



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Montgomery Companies

File: B-242858

Date: June 10, 1991

Henry E. Kinser, Esq., Kincaid, Wilson, Schaeffer, Hembree, Van Inwegen & Kinser, P.S.C., for the protester.
Roberta J. Lichtenstein, Esq., Brown, Todd & Heyburn, for Metropolitan Life Insurance Company, an interested party.
Brenda J. Brunson, Department of Agriculture, for the agency.
John W. Van Schaik, Esq., and John G. Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of contracting agency's evaluation of proposals under solicitation for office space lease 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 solicitation 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.
2. Under a solicitation for the lease of office space, agency evaluation of the maintenance of protester's building under existing lease was reasonable and consistent with evaluation factor which indicated that agency would consider "building maintenance." Although an agency may consider in evaluation information outside of proposal only where consistent with long-standing procurement practice, General Accounting Office concludes that it is consistent with long-standing practice of most federal agencies to view the site and consider the maintenance condition of existing buildings.
3. Where protester raises new and independent grounds of protest in its comments on the agency's report, the newly raised allegations must independently satisfy the timeliness regulations.

DECISION

The Montgomery Companies protest the award of a lease to the Paragon Group, Inc. under a solicitation for offers (SFO) issued by the United States Department of Agriculture (USDA) for office space in Lexington, Kentucky. The SFO was for 37,800 to 39,800 net usable square feet of office space for the Agricultural Stabilization and Conservation Service, the Farmers Home Administration, the Soil Conservation Service and the Agricultural Marketing Service. Montgomery is the current owner of the building leased by USDA for the past 19 years and argues that the agency's evaluation was arbitrary and capricious.

The protest is denied in part and dismissed in part.

BACKGROUND

The SFO solicited offers of contiguous space for 5 years and required a loading facility and 213 parking spaces with 30 spaces reserved for agency employees. The solicitation stated that in evaluating offers, the agency would consider proposed rental costs, conformity of offered space with the SFO requirements and the following factors:

Accessibility/Location
(16 points)

Quality/Physical Characteristics
(12 points)

Parking
(8 points)

Layout Compatibility and Local Plans
(6 points)

Safety
(5 points)

Proximity to Eating Facilities
(3 points)

According to the SFO, price and the listed factors were to receive equal weight.

USDA received five offers, including Montgomery's offer of its building on Waller Avenue in Lexington which the agency currently occupies. The agency evaluated the offers, held negotiations with all five offerors and received best and final offers. The offers ranged from Montgomery's at

\$11.70 per square foot to \$18.74, with Paragon's offer the second low at \$13.75 per square foot. With respect to the price evaluation, the agency assigned the 50 points available for price (out of a total of 100) based on proximity to the lowest priced proposal. Under this scoring system, Montgomery received 50 price points for its low offer and Paragon received 43 points.

Based on the evaluation which included visits to the existing buildings offered, the agency assigned 30 points to the protester and 46 points to the awardee. Combining the price and evaluation factor scores resulted in a total score of 89 for Paragon, 85 for the next highest rated offeror and 80 for Montgomery. On January 25, 1991, the agency awarded the lease to Paragon based on its high total score, for office space at Corporate Plaza, which is owned by Metropolitan Life Insurance Company.

PROTEST ALLEGATIONS

Montgomery principally contends that as a result of miscommunications and a misunderstanding relating to Montgomery's performance under the previous lease, USDA officials were biased against the protester in the evaluation and improperly considered Montgomery's past performance to downgrade its proposal. Montgomery explains that it purchased the Waller Avenue building in September 1989, and at that time, some USDA offices in the building requested improvements in janitorial and maintenance services. According to Montgomery, it attempted to alleviate the problems by replacing the janitorial service and, as a result of its efforts, representatives of some of the agency offices expressed satisfaction with the improved services.

Montgomery further explains that during lease renewal negotiations on September 19, 1990, in response to a request of the agency leasing specialist responsible for the building, it outlined corrections and improvements it would undertake if its lease were renewed. Among the listed items, Montgomery proposed to make the second floor restrooms handicapped accessible, paint walls that needed it, replace damaged baseboards, repair leaking and warped walls, clean and replace blinds, replace carpets and damaged ceiling tiles, post emergency elevator phone numbers and repair or replace noisy air conditioning wall units. However, according to Montgomery, on October 3, the leasing specialist informed Montgomery that he was leaving the government and that the firm should not make any further corrections until his replacement had reviewed the situation.

Montgomery maintains that, because of miscommunications within the agency, it was never told to proceed with the repairs and

improvements, which resulted in renewed complaints by agency employees in the building and a decision to solicit other offers rather than renew the lease. Montgomery also argues that as a result of the misunderstanding, and in spite of its efforts to respond to agency concerns, agency officials, including those who participated in the evaluation, became resentful and biased against it. Montgomery objects to the evaluation and scoring under all of the factors listed in the solicitation and maintains that the scoring was tainted by bias and by the agency's improper consideration of Montgomery's past performance, which was not a factor in the SFO.

Montgomery also argues that agency officials were predisposed to award the lease to Paragon, that they failed to consider in the evaluation the cost and disruption of the move and failed to give Montgomery a preference for offering a fully serviced building, as required by the SFO. Further, Montgomery contends that the agency violated Federal Acquisition Regulation (FAR) provisions relating to discussions, technical leveling and disclosure of pricing information during negotiations. Finally, according to Montgomery, the lease awarded to Paragon was for greater square footage than required by the SFO and the agency should have stopped performance of the lease pending our decision on the protest.

ANALYSIS

Technical Evaluation

Montgomery objects to the evaluation of its offer and that of the awardee and contends that its offer should have been rated higher and the awardee's lower. The protester disputes the ratings assigned to its offer and that of the awardee under each of the six evaluation factors, essentially arguing that it should have received the same or a higher rating than the awardee under each. We have carefully reviewed the evaluation record in the context of all of Montgomery's objections and we conclude, for the reasons set forth below, that the selection by USDA was rationally based.

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 evaluation to ensure that it was reasonable and consistent with the stated evaluation factors. Buffalo Central Terminal, Ltd., B-241210, Jan. 29, 1991, 91-1 CPD ¶ 82; Litton Sys., Inc., B-239123, Aug. 7, 1990, 90-2 CPD ¶ 114. The fact that the protester disagrees with the

agency's judgment does not render the evaluation unreasonable. Id.

Under the first evaluation factor, Accessibility and Location, Montgomery received 7 out of 16 possible points and Paragon received 15. Montgomery was given a low score because train tracks run directly behind its building and cross Waller Avenue, there is heavy traffic in the area since the building is close to downtown Lexington and the University of Kentucky and the building has poor street access by way of a two lane road with no traffic signal. The evaluation record also shows that, due to its near downtown location, the building is not as accessible as other proposed buildings to the airport and other parts of the state including areas with significant agricultural production. Further, according to the agency, the trains which pass the building up to 18 times a day cause it to shake and disrupt phone conversations and meetings. On the other hand, the evaluation record shows that the awardee's higher score on this factor was due to its building's location on the outskirts of the city with access off of a major four lane road with a traffic signal, proximity to Route 4, Lexington's "beltway," and the lack of train tracks or other nuisances. The agency record also cites the awardee's location in an office park as an advantage.

Montgomery objects to the conclusion that there is significant traffic congestion near its building and argues that traffic at Corporate Plaza is worse and, due to population growth and expected development, will continue to worsen. In a statement submitted by the protester, a recently retired traffic engineer for the Department of Public Works of the Lexington-Fayette Urban County government states that the traffic on Waller Avenue has ranged from 16,000 to 17,000 vehicles per day for the last 6 or 7 years and that "[t]he only time there are any major problems is in the morning and afternoon peak traffic hours." The engineer states that at the location of the awardee's building, however, traffic has grown from 17,000 vehicles per day in 1984 to over 46,000 per day and, due to growth in the area, is expected to increase from 70,000 to 80,000 vehicles a day in the next 15 or 20 years. According to the engineer, that traffic volume is worse than currently exists at the intersection considered the county's worst traffic problem.

Montgomery also argues that trains pass its building only six times per day and do not cause the building to shake and, according to the protester, the trains crossing Waller Avenue are an extremely minor traffic disruption which was never an issue in previous lease renewals. More generally, Montgomery argues that the agency found fault in its building where it should have found advantages. For instance, according to Montgomery, while the proximity of its building to

restaurants, hotels, hospitals, downtown and the university, with agricultural research and training facilities, would usually be considered an advantage, the agency concluded that this proximity detracted from the offer.

We do not believe that the agency acted unreasonably in scoring the awardee higher than Montgomery under the Accessibility and Location factor. Although Montgomery believes that the agency should have preferred a "closer in" location, it is clear that the agency believed that its needs were better met by the Corporate Plaza location on the outskirts of the city with proximity to major roads allowing easy access for out-of-town visitors. The agency's preference was consistent with the SFO's Accessibility and Location evaluation factor which stated that the agency sought "accessibility for USDA visitors and employees, accessibility to primary, hard-surfaced roads," and Montgomery's disagreement with the agency's judgment in this respect does not render the evaluation unreasonable. Buffalo Central Terminal, Ltd., B-241210, supra.

Further, although Montgomery strenuously challenges the agency's views as to the traffic congestion at the two locations, in our view the traffic engineer's statement submitted by Montgomery does not make the agency's preference unreasonable. For instance, the engineer admits that there are "major traffic problems" at the Montgomery location during rush hours and most of his comments about traffic at Corporate Plaza focus on future development and congestion over the "next 15 to 20 years." Considering all the circumstances spelled out in the record, including agency concerns about the absence of a four lane road with a traffic light and the traffic congestion and other disruption caused by the train tracks at the Montgomery location, we find no basis to disturb the agency's judgment under the Accessibility and Location factor.

Under the second evaluation factor, Quality/Physical Characteristics, Montgomery was assigned a score of 7 and the awardee 11, out of 12 possible points. The evaluation record indicates that Montgomery's score was based on "[i]nferior quality building materials; poor building maintenance." The agency's primary concerns under this factor were the poor housekeeping and maintenance under Montgomery's current lease and whether the space offered by Montgomery would be repaired and improved without undue disruption.

With respect to the score assigned to Paragon under the second evaluation factor, the evaluation record states: "not luxurious space, but nice; modern HVAC-no window units; 2-story atrium/lobby; high-grade building materials; solid structure; clean and neat; good building maintenance."

Montgomery argues that USDA's consideration of the firm's allegedly poor maintenance under the previous lease was improper since this matter was outside the SFO evaluation factors. The protester also argues that the agency's evaluation of maintenance was unfair since many defects noted in its building also exist in the awardee's building, and the agency did not make the same effort to examine the awardee's maintenance history; only Montgomery was required to submit a repair cost estimate. Further, Montgomery contends that even if it is considered in the evaluation, the condition of its building under the prior lease should not have resulted in the loss of points. According to Montgomery, since it purchased the building, it changed the janitorial service and it has responded promptly to repair requests and, although it offered to make other repairs and improvements, it did not follow through on the advice of USDA's leasing specialist. Montgomery maintains that due to miscommunication within the agency, the current leasing specialist and other agency officials were unaware that Montgomery was told not to do the work it promised until instructed to do so by the new leasing specialist. Montgomery also complains that the agency had no grounds to criticize and deduct points because of its plans and estimate of the cost of repairs. According to Montgomery, since it is a builder, it knows the cost of the repairs it proposed and can do the work itself for less than others.

Further, Montgomery argues that the agency deducted points from its score based on the leasing specialist's unreasonable conclusion that the heating, ventilation and air conditioning (HVAC) system in its building is "antiquated." Montgomery explains that its building has a commonly used HVAC system which uses a centralized system for the interior of the building and individual wall units for the perimeter. A statement submitted by Montgomery from a mechanical contracting consultant states that the main chiller in Montgomery's building was replaced a year ago, the perimeter units are replaced every 5 years and the system is in serviceable working order and not antiquated. Montgomery also complains that while the agency report stated that some of its wall units are noisy and inefficient or have other problems, it received no complaints from the building occupants and while the compressor wiring melted in one unit, the entire unit did not catch fire, as stated in the agency's protest report.

Montgomery also argues that it proposed to construct a loading facility meeting USDA specifications and instructions and that the awardee's initial proposal did not even address this requirement. According to Montgomery, the awardee only submitted information on a loading facility after award when Montgomery raised the matter. Further, Montgomery submitted a letter from the owner of a freight handling company which

states that he believes the loading facility proposed for Montgomery's building is superior to that proposed at the awardee's building in terms of safety, accessibility and practicality.

We believe the scoring under the Quality/Physical Characteristics factor was reasonable. First, since that evaluation factor indicated that the agency would consider "building maintenance, and grounds maintenance," in our view, there was nothing improper in USDA's evaluation of the current maintenance of Montgomery's building under the existing lease. Although as Montgomery argues, an agency may consider in the evaluation information outside of the proposal only when doing so is consistent with long-standing procurement practice, Western Medical Personnel, Inc., 66 Comp. Gen. 699 (1987), 87-2 CPD ¶ 310, we think that it is consistent with the long-standing practice of most federal agencies to visit the premises and to assess and consider in the evaluation the maintenance condition of existing buildings proposed for lease to the government. See, for example, Landsing Pacific Fund, B-237495.2, June 20, 1990, 90-1 CPD ¶ 574; Delmae Co., B-214082, July 10, 1984, 84-2 CPD ¶ 36.

We also reject Montgomery's contention that the deduction of points based on the condition of its building was arbitrary. Montgomery attributes the condition of its building to the janitorial service that it inherited from the previous owner and maintains that it was prepared to make requested repairs and improvements until the departing USDA leasing specialist told it to wait until the new leasing specialist reviewed the matter. We note, however, although Montgomery replaced the janitorial service in February 1990, 6 months later many janitorial problems remained. In a letter to Montgomery dated September 6, 1990, USDA listed numerous complaints about the building, including the following:

"Better janitorial service is required. At present, most floors are receiving little cleaning, and baseboards are never cleaned. All floors require cleaning at least twice a week. Baseboards should be cleaned regularly. Doors and walls should be cleaned to remove finger prints and other dirt. All the rest rooms are dirty. Walls, floors, and fixtures are not clean. Ceiling vents are full of dust. Cobwebs hang from the ceiling. Rest rooms require regular inspection by the janitorial services contractor. Walls, floors, and fixtures must be cleaned 2 to 3 times a week. Vents require dusting."

Thus, contrary to the protester's contention, the new janitorial service did not resolve the housekeeping problems

in its building. Moreover, since it was appropriate to consider the quality of the proposed space and the maintenance of the building in the evaluation, we think the agency's request of an estimate from Montgomery of the costs of repairs and improvements was reasonable. In correspondence with the agency before proposals were submitted and during negotiations, Montgomery offered to make numerous repairs and improvements in the building. Given its condition, we think the agency reasonably declined to take Montgomery's representations at face value.

We also do not believe the agency treated Montgomery inequitably by asking that firm, and not the awardee, for an estimate of the cost of repairs and improvements in its building and by performing a less detailed evaluation of the awardee's building maintenance. Based on the recent condition of Montgomery's building, contracting officials had reasonable concerns about maintenance and the general quality of the space and attempted to alleviate those concerns during discussions by asking the firm about repairs and improvements. On the other hand, the agency was impressed with the condition of Corporate Plaza and described it as "clean and neat; good building maintenance." Under the circumstances, there was no reason to investigate other buildings managed by Paragon or to ask the awardee for the type of information requested from Montgomery.^{1/}

Under the Parking evaluation factor, eight points were available. A point was deducted from Montgomery's score because the agency found that its parking lot was poorly maintained, with debris and bushes blocking two spaces, and the loading facility was too close to the parking spaces. Paragon received all eight points based on the conclusion that Corporate Plaza has plenty of well-maintained spaces and the proposed loading facility will be away from the parking.

^{1/} Although the evaluation record includes criticism of Montgomery's HVAC system and the loading facility it proposed, these matters do not appear to have played a significant role in the scoring under this factor. In any event, the agency's position on these matters does not appear to us to be unreasonable. Montgomery was not criticized for the design of its loading facility, only its proposed location, which the agency considered to be too close to its parking and which was raised under the Parking evaluation factor. With respect to the HVAC system, the agency was aware of and, in our view, was entitled to consider problems its employees experienced with heating and air conditioning in the building under the previous lease.

Montgomery argues that it should have been given the full eight points under the Parking factor for offering the required number of spaces and the awardee should have been given fewer points for not having sufficient parking. According to the protester, there are insufficient parking spaces at Corporate Plaza to provide USDA the number of spaces required by the SFO and also allow a comparable number of spaces for other future tenants. Montgomery also maintains that the number of spaces remaining beyond those offered to USDA is less than required by local parking regulations for the remaining space in the building.

We have no reason to disturb the assignment of points under the Parking evaluation factor. That factor allowed consideration of the quality and maintenance of parking offered. The scores reflect a slight preference for the awardee's parking because it was farther removed from the loading area and, at the time the agency visited the sites and made its evaluation, it was better maintained than the protester's. We have reviewed the record, including photographs and drawings of the two parking areas, and we do not find that the agency's judgment was without a rational basis. Further, it is undisputed that Paragon offered the number of parking spaces required by the SFO. Whether Paragon complies with local parking regulations concerning the number of spaces that it has available for other tenants is a matter of responsibility, which we do not review except in circumstances not present here. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1991); NFI Management Co., 69 Comp. Gen. 515 (1990), 90-1 CPD ¶ 548.

Under the Layout Compatibility factor, worth six points, Montgomery was given three points and the awardee five points. Generally, this difference was based on the agency's conclusion that the space proposed in Corporate Plaza offered greater design flexibility because it has fewer load-bearing walls and it would require splitting only one of the four USDA agencies between two floors while, in Montgomery's building some of each agency's space would be on the first floor.

Montgomery argues that the floor plans for the two buildings do not support the agency's position that Corporate Plaza offers greater design flexibility with fewer load-bearing walls in the offered space. In this respect, Montgomery argues that it offered the agency total design flexibility and, while it was criticized and lost points for proposing to place part of each agency on the ground floor, only one point was deducted from the awardee's offer even though the evaluation record states that its space has "many sharp angles" and part of its offered space is separated by several floors.

We have reviewed the evaluation record under this factor and the floor plans for the two buildings and we believe that the evaluation was reasonable. The difference in points between the two firms is justified by the agency's opinion, which we find to be reasonable, that the Corporate Plaza space would allow greater design flexibility because it is broken up by fewer load-bearing walls. Although Montgomery states that it offered total design flexibility, that offer obviously is limited by the construction of the building in which it offered space. We also think that the agency's judgment that it is preferable to have one of its four agencies separated by several floors than to have all four agencies' space separated at least one floor was reasonable.

On the Safety factor, Montgomery scored three points and Corporate Plaza scored five points out of five possible points. That difference is explained in the evaluation record by the agency's conclusion that Montgomery's building has traffic congestion; a history of vagrants; thefts and vehicle break-ins; fires in window HVAC units; and a loading facility design that will place trucks in the parking area while there are no perceived safety problems at Corporate Plaza, which has a night security patrol, a property manager on-site and a full building sprinkler system.

Montgomery argues that the evaluation under this factor was arbitrary. According to the protester, it received no written reports of vagrants in the area of its building, it is not aware of any serious intrusions by vagrants and the agency has presented no evidence that vagrants have ever presented a problem. While the agency report states that there have been unlawful intrusions on the Montgomery property, the protester has submitted a copy of a police report which indicates that there have been no unlawful intrusions onto its property. In contrast, according to Montgomery, the police report for the Corporate Plaza building indicates numerous burglary reports over the past 2 years. Montgomery maintains that the agency's failure to request police reports on the offered buildings demonstrates the arbitrary and capricious nature of the evaluation since those reports would have uncovered numerous safety deficiencies at Corporate Plaza that do not exist at the Montgomery building.

The record includes descriptions by agency employees of suspicious persons, vagrants and vandalism in and around the Montgomery building. While this information is anecdotal, Montgomery does not deny that such incidents have occurred. With respect to the Corporate Plaza building, the police report submitted by Montgomery shows significantly more entries for that building than the Montgomery building over a similar period of time. Nonetheless, neither Montgomery nor the agency provided any explanation of the significance of the

entries in the police reports--for instance, whether an entry represents an actual criminal incident or a false alarm--and most of the entries for Corporate Plaza are "ALARM BURGLAR," suggesting the possibility of alarms accidentally tripped. In any event, the evaluation and scoring under the Safety factor included consideration of other issues such as traffic congestion, loading dock proximity to parking and the night security patrol at Corporate Plaza. Further, it does not appear that the Safety factor played a deciding role in the evaluation and selection since only five points were allotted to this factor by the SFO and only two points separated Montgomery and Corporate Plaza on this factor. Had the Safety factor been weighted higher or had it been a decisive factor in the selection, we expect that USDA would have more thoroughly investigated and documented this issue. Under the circumstances here, we think the record provides a reasonable basis for the scores assigned under this factor.

Finally, under the Proximity of Eating Facilities factor, Montgomery was given three points due to its proximity to many restaurants and two points were assigned to Corporate Plaza since it has a deli on site but not as many restaurants nearby as other offered sites. This factor also was not decisive in the selection and Montgomery provides no basis to challenge the scores assigned under this factor.

As we have explained in detail, we think the evaluation record reasonably supports the selection based on the proposals submitted and site visits to the space offered. In other words, we think that the record indicates a clear preference by the agency for the location, building design, condition and other characteristics of the Corporate Plaza space offered by Paragon over the space offered by Montgomery. We believe that preference is consistent with the evaluation factors set out in the SFO, and in our view, rationally based. The choice is one which the USDA must make in the context of its needs. 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 Corporate Plaza site.

Bias

Underlying the numerous arguments which it makes regarding the various evaluation factors is Montgomery's contention that USDA officials, including the agency's leasing specialist and local officials in Lexington, were biased against it. Montgomery maintains that while three of the four USDA offices were in favor of a lease renewal when it bought the building in September 1989, their current opposition to staying in the building is based on bias against the firm. Montgomery argues that this bias arose in part from the misunderstanding that resulted from the former leasing specialist telling Montgomery

not to proceed with repairs it had promised until the new leasing specialist reviewed the situation.

Also, according to Montgomery, an official in one of USDA's Lexington offices had a personal dispute with a Montgomery employee and, for that reason, attempted to undermine Montgomery's chances for award by supplying newspaper clippings and other irrelevant information to the leasing specialist. Montgomery argues that this employee's efforts to influence the leasing specialist were successful since the leasing specialist stated in the evaluation record that Montgomery's "building is a disgrace" and expressed resentment about Montgomery's low price and, according to Montgomery, about having to even consider the firm's building. Montgomery also maintains that the record indicates that the leasing specialist and other agency officials involved in the evaluation relied on matters not related to the SFO evaluation factors, such as notices of Montgomery's tax delinquency, and used Montgomery's building as a standard against which to compare the others offered.

Government officials are presumed to act in good faith and, therefore, for our Office to find bias, the record must contain convincing evidence that government officials had a specific and malicious intent to injure the protester. Microlog Corp., B-237486, Feb. 26, 1990, 90-1 CPD ¶ 227. We have reviewed the record in the context of Montgomery's arguments and we do not find that the record supports Montgomery's allegation of bias. Clearly, some USDA officials in Lexington were opposed to staying in Montgomery's building. Nonetheless, where Montgomery sees bias against it, the record, in our view, reveals concern on the part of agency officials about the condition and quality of the space offered by Montgomery. As explained above, these are appropriate concerns in the evaluation of space for lease to the government.

Moreover, the record indicates that most of the individuals in USDA's Lexington offices whom Montgomery refers to as biased as a result of the previous lease and personal disputes had limited roles in the evaluation and selection. While certain individuals may have participated in scoring proposals, their scoring was advisory only and the actual evaluation, scoring, and the selection itself were done by the USDA leasing specialist from outside Lexington. While this, of course, does not mean that agency employees in the local offices could not have influenced the leasing specialist, we are not inclined to view the protester's speculation as establishing bias. See Empire State Medical Scientific and Educ. Found., Inc., B-238012.2, Mar. 9, 1990, 90-1 CPD ¶ 261.

Other Issues

Montgomery argues that USDA officials had improper contact with Paragon, the leasing agent for Corporate Plaza, before the SFO was released and that this indicates a predisposition to award the contract to Corporate Plaza. Montgomery also maintains that USDA promised to award the lease to Paragon months before the award.

Before issuing the SFC, USDA officials contacted potential offerors, including Paragon and Montgomery, to inform them of the solicitation and gather pricing information. We fail to see how this shows a predisposition toward Paragon and we are aware of no regulation that prohibits such contacts. Further, the agency denies that Paragon was given advance notice that it would receive the award, and Montgomery's allegations in this regard are based on rumors. Montgomery has not shown that any agency officials engaged in improper conduct.

Montgomery also argues that while USDA claims that the renovations that would be necessary in the Montgomery building would cause too much disruption, the agency failed to consider in the evaluation the cost and disruption of moving its offices to Corporate Plaza. Montgomery submitted a letter from a moving company which estimates that the cost of moving from the Montgomery building would be in excess of \$75,000 and would take 10 days. Also, in a letter submitted by Montgomery, a company that installs telephone systems estimates the cost of moving the agency's phones as \$42,000 to \$63,000. In contrast, according to Montgomery, any renovation needed in its building could be accomplished with minimal disruption while saving moving and phone relocation expenses.

The solicitation included no requirement that moving costs be considered in the evaluation. Nonetheless, according to the agency, although significant expense will be involved in relocating to another building, there would also be considerable costs associated with staying in the Montgomery building, since required renovations would take up to 3 months. The agency explains that if it remained in the present location, the space would have to be almost completely remodeled and reconfigured which would involve such costs as moving furniture and equipment, rewiring and lost productivity, due to employee downtime and work shutdowns. According to the agency, generally, relocation costs are advantageous to a current lessor only when no major renovations are planned and in this case the costs of relocating are offset by the costs of staying in the present location and enduring months of major renovations. Under the circumstances here, while we believe that it would have been more prudent for the SFO specifically to require a formal evaluation of relocation costs and a determination as to whether those costs

are offset by staying in the existing space while it is renovated, there was no such requirement in the SFO. To the extent that the protester is arguing that there should have been such a factor in the SFO, the protest is untimely as such matters must be raised prior to the due date for submission offers. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1); NFI Management Co., 69 Comp. Gen. 515, supra.

Montgomery also argues that the terms of Paragon's offer precluded a legally binding obligation from taking effect until the owner of Corporate Plaza approved the lease. For this reason, according to Montgomery, the contract was not binding until January 28 when it was approved by the building owner and since Montgomery filed its protest within 10 calendar days of that award date, USDA should have suspended contract performance until the protest was decided.

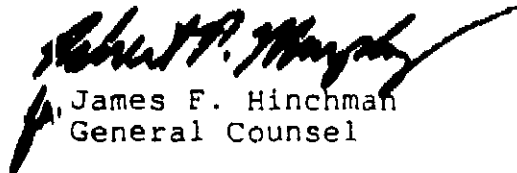
In a separate decision, The Montgomery Cos., B-242858.2, Apr. 25, 1991, 91-1 CPD ¶ _____, we dismissed as untimely Montgomery's contention that Paragon's offer was contingent on later approval by the building owner. Consequently, we will not decide that issue now. In any event, since the protest is denied, the protester suffered no prejudice because of the failure to receive the stay.

Finally, in its comments submitted in response to USDA's report on the protest, Montgomery included numerous issues which it had not raised before. Among these allegations are the contentions that USDA failed to conduct meaningful discussions, improperly informed Montgomery that its price was too low and engaged in technical leveling. Also, Montgomery argues for the first time that the lease awarded to Paragon is for greater square footage than specified by the SFO and that USDA failed to afford it the preference required by the SFO for its fixed-rate, fully serviced offer.

Under our Regulations, protest allegations such as these must be filed within 10 working days of when the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). Where, as here, a protester supplements a timely protest with new and independent grounds of protest, the later raised allegations must independently satisfy the timeliness requirements. Holmes & Narver, Inc., B-239469.2, B-239469.3, Sept. 14, 1990, 90-2 CPD ¶ 210. The arguments listed above, which Montgomery raised for the first time in its comments on the agency's report, are all based on documents which Montgomery received on or before February 21 in response to a Freedom of Information Act request or in the

agency report, which it received on March 14. Since Montgomery did not raise these new contentions until more than 10 days later when it filed its comments on the agency's report on April 19, these issues are untimely and will not be considered.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel