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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Oak Street Distribution Center, Inc.

File: B-243197

Date: July 2, 1991

Sam Zalman Gdanski, Esq., for the protester.
Roy S. Mitchell, Esq., Morgan, Lewis & Bockius, for Luzerne Products, Inc., an interested party.
Manuel B. Oasin, Esq., and Robert J. McCall, Esq., General Services Administration, for the agency.
Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee's property is "functionally" located in a base flood plain and thus that award is inconsistent with the terms of the solicitation is denied where the solicitation merely prohibits the agency from leasing property that is in fact located in a base flood plain and does not mention or include property that is "functionally" located there.

2. Protest that agency improperly conducted discussions with only one offeror after best and final offers were submitted and engaged in technical leveling during these discussions is denied where there is nothing in the record to support these allegations.

3. Challenge of an award as improper on the basis that the agency's actions during the course of negotiations created a "technical auction by transfusion" is denied where the protester gives no support or specific details for its allegation of technical transfusion and where there is no corroborating evidence that supports the protester's speculative claim that the agency used improper auction techniques.

4. Protest that contracting agency conducted procurement in a way that fostered unequal competition, based on claims that the agency required only the protester, and not the awardee, to include electricity costs in its offer and that the agency miscalculated the protester's rates, is denied where the protester and the awardee were afforded the same opportunity to either include or exclude electricity costs and where the

protester concedes that, even based upon its own calculations, the awardee's rates were still lower than its rates.

DECISION

Oak Street Distribution Center, Inc. protests the award of a contract to Luzerne Products, Inc. under Solicitation for Offers (SFO) No. MPA90133, issued by the General Services Administration (GSA) for the lease of warehouse space in Wilkes-Barre, Pennsylvania.

We deny the protest.

The solicitation, issued on October 12, 1990, contemplated the award of a 10-year lease with two 5-year option periods. The solicitation specified that the lease space--to house an active records storage facility--must be between a minimum of 94,400 square feet and a maximum of 100,000 square feet. The solicitation also advised offerors that the lease space could not be located within a base flood plain or wetland unless the government determined it to be the only practicable alternative, and imposed certain physical requirements related to handicapped accessibility.1/

The SFO stated that GSA would award a lease to the responsible offeror whose proposal is most advantageous to the government, price and other factors considered. In regard to the non-price factors, the SFO, as amended on December 3, provided that proposals were to be evaluated under the following factors: efficiency of layout; ability to accept responsibility for relocation costs; ability to meet the stated occupancy date; ability to cover all build-out costs for all special requirements; and the close proximity to highways.

The amended SFO also deleted the requirement that proposed buildings fully meet the requirements of the UFAS. GSA's decision was predicated on a determination by the Social Security Administration--the agency for which GSA is leasing the property--that the lease space is exempt from the UFAS requirements for the following reasons: (1) the building housing the documents is not intended for and is not open for use by the general public; and (2) the operation requires able-bodied persons to do physically demanding labor in

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1/ These requirements derive from the Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4157 (1988), and its implementing regulations, 41 C.F.R. § 101-19.6, App. A (1990), referred to as the Uniform Federal Accessibility Standards (UFAS).

confined spaces, which thus prohibits the employment of physically handicapped persons.

Two firms submitted proposals by the December 17 closing date. After the initial evaluation, the agency determined that the two offerors, Luzerne and Oak Street, were within the competitive range. Discussions were held and best and final offers (BAFO) were requested by January 18, 1991.

After evaluating the BAFOs, the agency concluded that the proposals were technically equal and that Luzerne was the low-priced offeror. On February 27, Luzerne, the current lessor, was awarded the lease. Oak Street's protest to our Office followed.

FLOOD PLAINS

Oak Street contends that the award to Luzerne is inconsistent with the solicitation's prohibition on leasing property that is located in a base flood plain or wetland. While the protester recognizes that Luzerne's proposed building is not actually located within a flood plain, it nevertheless claims that GSA should have found the building unacceptable on the basis that it is "functionally" located in such an area. The protester bases this assertion on its belief that the land surrounding Luzerne's building has a high flood rating and that the building will not be accessible in the event of flooding.

In its comments on the agency report, the protester's attorney included a statement by the protester's representative which, the attorney maintained, would demonstrate that the parking lot to Luzerne's building is located in a flood plain area. The statement does not mention the parking lot area and does not, for that matter, convincingly demonstrate that the land surrounding the building was actually located in a flood plain. Oak Street has not established its assertion that Luzerne's building is located in what Oak Street calls a "functional" flood plain. Even if Oak Street had made such a showing, we see no basis to conclude that property that is "functionally" located in a flood plain area should be found unacceptable under the SFO. Contrary to the protester's suggestion, paragraph 8 of this SFO, entitled "Flood Plains and Wetlands," provides that the agency may not execute a lease for property that is located within a flood plain or wetland unless the government has determined it to be the only practicable alternative; the provision does not mention "functional" flood plains. The agency properly found that the property met the solicitation flood plain concerns and was acceptable. To the extent that the protester believes that the solicitation should have included language to define land that is considered to be

"functionally" located in flood plains and to prohibit the execution of a lease of property that is located in such an area, it should have lodged this objection prior to the closing time for receipt of proposals. See 4 C.F.R. § 21.2(a)(1) (1991).

TECHNICAL LEVELING

Oak Street contends that GSA improperly conducted post-BAFO discussions with Luzerne and engaged in technical leveling during these "ongoing discussions." To support this allegation, the protester claims that it knows from "conversations with trade and industry people" that the agency conducted negotiations only with Luzerne for approximately 5 weeks in order to negotiate a package more advantageous to GSA than Oak Street's BAFO offered.

Discussions occur when an offeror is given an opportunity to revise or modify its proposal, or when information requested from and provided by an offeror is essential for determining the acceptability of its proposal. Federal Acquisition Regulation (FAR) § 15.601; Motorola, Inc., 66 Comp. Gen. 519 (1987), 87-1 CPD ¶ 604. Discussions are to be distinguished from a request for clarification, which is merely an inquiry for the purpose of eliminating minor uncertainties or irregularities in a proposal. Id.

Technical leveling arises when, as the result of successive rounds of discussions, the agency helps to bring one proposal up to the level of other proposals, such as by pointing out inherent weaknesses that remain in an offeror's proposal because of the offeror's own lack of diligence, competence or inventiveness after having been given the opportunity to correct those deficiencies. FAR § 15.610(d)(1); Raytheon Ocean Sys. Co., B-218620.2, Feb. 6, 1986, 86-1 CPD ¶ 134.

GSA denies any involvement in post-BAFO discussions or technical leveling with or on behalf of Luzerne. Rather, the agency asserts that after its receipt of the offerors' BAFOs on January 18, it determined that it should make award to Luzerne based on the fact that Luzerne's proposal was technically equal to Oak Street's and offered the lowest price. GSA reports that pursuant to section 1.11 of the solicitation,2/ it then requested that Luzerne execute the proposed lease before the actual award was made. GSA maintains that its post-BAFO communications with Luzerne did

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2/ Section 1.11 states "after conclusion of negotiations, the contracting officer will require the offeror selected for award to execute the proposed lease prepared by GSA which reflects the proposed agreement of the parties."

not constitute discussions and were limited to its request for the executed lease and certain clarifications that Luzerne raised in connection with executing the lease.

Based upon our review of the record, including the protester's submission, we find nothing to support the protester's allegation that GSA engaged in post-BAFO technical leveling with the awardee. The fact that Luzerne requested and obtained clarifications from GSA prior to executing its lease was not improper. Luzerne merely asked questions which, in part, centered around when GSA would start making rental payments. Clearly, such questions and GSA's responses do not constitute discussions or technical leveling since they do not involve information essential to determining the acceptability of Luzerne's proposal.

The protester's reliance on unidentified "conversations with trade and industry people" does not demonstrate improper agency action. Our regulations, 4 C.F.R. § 21.1(c)(4), require a detailed statement of the legal and factual grounds of the protest. The protester has failed to provide sufficient detail in support of its allegation by failing to have the "trade and industry people" to whom it refers provide the specific details that led them to believe that improper agency actions had occurred.

TECHNICAL TRANSFUSION AND IMPROPER AUCTION TECHNIQUES

Oak Street's contention that GSA's actions during the course of the procurement created a "technical auction by transfusion" is limited to setting out the definition of technical transfusion. As stated above, our regulations, 4 C.F.R. § 21.1(c)(4), require a detailed statement of the legal and factual grounds of the protest. See Barfield Assocs., Inc., B-238992, Mar. 29, 1990, 90-1 CPD ¶ 342. Since the protester gives no support or specific details for its allegation that the agency engaged in technical transfusion in connection with this procurement, we have no basis upon which to consider the matter.

With regard to its charge that the agency used improper auction techniques during discussions, the protester argues that the phrase "reduced price" in the realty specialist's notes on the negotiations with Oak Street indicates the agency's attempt to auction. GSA denies this allegation, and we find no corroborating evidence in the record to support Oak Street's position.

FAR § 15.610(d)(3) states that the contracting officer may not engage in such auction techniques as the following: indicating to an offeror a cost or price that it must meet to obtain further consideration; advising an offeror of its price

standing relative to another offeror; and furnishing information about other offerors' prices. The record here does not show, and the protester does not claim, that the realty specialist indicated to Oak Street the price it must meet to obtain further consideration; that he advised Oak Street of its price standing in relationship to Luzerne's; or that he furnished Oak Street with information about Luzerne's prices. Nor does the protester attempt to refute the specialist's declaration that the phrase "reduced price" was merely listed as one of his negotiation goals. Even though Oak Street did reduce its cost and rental rates after discussions, the relatively common occurrence of a price reduction in a BAFO is an insufficient basis to support a conclusion that the agency disclosed any pricing information. Byrne Indus., Inc., B-239200, Aug. 13, 1990, 90-2 CPD ¶ 122.

UNEQUAL COMPETITION

Oak Street also charges that GSA's handling of the procurement fostered unequal competition between the two offerors in regard to calculation of their prices. To support this allegation, the protester contends that while it was required to include the cost of electricity in its proposal, Luzerne was not, and, consequently, did not include this cost in its proposal. In addition, the protester claims that GSA improperly calculated its rate, which, if calculated fairly, would be $6.28 per square foot, compared to Luzerne's rate of $6.22.

A showing of prejudice is an essential part of a protest, and it is incumbent upon a protester to show how it was prejudiced if corrective action is requested. Barfield Assocs., Inc., B-238992, supra. The protester has made no such showing here.

With regard to Oak Street's claim that it was unfairly required to include the cost of electricity in its proposal, this is simply not the case. Block 20 of the solicitation specifically advised offerors that they should enter a checkmark to designate their selection of one of the two choices provided:

> "(a) [to] [f]urnish adequate metering facilities (without cost to the Government) to permit separate payment of current lighting and operation . . . direct to the local utility company; or (b) [to] [i]nclude the cost of electric current for lighting and operation of office appliances and machines in the rental consideration."

Since both Oak Street and Luzerne were given the option to include or exclude these costs in their offers, we fail to see how Oak Street was prejudiced.

Similarly, even if we accept Oak Street's allegation concerning GSA's miscalculation of its rates, Oak Street was not prejudiced by the alleged miscalculation since Oak Street concedes that Luzerne would still have been the low offeror if GSA had calculated Oak Street's rate as Oak Street suggests.

BIAS IN FAVOR OF THE AWARDEE

Oak Street contends generally that GSA was biased in favor of Luzerne, and that this bias is reflected in the way GSA handled the procurement from the time it issued the solicitation to the time it awarded the lease to Luzerne.

Oak Street first claims that the SFO was clearly biased in favor of Luzerne because the SFO's Statement of Requirements section was merely photocopied from the incumbent contract with Luzerne. According to Oak Street, another offeror, Miracle Development Corporation, did not participate in the procurement because the solicitation was "skewed towards Luzerne." Oak Street also questions the manner in which GSA responded to its request to visit the existing facility so that it could accurately determine the extent of relocation costs it would be responsible for under the project. Oak Street states that after several requests and resultant delays on the part of GSA, Oak Street was finally allowed to visit the existing site that houses these records.

Oak Street also argues that the agency's deletion of the UFAS requirements from the SFO by addendum No. 1 constitutes an improper relaxation of the solicitation's original accessibility requirements. The protester contends that GSA's motivation in eliminating the requirement was its desire to make award to Luzerne.

Finally, the protester asserts that during negotiations GSA's realty specialist informed it that even though Oak Street's offer of 100,000 square feet was the maximum space allowed under the solicitation, the space offered should be limited to the SFO's minimum of 94,400 square feet. Oak Street contends that the realty specialist selected 94,400 square feet as the only permissible space because the reduction of Oak Street's planned space would cause its rental rates to rise and because Luzerne could not offer 100,000 square feet.

Despite the fact that Oak Street did not timely raise the issue of alleged bias in favor of Luzerne, 3/ we have examined the whole record and see no evidence to support Oak Street's allegation. With regard to the specific events Oak Street cites, for example, Oak Street concedes that in response to its assistance, GSA issued addendum No. 1 to the SFO in order to make it "more suitable for fair bidding." As discussed above, the record does not support Oak Street's other allegations regarding the flood plain requirements; technical leveling; technical transfusion and auction; and unequal competition. Since the protester has presented no evidence to substantiate its allegations, and we see none elsewhere in the record, we find that the agency acted properly in making award to Luzerne.

The protest is denied.

for James F. Hinchman
General Counsel

3/ At the latest, Oak Street's allegation of a pattern of bias should have been raised in a timely fashion after the last event which Oak Street cites in its support--the realty specialist's statement during discussions regarding the minimum space to be offered. Since Oak Street learned of the realty specialist's preference prior to submitting its BAFO, Oak Street should have raised its objection to the limitation prior to the submission of BAFOs rather than waiting to protest this issue more than 5 weeks after negotiations ended. See Vicor Assocs., Inc., B-241496, Feb. 6, 1991, 91-1 CPD ¶ 127.