



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: 440 East 62nd Street Company

File: B-276058.2

Date: December 11, 1997

Melinda L. Carmen, Esq., Carmen & Muss, P.L.L.C., for the protester.
Rebecca L. Kehoe, Esq., Cotten & Selfon, for Arch 1650 Partners, L.P., an intervenor.

Robert J. McCall, Esq., General Services Administration, for the agency.
Andrew T. Pogany, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Award to offeror submitting technically higher-rated, higher-priced proposal was unobjectionable, where solicitation stated that price and technical factors were of equal weight and agency determined that superior technical merits of successful offer justified higher price.

DECISION

440 East 62nd Street Company protests the award of a lease to Arch 1650 Partners, L.P. under solicitation for offers (SFO) No. MPA95000, issued by the General Services Administration (GSA) for office space in Philadelphia, Pennsylvania. 440 East principally contends that the evaluation of offers and the selection decision by the agency were seriously flawed, and that its offer should have been selected for award.

We deny the protest.

As amended, the SFO requested offers to enter into an initial lease term of 10 years, with 2 consecutive renewal options of 5 years each, for 265,000 occupiable square feet (o.s.f.) of office space for the Environmental Protection Agency (EPA). The SFO specified that the 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." The SFO required parking spaces within the building or within two city blocks for only two government vehicles, as well as visitor parking at reasonable rates, also within two city blocks. The SFO additionally required that a variety of inexpensive fast food establishments and/or

restaurants be located within two blocks and that other services benefiting EPA employees such as retail shops, cleaners, and banks be located within three blocks.

The SFO stated that award of the lease would be made to the offeror whose offer was most advantageous to the government, price and other factors considered. The SFO provided that price was equal to the combination of the following factors listed in descending order of importance: (1) proximity to public transportation;¹ (2) space layout efficiency;² (3) past performance (including technical comprehension of requirements, construction plan, implementation schedule/sequencing, and experience with projects of comparable size and complexity); and (4) ability to provide a quality workplace/building/location (including consideration of, among other things, the building's quality, appearance, and systems efficiency, as well as the surrounding locale). The SFO also contained a "Historic Preference Clause," which provided for a 10-percent price evaluation preference for buildings listed in the National Register of Historic Places, but only if the "offer for space meets the terms and conditions of [the SFO] as well as any other offer received." Finally, occupancy was required within 360 calendar days from the successful offeror's receipt of "design intents" from GSA following execution of the lease.

Five offers were received, three of which, including 440 East's and Arch 1650's, were included in the competitive range. Following extensive discussions, GSA requested and received best and final offers (BAFO). The agency evaluated BAFOs with the following technical and price results:³

¹In response to an offeror's question during a pre-proposal conference as to whether distance to public transportation would be evaluated relatively or only to determine whether the building location was within the specified delineated area of the SFO, GSA stated that "[p]roximity to public transportation will impact the score." This response was memorialized in an SFO amendment.

²The SFO stated that the agency would consider a floor plate size (the size of the rectangular floor offered) of between 19,000 o.s.f. (minimum) and 50,000 o.s.f. (maximum). In the amendment containing the offerors' questions and the agency's responses, GSA, in response to a question whether these dimensions were "minimum requirements" that had to be met, stated as follows:

No, these are not minimum requirements. However, potential offerors [are] informed that a floor plate under 18,000 sf or over 60,000 sf would impact their score in the technical evaluation process.

³The agency employed the following technical ratings: excellent (5 points); average (2 to 4 points); and unacceptable (1 point).

Offeror	Overall Technical Score	Price (Present value per o.s.f.)	Operating Costs
Arch 1650	5.00	[Deleted]	[Deleted]
Offeror A	3.13	[Deleted]	[Deleted]
440 East	1.60	[Deleted]	[Deleted]

Briefly, concerning 440 East's building, the agency evaluators found that its location was in an area that "has historically housed light-industrial, manufacturing, production oriented companies [and that] the only other large and prominent tenant in [the area] is the [Philadelphia] Inquirer Building across the street, which has large elements of quasi-industrial, shipping, receiving, storage type functions." The evaluators concluded that 440 East's building was in a location that "cannot be considered a prime commercial office district." (Emphasis in original.) The evaluators also found that the 440 East building has direct access to only two of the four major public transportation systems, lacks amenities, and had an excessively large floor plate which would make the space inefficient for EPA's intended use.

In contrast, the agency found that Arch 1650's offer met or exceeded agency expectations regarding all award factors. The evaluators found that the 1650 Arch Street building was a "Class A" building which presented a professional appearance, has been maintained in excellent condition, and has immediate access to all means of public transportation. Further, the evaluators found that the building was located in the central prime commercial core of the city with excellent amenities.

Based on the evaluation results, the contracting officer determined that the Arch 1650 offer was most advantageous to the government and awarded a contract for the lease to that firm on September 4, 1997.⁴ This protest followed a debriefing provided by the agency to 440 East.

440 East raises numerous arguments concerning the evaluation and the award decision. We have reviewed the record and find all to be without merit. We discuss the principal evaluation issues below.

⁴The protester argues that the agency did not properly award the lease because the award letter contained additional conditions and contingencies imposed by the agency. We find this argument to be factually erroneous. We have reviewed the award letter and find it to be an unconditional acceptance of Arch 1650's offer without containing any material conditions or contingencies.

The evaluation of offers is primarily within the discretion of the procuring agency, not our Office; the agency is responsible for defining its needs and the best method of accommodating them. Buffalo Central Terminal, Ltd., B-241210, Jan. 29, 1991, 91-1 CPD ¶ 82 at 5. Consequently, we will not make an independent determination of the merits of offers; rather, we will examine the agency's evaluation to ensure that it was reasonable and consistent with the stated evaluation factors. Id.

Concerning the evaluation factor of proximity to public transportation, 440 East argues that, in addition to two public transportation systems (one bus line and a subway stop) nearby its building, [deleted]. Further, the protester argues that its offer was "clearly superior" to the awardee's inasmuch as the protester offered [deleted] inside secured parking spaces in its building [deleted], and also has parking across the street at very low daily and monthly rates. The protester notes that the 1650 Arch Street building provides no such parking. Additionally, the protester states that its building is accessible to major highways and is not located in a congested traffic area. In short, the protester complains that Arch 1650 unreasonably received a perfect score of 5 under this factor, while its offer was allegedly improperly downgraded.

The record does not support the protester's position. The evaluators found that while the 440 East building was 700 feet from the Broad Street subway and less than 100 feet from one bus line (Route C), it is more than 1/2 mile to the Market/Frankford subway/surface line and more than 3/4 mile to PATCO (a regional commuting rail line to New Jersey). The evaluators recognized that the protester's [deleted] was an attempt to "somewhat enhance" employee access to public transportation. However, [deleted], and the agency states that a great majority of EPA employees use flextime, compressed time, and alternate work schedules, and therefore leave work prior to 4 p.m. Further, EPA, with its mission to reduce pollution by fossil-fuel vehicles, places heavy emphasis on its employees using mass transit, and 87 percent of its employees do so.⁵

In contrast, the record shows that the 1650 Arch Street building was 1,300 feet from the Broad Street Subway, 950 feet from the Market/Frankford elevated trains, 400 feet from the regional rail, and less than a 1/2 mile from PATCO. The evaluators also found that the building is serviced by several bus routes within a two-block radius. We conclude that the agency reasonably declined to increase the protester's proposal rating based on proximity to inexpensive parking, and that its proposal was reasonably downgraded relative to Arch 1650's under this factor.

Concerning space layout and efficiency, the protester argues that its office space is on contiguous, open rectangular floors with elevators dedicated to EPA's use and is "highly efficient." The protester also states that [deleted] the required 265,000 o.s.f.

⁵This is why the SFO required only minimal parking spaces.

[deleted] to provide even greater layout flexibility. The protester asserts that the 1650 Arch Street building, which is configured over 16 floors, offers a less efficient layout of space.

The record shows that the protester's offered floor plate was more than [deleted] square feet, which [deleted] the desired maximum of 60,000 square feet as stated in the amended SFO. The protester's solution for reducing the [deleted] floor plate size was to [deleted]. The evaluators found that [deleted] the floor plate did not resolve any of the efficiency or space use problems associated with [deleted] floor plates, including [deleted]. Moreover, EPA states that fit-out of the general floor area would be extremely difficult due to small bay sizes in some areas, and that it would have to customize numerous system furniture workstations to effectively use the space. Floor space also would be lost due to inefficiencies caused by the number of columns requiring box-outs. The evaluators also found that insufficient natural daylighting would result due to the sheer depth of the floor plate. The evaluators concluded that "[t]he combination of the aforementioned factors render this space unsuitable for the agency needs with respect to functionality, space use and employee efficiency." (Additionally, we agree with the agency that the protester's offer of [deleted] not required by the SFO could not properly have been considered by the agency, since giving the protester credit for this [deleted] would have been inconsistent with the SFO evaluation criteria.)

In contrast, the record shows that Arch 1650's building offered a floor plate well within the agency's desired minimum and maximum. Further, the Arch 1650 office space is essentially column-free, allowing for efficient layouts, and is contiguous and uninterrupted, with the exception of a mechanical equipment floor (15th floor). Moreover, the floor plate size and nearly continuous perimeter glazing offer ideal natural daylighting conditions. For these reasons, we again find that the protester's building was reasonably downgraded relative to Arch 1650's under this factor.

Concerning the past performance factor, the protester argues that it offered a "team [with] an outstanding record with GSA and the private sector" that should have merited a "top score." The protester states that it has "strong" owner, developer, contractor, and property management experience as a lessor for which it did not receive proper credit.

The record shows that the protester received a score of 3 points under this factor and demonstrated a "good comprehension of the Government's Solicitation and related technical requirements"; its construction schedule was "adequately presented" and accounted for major trades and SFO scheduling elements. Further, the evaluators found that its team of architects, engineers, and construction managers demonstrated past experience with large scale projects similar in size or complexity. However, Arch 1650 also demonstrated a superior understanding of solicitation requirements and was even able to make viable suggestions regarding reuse potential, the heating/ventilation/air conditioning (HVAC) system and lighting,

which allowed for significant cost savings. Further, the evaluators found that its construction schedule/phase-in was superior and demonstrated a thorough understanding of the scope of the project. Arch 1650's team of architects, engineers, and construction managers also demonstrated past experience with projects of comparable size and complexity. In short, because both offerors were found to demonstrate good past performance credentials, the record shows that this factor properly was not a determinative or material factor in the selection decision.

Under the factor of ability to provide a quality workplace/building/location, the protester argues that its building was located in the SFO's delineated area and that it agreed to use a "top GSA award winning architect for its building renovation and a nationally renowned, environmentally experienced engineering firm." The protester states that its offer included major building renovations to the outside of the building, entrance, lobby, elevators, and building systems.

While the protester's building was located in the SFO's delineated area, the evaluators found not only that the protester's building is in a light industrial area, but that the only tenant in the building is a "computer disaster recovery firm," which also has large elements of quasi-industrial and storage functions. The evaluators also noted that the protester's building is "industrial in appearance [although] [p]lanned renovations to the facade may serve to alter this somewhat."

In contrast, concerning the 1650 Arch Street building, the evaluators found as follows:

The building was built to very high standards which adhere to progressive design principles. The building configuration is highly functional and efficient. The building's existing condition, even before any attempt to retrofit, is excellent. This is a modern office building which projects a highly desirable professional image. As EPA seeks a high degree of public 'presence' and professionalism, this building is well suited to [its] needs. The building is located in a prime commercial office area and all neighboring buildings are of similar high quality. Overall the building projects a professional, aesthetically pleasing appearance.

While the protester disagrees with the agency's assessment, it simply has not shown that the evaluation was unreasonable under this factor.⁶

⁶The protester also argues that the agency should not have awarded the lease to Arch 1650 because that firm was sold to new owners prior to receipt of BAFOs. As the agency points out, however, the transfer or assignment of rights and obligations of an offeror is permissible where, as here, the transfer is to a legal entity which is (continued...)

Concerning the selection/tradeoff decision, agency officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Price/technical tradeoffs may be made, and the extent to which one is sacrificed for the other is governed by the test of rationality and consistency with the established evaluation factors. 841 Assocs., L.P.; Curtis Center Ltd. Partnership, B-257863, B-257863.2, Nov. 17, 1994, 94-2 CPD ¶ 193 at 7. This discretion exists even where price and technical factors are of equal weight. Id. We will not disturb awards to offerors with higher technical merit and higher prices so long as the result is consistent with the evaluation factors and the agency has reasonably determined that the technical superiority outweigh the price difference. Id.

GSA states that it reasonably paid a [deleted]-percent premium for the Arch 1650 property. The protester argues that the premium paid was at least [deleted] percent above its offered price and that this premium was unjustified. The record does not support the protester's argument. As discussed, the Arch 1650 building was rated substantially higher than the protester's under all technical evaluation criteria--the agency reasonably found that it was a modern office building with a highly professional image in a prime commercial area. The record also shows that the agency was fully aware that the Arch 1650 property would command a substantial premium over the protester's building. The determination that this premium was warranted by the superiority of the Arch 1650 property was consistent with the SFO (technical and price factors were equal), and well within the agency's discretion.⁷ The award therefore was proper.⁸

⁶(...continued)

the complete successor in interest to the offeror by virtue of the sale of the entire business embraced by a proposal. See Ionics Inc., B-211180, Mar. 13, 1984, 84-1 CPD ¶ 290 at 4-6.

⁷Moreover, while the agency has confirmed the accuracy of its [deleted]-percent calculation and the protester has not demonstrated that it is inaccurate, even if we were to assume, arguendo, that the protester's [deleted]-percent figure is correct, in light of the agency's reasonable preference for Arch 1650's higher-rated building, we find that an additional [deleted]-percent differential would not have altered the selection decision.

⁸The record shows, contrary to the protester's argument, that no post-BAFO discussions occurred except for permissible clarifications and a reduction in price for [deleted] by Arch 1650, also permissible, since that firm at that time was already evaluated as having submitted the otherwise successful proposal. See Federal Acquisition Regulation (FAR) §§ 15.412(c) (FAC 90-45) and 52.215-10(f). The protester also states that it should have received a preference under the historic
(continued...)

Finally, the protester argues, as an alternative to its evaluation challenge, that its offer should have been excluded from the competitive range since its location precluded a chance for award vis-à-vis Arch 1650. This argument is without merit. An agency should not automatically reject a relatively inferior offer in the same manner that it would reject a nonresponsive bid. See Caldwell Consulting Assocs., B-242767, B-242767.2, June 5, 1991, 91-1 CPD ¶ 530 at 11. Rather, an agency may broaden the competitive range to maximize the competition and provide fairness to the various offerors. Avondale Tech. Servs., Inc., B-243330, July 18, 1991, 91-2 CPD ¶ 72 at 3. Here, the protester was fully aware when it submitted its offer that the SFO's evaluation criteria would favor an offeror with closer proximity to public transportation, smaller floor plate sizes, and a more modern office building which projected a desired professional image. The protester was therefore cognizant that it would be in an "uphill battle" to have a chance at award. See Deskin Research Group, Inc., B-254487.2, Feb. 22, 1994, 94-1 CPD ¶ 134 at 5. Yet the protester chose to aggressively pursue competing for this requirement. Under these circumstances, the protester cannot reasonably claim that it somehow was misled by its inclusion in the competitive range.⁹ In sum, we find nothing improper in the agency's establishing a competitive range of three proposals that included 440 East's.

The protest is denied.

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⁸(...continued)

building provision of the SFO since its building is a registered historic building. However, since its offer did not meet the terms and conditions of the SFO "as well as any other offer received," we find no merit to this contention.

⁹In a somewhat related contention, the protester also argues that the agency failed to conduct meaningful discussions by not disclosing inherent weaknesses in its offer which the protester could not change, such as location and floor plate size. The protester states that GSA "should have done so promptly." The record shows that the protester knew from the beginning of the procurement that such factors as location and floor size were of central importance to the agency's evaluation scheme, and the protester obviously knew the location and size of its own building. We do not think that the agency had to tell the protester what it already knew, and therefore do not find that this issue provides a basis to challenge the meaningfulness of the discussions conducted.