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

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REDACTED VERSION*

Decision

Matter of: South Capitol Landing, Inc.

File: B-256046.2

Date: June 20, 1994

Richard D. Gluck, Esq., Garvey, Schubert & Barer, for the protester.
Nancy F. Lesser, Esq., and Erik S. Jaffe, Esq., Williams & Connolly, for Federal Center Associates, an interested party.
Jeffrey M. Hysen, Esq., and Rebecca L. Kehoe, Esq., General Services Administration, for the agency.
Richard P. Burkard, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly accepted proposal to provide developer manager services which did not meet "retail" requirements of the solicitation is denied where record shows that awardee's proposal specifically addressed those requirements.

2. Protest that agency conducted prejudicially unequal discussions by providing awardee with more detailed information than was provided to protester is denied where transcripts of the respective discussion sessions show that the agency identified similar areas of concern in each of the proposals and provided each of the offerors with similar guidance in those areas.

DECISION

South Capitol Landing, Inc. (SCL) protests the award of a contract to Federal Center Associates (FCA) under request for proposals (RFP) No. GS11P91MJD0027, issued by the General Services Administration (GSA) for developer manager

*The decision issued on June 20, 1994, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[deleted]."

services. SCL argues that GSA improperly waived mandatory RFP retail requirements for the awardee and also conducted discussions improperly.

We deny the protest.

BACKGROUND

The RFP contemplated the award of a fixed-price contract to provide the services of a developer manager (DM) to manage the development of the Southeast Federal Center (SEFC), a 55.3-acre government-owned site along the Anacostia River, adjacent to the Washington Navy Yard in Washington, D.C. The RFP stated that it is anticipated that the SEFC ultimately will contain more than 4 million square feet of office space and 189,000 square feet of retail space, and will accommodate a total government employee population of 23,000. The RFP stated that as part of the contract, the DM will be expected to provide a wide range of development services over a multi-year period and that the DM must propose a development team with the experience, expertise, and capability to manage and coordinate the timely and orderly development of the SEFC.

As amended, the RFP divided the contractual requirements into the following five major "base core" sections:

(1) C.5 Developer Management Services,
(2) C.6 Project Management Services,
(3) C.7 Design Services,
(4) C.8 Construction Management Services, and
(5) C.9 Special Services and Studies

Under section C.5, developer management services, the RFP required offerors to submit a comprehensive DM plan which was to include an approach to the overall management and coordination of the SEFC development. Among other things, the RFP required the plan to address the "retail component" and the approach that will be taken to address the phasing and management of development.

Also under section C.5, the RFP set forth "[g]eneral [m]anagement [s]ervices" requirements, including "[o]verall coordination and management of the SEFC development," "[m]anagement of all aspects of project completion including contacts and coordination with other Government agencies having an interest in the site," community relations activities, and "[p]roviding advice and assistance for retail space." Subsection C.5.2.10., "[r]etail [c]omponent," was one of many specifications that followed the list of general management services, and provided as follows:

> "While the full development of the retail space at the SEFC site is described as an option to this contract, it is an integral part of the Master Plan and the basic concept for proven development of the site. . . . It is essential that the Design Guidelines[1] fully address the retail component since it will affect the pedestrian, parking, and traffic patterns, existing structures, proposed structures and the waterfront area."

The retail component specification stated further that "[t]he Master Plan and Preliminary Study are merely guidelines for the phasing of the retail development, and GSA is looking to the DM to recommend initial amounts and types of retail which will serve the needs of the tenants and visitor population. . . ."

As originally issued, the RFP required offerors to submit prices for two retail options for the "[d]evelopment and [m]anagement of [r]etail [s]pace," set forth in section C.10 of the RFP. Under retail option No. 1, the DM would market, lease, and manage the retail space for GSA on a fee basis, with rental proceeds going to GSA and expenses of operation being GSA responsibility. Retail option No. 2 contemplated that the DM would lease the entire retail component from GSA and assume responsibility for the expense of operation. By amendment No. 4 to the RFP, issued after the submission of initial proposals, the agency effectively deleted these options by stating that offerors would not be required to submit prices for the retail options. The amendment noted, however, that the DM may be tasked by the government "to implement the accepted retail plan (or some modified plan) at some future time." It stated that "[i]f this occurs, the [g]overnment will negotiate the price of such an implementation."

RFP amendment No. 6 modified "the requirement for [r]etail [c]omponent" and referenced the retail option section of the RFP which, as stated, would not be priced, as well as the "retail component" specification set forth in the "base core," developer management services section of the RFP. Amendment No. 6 stated that "[t]he [g]overnment intends to implement the successful offeror's proposed retail plan (or some modification thereof)." The "retail plan" referred to was a plan originally described in the retail option section

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[1]Design Guidelines, which were required to be prepared under section C.7 of the RFP, are intended to provide "an urban design context" by defining the "character/nature of the site as well as providing parcel by parcel (block by block) guidelines for buildings."

of the RFP. Required to be included in the "retail plan" was a plan for "the orderly phasing of retail leasing on the site" and "a plan for the 147,300 square feet on the dedicated interior retail space as well as potential retail opportunities on exterior areas. . . ." The retail option section provided, however, that the "retail plan" must be included as part of the DM plan. Amendment No. 6 provided also that "[a]ll offerors must integrate the [p]lan" into the DM plan. This requirement essentially reiterated the existing requirement for a retail component in the developer management services section of the RFP. Thus, while not a model of clarity, the RFP required offerors to include a retail plan as part of the DM plan, a base core requirement of the RFP.

Concerning "implementation" of the plan, amendment No. 6 stated that the agency "requires a proposal where the offeror agrees to put some of fees earned for the guaranteed portion of the development against the success of the retail portion of the project. . . ." It stated further that the government is "interested in negotiating a risk profile for the retail component of the project which [p]ermits the [d]eveloper [m]anager to earn more as a function of the success of the retail; and . . . [p]uts some portion of the more assured earnings at risk against the success of the retail."

The RFP listed the following three technical evaluation factors:

(1) Past performance and experience on similar projects;
(2) DM plan; and
(3) Qualifications of key personnel and offeror capability

Factors (1) and (2) were of equal importance and factor (3) was of less importance than (1) or (2). Price was stated to be of less importance than the combined technical evaluation factors. Award was to be made to the responsible offeror whose offer conforming to the solicitation was considered most advantageous to the government, price and other factors considered.

The agency received 10 proposals. Eight proposals, including those of the protester and the awardee, were included in the competitive range. FCA's proposal received the highest technical point score of [deleted], and offered a price of [deleted]. SCL's proposal received a score of [deleted] and offered a price of [deleted]. Following discussions, the agency requested best and final offers (BAFO).

FCA's BAFO received the highest technical point score of [deleted] and an adjectival rating of "very good." FCA reduced its price significantly, to $42,170,874, to become the low-priced offeror. The evaluators noted the [deleted] percent price reduction and the fact that the price was below the expected target price range as set by the government estimate. They stated in this regard that "[a]s noted in FCA's BAFO, the offeror eliminated any actual and potentially duplicated, overlapped, or redundant pricing . . . and reduced their staffing to eliminate functions and services that GSA indicated the Government would provide." SCL's BAFO, which also was rated "very good" and received a point score of [deleted], was priced at [deleted]. Since FCA's proposal was lowest priced and technically highest rated, on December 7, 1993, GSA awarded that firm the contract.

ANALYSIS--COMPLIANCE WITH RETAIL REQUIREMENTS

SCL raises several arguments in support of its position that GSA improperly evaluated FCA's proposal as adequately addressing the RFP's base core retail requirements.[2] The evaluation of technical proposals is primarily the responsibility of the contracting agency; the agency is responsible for defining its needs and the best method of accommodating them, and must bear the burden of any difficulties resulting from a defective evaluation. Steward-Davis Int'l, Inc., B-250254; B-250254.2, Dec. 17, 1992, 92-2 CPD ¶ 423. Thus, our Office will not make an independent determination of the merits of technical proposals; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with stated evaluation criteria and applicable statutes and regulations. Id. A protester's mere disagreement with the agency does

[2]SCL's raised a number of protest issues which it has subsequently abandoned. Specifically, it alleged that the awardee's proposal should have been rejected or downgraded because FCA had submitted unnecessarily elaborate designs, drawings, and specifications. SCL also argued that the awardee enjoyed an unfair competitive advantage because one of its team members had participated in the preparation of the GSA Master Plan for the project. Additionally, the protester challenged the agency's evaluation of FCA's financial standing under the past performance and experience factor. The agency responded to each of these allegations in its report. Since the protester failed to rebut the agency's explanations concerning these issues, we consider them to be abandoned and will not consider them. Knoll N. Am., Inc., B-250234, Jan. 11, 1993, 93-1 CPD ¶ 26.

not render the evaluation unreasonable. Marine Animal Prods. Int'l, Inc., B-247150.2, July 13, 1992, 92-2 CPD ¶ 16.

Technical Proposal Language

SCL contends that language in the FCA technical proposal shows that FCA does not intend to perform any of the retail aspects of the base core contract. The protester essentially disagrees with the agency's interpretation of FCA's proposal as offering to perform all the RFP requirements. While the protester presents several examples of language in the FCA proposal which it views as qualifying FCA's offer or improperly limiting FCA's contractual obligations, we have independently reviewed each of the examples presented by SCL and do not reach the same conclusion.

Since, as described above, the RFP contained retail requirements in several sections of the RFP, including the deleted retail option section, and contained overlapping and cross-referenced requirements, our review of the FCA proposal necessarily was based on the proposal in its entirety. Several areas of the FCA proposal address retail requirements, and the proposal identifies how certain retail aspects of the contract will be related during performance of the contract.

FCA's proposal stated that "[a]s described under Tab B-5, FCA plans to provide advice and support to GSA on the full range of subjects dealing with retail planning and analysis. Please refer to that tab for additional details." Moreover, in response to the "retail component" requirement of the RFP, the FCA proposal stated as follows:

> "FCA has prepared a retail approach and incorporated it into the DM plan (and will implement it if so required by GSA). The approach includes discussion of compliance with design guidelines and phasing sequences (B-5)."

Tab B-5 contained the FCA retail plan, which addressed in detail the retail component base requirements, including proposed phasing sequences of the retail development. The retail plan emphasized that the design guidelines, which the DM would prepare under a separate contract requirement, "are an essential tool in the implementation of the [r]etail [p]lan," and stated further that the "[d]esign [g]uideline phase of the project is the time to evaluate, further develop, and refine the elements and tenets of the plan." The plan explained that "[a]s part of the [d]esign [g]uidelines process, certain design ideas will be proposed to implement the [r]etail [p]lan. The appropriate time to

introduce the modification required is Task 1--Design Guideline Initiation/Plan Refinements." Thus, the retail plan addressed the retail components of the RFP and indicated that further retail considerations and refinements would be performed as part of the design guideline preparation process.

With respect to the requirement for preparation of design guidelines, the FCA proposal identified "RETAIL DESIGN AND PLANNING" as a major component of the design guidelines. Moreover, the design guideline section of the proposal recognized the relationship between the design guideline process and the retail plan, noting that "the [r]etail [p]lan is a critical element in the marketing and viability of the Southeast Federal Center."

Notwithstanding FCA's repeated and consistent discussion in its proposal of its approach to retail design and planning, the protester, even after reviewing the FCA proposal through its counsel under a protective order issued for this protest, asserts that FCA's proposal "regards all retail-related tasks, without distinction, to be part of the retail option." SCL asserts that when the agency deleted the retail option requirement, FCA deleted all retail-related tasks, including those required by the base core sections of the RFP. Based on our review of the protest filings, the RFP, and the proposal, we conclude that the protester simply misunderstands or mischaracterizes the FCA proposal.

The protester claims, for example, that the awardee's proposal took exception to the "fundamental [b]ase [c]ore [r]equirement" in the RFP to provide "advice and assistance for retail space." SCL points out that the awardee's offer to provide advice and assistance references its retail plan. SCL asserts that the retail plan was offered as part of FCA's "[r]etail [o]ption" which would be subject to future negotiation. Since, according to the protester, FCA relegated the retail plan to an option, it is clear that FCA only intended to provide retail advice as an option to be negotiated later.

We are unpersuaded by this argument, since it fails to recognize that, as explained above, the retail plan was specifically incorporated by FCA into its DM plan as required by the RFP. The DM plan, as stated, was required to be submitted as part of the offeror's proposal in the "[d]eveloper [m]anagement [s]ervices" area and served as a technical evaluation factor. Moreover, the retail plan itself, in our view, constitutes "advice and assistance." As discussed above, the FCA proposal described its retail plan as one which would evolve throughout the life of the contract and not as a static plan representing the full extent of FCA's retail advice and assistance. We therefore

find that the agency could reasonably consider the plan to have been submitted in response to the base core requirement and reasonably conclude that FCA would continue to provide advice and assistance as part of contract performance. We do not think that FCA's offer to provide advice and assistance can reasonably be read to have been qualified.

SCL next points to language in the FCA retail plan itself that the protester construes as conditioning the FCA offer in a manner contrary to the RFP's retail requirements. SCL points out that FCA's retail plan stated that the plan will be "implemented to the degree desired by GSA" and that "FCA has prepared a retail approach and incorporated it into the DM plan (and will implement it if so required by GSA)." The protester apparently believes that this language invalidates the plan or removes the plan from the base core proposal. While the protester's position is difficult to understand, it appears to be that FCA's proposal should have been found unacceptable since it did not unequivocally offer to implement its retail plan. However, this argument is without merit, as there simply was no requirement to implement the retail plan submitted as part of the proposal.[3] We therefore think that the references in FCA's proposal[4] to "implementation" are irrelevant to this contract award.

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[3]We are also unpersuaded by the protester's argument that FCA did not unequivocally offer to prepare the design guidelines required by RFP section C.7. The argument is based on a statement in the retail component section of the FCA proposal that "[i]f so desired by GSA . . . FCA will implement the [d]esign [g]uideline development." In our view, this statement does not refer to simply preparing the design guidelines, which FCA's proposal addressed in the appropriate RFP section. SCL's interpretation makes no sense in light of the statements in the design guidelines section of the proposal about how the design guidelines would be prepared, who would prepare them, and the price for their preparation.

[4]The references apparently are in response to RFP amendment No. 4 which stated that "the successful offeror may be tasked by the [g]overnment to implement the accepted retail plan (or some modified plan) at some future time." It stated further that "[i]f this occurs, the [g]overnment will negotiate the price of such an implementation. If negotiations are unsuccessful, the [g]overnment reserves the right to contract out the retail development." The awardee's proposal repeatedly expressed FCA's willingness to implement the retail plan.

Price Proposal

SCL next argues that the awardee's price proposal demonstrates that the awardee did not offer to perform the retail requirements since the protester is unable to locate pricing information related to retail in the awardee's price proposal. SCL essentially argues that the agency should have inferred from the pricing information that the FCA technical proposal was unacceptable for failure to address the retail component. For example, although FCA's initial proposal included staff-hours for a retail manager, the protester points out that FCA's BAFO listed "0" staff-hours for a retail manager. The agency and the awardee contend that the "0" entry in FCA's BAFO simply reflects the fact that the agency deleted the requirement to submit prices for the retail option and in no way affected the awardee's commitment to perform the retail-related base contract requirements.

We point out initially that the retail requirements are to be performed at a fixed price and, as discussed, the awardee's proposal did not take exception to those requirements. Concerning the "0" price entries in the FCA proposal, those entries are for services listed as "retail services to be negotiated" and therefore, by definition, do not purport to be the costs for performing the base core contract requirements. We thus fail to see the significance of these entries.

To the extent the protester is suggesting that FCA's price proposal indicates that it has not proposed personnel to perform the base core retail requirements, the protester is incorrect. The retail plan identified the Jerde Partnership as the leader of the FCA retail design team and described the Jerde Partnership as "nationally recognized for its innovative, event-oriented retail and environmental planning." The proposal also specifically identified the members of the FCA design team, which included "Jon A. Jerde for retail design/urban planning" as well as other Jerde Partnership "principals" who will work on the design guidelines. Thus, the FCA technical proposal clearly set forth the team members and their roles in performing the retail-related requirements. In addition, the awardee explains that in pricing the base core tasks, tasks were not differentiated between retail and nonretail, but were "instead treated as integrated tasks directed at the project as a whole." Based on our review of the record and specifically the awardee's proposal, we find nothing in the pricing information submitted that is inconsistent with the commitments in the technical proposal to perform the base core requirements.

GSA Price Evaluation Document

The protester also points to statements made in an agency price evaluation document that FCA's revised proposal deleted pricing "for the retail requirement" and that "retail costs were not included [in FCA's BAFO] and will be negotiated on an as needed basis." The agency states and the record shows that these statements were based on the agency's understanding that the awardee reduced its price as a result of the deletion of the retail options. While the protester argues at length that the elimination of retail costs was the result of the awardee taking exception to mandatory RFP requirements, we agree with GSA that the reductions are reasonably explained by the elimination of the services to be possibly implemented in the future as part of the retail option. In any event, as discussed, FCA offered, and is legally obligated, to perform the contract in accordance with the base core RFP requirements.[5]

ANALYSIS--MEANINGFUL DISCUSSIONS

SCL complains next that the discussions held with SCL were not as detailed as those held with the awardee. After reviewing the discussion transcripts provided under a protective order, the protester identifies several instances where the awardee was allegedly given specific guidance, and attempts to contrast that guidance with the discussions with SCL. Based on our review of the transcripts, we disagree with the protester that the discussions were misleading, unequal, or otherwise improper.

Contracting officers are required to conduct meaningful discussions with offerors whose proposals are within the competitive range. Miller Bldg. Corp., B-245488, Jan. 3, 1992, 92-1 CPD ¶ 21. Such discussions must be meaningful, and in order for discussions to be meaningful, agencies must

[5]SCL also argues that the agency failed to conduct a meaningful price analysis. The protester points out that the awardee's price was lower than the government estimate and concludes that GSA had no basis to determine whether the price was fair and reasonable. An agency's concern in making a price reasonableness determination, prior to awarding a fixed-price contract, is to ensure that the offered prices are not higher than warranted based on the offeror's costs. See Family Realty, B-247772, July 6, 1992, 92-2 CPD ¶ 6. Moreover, consistent with the fixed-price nature of the contract, the RFP did not provide for the type of price evaluation or cost realism analysis urged by the protester. See Norden Sys., Inc., B-227106.9, Aug. 11, 1988, 88-2 CPD ¶ 131. Accordingly, the protester's arguments do not provide a basis to object to the award.

point out weaknesses, excesses, or deficiencies in proposals unless doing so would result in technical leveling or technical transfusion. In addition, while agencies are required to tailor discussions to each particular offeror, they may not conduct misleading or prejudicially unequal discussions. MSI, a Division of the Bionetics Corp., B-243974 et al., Sept. 17, 1991, 91-2 CPD ¶ 254. Since the number and type of deficiencies and weaknesses will vary among proposals, contracting officers necessarily must have considerable discretion in determining what will be discussed with each offeror. See Department of the Navy--Recon., 72 Comp. Gen. 221 (1993), 93-1 CPD ¶ 422.

SCL argues first that GSA gave SCL and FCA "vastly different advice" concerning the level of effort that will be required by the DM to market space to other federal agencies. Specifically, it asserts, the agency "told FCA that GSA, and not the contractor, would be doing most of the lease marketing work." In support of these assertions, SCL quotes an agency negotiator from the FCA discussion transcript as follows:

> "I wanted to mention it, because in the area of marketing, I am not sure if we made it clear . . . [that] it is basically not our intent that you all have an open book or open shotgun approach to marketing the Southeast Federal Center to all Federal agencies. What, instead we will do if it is not clear, is our Planning Office will identify key target agencies . . . and then we will be looking for your assistance in helping us to perhaps put on presentations. . . . It will be helping in some cases . . . to retain clients."

SCL claims that it "received no such information about the government's requirements" and that "SCL was led to believe that it would have a broad role in marketing to federal agencies. . . . "

The record simply does not support the protester's account. The GSA negotiators advised SCL as follows:

> "What we would envision, I think--I hope it's clear that once [SCL's] team comes onboard the marketing, we will target the agencies to be marketed, and it will be either new agencies . . . or in the case of, say GSA or OPM or others, we feel there's an effort needed to reinforce their commitments. . . ."

The contracting officer stated further as follows:

> "what we know to date is that the site is between 80 and 85 percent filled up basically. We recognize that there are going to be secondary and tertiary marketing efforts, even if all those people go, and they may drop out, and we may need to put somebody else. So what we're looking for is what you intend to do, based on what we all know now."

Thus, while the protester asserts that it expected "an intense marketing campaign to prospective federal agency tenants," the record shows that the agency specifically pointed out that 80 to 85 percent of the site is "filled up basically," that GSA will target the agencies to be marketed, and that the contractor would be needed to "reinforce" commitments. Indeed, the chairman of SCL acknowledged the limited role of the contractor during the discussion session; he responded to GSA's description of the required effort as follows: "I mean you've done--its more of a reemphasis, a restatement and a firming up rather than a quote, 'cold canvassing.'" Thus, the transcripts show that the agency communicated to both the protester and awardee the role of the DM and "what we all know now" concerning potential federal agency tenants.

SCL argues similarly that GSA provided FCA with specific price guidance not provided to SCL. SCL complains that the GSA negotiator pointed out specific areas of duplication which could be eliminated in the FCA proposal but failed to do so for SCL. Again, the protester's version of events is not consistent with the discussion transcripts.

SCL identifies the following statement made by GSA as an example of the specific guidance given to FCA during discussions:

> "I am a little bit concerned about what you include as far as your project management fees on the projects and what you are going to do for us as opposed to what you are going to do for the core services. We are cognizant that there may be some duplication of efforts there and I would not

> want you to fill in a large number in a block, because I gave you a block to put a number in."[6]

While the nature of the alleged improper guidance is unclear, the protester appears to focus on GSA's admonition concerning the potential for duplication in the project management portion of the proposal. However, the record shows that the agency emphasized potential duplication as an area which SCL should examine and specifically mentioned the project management area. For example, a GSA negotiator stated as follows:

> "[O]ne of our concerns is that when you put all those blocks out for people to put dollars in--[t]hey fill them in. And then you have to be concerned, well, what gets covered by core? What gets covered by project management, and what gets covered by construction management?"

The GSA negotiators stated further:

> "[C]ore services, construction management, and project management, if you're not careful, can be duplicated and we would only caution you to be careful that in this filling out of these multi-pages of pricing proposals, that you don't duplicate your costs because it will hurt you in the cost area."

While SCL asserts in its protest that it did not have the "slightest hint, indication, or clue" as to what GSA meant by "duplication of effort when none had been identified in SCL's proposal," and suggests that the agency was evasive in answering the protester's questions, the transcript of the discussions does not support the protester's position. At the end of the colloquy concerning the potential for duplication, an SCL representative concluded that "I think we have a clear understanding conceptually of the approach. I appreciate this kind of input, because it would force us,

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[6]SCL points out other costs, such as FCA's "[deleted]" which GSA identified to FCA as causing concern. These costs were not costs which the agency considered to be duplicative; rather, they were costs which GSA believed may have been excessive. Similar costs were specifically brought to the attention of SCL. For example, in SCL's proposal, GSA identified costs for [deleted] which may have been excessive.

then, to possibly go beyond a job title and actually look at duties as clearly as we can."[7]

Based on the transcripts of the respective discussion sessions, we think the agency communicated its concerns about duplication to SCL and FCA in an equal manner. Mark Dunning Indus., Inc., B-230058, Apr. 13, 1988, 88-1 CPD ¶ 364. We therefore find nothing improper about the discussions conducted by GSA.

The protest is denied.

Robert P. Murphy
Acting General Counsel

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[7]SCL also asserts that "in response to direct questions from SCL" during discussions, GSA's negotiators "took the Fifth" and failed to identify even a single broad area [of potentially overlapping costs in SCL's proposal] that SCL should review." The protester's assertion distorts the record; the questions which the agency declined to answer occurred long after the discussion of potential duplication of costs and could not reasonably be characterized as "direct questions" concerning overlapping. The questions are as follows:

> "Inasmuch as you haven't purchased a developer manager service, how do you begin to look at how you value that? We clearly--you know, we're trying to get inside GSA's head to see how they would look at and see where that is. Is that something you can respond to, or, you know, you've got 1 to 2 percent for CM [construction management] and 6 percent for architect? How do you do that?"