



Comptroller General
of the United States

Washington, D.C. 20548

J. Vickers

Decision

Matter of: Buffalo Central Terminal, Ltd.

File: B-241210

Date: January 29, 1991

Mark J. Fuzak, Esq., Davis, Augello & Matteliano, for the protester.

Lionel G. Batley, Jr., Esq., General Services Administration, for the agency.

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DIGEST

1. Protest against the delineated area in a solicitation for the lease of office space is untimely because it was filed after the closing date for receipt of proposals.
2. Protest that objects to contracting agency's evaluation of proposals under technical evaluation criteria for office space lease and which disputes agency's conclusion that space offered by awardee is superior to protester's is denied where the record supports the ratings given to the protester and the awardee under each of the evaluation criteria and the record supports the agency's conclusion that space offered by the awardee is best suited to the needs of the user agency as set forth in the solicitation.
3. Protest that agency failed to apply solicitation preference for historical buildings is denied since preference did not apply where agency reasonably concluded that the awardee's offer was superior to the protester's offer.

DECISION

Buffalo Central Terminal, Ltd. protests the award of a lease to Woodfield-Chapin Associates under solicitation for office space (SFO) No. XNY-89-058, issued by the General Services

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Administration (GSA).^{1/} The SFO was for 65,000 to 68,250 square feet of office space to house an Internal Revenue Service (IRS) Taxpayer Service Facility.

The protest is denied in part and dismissed in part.

BACKGROUND

Because the local IRS taxpayer service operation, which has the responsibility for answering taxpayer phone calls is to be expanded to include telephone calls from Connecticut, the IRS needed greatly expanded facilities. Therefore, GSA issued this SFO for office space in the Buffalo, New York area and listed the following evaluation factors in descending order of importance:

Quality

"Physical characteristics such as character and quality of space, grounds and approaches, landscaping and the decor of the main lobby."

Layout, Compatibility, and Local Plans

"Potential for efficient layout; consistency of highest and best used with the Government's intended use; and consistency of the proposed development with state, regional, and local plans and programs."

Delivery of Space

"Offer's ability to deliver the space ready for Government occupancy within the shortest time frame."

^{1/} On December 19, 1990, while the protest was pending, Buffalo Central filed suit for injunctive relief in the United States District Court for the Western District of New York, raising the same issues which are present in the protest. Buffalo Central Terminal, Ltd. v. The United States General Services Administration, No. Civ-90-1295S. Ordinarily, we will dismiss a protest where the matter involved is the subject of litigation before a court of competent jurisdiction; however, where, as here, the district court so requests, we will issue a decision in the matter. Bid Protest Regulations, 4 C.F.R. § 21.9(a) (1990).

Transportation

"Availability of satisfactory public transportation less than 1/2 mile."

Eating Facilities

"Availability of adequate dining facilities operated on a non-segregated basis less than 1/2 mile."

Price was to be of equal importance to these considerations. The SFO also provided that preference would be given to buildings on the National Register of Historic Places.

Eleven offers were received by the closing date of January 18, 1990 and four, including Buffalo Central's, were found to be acceptable and in the competitive range. After discussions were held with all the firms within the competitive range, best and final offers (BAFO) were requested on March 16 and received by March 30. Since the BAFOs did not resolve all outstanding questions, GSA reopened negotiations on April 6 and held discussions with all offerors. A second set of BAFOs were received on April 23. As a result of the evaluation, Woodfield-Chapin's offer of space at a location called Appletree Office Plaza received the highest evaluation score of 470 points. Its offer was evaluated by GSA to be \$15.18 per net usable square foot. Buffalo Central's offer of space in the "Baggage Building" Annex, a part of the former New York Central Terminal Building in Buffalo, received a score of 300, the lowest score awarded any of the four competitive-range offerors. Its price was evaluated as \$14.54 per net usable square foot; the second lowest.

The contracting officer concluded that Woodfield-Chapin's superior score, which was due in large part to his view that firm's space located on a single floor had superior layout efficiency and that its location was more accessible to transportation and eating facilities, outweighed the price advantage of the Buffalo Central offer and made award to Woodfield-Chapin.

PROTEST ALLEGATIONS

Buffalo Central objects to the award on several grounds. It complains that the SFO's area of consideration was "gerrymandered" so as to include the Woodfield-Chapin property because GSA was predisposed to select that firm and that GSA did not comply with Executive Order 12072 and provisions of the Federal Property Management Regulation (FPMR), when it selected the delineated area. The protester also argues that its property was clearly superior to that offered by the awardee and therefore maintains that the evaluation was

arbitrary and unreasonable and failed to properly consider the fact that its site was entitled to a preference as an historical building and was endorsed by local, state and federal officials. Buffalo Central further argues that it was prevented from making an offer based on the government supplying its own electricity while Woodfield-Chapin was allowed to offer on that basis.

ANALYSIS

We have carefully reviewed the evaluation record and we conclude for the reasons set forth below that the selection by GSA was rationally based.

Delineated Area

First, we dismiss the protester's objection to the inclusion of the awardee's site within the delineated area in the SFO and the contention that GSA failed to comply with Executive Order 12072 and the FPMR when it selected the delineated area.

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). 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 or the FPMR in selecting that area or if it had any other objection to the area it should have raised those matters prior to the January 18 closing date for initial offers. Buffalo Central's protest of the area set forth in the SFO was not filed with our Office until September 19, after the award was made. This ground of protest was untimely and will not be considered. Englehand Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324.

Technical Evaluation

Buffalo Central objects to the evaluation of its offer and contends that its space should have been rated as high or higher than the property offered by the awardee. The protester disputes the rating it received under each of the five evaluation factors essentially arguing that its facility should have received the maximum rating under each.^{2/}

^{2/} The protester argues that an agency document called "AWARD FACTOR EVALUATION CRITERIA" which sets forth the standards to be used in scoring the proposals was not actually used during the evaluation but was in fact generated in response to the protest in order to justify the award selection. There is

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The evaluation of proposals 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, and must bear the burden resulting from a defective evaluation. 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. Litton Sys., Inc., B-239123, Aug. 7, 1990, 90-2 CPD ¶ 114; Lucas Place, Ltd., B-238008; B-238008.2, Apr. 18, 1990, 90-1 CPD ¶ 398. The fact that the protester disagrees with the agency's judgment does not render the evaluation unreasonable. Id.

Under the first evaluation factor, Quality, both Buffalo Central and Woodfield-Chapin received 120 points. The protester contends that since it is offering a historic landmark which it describes as "magnificent" with an art deco marble entrance and which will be landscaped with specimen trees, shrubbery and flowers, while the awardee's space is in a single story shopping mall, with no lobby or landscaping, its proposal was far superior to Woodfield-Chapin's and deserved the maximum points available under this factor (150).

The record shows that the evaluators were concerned that the space offered by Buffalo Central is located in a 70 year-old "deteriorating" structure that would need a total renovation to comply with the quality construction specifications contained in the SFO. On the other hand, the evaluators stated that Woodfield-Chapin's space was located in a "well maintained mall" and would provide "first class office space." They also noted that the firm had in the past always provided high quality space. In awarding both firms the same rating under this factor, the evaluators were concerned about the risk that the protester would in fact be able to convert its aging though historic site into office space that would meet the SFO requirement.

It may well be that if the protester is successful in renovating its space that the result will indeed be "magnificent;" nevertheless, the protester does not argue that converting the 70-year old building will not be a considerable undertaking and, in the evaluators' judgment, the mall

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nothing in the record to support such a theory. Moreover, the scoring standards are consistent with the evaluation criteria listed in the solicitation. The standards also are consistent with the evaluation narrative which no party argues was generated after the actual evaluation.

location would provide office space that meets the quality requirements of the SFO at less risk. While it is clear that the protester views its space as of superior quality, this view was not shared by the evaluators for the reasons stated above. We do not find that their judgment was without any rational basis and we therefore will not disturb their conclusion.

The second evaluation factor measured the layout, and compatibility of the proposed space with the government's use and the consistency of the proposed development with state, local and regional plans and programs. The evaluators assigned the protester only 25 points under this category while the awardee received 125 points. Buffalo Central's low score was due primarily to the evaluators' view that the protester's proposal to divide the space on the four floors would not lend itself to "efficient layout and design." Also, the agency points out that since the floors are rectangular and narrow and further restricted by stairway and toilet locations, it would be difficult to design a space layout that would provide for efficient operation of the IRS' service operation. In contrast, the awardee's site has a single floor layout with a square configuration and evenly spaced columns which in the agency's view will maximize the use of the available space.

Buffalo Central objects to the agency's rating arguing that it is based on bare conclusions and not on facts. The protester points out that there is nothing inherently wrong with a four floor configuration. In this regard, the protester says that it has retained interior design specialists with experience in the renovation of historic structures and has designed an effective and efficient systems layout. Buffalo Central further states that the awardee's single floor space is not more efficient and, in fact, would be like working in a "cave," and argues that it has provided information which shows that its development is in conformance with local and state plans as required while no such evidence concerning the awardee's development has been shown. Buffalo Central also argues that GSA did not point out during discussions that it objected to a four floor configuration and that if such was the case the agency should have so informed the firm.

We do not believe that the agency acted unreasonably in downgrading the protester's proposal because of its four-floor layout. While the protester argues that the agency's evaluation was conclusory and without a factual basis, we understand the rationale behind the agency's position. The agency downgraded Buffalo Central's layout because it felt that the four floor arrangement would require the IRS to place groups of people who needed to work together on separate

floors. The floors themselves were also a concern as each, according to the agency, was narrow and broken up by stairs and restrooms into separate and distinct areas. There is nothing in the record which disputes the agency's basic physical description of the Buffalo Central layout.

It is our view that the agency's concern about the separation of the work force caused by the configuration of Buffalo Central's space would not result in an efficient space for the IRS' operations was reasonable--clearly it is desirable to have people who work together on the same floor--and we have no basis to disagree with its judgment that the IRS would be better served by a large single square work space. Further, there is nothing in the record to indicate that there would be anything inconsistent with local, state or regional plans with the "development" of the Woodfield-Chapin space which is located in an already existing mall.

Buffalo Central also contends that it was "blind sided" by GSA because it was not informed in discussions that GSA had a preference for a single floor layout. According to the protester, had it been given some indication of the agency's preference it could have proposed a single floor layout.

The requirement for discussions with offerors is satisfied by advising them of deficiencies in their proposals and affording them the opportunity to satisfy the government's requirements through the submission of revised proposals. Federal Acquisition Regulation (FAR) § 15.610(c)(2), (5); Furuno U.S.A., Inc., B-221814, Apr. 24, 1986, 86-1 CPD ¶ 400. Agencies are not, however, obligated to afford offerors all-encompassing discussions, Training and Mgmt. Resources, Inc., B-234710, June 29, 1989, 89-2 CPD ¶ 12, or to discuss every element of a technically acceptable, competitive-range proposal that has received less than the maximum possible score. See Associated Chem. and Env'tl. Servs., et al., 67 Comp. Gen. 314 (1988), 88-1 CPD ¶ 248; Federal Data Corp., B-236265.4, May 29, 1990, 90-1 CPD ¶ 504.

Here, GSA was not required to inform Buffalo Central during discussions that its four floor proposal had earned less than the total possible points under the layout factor. The four floor office layout was acceptable under the SFO and, while on a comparative basis, Buffalo Central received a lower score than other offerors under this factor this represented GSA's judgment of the relative efficiency of the varying floor plans, not a rejection of Buffalo Central's proposal. Although Buffalo Central now argues that it would have proposed a single floor layout had this matter been raised in discussions, we do not see how this could have been done since the total space required by the SFO, 65,000 to 68,250 square

feet, is greater than the square footage of any single floor in the building proposed by Buffalo Central.

Under the Delivery of Space evaluation factor, Woodfield-Chapin received 100 points and Buffalo Central received 80 points. While both firms offered delivery of the space within 120 days, the difference in the point scoring reflected GSA's concern that there may have to be slippage in Buffalo Central's delivery schedule because the building offered by that firm, which has been unoccupied since 1979, has to be totally renovated, including the removal of existing compartmental partitioning and updating of the building's systems, including the fire and accident safety systems. On the other hand, the awardee's space required a much less extensive conversion from a warehouse type space to an office.

The protester argues that since it had agreed to be contractually bound to deliver the space within 120 days it should have received the highest possible rating under this factor. In view of the extensive renovation needed to upgrade Buffalo Central's space, we find GSA's conclusion that there was a substantial risk of slippage in the delivery timetable was reasonable. We thus have no basis upon which to question the scoring of the protester's proposal under this factor.

The next evaluation factor, Transportation, concerned the proximity of public transportation. Here, the protester received 45 points while the awardee received 75 points. The difference in the scoring reflects the fact that there are several bus stops at the Appletree Mall where the awardee's space is located and there are none currently in operation at Buffalo Central's site. The evaluators also concluded that although there is a bus stop one-fourth of a mile from Buffalo Central's building, the walk from the bus stop to the building is on an incline, which would be a disadvantage to some employees, especially the handicapped.

The protester states that it included in its proposal a commitment from the city of Buffalo to establish a bus stop at the terminal building and says the walk to the current stop does not in fact include an incline. Nevertheless, the fact remains that there are currently several public transportation routes serving the awardee's site while the nearest existing bus stop is one-fourth of a mile away from the Buffalo Central site. Regardless of whether or not the walk to the Buffalo Central site is on an incline, we believe the evaluators reasonably translated the different circumstances of the two offerors into the different scores they assigned the firms.

Finally, Buffalo Central received 30 points under the Eating facilities factor because, according to the evaluators, the eating facilities are located in a shopping district a quarter

of a mile from the terminal building. The awardee received 50 points because the agency states that there are three eating facilities in the mall, and four more across the street.

The protester argues that there are many eating establishments within one-half mile of its site and that it offered to construct one or more restaurants at the site and that the master plan for the terminal facility includes the construction of at least six eating facilities within 10 years. Further, the protester states that the mall has only one restaurant and argues that if this justified the awardee's score, then its score should be the same.

The record shows that in fact the Appletree Mall currently has only one restaurant as the protester argues. Another, however, will be under lease soon and there are several across the street. The fact remains that currently Buffalo Central has no eating facilities on site and that the nearest facilities are a quarter mile away. Again, we think that this provides a reasonable basis for the agency's conclusion that the awardee's offer justified a higher score.

In sum, GSA has chosen the more conventional of the two sites as the one which is best suited to the needs of the IRS as set forth in the SFO. The protester is convinced that its more exciting, though as yet undeveloped space in an historical landmark building cannot be equalled. It may well be that the protester's building would provide a "magnificent" office space; nevertheless, we believe that the choice is one which GSA must make in the context of the needs of IRS for its telephone answering facility. We have carefully reviewed the entire evaluation record and we find no legal basis upon which to disturb the agency's judgment in selecting the Woodfield-Chapin site.

Other Issues

Buffalo Central also argues that GSA failed to properly consider the fact that the building it offered was listed in the Historic National Registry and, therefore, its offer was entitled to a preference under the solicitation. The protester complains that GSA is not properly applying the requirements of the Historic Sites, Buildings and Antiquities Act, 16 U.S.C. § 461 et seq. (1988), and other acts and executive orders by not awarding the lease to it based on the historic property offered.

Section 11 of the solicitation provided for a preference for proposals offering space in historic buildings. That section provided that the preference would result in award if:

"(1) The offer for space meets the terms and conditions of this solicitation as well as any other offer received . . . and

(2) The rental is no more than 10 percent higher, on a total annual square foot (net usable area) cost to the government, than the lowest otherwise acceptable offer."

GSA concluded, based on the technical evaluation and scoring, that the protester's offer did not meet the terms and conditions of the SFO "as well as" the Woodfield-Chapin offer. As explained above, we have no legal basis upon which to challenge that evaluation and scoring. Since the awardee's proposal was considered superior, GSA properly did not apply the historical preference. Landsing Pacific Fund, B-237495, Feb. 22, 1990, 90-1 CPD ¶ 200.3/

Buffalo Central also argues that "[v]arious public officials and entities" support its offer over that of the awardee. The protester has submitted to this Office a number of letters from officials that urge the selection of Buffalo Central's site because of the historical nature of the building proposed. While these officials believe that the plans to renovate and restore the Buffalo Central terminal are important to the local community and should have had a greater impact on the evaluation and award process, that process was spelled out in the SFO which limited the use of the historical preference in the evaluation. Since GSA is required to award contracts based on the terms set out in the solicitation, it would be improper to now give greater weight to the historical significance of a particular building than was allowed by the SFO.

Buffalo Central complains that the lease agreement signed between Woodfield-Chapin and GSA is not fully serviced because the rental rate does not include electricity or air conditioning as required by the SFO. The protester states that when it inquired during negotiations whether it would be permitted to install separate utility meters at its site, that request was

3/ Buffalo Central also argues that under applicable statute, regulations and executive orders its historically significant building was entitled to an evaluation preference beyond that provided by the SFO. The evaluation preference for historical buildings was clearly set forth on the face of the SFO and if the protester believed that preference was insufficient, it should have raised the matter prior to the closing date for receipt of initial offers. Since the protester did not do so, this ground of protest is untimely and will not be considered. 4 C.F.R. § 21.2(a)(1), Englehand Corp., B-237824, supra.

denied. Its proposal was thus based on a fully serviced lease including the cost of electricity and air conditioning.

The SFO did not require that utilities be included as part of the offered rental rate. The SFO instructed offerors to specify which utilities are excluded if the cost of all utilities was not included. By letter dated December 18, 1989, the contracting officer informed Buffalo Central that the government "desires a fully serviced lease." GSA maintains that this letter merely stated its preference for a fully serviced lease and the SFO allowed consideration of offers in which utilities were not included in the rental cost. In any event, although Buffalo Central states that it was advised that no separate meters could be used, both the first and second requests for BAFOs dated March 16, and April 13, 1990, sent to all four offerors read, in part, as follows:

"Please indicate whether the annual rental rate will:

- a) include full service and utilities as part of the rental consideration; or
- b) include the installation of a separate meter or meters to measure the Government's consumption of certain utilities. You must state the specific utility(ies) to be separately metered and paid by the Government directly to the utility company."

Therefore, all offerors had the same option to include or exclude utility costs in their proposed rental rates.

The record shows that three of the four offerors in the competitive range excluded electricity and air conditioning from their rental rates, and to calculate the rental rates for the offerors that excluded electricity and air conditioning, GSA added \$1.75 per square foot to the proposed annual rental rates for such offers. Based on that adjustment, we find GSA properly evaluated the costs of each proposal so that the offerors did compete on an equal basis.^{4/}

4/ Buffalo Central also complains that the lease awarded to Woodfield-Chapin included an additional 5-year renewal option which was not a part of the SFO. GSA explains that Woodfield-Chapin offered the additional 5-year option which was not evaluated by GSA or considered in the award selection. It was included in the lease and will be evaluated before being exercised. We fail to see any impropriety in GSA including

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Finally, Buffalo Central alleges that GSA was predisposed to award to Woodfield-Chapin. The protester cites a local newspaper article published 4 months before the award date, which it argues shows that GSA had already selected a suburban location for the IRS offices. Also, Buffalo Central refers to a statement in the evaluation record that Woodfield-Chapin has a superior performance record based on previous leases with GSA. Buffalo Central further points to floor plans attached to Woodfield-Chapin's lease, which were approved by the IRS on May 24, to show that Woodfield-Chapin knew well before the date of the award, August 29, that it would receive the contract.

The newspaper article refers to the possibility of IRS moving from downtown Buffalo to a suburban location and also quotes GSA as stating no determination had been made about a new location. We fail to see how this shows a predisposition toward Woodfield-Chapin, especially in view of the fact that three of the four sites in the competitive range were suburban locations.

The fact that Woodfield-Chapin had previously leased property to GSA does not show a predisposition to award again to that firm. The reference in the evaluation documents referred to by Buffalo Central was made to show that Woodfield-Chapin has met the occupancy dates in its other leases.

Finally, GSA has responded to Buffalo Central's argument regarding the date of approval of the floor plans attached to Woodfield-Chapin's lease. GSA states that after evaluation of BAFOs, it is its practice to recommend a particular offeror's space to the user agency. At that time, GSA forwards the floor plans submitted by the offeror to the user agency so that it can indicate the location of partitions and telephone and electrical requirements. This is done without conferring with the offeror and after approval by the user agency and GSA, the floor plans are attached to the lease for signing. Here, GSA states that Woodfield-Chapin was not privy to IRS approval of the floor plans prior to the award date and the contracting officer did not consider the floor plans in the evaluation. Although the protester argues that the floor plans could not have been prepared without Woodfield-Chapin's input, we have no reason to dispute GSA's accounting of what

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the additional option period in the lease since the option, on its face, is favorable to the government. GSA is not bound to exercise the option but is free to evaluate it and exercise it if it is still favorable at the appropriate time.

occurred and we do not believe that the record indicates a predisposition to award the lease to Woodfield-Chapin.

The protest is dismissed in part and denied in part.



for James F. Hinchman
General Counsel