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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

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Decision

Matter of: 901 North Fifth Street, LLC

File: B-404997; B-404997.2

Date: July 22, 2011

Jeffrey A. Belkin, Esq., and Steven R. Campbell, Esq., Alston & Bird, LLP, for the protester.

Charles A. Patrizia, Esq., and Mary-Elizabeth M. Hadley, Esq., Paul, Hastings, Janofsky & Walker LLP, for Lexington LAC Lenexa LP, the intervenor.

Mark R. Warnick, Esq., General Services Administration, for the agency.

Paula A. Williams, Esq., and Edward T. Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency's evaluation and selection decision were flawed is denied where the record shows that both the evaluation and the resulting selection decision were reasonable and consistent with the solicitation's evaluation factors.
 2. Protest that agency failed to comply with terms of Executive Order 12072 is dismissed; our Office does not normally review allegations of an agency's failure to comply with executive branch policies.
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DECISION

901 North Fifth Street, LLC (901 North) of Kansas City, Kansas protests the award of a lease by the General Services Administration (GSA), to Lexington LAC Lenexa, LP (Lenexa) of Lenexa, Kansas pursuant to solicitation for offers (SFO) No. 9KS0054 for office space to house the Environmental Protection Agency (EPA) regional headquarters in the Kansas City, Kansas metropolitan area.¹ The protester argues that the agency's evaluation of offers was unreasonable, its discussions were misleading, and the agency failed to comply with Executive Order 12072 in its selection of Lenexa for award.

¹ The regional EPA office is responsible for administering environmental programs in four states--Iowa, Kansas, Nebraska and Missouri. SFO, Program of Requirements (POR) at 9-10.

We deny the protest in part and dismiss it in part.

BACKGROUND

901 North is the owner and current lessor of a Kansas City building specifically built for and used by the EPA's regional office.² This building is located in the central business district (CBD) of Kansas City, Wyandotte County, Kansas. The EPA has occupied the building, which is partially-serviced by the lessor, since June 14, 1999, under an initial lease term of 10 years. The lease term subsequently was extended through June 14, 2012. Contracting Officer's Statement at 6.

In July 2007, GSA initiated informal discussions with a representative of the then-current owner of the building and a representative of their real estate brokerage firm (which remained the same after the change of ownership) to explore the possibility for a 20-year, 10-year firm, fully-serviced succeeding lease.³ Among the considerations identified by GSA was the lessor's ability to achieve Leadership in Energy and Environmental Design for Existing Buildings (LEED-EB) Platinum certification, renovation of various areas of the building, replacement of carpeting, interior painting, and upgrading the restrooms. Id. at 2-4.

Although negotiations between 901 North, its broker, and GSA continued for an extensive period of time, they were ultimately to no avail. The record shows that 901 North rejected many of GSA's standard requirements, was unwilling to offer a fully-serviced lease, was unwilling to provide periodic painting and carpeting, required the inclusion of special assessments in the calculation of tax escalations, and proposed either a 15-year or 20-year firm lease term at rental rates which GSA considered to be significantly above fair and reasonable market rates. Id. at 4-5. GSA ultimately determined that award of a succeeding lease to 901 North would not be in the best interests of the government, due primarily to the protester's failure to offer market rental rates. GSA therefore decided to conduct a competitive procurement for this requirement and by letter dated November 30, 2009, GSA notified Congress of its intentions, and of its need to expand the delineated area to include areas outside the CBD of Kansas City. Agency Report (AR) exh. 10, GSA Letter to Congressman James L. Oberstar, Chairman.

² On December 8, 2008, 901 North acquired the building, becoming its fourth owner.

³ In September 2008, GSA received prospectus approval from Congress to negotiate a sole-source succeeding lease with 901 North for up to 20 years. Contracting Officer's Statement at 3.

The SFO at issue here was published on October 15, 2010 to three building owners with buildings located in the Kansas City, Kansas metropolitan area.⁴ SFO at 5, 7; Contracting Officer's Statement at 6. More specifically, the buildings were within the delineated area of consideration established by the SFO, which was described as "the state of Kansas and a maximum of 20 miles driving distance from the EPA Science and Technology Center (STC), 300 Minnesota Avenue, Kansas City, Kansas." Id. at 7. This delineated area encompasses all or parts of three counties in Kansas--Johnson, Leavenworth, and Wyandotte--and 23 municipalities, and is beyond Kansas City's CBD. Agency's Suppl. Memorandum of Law, at 5 n.7.

The SFO sought offers for a maximum of 203,475 rentable square feet of office and related space yielding 182,554 usable square feet.⁵ The SFO also disclosed that the offered building must, at a minimum, meet the requirements of LEED for Existing Buildings Operations and Maintenance (LEED-EBO&M) Silver level; higher levels of LEED-EBO&M, such as Gold or Platinum, were preferred. Id. at 6.⁶

The SFO required offerors to submit alternate offers: the first for a 10-year firm term, with two 5-year renewal options; the second for a 20-year lease with a 10-year firm term. The agency reserved the right to evaluate each of the two offers and select the term deemed most advantageous to the government. Id. at 7.

The solicitation advised that award would be made to the firm whose offer was considered most advantageous to the government based on price and the following factors, listed in descending order of importance: (1) sustainability; (2) building and systems design; (3) development team experience; and (4) development team past performance. Id. at 11. All evaluation factors other than price, when combined, were approximately equal in importance to price. Id.

As relevant here, the sustainability evaluation factor consisted of the following equally-weighted subfactors: (a) LEED-NC [New Construction] or LEED-CS [Core

⁴ Prior to issuing the SFO, the contracting officer conducted a market survey and identified three potential sites, including Lenexa's, that were capable of meeting the government's needs and were within a 20 mile radius of the EPA's Science and Technology Center. Contracting Officer's Statement at 6.

⁵ Consistent with the American National Standards Institute (ANSI)/Building Owners and Managers Association (BOMA) office area standards, "usable square feet" refers to the area where a tenant normally houses personnel and/or furniture. "Rentable space" refers to the area for which a tenant is charged rent and may include a share of building support/common areas such as elevator lobbies, building corridors, and floor service areas. SFO at 26.

⁶ The requirements to achieve certification were set forth in the LEED-EBO&M Reference Guide at <http://www.leedbuilding.org>. SFO at 6.

and Shell] Silver, Gold or Platinum certification;⁷ (b) LEED-EBO&M gold or platinum certification; and (c) preferred features. Id. With regard to price, the SFO stated that the agency would perform a present value price analysis to determine the annual ANSI/BOMA office area square foot price. SFO at 14.

Offers were received from 901 North and Lenexa by the November 15 closing date. Although, as noted above, the SFO required firms to submit two alternative offers, the protester submitted only one offer for a 10-year firm lease term with two 5-year renewal options. Lenexa, on the other hand, submitted offers for a 10-year firm lease term with two 5-year renewal options, and for a 20-year lease with a 10-year firm term, as required by the SFO.

GSA held multiple rounds of discussions with the offerors during the evaluation. After each round of discussions, the source selection evaluation board (SSEB) evaluated offers, identifying “strengths,” “weaknesses,” and “deficiencies” in each offer. The SSEB also assigned a numeric score to offers for each evaluation factor and subfactor.

⁷ With respect to the LEED-NC or LEED-CS Silver, Gold or Platinum certification subfactor, the SFO states:

a. Offerors that have achieved or demonstrate an ability and commitment to achieve LEED-NC certification at the Silver, Gold or Platinum level will receive preference under this subfactor. Gold certification shall receive higher preference than Silver certification. Platinum certification shall receive higher preference than Gold certification.

If a building addition is required to provide the required square footage, the expansion shall achieve the same or higher level of LEED as the original building.

b. Offerors without existing LEED certifications that commit to providing LEED-CS certification at the Silver, Gold or Platinum level will receive preference under this subfactor. Gold certification shall receive higher preference than Silver certification. Platinum certification shall receive higher preference than Gold certification.

SFO amend. 3.

Final revised offers were requested and received by March 9, 2011. The final consensus ratings were as follows:

Factor		901 North	Lenexa
1. Sustainability			
	LEED-NC or LEED-CS	0	10
	LEED-EBO&M	8	12
	Preferred Features	11	13.5
2. Building and Systems Design			
	Mechanical and Electrical Systems	12	14.5
	Building Design	12.5	12
3. Development Team Experience		5.5	8
4. Development Team Past Performance		8	9
Total Points (out of a possible 100 points)		57	79
Present Value Price/usable square foot		\$22.06	\$21.40

Agency Report (AR) exh. 24, Technical Evaluation Report at 29; exh. 16, Present Value Analysis of Final Revised Offers.

Based on the respective technical scores and prices of each offer, the contracting officer, as source selection authority (SSA), determined that Lenexa's offer was most advantageous to the government and awarded it the lease for a 10-year firm term with two 5-year renewal options. After a debriefing, 901 North filed this protest with our Office.

DISCUSSION

In its protest, 901 North argues that GSA: (1) improperly and unreasonably calculated move-related costs associated with Lenexa's offer; (2) failed to conduct meaningful discussions with the protester with regard to the first sustainability subfactor, LEED-NC or LEED-CS Silver, Gold, or Platinum certification requirement, Protester's Initial Comments at 8-16; and (3) failed to comply with Executive Order 12072. Suppl. Protest at 4-8.⁸

⁸ In its initial protest, the protester argued that the agency: (1) improperly evaluated the location, building design, construction and space requirements for Lenexa's building and should have found Lenexa's offer nonresponsive; (2) improperly evaluated 901 North's offer under the sustainability subfactor A (LEED NC or LEED-CS certification requirements) and subfactor B (LEED-EBO&M certification requirement); and (3) failed to properly consider the risks associated with buildout construction at Lenexa's building and the risks associated with relocating to a new building. Protest at 8-9. Because the agency substantively responded to each of

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Our standard in reviewing evaluation challenges is to examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. Savannah River Tank Closure, LLC, B-400953 et al., Mar. 30, 2009, 2009 CPD ¶ 78 at 16. The protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable. Ben-Mar Enters., Inc., B-295781, Apr. 7, 2005, 2005 CPD ¶ 68 at 7.

Move-Related Costs

901 North complains that GSA incorrectly calculated Lenexa's present value cost (PVC) for Lenexa. More specifically, 901 North argues that Lenexa's low PVC price of \$21.40 per useable square foot resulted from GSA's undervaluing significant move-related costs associated with relocating to the Lenexa building. Protester's Initial Comments at 8-18. In this regard, the SFO provided that an offeror's PVC would be calculated by adding, "if applicable," "the cost of relocation of furniture, telecommunications, replication costs, and other move-related costs." SFO at 14. While the protester ultimately "concedes that GSA's estimate of the cost of relocation (i.e., the moving cost) was reasonable in amount," it maintains that GSA failed to properly consider replication costs, specifically "reimbursable work authorization costs for tenant improvements which will exceed the available funds in the TIA [tenant improvement allowance]." ⁹ Protester's Suppl. Comments at 14.

The agency responds that it properly considered all applicable move-related costs, to include replication costs. In this regard, the agency reports that it even included replication costs associated with closed circuit television and other security related items in Lenexa's evaluated price. Contracting Officer's Suppl. Statement at 15. While the protester maintains that the agency will experience other significant costs in excess of the TIA (replication costs) associated with Lenexa's offer, see

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these bases of protest, and the protester did not further address these issues in its comments on the agency report, we consider the protester to have abandoned these issues and we will not consider them. Analex Space Sys., Inc.; PAI Corp., B-259024, B-259024.2, Feb. 21, 1995, 95-1 CPD ¶ 106 at 8. Moreover, to the extent the protester may have reasserted these arguments in subsequent filings, we have held that abandoned issues will not be considered even when reasserted in supplemental filings since our rules do not contemplate the piecemeal presentation of protest issues. Liberty Street East Assocs., B-299486.3, June 15, 2007, 2007 CPD ¶ 112.

⁹ The protester defines replication costs to include those costs needed to buildout and improve the space, which are in excess of the TIA. Protester's Suppl. Comments at 14.

Protester's Suppl. Comments, at 18, it does not offer any support for, or explain, beyond merely citing the fact of Lenexa's "low" PVC, its conclusion in this regard. Given the lack of evidence in the record to support the protester's contention that the costs associated with Lenexa's building will exceed the available funds in the TIA, we view the protester's arguments as amounting to unsupported speculation and mere disagreement with the agency's assessments; thus, we have no basis to conclude that the agency's evaluation was unreasonable or otherwise inconsistent with the terms of the solicitation.

Meaningful Discussions

Next, 901 North contends that the discussions it received were misleading regarding the agency's intended evaluation of the sustainability subfactor A, LEED-NC or LEED-CS certification. According to the protester, during the course of discussions, it advised GSA that it was "impossible" for it "to achieve LEED requirements under Subfactor A" and that it was led to believe that it "would only be rated on the technical factors which it could actually achieve." Protester's Initial Comments at 14. The protester asserts that had it known Subfactor 1.A. accounted for 15 percent of the total possible technical points it could achieve, it "would not have chosen to compete in the Solicitation, as it was impossible for 901 North to obtain any points under Subfactor A." Protester's Suppl. Comments at 18.

Competitive prejudice must be established before we will sustain a protest; where the record does not demonstrate that the protester would have had a reasonable chance of receiving the award but for the agency's actions, we will not sustain a protest, even if deficiencies in the procurement process are found.

McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3. Here, the alleged harm suffered by the protester as a result of the allegedly misleading nature of the agency's discussions does not constitute competitive prejudice. In this regard, as articulated by the protester, the agency's allegedly misleading discussions merely impacted the protester's own business decision of whether to continue in the competition. Since this does not bear on the propriety of the ultimate award decision, we have no basis to further consider the protester's allegations in this regard.

Executive Order 12072

In a supplemental protest filed with our Office on May 23, 2011, the protester argues that the agency failed to comply with sections 1-102 and 1-203(c) of Executive Order 12072. Exec. Order No. 12072.¹⁰ We dismiss this aspect of the protest.

¹⁰ The protester has withdrawn its allegation that the agency also failed to comply with alleged pre-solicitation requirements set forth in section 1-103 of Executive Order 12072. Protester's Suppl. Comments at 6, n.14; at 11.

As an initial matter, GSA's compliance with the EO is a matter concerning Executive Branch policy, which we do not review. In this regard, Executive Order 12072 prescribes policies and directives regarding the planning, acquisition, utilization and management of federal facilities. See Exec. Order No. 12072; H&F Enterprises, B-251581.2, July 13, 1993, 93-2 CPD ¶ 16 at 2 n.1. The underlying policy objective of the Executive Order is to "strengthen the Nation's cities" and "conserve existing urban resources and encourage the development and redevelopment of cities." Exec. Order 12072 at § 1-101. As it relates to this protest, the Executive Order states:

1-102. Procedures for meeting space needs in urban areas shall give serious consideration to the impact a site selection will have on improving the social, economic, environmental, and cultural conditions of the communities in the urban area.

1-203. In the process of meeting Federal space needs in urban areas and implementing the policies of this Order, the Administrator shall:

* * * * *

(c) Consult with appropriate Federal, State, regional, and local government officials and consider their recommendations for and objections to a proposed selection site or space acquisition.

Id. at §§ 1-102, 1-203.

We do not review allegations of an agency's failure to comply with Executive Branch policies under our Procedures, as a general matter. Northwest Independent Forest Manufacturers--Recon., B-207711, B-207711.2, Aug. 31, 1982, 82-2 CPD ¶ 192 at 2; Fairplain Devel. Co., et al., B-192483, Apr. 24, 1980, 80-1 CPD ¶ 293 at 3. We will, however, review an agency's compliance with, or implementation of, such policies when it is contended that such policies are contrary to applicable procurement statutes and regulations. See e.g., Helmsman Properties, Inc., B-278965, Apr. 20, 1998, 98-1 CPD 117 (holding the agency's compliance with policy considerations established by Executive Order 12072 was not contrary to the Competition in Contracting Act of 1984, 41 U.S.C. § 3301 et seq. (2011)); Fairplain Devel. Co., et al., supra. (addressing whether compliance with Executive Order 12072 improperly restricted competition contrary to procurement statutes and regulations). We may also consider compliance with an executive order to the extent the provisions of the order have been expressly incorporated as requirements by the terms of a solicitation, see e.g., Port of Bellingham, B-401837, Dec. 2, 2009,

2009 CPD ¶ 245 (sustaining protest where agency did not reasonably consider whether awardee complied with solicitation provision, which was based on an executive order). Here, 901 North's protest merely challenges GSA's failure to properly implement the policies established solely by Executive Order 12072, which were not expressly incorporated as requirements in the SFO; thus, the issues raised are not for our consideration.¹¹

In any event, even if the protester's allegations were for our consideration, they were untimely raised.

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 be filed prior to that time. 4 C.F.R. § 21.2(a)(1) (2011). Here, the delineated area was clearly set forth on the face of the SFO and if the protester believed that GSA failed to comply with Executive Order 12072, which pertains to GSA's establishment of its delineated for the competition, in selecting that area, the protester should have raised these matters prior to the November 15, 2010 closing date for initial offers.¹²

¹¹ To the extent the protester has asserted that the agency's failure to comply with the EO is inconsistent with Federal Acquisition Regulation (FAR) § 1.602-1(b), which provides that "No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations . . . have been met," the protester's argument is misplaced. The FAR, by its terms, only applies to the acquisition of "supplies or services," whereas the subject procurement concerns GSA's acquisition of a real property lease. See FAR § 1.104 (stating that the FAR "applies to all acquisitions as defined in Part 2 [to mean 'acquiring by contract with appropriated funds of supplies or services . . . by and for the use of the Federal Government through purchase or lease'] except where expressly excluded"). Moreover, we have previously held that the FAR provision cited by the protester does not expand our process to address actions solely concerning compliance with executive branch policy, since our jurisdiction, as established by the Competition in Contracting Act of 1984, 31 U.S.C. § 2553 (2006) is limited to addressing protests alleging a violation of procurement statute or regulation. See RMS Indus., B-246082, et al., Jan. 22, 1992, 92-1 CPD ¶ 104 at 2.

¹² The protester maintains that the provisions of the EO at issue do not concern the scope of the delineated area established in the SFO, but rather pertain to agency responsibilities after it has selected a particular firm for award. GSA, however, reasonably interprets the EO, which GSA has addressed in its Federal Management Regulations, as pertaining to considerations regarding the establishment of a delineated area. The agency's interpretation is reasonably based, consistent with its regulations, and is consistent with our decisions, which have addressed compliance with the EO as a matter pertaining to the appropriate scope of a delineated area established by a SFO. See e.g., Helmsman Properties, Inc., supra (denying protest

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Because the protester first raised these issues on May 23, 2011 as supplemental protest grounds, they are untimely. See Buffalo Central Terminal, Ltd., B-241210, Jan. 29, 1991, 91-1 CPD ¶ 82, at 3-4 (dismissing, as untimely, protest of agency's failure to comply with Executive Order 12072 in establishment of delineated area).

The protest is denied in part and dismissed in part.

Lynn H. Gibson
General Counsel

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challenging terms of solicitation which argued that agency failed to comply with provisions of Executive Order 12072, and thus improperly limited competition to delineated area defined by SFO). Moreover, we find unconvincing the protester's argument that it did not in fact learn of the violation until it received the agency report; we note that none of the issues addressed in the report had any bearing on the agency's compliance with the Executive Order.