to include evaluation factors for award); 49 Comp. Gen. 229 (1969); 44 Comp. Gen. 439 (1965) (solicitations issued under negotiated procedures by federal agencies, subject to general procurement statutes, were defective when they did not disclose the evaluation criteria and their relative weights, even though the statutes and implementing regulations themselves did not expressly require such disclosure); see generally Ford Motor Co.; Chrysler Corp., B-207179; B-207179.2, Jan. 20, 1983, 83-1 CPD ¶ 72. Only through such disclosure can an offeror know what factors the agency cares about and to what relative extent, or whether the procurement is intended to result in the acquisition of property or services at the lowest possible price or if the government is willing to pay a higher price for property or services that are technically superior to what can be acquired at the lowest possible price; competition is not served if offerors are not given any idea of the factors, and their relative values, upon which the government will select an offer for award. See Signatron, Inc., 54 Comp. Gen. 530 (1974), 74-2 CPD ¶ 386. Thus, where an agency fails to advise offerors of the evaluation factors and the relative importance of those factors, there is no assurance that in selecting an offer for award it is obtaining what is "most advantageous to the United States, all factors considered."

Here, GSA evaluated the offered sites against the following evaluation criteria: (1) the amount of below grade space necessary, given site size and zoning, in order to satisfy the agency's overall requirement for a minimum of

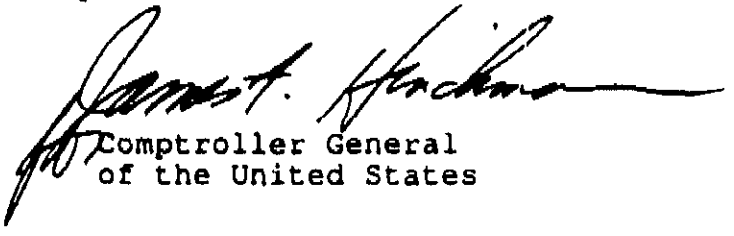
461,000 square feet; (2) environmental considerations; (3) site geometry; (4) historic review considerations; (5) proximity to Washington's subway system (Metro); (6) proximity to the White House Executive Office complex; (7) access to site; (8) security; (9) proximity to fitness center; (10) access to commuter routes; (11) access to food services; (12) availability of commercial parking; (13) access to open space; and (14) pedestrian walkways. The importance of these evaluation criteria varied greatly, with the most important criterion (amount of below grade space) given a weight of 25 percent, 5 times greater than the weight given the least important criteria (such as those for historic review or proximity to the subway). Although GSA requested the submission of information concerning some of the above evaluation criteria, it did not at any time during the site acquisition process advise the offerors of the evaluation criteria themselves and their relative importance. In our view, this process both precluded intelligent competition and resulted in prejudice to offerors. See generally 17 Comp. Gen. 554 (1938).

For example, had offerors been aware of the evaluation criteria and their relative weight, including price, they might have provided information in their offers specifically bearing on these factors that would have been helpful to and had an impact on GSA's evaluation, and/or may have adjusted their proposed price or site size to account for relative advantages or disadvantages of their proposed sites in light of the criteria. Indeed, the record clearly demonstrates that the possibility of offerors adjusting their offers had they known of the evaluation criteria and their relative weight was far from hypothetical. As noted above, in his alternate offers, Cohen was able to reduce the size of the offered site by up to 20.7 percent and the purchase price by up to approximately 31 percent. Thus, the failure to disclose the evaluation criteria here very likely resulted in competitive prejudice.

In sum, because the agency failed to provide the offerors with the criteria upon which the evaluation of their proposals would be based, and the relative importance of the factors, we find that the process by which GSA selected the C&P site for acquisition precluded the submission of offers on an intelligent basis and thus did not maximize the likelihood of the agency's receiving advantageous offers responsive to its needs. Under the circumstances, GSA cannot be sure that it selected, consistent with the PBA, the site "most advantageous to the United States, all factors considered." This is in contrast to RJP Ltd., supra, where offerors were advised of the site selection criteria on a PBA site selection and the protester's site was reasonably found less advantageous than the selected site under those criteria.

We recommend that GSA resolicit expressions of interest, advising potential offerors of the evaluation criteria to be used in evaluating the sites offered and the relative importance of those factors, including price, and request new offers. In addition, Cohen is entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). Cohen should submit its certified claim for its protest costs directly to the agency within 60 working days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.



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