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Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Square 537 Associates LP
File: B-260949.3
Date: June 6, 1995

DECISION

Square 537 Associates LP protests the proposed award of a lease to Triangle MLP Limited under solicitation for offers (SFO) No. HQ 94-1, issued by the Securities and Exchange Commission (SEC) for office and related space. The protester contends that the SEC violated the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. §§ 253 et seq. (1988), and Executive Order 12072.

We dismiss the protest.

The SFO, issued on August 24, 1994, sought between 550,000 and 600,000 net usable square feet of office and related space to house the SEC's headquarters. The SFO contemplated the award of a 20-year firm level lease, with a 10-year market renewal and purchase option. Section A of the SFO listed the technical factors that the agency would consider in evaluating proposals. In addition to technical considerations, the SFO also explained that price would be evaluated in accordance with the procedures announced in the SFO; price was considered less important than technical factors. Initial offers were to be submitted by 2 p.m. on October 7. The SEC evaluated initial proposals, conducted discussions, and requested best and final offers from those offerors whose proposals remained within the competitive range. Award was to be made to the offeror whose proposal represented the greatest overall value to the government.

Square 537 asserts that the SEC has selected a site for its new headquarters building in Silver Spring, Maryland. The protester argues that in reaching its decision, the SEC violated CICA's mandate for "full and open competition" and improperly failed to provide offerors with a "level playing field." According to the protester, the State of Maryland and Montgomery County will provide the proposed awardee, Triangle MLP Limited, with a subsidy, thereby allowing that firm to offer a reduced leasing price, significantly below any price that could reasonably be proposed by other offerors, such as Square 537, whose properties are located within the District of Columbia. To remedy that situation,

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the protester argues that the SEC should have evaluated Triangle MLP Limited's proposal using "a normalization process," whereby any advantage gained by Triangle MLP Limited due to the subsidy would be equalized with the competing offers.

We have previously considered and rejected the argument that contracting agencies are obligated to eliminate the effects of subsidies on the successful offeror. For example, in Cadillac Gage Co., B-209102, July 15, 1983, 83-2 CPD ¶ 96, we rejected the protester's argument that in evaluating offers the contracting agency should have eliminated any advantages gained by the awardee from receiving a Canadian government subsidy. See also Pyrotechnics Indus., Inc., B-221886, June 2, 1986, 86-1 CPD ¶ 505. These cases reflect the general principle that contracting agencies are not required to equalize the competitive advantage a firm might enjoy by virtue of its own particular circumstances, so long as the advantage is not the result of preferential or unfair action by the contracting agency. See Enidine, Inc., B-222617, June 5, 1986, 86-1 CPD ¶ 528.

Here, it is clear from the protester's filings that any advantage gained by Triangle MLP Limited is due to that firm's individual circumstances, and not the result of preferential or unfair action by the SEC. We are not aware of, and the protester has not cited, any statute or regulation which requires agencies to offset the effects on the awardee of the type of subsidy alleged here.¹ The fact that the source of the subsidy is a local or state government does not affect our conclusion that the SEC is not required to "normalize" offers or to otherwise offset the effects of the subsidy.²

¹To the extent that the protester alleges that the proposed awardee submitted a below-cost offer, it is well established that offerors may propose, and the government may properly accept, below-cost offers where, as here, award of a fixed-price contract is involved. See GTE Customer Networks, Inc., B-254692.2, Feb. 24, 1994, 94-1 CPD ¶ 143.

²The protester also argues that the agency should have announced in the SFO that subsidized offers would be considered. Offerors were free, however, to rely upon their assets and resources--including creative financial arrangements--to prepare proposals in any manner which they believed would make their lease prices competitive. We fail to see, and the protester does not explain, how the failure of the SFO to specifically announce that "subsidized" offers would be acceptable prevented Square 537 from developing a competitive proposal.

The protester also argues that the SEC failed to comply with Executive Order 12072, which sets out various factors to be considered in meeting the government's space needs. In particular, Square 537 contends that the proposed award is inconsistent with section 1-103 of the Executive Order, which provides that "the process for meeting [f]ederal space needs in urban areas shall give first consideration to a centralized community business area and adjacent areas of similar character" This contention is untimely.

The areas eligible for consideration for the new headquarters building were clearly set forth in the solicitation. Specifically, section A.2 c of the SFO delineated the locations for consideration as follows:

"PROPERTY OFFERED IN RESPONSE TO THIS SOLICITATION MUST BE IN THE WASHINGTON METROPOLITAN AREA INCLUDING THE DISTRICT OF COLUMBIA AND THE AREA ENCOMPASSED BY THE COUNTIES OF FAIRFAX AND ARLINGTON AND THE CITY OF ALEXANDRIA IN VIRGINIA, AND THE COUNTIES OF MONTGOMERY AND PRINCE GEORGE'S IN MARYLAND."

Section A.5 of the SFO listed the technical factors the SEC would apply in evaluating offers, including the following "LOCATION" factor:

"AT THE TIME OF AWARD SPACE MUST BE LOCATED IN A PRIME COMMERCIAL OFFICE DISTRICT WITH ATTRACTIVE, PRESTIGIOUS, PROFESSIONAL SURROUNDINGS WITH A PREVALENCE OF MODERN DESIGN AND/OR TASTEFUL REHABILITATION IN MODERN USE. STREETS AND PUBLIC SIDEWALKS SHOULD BE WELL MAINTAINED.

ACCESS TO RELEVANT GOVERNMENT FACILITIES (E.G. FEDERAL COURTS, CONGRESS, [OFFICE OF MANAGEMENT AND BUDGET, DEPARTMENT] OF JUSTICE.

AT THE TIME OF AWARD A VARIETY OF INEXPENSIVE AND MODERATELY PRICED FAST FOOD AND EAT-IN RESTAURANTS SERVING BREAKFAST AND LUNCH MUST BE LOCATED WITHIN 1750 WALKABLE LINEAR FEET AND OTHER EMPLOYEE SERVICES SUCH AS RETAIL SHOPS, CLEANERS, BANKS, ETC. MUST BE LOCATED WITHIN 1750 WALKABLE LINEAR FEET.

AT THE TIME OF THE AWARD THE BUILDING MUST BE ACCESSIBLE TO A MAJOR AIRPORT/TRAIN FACILITIES PROVIDING ACCESS TO OTHER MAJOR FINANCIAL CENTERS.

AT THE TIME OF AWARD THERE MUST BE QUALITY HOTEL ACCOMMODATIONS WITHIN A REASONABLE DISTANCE AND RESTAURANTS PROVIDING THREE MEALS A DAY WITHIN 1750 WALKABLE LINEAR FEET OF THE BUILDING."

None of the seven amendments to the SFO changed the SFO's announced locations for consideration or altered any element of the "LOCATION" evaluation factor.

The protester's contention--that in selecting the proposed awardee the SEC failed to give "first consideration" to buildings located in a "centralized community business area"--is essentially a challenge to the SFO's evaluation scheme, which is untimely. Our Regulations require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing time. 4 C.F.R. § 21.2(a)(1) (1995); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. If the protester believed that the areas for consideration delineated in the SFO, or that the "LOCATION" evaluation factor, failed to adequately reflect the provisions of Executive Order 12072, it should have raised its objections prior to the time set on October 7, 1994, for receipt of initial proposals. Since Square 537 did not file its protest in our Office until May 12, 1995, well after that time, this allegation is untimely, and will not be considered.³ See Buffalo Central Terminal, Ltd., B-241210, Jan. 29, 1991, 91-1 CPD ¶ 82.

The protest is dismissed.



Ronald Berger
Associate General Counsel

³Square 537 also states that in making its selection, the SEC did not consult with appropriate federal, state, regional, and local government officials and consider their recommendations for and objections to the proposed location as contemplated in section 1-203(c) of the Executive Order. Other than its summary statements in this regard, however, Square 537 offers no support for its contention. Since the protest does not include sufficient factual information to support the protester's contention that the SEC acted contrary to requirements in the Executive Order, we see no basis to consider this issue further.