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**DECISION** **THE COMPTROLLER GENERAL OF THE UNITED STATES**
**WASHINGTON, D.C. 20548**

**FILE:** B-214082 **DATE:** July 10, 1984

**MATTER OF:** Delmae Company

**DIGEST:**

1. Protest alleging solicitation improprieties is untimely where it is filed with GAO after the due date for submission of initial proposals. 4 C.F.R. § 21.2(b)(1) (1983).

2. Protest that agency failed to give protester adequate notice of intent to vacate its premises concerns a matter of contract administration which is not for resolution under GAO Bid Protest Procedures.

3. Bare allegations will be regarded as pure speculation and will not be considered on the merits.

4. Where award is to be made based upon rental cost and 14 other award factors, award is not improper when made to an offeror with a slightly higher rental cost with property that received a higher evaluation on a number of other important award factors.

5. New grounds of protest must independently satisfy the timeliness requirements of GAO's Bid Protest Procedures. Where protester supplements its original protest with new grounds more than 10 working days after the basis for them should have been known, the new grounds are untimely and will not be considered on the merits.

Delmae Company (Delmae) protests the award of a lease to Mount Ephriam Associates (Ephriam), pursuant to solicitation for offers (SFO) No. MNJ82-362, issued by the General Services Administration (GSA). The SFO requested offers for a minimum of 21,600 square feet and a maximum of 23,800 square feet to house the Internal Revenue Service (IRS) for a 5-year period with an option to renew the lease for an additional 5 years. The IRS had been in Delmae's building for over 10 years.

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The protest is dismissed in part and denied in part.

The SFO was issued on August 5, 1982, and initial proposals were due by September 15, 1982. Although Delmae offered a slightly lower per square foot rate than Ephriam, on December 21, 1983, the contracting officer made award to Ephriam after considering all of the evaluation factors and determining that such award would be in the government's best interest.

The introduction to the SFO stated that the space should be on no more than three contiguous floors and that preference would be given to offers with a minimum of at least 11,000 square feet of space on the street level and the balance of space on the second floor. The solicitation states that in addition to rental price, the following award factors will be considered: handicapped accessibility; efficiency of layout and compatibility with the government's intended use; character, quality and decor of the space, grounds, approaches and main lobby; safety; historic preference; availability of public transportation; availability of public parking; impact of the site on local development or redevelopment; availability of local eating facilities; ground floor space; delivery date; energy efficiency; energy efficient lighting; and moving costs.

Delmae's protest letter, filed after award, raises a number of points alleging improprieties in the solicitation. For example, Delmae argues that the solicitation should have contained an evaluation factor reflecting the fact that the IRS spent approximately "1/4 million dollars in revamping the present site with new partitions and other furnishings, including carpeting." Delmae also argues that the selection process appears to lack compassion for the public who utilizes the IRS's services because the awardee's location would remove the IRS from the "public flow." In addition, Delmae contends that inadequate visits were made to Camden to determine what sort of site would be best for the IRS and that, in fact, in contrast to indications from the solicitation terms, the IRS administration communicated to Delmae's president "prior to the lease bidding" that it preferred not to have its offices on a single floor, because it could continue to divide its functions according to floors. These issues, alleging solicitation improprieties, are untimely and will not be considered on their merits because they were filed after the date for receipt of initial proposals. 4 C.F.R. § 21.2(b)(1) (1983); Simulators Limited, Inc., B-208418.2, B-213046.2, Apr. 23, 1984, 84-1 C.P.D. ¶ 453.

Delmae contends that the notification of IRS's intent to vacate its premises in early 1984 was "unfair" because of the short time between the notice and IRS's move and Delmae argues that it should have been given "at the minimum, a 24-month notice." Delmae is raising an issue of contract administration that we will not consider, since our Bid Protest Procedures are reserved for determining whether an award or proposed award complies with procurement statutes and regulations. Tate Engineering, Inc., B-213854, Mar. 26, 1984, 84-1 C.P.D. ¶ 350.

In response to GSA's report on the protest, Delmae timely raised additional bases of protest. Delmae contends that on September 28, 1983, shortly after the closing date for receipt of best and final offers, September 15, 1983, award was made to Ephriam, but, nonetheless, the contracting officer misled Delmae by asking that it keep its offer open. While it is true that offers were evaluated on September 28, 1983, award was not made until December 21, 1983, when GSA executed the lease document. Between October 17, 1983, and December 21, 1983, when the proposed lease to Ephriam was being reviewed, the contracting officer requested Delmae to extend its offer. We conclude that this action was necessary in case Ephriam's offer was not approved during the review process.

Delmae protests the evaluation of the offers. In substance, Delmae argues that if the award criteria stated in the SFO were properly applied, it, rather than Ephriam, should have been awarded a lease and, therefore, there was bias against Delmae. We disagree.

The contracting officer, after reviewing the best and final offers, determined that Ephriam's evaluated offer was lower priced and additionally advantageous in that all the space was at street level and the offered property had better fire safety and was more energy efficient than Delmae's property.

Delmae contends that in determining that Ephriam's offer was more advantageous, the contracting officer ignored the fact that Delmae's offered price was $9.25 per net usable square foot (NUSF), which was lower than Ephriam's offered price of $9.50 per NUSF. Delmae argues that it was improper to add a sum per NUSF to its price based upon expected extra expenses which would be incurred due to the poor layout (three floors) of Delmae's offered space. The figure added was calculated by estimating the cost of extra staff, office equipment, and storage space that would be necessary because of the fact that Delmae's building could not house the IRS on one floor as Ephriam's building could. Delmae contends that since the SFO did not state that the cost of extra staff, equipment, etc., necessitated by a multifloor layout would be calculated into evaluated rental cost, it was improper to do so.

While we agree with Delmae that the SFO did not specifically provide that the extra costs associated with multifloor layout would be added to the offered rental prices to determine the lowest evaluated price, the SFO, at clause 11, does provide for the evaluation of layout as an award factor. Clause 29 ("Determination of Low Offer") of the SFO, in addition, states that the annualized cost of any items specified in this solicitation which are not included in the rental will be considered in determining the low offer. While we find the SFO does not make clear that the award factor of layout efficiency will be evaluated as a cost factor as it does with "moving costs," for example, we nonetheless conclude that Delmae was not prejudiced by the ambiguity of the solicitation, or the evaluation. Although if layout efficiency is evaluated separately, Delmae's evaluated price would be slightly lower than Ephriam's, layout would become one of a number of award evaluation factors in which Ephriam surpassed Delmae, thereby justifying award to Ephriam.

Delmae argues that it offered second, third, and fourth floor space because the IRS indicated that "they would like to be on another floor." Delmae states that it was more than willing to have IRS on the first floor. The solicitation, clause 1, clearly requires, however, that the space offered be on three contiguous floors. Delmae could not have met this basic requirement if it offered first floor space because Delmae would have also had to offer space on the second, third, and fourth floors (four, not three, floors) in order to comply with the minimum 21,600 square feet requirement. It is clear that Delmae could not meet the solicitation requirements and offer first floor space even though the SFO at clause 1 clearly stated that a "preference will be given to offers with a minimum of at least 11,000 square feet of space on the street level and the balance of space on the second floor."

Delmae argues that it was improperly determined to not meet fire safety standards. Delmae, however, was evaluated to meet the minimum requirements under this award factor ("safety"). We find this protest basis to be without merit.

Delmae alleges that its offer was improperly evaluated because it did not receive a preference due to its central business district location. We disagree. Section 2 of the SFO, "location," simply states:

> "(1) Within the central business of Camden, N.J.
> "(2) Within the city limits of Camden, N.J."

Since the SFO does not indicate a preference for a central business district location, Delmae's offer was properly not given a preference in this regard.

Delmae contends that its offer was improperly evaluated under award factor No. 9, "Economic Development." Neither Delmae's offer nor Ephriam's was evaluated as impacting on the redevelopment of Camden. Delmae argues that since a great deal of money is being spent in redeveloping the center city, it should be clear that its center city offer would impact upon the redevelopment of Camden. While Delmae may have shown that center city Camden is undergoing redevelopment, it has not indicated in any way how its offer would positively impact the redevelopment of the central business district. Delmae has not met its burden of affirmatively proving that the evaluation was improper. See Robert E. Derecktor of Rhode Island, Inc.; Boston Shipyard Corp., B-211922; B-211922.2, February 2, 1984, 84-1 C.P.D. ¶ 140.

Delmae alleges that Ephriam should not have received a positive rating under clause 15, the award factor "transportation" requiring "satisfactory public transportation within four blocks." While Delmae argues that the bus which comes near the Ephriam site only makes infrequent stops there, Delmae has failed to show that the availability of public transportation, which Delmae concedes comes within four blocks of Ephriam's location, is not "satisfactory."

Delmae alleges that the contracting officer "engaged in some serious number crunching" when he calculated that an interbuilding move (to Ephriam's site) would cost $16,800 and that an intrabuilding move (to different floors within Delmae's building) would cost $12,712. Because Delmae has not shown that the calculations are not reasonably based, we view Delmae's bare allegation as being pure speculation and will not consider it. See Janel, Inc., B-214036.2, May 22, 1984, 84-1 C.P.D. ¶ 547.

Delmae argues that its property received an unfair evaluation under the award factor "Quality." It was determined the quality of the Delmae building was "questionable" because the building was 56 years old and "in poor condition which represents its age and architectural design." The contracting officer recognized that Delmae promised that it would make all necessary interior and exterior improvements necessary to meet GSA's requirements except that Delmae had refused to replace windows to ensure that the space would be weathertight. Additionally, Delmae never provided certification to show that its elevator met the requirements of paragraph 104 of the solicitation. Although Delmae refutes the position concerning making the windows weathertight, we find the determination that the Delmae building's quality is questionable was reasonable. For example, the IRS commented that the cast iron radiators in the building caused significant heat buildup around the perimeter of the building. IRS stated also that the electrical power was insufficient, with circuit breakers often tripping, and on one occasion the office had to be closed because a transformer blew out. We conclude that Delmae has failed to show that the evaluation was unreasonable.

We conclude that award to Ephriam under the solicitation award factors and other SFO provisions was reasonable, notwithstanding Delmae's slightly lower offered rental price. Ephriam offered all its space on the ground floor, whereas Delmae offered no ground floor space. Paragraph 1 of the SFO states that preference will be given to offers with a minimum of at least 11,000 square feet of space on street level with the balance on the second floor. Paragraph 19 under "award factors" also states a preference for street level space. These clauses make the preference for first floor space quite clear. In addition, Ephriam's offered space was properly evaluated to surpass Delmae's offered space in regards to layout (award factor 11), quality (award factor 12), and energy efficient lighting (award factor 22). Since the combined rental and moving cost of Delmae's offer was only slightly below that of Ephriam's offer ($9.94 versus $10.23 per NUSF), we find that award to Ephriam was in accord with the SFO.

Delmae alleges that Ephriam has been shown favoritism in that a number of the solicitation requirements were deleted in Ephriam's lease when award was made to Ephriam. Specifically, Delmae states that:

> "It appears that the criteria for the lease space was deleted such as (a) 22,700 square feet of office space; (b) located in central business district of Camden; (c) city limits of Camden."

It appears that Delmae overlooked the first paragraph of Ephriam's contract which describes the property rented as "22,700 net usable square feet of ground floor space . . . in Camden, New Jersey."

Finally, Delmae argues in a letter filed with GAO that Ephriam had more opportunities to negotiate and that negotiation with Delmae was inadequate. Delmae alleges that negotiations were confined to time extensions on the lease of the Delmae building. Delmae quotes the owner of Ephriam as saying that this matter "had been in negotiation for two years," in order to show that Emphriam had negotiation opportunities which Delmae did not have.

New grounds of protest must independently satisfy the timeliness requirements of our Bid Protest Procedures. Tracor Marine, Inc., B-207285, June 6, 1983, 83-1 C.P.D. ¶ 604. Delmae's protest alleging inadequate negotiations is untimely and will not be considered on the merits where, as here, it was raised for the first time approximately

6 months after negotiations were completed. See 4 C.F.R. § 21.2(b)(2) (1983); Tracor Marine, Inc., B-207285, supra.

We find Delmae's reference to the statement allegedly made by Emphriam's owner that "this matter had been in negotiations for two years" to support its argument of unequal negotiations to be inapposite. It appears that the quoted statement merely refers to the fact that the original SFO was issued in August of 1982, which was approximately 2 years before the conference in which the comment was allegedly made. In addition, we have recognized that while discussions, when conducted, must be held with all offerors in the competitive range, the same detailed discussions need not be held with all such offerors since the degree of deficiencies in acceptable proposals will vary. See Pope Maintenance Corporation, B-206143.3, Sept. 9, 1982, 82-2 C.P.D. ¶ 218. In any case, nothing in the record indicates that unequal negotiations were held.

The protest is dismissed in part and denied in part.

for Milton J. Socolar
Comptroller General
of the United States