



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: George A. and Peter A. Palivos

File: B-245878.2; B-245878.3

Date: March 16, 1992

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Ralph O. White, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly evaluated proposal for the lease of a building is denied where record shows that the agency evaluation was reasonable and consistent with the solicitation's evaluation criteria.

2. Contention that agency was biased and determined in advance not to award a lease for the protesters' building under any circumstances is denied where: (1) the protester fails to establish that the contracting officer acknowledged in a private meeting that the agency was biased against the protester or its building; and (2) despite the dissatisfaction of the tenant agency with its existing unrenovated space, the record, on balance, shows that the agency was attempting to ensure that the procurement was conducted in compliance with statutory requirements for full and open competition.

DECISION

Messrs. George A. and Peter A. Palivos (Palivos), owners of the building at 2444 West Lawrence Avenue, Chicago, protest the award of a lease by the General Services Administration (GSA) to Norman L. Traeger (Traeger), for office space in the building located at 4824 North Clark Street, Chicago. The lease award, for a period of 20 years, was made under GSA's solicitation for offers (SFO) No. GS-05B-15075 for 14,082 square feet of office space in north Chicago for a local office of the Social Security Administration (SSA). The protesters argue that the evaluation of their offer and that of the awardee was unreasonable in several specific

areas, and that it was improper to award a lease to Traeger because he allegedly did not submit a proposal until the second request for best and final offers (BAFO). In addition, the protesters argue that GSA was biased and decided in advance not to lease their Lawrence Avenue building under any circumstances.

We deny the protests.

BACKGROUND

Since 1978, the Chicago North District office of the SSA has been located at 2444 West Lawrence Avenue in a building owned by the protesters. The Lawrence Avenue building, formerly a neighborhood bowling alley, was originally leased for a 10-year period, which has been extended by two 2-year supplemental leases.

GSA issued the SFO on July 9, 1990, seeking offers for a new 20-year lease for SSA's north district office space. The SFO advised that price would be less important than the other award factors, and that award would be made on the basis of the offer considered most advantageous to the government. The other award factors, and accompanying weights, were:

Building Quality	40 percent
Past Performance	25 percent
Operations and Maintenance	15 percent
Ground Floor Location	10 percent
Availability of On-Site Parking	10 percent

In addition, amendment No. 0001 to the SFO elaborated on these award factors. For example, in the areas of building quality, past performance, and availability of on-site parking--each discussed in detail in this decision--amendment No. 0001 provided guidance about what GSA viewed as important under that particular award factor.

On October 5, 1990, GSA received three initial offers in response to the SFO: one from the protesters for the Lawrence Avenue building; one from J.S. Drew Construction (Drew), offering a building owned by Traeger (the awardee); and a third from a limited partnership offering to construct a new building to house SSA.

Upon evaluation of the three initial offers, the proposal to construct a new building received the highest technical score. The second highest score was awarded to the proposal to renovate and lease the Clark Street building offered by Drew. That proposal offered to renovate vacant space in a 70 year old building also used to house a roller skating rink. The space offered in that building has been vacant

for approximately 20 years. Finally, the lowest-scored proposal was the protesters' offer to renovate and lease the Lawrence Avenue building currently used to house SSA. Although the evaluators conceded that the Lawrence Avenue building met the minimum requirements of the SFO, they concluded that the building possessed no real strengths. In addition, the initial evaluation concluded that the building had "[o]ngoing structural problems, bulging exterior walls, large areas of sinking floor, long-term roof leaks, inability to control HVAC¹ properly, and poor past performance in cleaning. . . ."

After discussions, GSA requested submission of BAFOs by December 21, 1990. All three offerors responded, and on January 16, 1991, the evaluation panel completed its review of BAFOs. All three offerors received improved scores for their proposals, with the Palivos proposal showing the greatest improvement--although it was still ranked third and was still scored significantly lower than the other two proposals. The scores received are set forth below:

Limited Partnership "A"	88
Traeger/Drew	79
Palivos	45

After completing its review of BAFOs, the evaluation panel decided to recommend award of the lease to the limited partnership offering to construct a new building. Although the price for that offer was the highest received, the evaluation panel concluded that the offer was technically superior and represented the greatest value to the government. However, before GSA made award to the limited partnership, GSA commissioned an appraisal of the property offered. This appraisal failed to support the proposed price for the limited partnership's offer, and attempts to clarify discrepancies between the appraisal and the offer were unsuccessful. Therefore, GSA concluded it had no choice but to reopen discussions with all offerors and call for revised BAFOs. After the second round of discussions, GSA requested submission of revised BAFOs by June 14, 1991. Again, all three offerors responded.

Along with its revised BAFO, the protesters, for the first time, proposed additional alternate proposals to the proposal already under consideration. These alternate proposals included offering to construct a new building at the Lawrence Avenue site and leasing it to GSA for the 20-year term, and offering to renovate the existing building and lease it to GSA for 10 years, followed by replacement of

¹HVAC is an acronym for heating, ventilation, and air conditioning systems.

the existing building with a newly-constructed building for the remaining 10 years of the lease period.

Upon review of the revised BAFOs, GSA evaluators reached the following conclusions about the need to rescore the proposals due to changes made since the previous round of BAFOs: (1) that there was no need to reevaluate the revised BAFOs submitted by the limited partnership and by Traeger/Drew because those proposals differed only in terms of price from the first BAFO; (2) that there was no need to reevaluate the technical proposal submitted by the protesters for renovation of the Lawrence Avenue building--i.e., the approach initially proposed, as opposed to the two alternate approaches proposed in the revised BAFO--because the changes in the revised BAFO were minor; and (3) that it was necessary to perform a new evaluation of the protester's first-time offer to construct a new building at the Lawrence Avenue site.²

After these evaluations, completed on August 13, 1991, the only change in previous scores was the addition of a new score for the protesters' offer of new construction. Therefore, the final evaluation scores were as follows:

Limited Partnership "A"	88
Traeger/Drew	79
Palivos (new construction)	67
Palivos (renovation)	45

Based upon the scores above, it appears the evaluation panel was prepared to again recommend award to the limited partnership for its offer of a newly constructed building. However, on September 6, that offeror withdrew its proposal leaving only Traeger/Drew and Palivos in the competition. Therefore, on September 16, the Source Selection Authority accepted the recommendation of the evaluation panel that award be made to Traeger/Drew for its offer of the Clark Street building.

On September 18, GSA officials, including the contracting officer, held a debriefing for Palivos to explain the agency's decision not to select the Lawrence Avenue building for the long-term lease for the SSA North District Office. In addition, and discussed in considerably more detail below, the contracting officer met alone with George A. Palivos on September 19. According to Palivos, in this

²With respect to the protesters' hybrid offer of renovation followed by new construction, the GSA concluded that it could not consider the proposal because it did not establish a rental rate for the building after the new construction was completed.

meeting the contracting officer admitted that the agency had determined in advance that it would not make award to Palivos under any circumstances. This protest followed.

PROTESTERS' CONTENTIONS

The crux of the protests is that the evaluations here were biased against the protester. In addition to its claims of bias, discussed below, Palivos also charges that the evaluation of its proposal was unreasonable. Specifically, Palivos argues: (1) that the evaluation of past performance was unreasonable because the agency downgraded Palivos for performance problems experienced with the prior owners of the building; (2) that the evaluation of Traeger's past performance was improperly based on the evaluation of Traeger's subcontractor; (3) that the evaluation of proposed parking was unreasonable; (4) that a determination by the agency not to rescore the protesters' revised BAFO was improper; and (5) that the evaluation failed to consider the more favorable location of the Lawrence Avenue building as opposed to that of the Clark Street building. Finally, the protesters also claim that the award of a lease to Traeger was improper because Traeger was not the party who submitted the initial offer for the Clark Street building when this competition began in 1990.

In addition to the issues above, the protesters have also alleged, in a supplemental protest filing, that they have evidence from an anonymous government source indicating that agency officials may have received a bribe, gratuity or kickback as a result of GSA's decision to award a lease for the Clark Street building. In response to this allegation, GSA has informed our Office that it has referred this matter to the Inspector General to investigate the allegations of wrongdoing. In view of this ongoing investigation, we believe the appropriate course of action is to dismiss this issue, without prejudice, until the investigation is complete. At the conclusion of the investigation, the protester may reinstate its protest on this issue. Usatrex Int'l, Inc., B-231815.4, Oct. 31, 1988, 88-2 CPD ¶ 413.

EVALUATION OF PROPOSALS

Past Performance of the Protesters

In both its claims of bias and its challenge to the evaluation, the protesters focus on the decision to award the Palivos proposal a low score--approximately 20 percent of the available points--in the area of past performance. According to Palivos, its score in this area was unfair because it was based, in part, on the past performance of the prior owners.

The evaluation of proposals is primarily within the discretion of the procuring agency, not our Office; however, evaluations in negotiated procurement must be in accordance with the terms of the RFP. Environmental Techs. Group, Inc., B-235623, Aug. 31, 1989, 89-2 CPD ¶ 202. In reviewing protests against allegedly improper evaluations, we examine the record to determine whether the agency's judgment was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations. ESCO, Inc., 66 Comp. Gen. 404 (1987), 87-1 CPD ¶ 450.

Our review of the record shows that when evaluating the protesters' proposal in this area, the evaluators noted that the references provided by the protesters were very good. In addition, the evaluation materials reflect recognition of an improvement in the lessors' responsiveness to tenant concerns since the beginning of the lease competition. The evaluators noted, however, that GSA's and SSA's experience with the lessor prior to the Spring of 1990 ranged from "very poor" to "mixed." As a result, the evaluators awarded the proposal approximately 20 percent of the available points in the category of past performance.

In our view, this assessment of the protesters was reasonable, and was not improperly based on experience with the prior owners. The poor score given the protesters for past performance was directly tied to SSA's and GSA's experience with the protesters as landlords. In this regard, the evaluators not only considered the references provided with the proposal but they also considered past responses to requests for building repairs and maintenance. Generally, agencies evaluating proposals may properly consider their own past unsatisfactory experience with an offeror's performance, rather than relying solely on references provided by the offeror. Western Med. Personnel, Inc., 66 Comp. Gen. 699 (1987), 87-2 CPD ¶ 310.

The SSA's office space on Lawrence Avenue has experienced problems since the inception of the lease in 1978. Specifically, SSA has been unhappy with the maintenance of the building by the present and former owners,³ and with ongoing structural problems there.⁴

³Palivos did not purchase this building until May 1, 1989.

⁴For example, in 1984 the building was evacuated for fear that collapse of the roof was imminent. This was followed by a 3-month closing of the building for structural repairs. Other problems have included poor ongoing maintenance, 39 roof leaks between July 1989 and September 1991, and several incidents of falling plaster and ceiling tiles--including one incident in 1991 where a member of the public

Here, the record shows that the agency's experience with this landlord regarding repairs to the Lawrence Avenue building was, in fact, poor. Although we recognize that disputes about repair issues are generally subject to interpretation, the weight of the evidence in this record regarding maintenance problems and poor responses to those problems is overwhelming. In fact, even if we ignore the substance of the ongoing maintenance problems with the Lawrence Avenue building--i.e., roof leaks, collapsing ceilings, sunken floors--and focus instead on the protester's response to those problems, the weight of the evidence does not lead us to a conclusion that a low evaluation score in the area of past performance was unreasonable, or was the result of bias.

Specifically, we find compelling the apparent difficulty the agency had in simply getting a response from its landlord--especially since these complaints were raised at a time when the agency was conducting a competition for the award of a long-term lease for this space. For example in a May 22, 1990, letter to Palivos from the Director of Facilities in GSA's midwest field office, GSA states:

"Per your telephone conversation with . . . my staff, on May 11, 1990, I understand you are reluctant to repair roof leaks due to a structural engineering analysis that is presently being performed on the subject location.

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"I am concerned with the short term problems caused by the leaks. Along with being unsightly and inappropriate for interviewing SSA clients, the leaks also pose health hazards to the public and employees at the location." Ex. 35.

GSA's Director of Facilities again wrote to the protester, 3 months later in a letter dated August 29, 1990, outlining eight prior contacts with the protesters (including the letter quoted above), and describing a meeting between GSA officials and representatives of SSA. In relevant part, the letter states:

"During that meeting it was determined that the roof leaks, which have been cited in previous letters and/or phone conversations, create conditions which are hazardous to SSA employees, affect the operations of SSA's computer system,

was struck by a falling ceiling tile as he entered the building.

and interfere with [g]overnment operations. My office has contacted you concerning these untenable conditions on the following occasions with little or no response

I regret that this situation has yet to be resolved. It is your obligation under Paragraph 2 of the General Provisions to maintain the premises in tenable condition. Further leaks will not be tolerated." Ex. 72.

After the protesters installed a new roof at the building, the agency continued to document, over a 5-week period, several additional roof leaks, and instances where water was seeping through the floor in one corner of the building. Ex. 151. Even if we assume that such problems were excusable, an April 14, 1991, memorandum from the contracting officer to GSA's Director of Facilities shows that the agency's experience with its landlord was not. In relevant part, this memorandum states:

"As you know, water leaks continue to plague the subject office. We are aware that your office has contacted the lessor by phone on each occasion in an effort to have the problems corrected. Due to the ongoing nature of these problems and the lessor's past poor response, we would appreciate your following all telephone contacts with a written contact. As we discussed earlier today, a record of letters written to the lessor reporting problems with the subject space is imperative if we are to remedy this situation." Id.

Despite the protesters assertions to the contrary, it is simply not the case that the agency was blurring its experience with the prior owners with its experience with the protesters--all of the comments quoted above were written during and about the Palivos ownership of the Lawrence Avenue building. In short, there is no denying that SSA's tenancy in this building has had many problems, and that Palivos' responsiveness--not that of some earlier owner--has been less than ideal. Given this kind of experience with the existing building and with its owners, we conclude that the agency reasonably considered its own experience as a tenant in the Lawrence Avenue building. Western Med. Personnel, Inc., supra. In fact, we note that despite these problems, and despite the apparent prevailing view in GSA that all dealings with this landlord had to be reduced to writing to ensure his accountability, the evaluators commented on improvements in the protester's

responsiveness to maintenance issues during the time when the agency was evaluating proposals.⁵

Past Performance of Traeger

The protester challenges the past performance score given to the awardee because the score applies to Drew and not Traeger. In addition, the protester claims that Drew's favorable score is not reasonable because Drew has no prior experience as a lessor to the government.

As explained above, the initial offer for the Clark Street building was submitted by Drew, not by Traeger. Because Traeger was then, and is now, the owner of the Clark Street building, GSA indicated its preference to award this long-term lease directly to the owner of the building, and to avoid a sublease arrangement. Since the agency chose not to reevaluate the revised BAFO for the Clark Street building, the protester claims that the agency irrationally based its past performance rating for Traeger entirely upon the past performance score given to Drew.

Amendment No. 0001 to the SFO included guidance to potential offerors regarding each of the evaluation factors. Under the past performance factor, offerors were requested to provide three to five references who could assist the agency in evaluating past performance. According to amendment No. 0001 these references should be able to address "the offeror's prior performance of maintenance and repair services." In addition, the amendment stated that "[i]deally, these references would be government tenants."

We note first that the favorable score awarded to Drew appears consistent with the good recommendations given Drew by its references. The evaluation of Drew reflects that the references provided positive information about past performance, especially those references from the private sector.⁶ In addition, the evaluation materials reflect recognition of the fact that Drew lacks experience as a landlord for the government, even though we note that such experience, while desirable, was not a requirement of the SFO.

⁵However, the evaluation notes also reflect skepticism about whether such improvement would be lasting or was related solely to the ongoing competition.

⁶We recognize that Palivos, too, provided favorable references in response to the requirement in the SFO. However, as we stated above, it was reasonable for the agency to consider its own experience as a tenant instead of relying solely on references. Id.

The second issue with respect to the past performance score given the awardee is whether it was reasonable to evaluate the awardee based on the past experience of the awardee's proposed subcontractor. In this regard, the experience of a proposed subcontractor properly may be considered in determining whether an offeror meets an experience requirement in the solicitation. Commercial Bldg. Serv., Inc., B-237865.2; B-237865.3, May 16, 1990, 90-1 CPD ¶ 473; AeroVironment, Inc., B-233712, Apr. 3, 1989, 89-1 CPD ¶ 343.

Since a subcontractor's experience can be properly credited to an offeror to meet experience requirements in solicitations, we see no reason why a subcontractor's past performance may not be treated similarly. Therefore, since the awardee plans to have Drew perform the required renovation of his building, and afterwards to manage the building, and since these plans indicate that GSA will likely deal with Drew more than with Traeger, we find the agency's decision to rely on its evaluation of Drew's past performance to be reasonable.

Evaluation of Proposed Parking

With respect to the evaluation of proposed parking, Palivos again raises two complaints: (1) that the agency improperly failed to consider off-site parking in the vicinity of the building; and (2) that the agency unreasonably withheld credit to the protesters' new construction offer for 15 parking spaces that were credited to the protesters in the review of initial BAFOs.

On the subject of parking, the SFO required offerors to provide 94 on-site parking spaces through the use of a formula applied to the square footage of the proposed building. SFO ¶ 1.3. In addition, amendment No. 0001 to the SFO set forth the following explanation of the parking award factor:

"AVAILABILITY OF ON-SITE PARKING SPACES

Advise how many parking spaces can be made available and indicate whether these spaces are on-site or indicate how far from the office space being offered that parking spaces are available."

With respect to the protesters' claim that GSA should have considered nearly 1,000 available parking spaces within walking distance of the Lawrence Avenue building, GSA argues that the SFO clearly advised offerors that the agency was seeking a building with on-site parking. GSA argues that there was no requirement to consider off-site parking, and in fact, there was no way that it could consider such

parking if the spaces were not under the control of the offeror.

In our view, GSA is correct in its interpretation of its SFO, and the protesters' complaint is untimely. Since its issuance in July 1990, this SFO has required offerors to provide on-site parking. In its evaluation of offers, GSA not only considered parking spaces that were on-site, but broadened its review to consider spaces that were essentially on-site and over which the offeror had control. As a result of this decision, the protester benefitted. Since all offerors were treated equally, and since off-site parking for which an offeror did not exercise control was not considered for any offeror, we find that no offeror was prejudiced. In addition, we find that the protester's challenge to the SFO's requirement for on-site parking is untimely at this late date. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991).

With respect to the protesters' contention that the agency unfairly withheld credit for 15 parking spaces in the evaluation of revised BAFOs, we likewise deny the claim. In the protesters' offer to renovate the Lawrence Avenue building--i.e., the protesters' initial offer and initial BAFO--it proposed a total of 17 parking spaces, none of which were on-site. Twelve of these spaces were located in the parking lot of a fast-food restaurant located across the street from the building, three were located in the parking lot of an adjacent bank, and two were on the street in front of the building. The protester proposed that these latter two spaces would be reserved for handicapped parking.

The contracting officer explains that in evaluating the initial BAFO submitted by the protesters, the agency gave the protesters credit for all 17 spaces, although the agency noticed that the agreement between the fast-food restaurant and the protesters failed to establish that the parking spaces would be available for the entire term of the lease. According to the contracting officer, the leniency of the evaluators in this regard had much to do with a desire to keep the protester in the competition, and to give the protester the benefit of the doubt. The protesters' new construction proposal offered 34 on-site parking spaces. In evaluating this proposal--first received when the protesters submitted their revised BAFO--the agency credited the 34 spaces, but did not credit the proposal with the spaces counted in the evaluation of the initial renovation BAFO.

Our review of the contracting officer's position with respect to the different treatment accorded the evaluation of parking between the initial BAFO for renovation and the alternate revised BAFO for new construction, leads us to conclude that while we may not agree with the decision to

treat these proposals differently, it does not appear to be unreasonable. In fact, the record here shows an attempt by the agency to keep Palivos within the competitive range rather than exclude it from further consideration.

In addition, the agency provided our Office with a revised evaluation in which it calculated the effect of awarding the protesters' revised alternate BAFO all available points for proposed parking. In our view, this approach was overly generous since the combined total parking offered, assuming the protesters received credit for every offered space, was slightly more than 50 percent of the SFO's requirement--while the Clark Street offer proposed to provide all of the required parking spaces. Even if all available points were credited to the protesters, their overall rating would be 73, while the Clark Street offer received 79 points. Since we consider this an overly generous analysis, and since the price for the Clark Street offer was less than the price quoted for the protesters' new construction offer, we conclude that the protesters were not prejudiced by the agency's decision to score these two proposals differently. See Textron Marine Sys., B-243693, Aug. 19, 1991, 91-2 CPD ¶ 162 (where an evaluation error occurs that--even when viewed in the most favorable light for the protester--does not render the evaluation unreasonable, the General Accounting Office will not disturb the agency award decision).

Failure to Rescore Revised BAFOs

In a fourth area of attack on the reasonableness of the evaluation, Palivos argues that the agency improperly failed to rescore its revised BAFO to give it additional credit for changes made as a result of negotiations. In this regard, Palivos claims its revised BAFO to renovate the Lawrence Avenue building should have received additional points for a decision to add an underfloor conduit system and to add a new ventilation system.

GSA disagrees with both of these contentions and further argues that if it had rescored the protesters' BAFO it would have lowered the score, not raised it. With respect to the proposed underfloor conduit system--i.e., the protesters' suggestion that it would correct the sinking floors by running cables under a raised floor to be built over the existing floor--GSA concluded that this approach failed to address the fact that the existing floor might nonetheless be additionally undermined by further sinking. Also, GSA stated that this was not the kind of gutting and renovation the agency expected to be performed on the Lawrence Avenue building. With respect to the new ventilation system, GSA responded that the changes in the revised BAFO were merely

clarifying details about changes the protester was already obligated to make.

In addition to GSA's disagreement with Palivos regarding the importance of the changes to its revised BAFO, the agency also states that Palivos added a new condition to all of its proposals in the revised BAFO. Specifically, the revised BAFO placed conditions requiring GSA to remain under the existing lease at Lawrence Avenue until the expiration of that lease, rather than exercise the exit provisions negotiated in the most recent extension of the lease. We agree with GSA that this kind of condition could well have resulted in downgrading the scores given the Palivos revised BAFO, not upgrading it. Since Palivos has failed to show that it was prejudiced by the agency's action in not rescoring the revised renovation BAFO, we will not conclude that the agency acted unreasonably in this regard. See Aircraft Porous Media, Inc.--Recon., B-241665.4, June 28, 1991, 91-1 CPD ¶ 613.

Failure to Consider More Favorable Location of Lawrence Avenue Building

The protesters claim that the agency acted unreasonably in failing to give their proposal a higher score than the score given the Clark Street building. According to the protesters, the Lawrence Avenue building has a location preferable to that of the Clark Street building and failing to consider that issue was unreasonable. In our view, this contention is untimely because the SFO did not contain any provision to permit the evaluators to weigh the relative merits of proposed locations other than whether they were within a specific geographic area and whether the space was located on the ground floor.

Specifically, the SFO here was quite clear about the location requirements for this procurement. Because the needed office space was for a neighborhood outlet for SSA, the solicitation required that any proposed building be located within a geographic area described by street boundaries. Specifically, these boundaries were: to the north, Peterson; to the south, Lawrence; to the east, Clark; and to the west, California to Lincoln to Peterson. SFO ¶ 1.2. Beyond this broad preference, the SFO did not include a provision to reward locations within the established boundaries. In addition, the award factor for location set forth in amendment No. 0001 to the SFO, was entitled, "Ground Floor Office Location." In short, the SFO did not include any provision for evaluating the relative merits of sites within the geographic boundaries other than whether the proposed space was located on the ground floor. Thus, if the protesters believed that the SFO was flawed in this regard, this issue should have been raised prior to the

closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1), supra, as amended by 56 Fed. Reg. 3759 supra.

AWARD OF LEASE TO TRAEGER

The protesters also claim that GSA acted improperly in awarding a lease to Traeger, when the initial proposal was submitted by someone other than Traeger. The protesters' ancillary complaints in this regard are that the revised BAFO submitted by Traeger was late (since Traeger had not submitted an initial offer prior to the closing date for receipt of proposals), and that it was unreasonable to accord Traeger the score awarded for past performance to the proposal submitted by Drew.

A review of the facts surrounding this situation is necessary. As explained above, the initial offer for the Clark Street building was submitted by Drew. That offer clearly indicated that the building was owned by Traeger and that it would be leased to Drew and subleased to government. During discussions, GSA expressed concerns about site control, leading the offerors of the Clark Street building to propose in their initial BAFO that the lease be awarded to a joint venture consisting of Drew and Traeger. When GSA reopened discussions because of its need to discuss an appraisal discrepancy with the offeror that would have received this award had it not rescinded its offer, it pointed out to the offerors of the Clark Street building certain procedural concerns about the way the documents in the initial BAFO were completed.⁷ Since GSA had repeatedly suggested its preference for dealing directly with owners of building, in order to improve responsiveness, the revised BAFO was submitted by Traeger with Drew as a subcontractor to perform the renovation and manage the building.

In our view, these changes did not render the Traeger revised BAFO late, and, as discussed above, it was not unreasonable to credit Traeger's revised BAFO with the past performance score given Drew. Traeger was, and is, the owner of the building, and was always the real party in interest in the proposed lease of his building to GSA. In short, we find the pattern here to be one of increased

⁷For example, both members of the proposed joint venture between Drew and Traeger signed the offer as the "offeror," while the document indicated that Traeger owned the building. In addition, the offer document indicated that the offeror was an "individual" (instead of a joint venture), and that the "individual's" interest in the building was that of an owner. When GSA reopened discussions with all parties, it asked the offerors of the Clark Street building to clarify these issues.

responsiveness to reasonable concerns on the part of GSA about having direct access to the owner of the building under the terms of this lease, and we reject the protesters' contentions that these changes must result in overturning the award to Traeger.

ALLEGED BIAS BY THE CONTRACTING OFFICER AND GSA

In addition to the protesters' claim that the evaluation was unreasonable, Palivos argues that the agency was biased against the Lawrence Avenue building as a result of a predetermination not to remain in the building under any circumstances. In support of these claims of bias, the protesters point to two types of evidence: (1) statements allegedly made by the contracting officer to one of the protesters expressly acknowledging agency bias in the procurement; and (2) statements in the record by SSA and GSA that indicate SSA's unwillingness to remain in the Lawrence Avenue building.

As explained above, Palivos claims that the contracting officer expressly confirmed in a September 19 meeting with George A. Palivos that the agency was biased against any award to the protester. Because many facts surrounding this meeting are in dispute, we will first set forth what is clearly known.⁸

The day after the debriefing, September 19, 1991, GSA's contracting officer met alone with George A. Palivos in the office of the Director of the Real Estate Division, in GSA's Chicago regional office. In that meeting, George A. Palivos expressed his disappointment with the outcome of the procurement, stated his intent to pursue a protest, and stated that he either already had requested, or would be requesting, an investigation into certain events related to the procurement. The contracting officer made no notes of this meeting, while the protester has produced a detailed memorialization of the meeting which he claims was written immediately after its conclusion. Although GSA contends that there is no evidence that the memorandum was produced when the protester claims, at the latest it was prepared within 7 days of the meeting, because on September 26, it was provided to this Office as an attachment to the initial protest in this case. The contracting officer, on the other

⁸The conclusions set forth below regarding what is known about the September 19, 1991 meeting between George A. Palivos and the contracting officer are taken from testimony offered by these two individuals in a March 4, 1992, hearing before our Office. Since both versions of this meeting correlate in the limited respects set forth below, we can reasonably assume that these events occurred as described.

hand, first memorialized his version of the meeting in an affidavit signed on November 25, 1991.

George A. Palivos' version of the September 19 meeting varies in several ways from that of the contracting officer. George A. Palivos states that he called the contracting officer on September 18, after the debriefing, to schedule the meeting for the next day; that he arrived, as scheduled, at 9:30 a.m. on September 19; and that the meeting lasted approximately 1 hour and 20 minutes. In addition, George A. Palivos states that during the meeting, the contracting officer explained to him that the agency was under significant pressure from SSA to ensure that it would not be saddled with a long-term lease for the Lawrence Avenue building. Further, George A. Palivos claims that the contracting officer stated in detail that GSA and SSA had predetermined that award would not be made to Palivos under any circumstances.

The contracting officer states that George A. Palivos did not have an appointment with him for a September 19 meeting, and that George A. Palivos showed up at the GSA offices unannounced. In addition, the contracting officer states that the meeting lasted approximately 10 to 15 minutes, but denies making any of the statements claimed, although he admits that SSA was very much opposed to remaining in the Lawrence Avenue building.

The hearing convened in our Office on March 4, 1992, resulted in conflicting testimony on even the minor points regarding this meeting--for example, whether the meeting lasted 15 minutes or 1 hour and 20 minutes, and whether the protester made an appointment with the contracting officer in advance or arrived unannounced. Although the matter is not free from doubt, for the reasons set forth below, we find it more likely than not that the meeting lasted long enough for the parties to have discussed some of the issues claimed by the protester. We also find it unlikely that any meeting between these two parties on the day after the debriefing would have failed to include some kind of discussion about whether SSA's dissatisfaction with the Lawrence Avenue building and its owners colored the evaluation of the protester's proposal.

Despite our conclusion that the subject of predetermination was probably discussed, we conclude that there is not enough evidence in this record to support a finding that the contracting officer stated that the agency made a predetermination against award to Palivos under any circumstances. In this regard, although we recognize that George A. Palivos memorialized his version of this meeting at least two months earlier than the contracting officer, the strength of this memorialization was undercut by George A. Palivos' admission

during cross-examination that the quotations attributed to the contracting officer were not, in fact, direct quotes, but were intended to reflect the essence of the remarks rather than to duplicate them. Video Transcript of Hearing (VT) 14:47:52. George A. Palivos also stated that he used quotations in his memorandum for emphasis, rather than for precise duplication of the contracting officer's statements. VT 14:26:20.

Not only does George A. Palivos' testimony raise some concern about the claimed quotes, but we are also aware of the possibility that the contracting officer's statements were misunderstood by the protester. During the hearing the contracting officer not only denied making the statements, but denied holding beliefs consistent with the statements. Faced with this record, we will not overturn a procurement based on statements allegedly made in a single meeting which occurred after the lease was awarded where the evidence offered by the opposing parties about the content of those statements remains inconsistent, leaves the facts unresolved, and there is no other evidence of predetermination in the evaluation.

With respect to the statements in the record regarding SSA's views of the Lawrence Avenue building, Palivos is correct in its claim that the record includes ample evidence that SSA did not want to remain housed in the unrenovated Lawrence Avenue building. However, despite SSA's vocal dissatisfaction with the Lawrence Avenue building, the complaints by SSA do not establish that GSA took steps throughout the procurement to harm or injure the protester. In fact, the record supports a different conclusion. As a result of SSA's dissatisfaction with the Lawrence Avenue building, SSA initially requested that GSA investigate whether GSA could limit any SFO to offers for new construction in order to avoid the Lawrence Avenue building because SSA believed it could not "risk remaining in this space." Nonetheless, despite these efforts, the record shows that GSA concluded that it should solicit offers for both renovated and newly constructed space, and that an offer should be solicited from the owners of the Lawrence Avenue building. These actions indicate that GSA, despite SSA's dissatisfaction, was attempting to ensure that any lease procurement conducted on behalf of SSA would comply with the statutory requirements for full and open competition.


Further, it is unclear how SSA's dissatisfaction with the current space translates to bias against the protesters' proposal to construct a new building on the existing site. Our prior reviews of procurements for lease space have recognized that even where tenant agency officials are clearly opposed to remaining in existing buildings, when the record as a whole shows that the evaluation results are

nonetheless reasonable, we will uphold the agency's lease decision. See The Montgomery Cos., B-242858, June 10, 1991, 91-1 CPD ¶ 554; Paladin U.S.A., Inc., B-236619.3, Mar. 13, 1990, 90-1 CPD ¶ 269.

CONCLUSION

We have considered all of the protesters' challenges to the evaluations and conclude that the agency's decisions were reasonable. We also find unpersuasive the protesters' challenges to the change in identity of the offeror of the Clark Street building. In addition, we find that the protesters have failed to show a predetermination on the part of GSA to avoid awarding a lease to the protesters under any circumstances. In fact, on the subject of bias, we find that the actions of GSA reflect an attempt to maintain an even-handed approach to this procurement.

The protests are denied.


for James F. Hinchman
General Counsel