



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ellman Companies

File: E-251288

Date: March 18, 1993

Marek S. McCallum, Esq., David L. Winstead, Esq., Wilkes, Artis, Hedrick & Lane, for the protester, Donald R. Jayne, Esq., and Allan I. Aasmaa, Esq., General Services Administration, for the agency. Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester, the incumbent-lessor of office space, was not prejudiced by contracting agency's failure to solicit the firm, where, based on the results of a market survey and information subsequently provided by the protester, the contracting agency reasonably determined that the protester would be unable to offer an acceptable building that conforms to the solicitation's minimum space requirements.

DECISION

Ellman Companies, the incumbent-lessor, owner of the One North First Street building in Phoenix, Arizona, protests any award of a lease under solicitation for offers (SFO) No. LA291987, issued by the General Services Administration (GSA) for office and related space for use by the Bureau of Indian Affairs (BIA). The protester contends that the agency improperly failed to provide Ellman with a copy of the solicitation.

We deny the protest.

BACKGROUND

BIA's Phoenix area office currently occupies approximately three floors of One North First Street pursuant to a lease GSA awarded Ellman in 1986, which will expire in December 1994. During July and August 1991, BIA requested 58,040 net

usable square feet (NUSF) of office space, with 35 inside parking spaces, to replace the expiring lease. The BIA space specification initially requested a minimum floor plate (i.e., contiguous floor space) of 14,800 NUSF. BIA later requested a floor plate between 19,000 and 21,000 NUSF, and informed GSA that the floor plate limitations of One North First Street were one reason for relocating BIA.

On May 8, 1992, in response to BIA's requests, GSA began preparing the SFO, calling for a minimum of 58,040 to a maximum of 60,942 NUSF of office and related space, with 35 inside parking spaces.¹ The SFO contemplates award of a lease for a 5-year period, with a 3-year option. Section 1.3 of the SFO, entitled "NEIGHBORHOOD," states that "SPACE MUST BE LOCATED IN A PRIME COMMERCIAL OFFICE DISTRICT WITH ATTRACTIVE, PRESTIGIOUS, PROFESSIONAL SURROUNDINGS WITH A PREVALENCE OF MODERN DESIGN AND/OR TASTEFUL REHABILITATION IN MODERN USE." Section 1.4 of the SFO, entitled "UNIQUE REQUIREMENT," states that the "BUILDING SHALL HAVE A MINIMUM OF 15,000 (NUSF) PLATE." Award is to be made to the responsible offeror whose proposal conforms to the SFO's requirements and who submits the lowest priced offer.

On June 16, the contracting officer and a BIA official, accompanied by an Ellman representative, surveyed One North First Street to determine whether the building would be a suitable site for the required space. At the conclusion of that survey, the contracting officer determined that Ellman would not be solicited because One North First Street did not satisfy the SFO's neighborhood and minimum NUSF requirements.

After the survey, Ellman inquired of GSA officials regarding the SFO, and requested that it be provided a copy of the solicitation as soon as it was issued. According to Ellman, GSA did not provide a copy of the SFO in response to its requests, and it appears that the contracting officer did not inform Ellman of her decision to not solicit the protester based on the survey. Later, having learned that the SFO had been distributed to its competitors, Ellman renewed its requests for the SFO in several telephone calls and written submissions to GSA during August and September; on September 24, the contracting officer mailed Ellman a copy of the SFO "for its information." In a cover letter accompanying the SFO, the contracting officer stated that one of the reasons that One North First Street was not considered

¹The agency states that although the SFO is dated May 8, the solicitation was not actually distributed to potential offerors until June 26, after BIA had concurred with all of the changes GSA made to the SFO.

after the survey was because of its surrounding area, specifically, because "there were a number of transients and undesirable commercial properties surrounding the building." The contracting officer also stated that the building did not meet the 15,000 minimum NUSF floor plate requirement.

On September 28, Ellman met with the contracting officer at GSA's office in San Francisco and delivered a presentation related to the neighborhood surrounding the building. On October 6, the protester wrote the contracting officer expressing its disappointment in not having been solicited; assuring GSA that four floors of its building exceeded 16,725 NUSF; and confirming that it would send GSA--apparently in response to a request by the contracting officer--a copy of the building's floor plans. On October 12, Ellman provided the agency with scale drawings of the building. In a letter dated October 30, the contracting officer informed Ellman that GSA had measured its drawings, with the following results of NUSF by floor: third (13,257); fourth (13,186); fifth (14,167); and sixth (14,174). The contracting officer's letter thus concluded that One North First Street would not be considered a potential site because the building did not meet the SFO's minimum 15,000 NUSF floor plate requirement.

On November 5, Ellman filed an agency-level protest challenging the agency's decision to exclude One North First Street from the competition based upon the minimum NUSF requirement. Before GSA responded to that protest, Ellman filed the instant protest in our Office on November 10.² The protester contends that the agency improperly failed to solicit the firm based upon the SFO's 15,000 minimum NUSF plate requirement. Ellman also asserts that GSA's failure to solicit the firm based upon the agency's assessment of the building's surroundings is unreasonable.

DISCUSSION

Timeliness

As a preliminary matter, GSA argues that Ellman's protest is untimely under our Bid Protest Regulations because GSA's September 24 letter, which the protester received on September 25, placed Ellman on notice of the bases for its protest.³ According to the agency, to be timely, Ellman

²The agency has suspended further activity in this procurement pending resolution of the protest.

³Under our Regulations, protests such as Ellman's, not based upon improprieties in a solicitation, must be filed no later than 10 working days after the protester knew, or should

should have filed its protest with either GSA or our Office within 10 working days from September 25, or by October 9. GSA asserts that since Ellman did not file its agency-level protest until November 5, this protest, filed in our Office on November 10, is untimely and should not be considered.

We disagree. The agency's actions subsequent to the survey GSA conducted of One North First Street reasonably led Ellman to conclude that the agency had not taken any firm action with respect to the suitability of its building until after Ellman received GSA's October 30 letter. Although it appears that the contracting officer had determined as early as June 16, during the survey, to not solicit Ellman, she did not inform Ellman of her decision at the time. The record shows that after the survey, the contracting officer met with Ellman on September 28, and allowed the protester to present information regarding the area where the building is located. GSA subsequently agreed to, and in fact did, measure the floor plans for the building, at that time apparently not taking further issue with the building's compliance with the SFO's neighborhood requirement. Ellman thus reasonably assumed that GSA was reconsidering its position regarding the suitability of the building with respect to the floor plate requirement, and reasonably concluded that GSA's concerns regarding the building's surroundings had been fully addressed during Ellman's presentation in San Francisco. Until the protester received GSA's October 30 letter, therefore, wherein the contracting officer informed Ellman that One North First Street would not be considered as a potential site, no basis for protest existed.⁴ Since the protester was not on notice of the agency's final decision until after receipt of GSA's October 30 letter, Ellman's protest, filed in our Office on November 10, within 7 working days of October 30, is timely.

have known of the basis for protest, whichever is earlier. See 4 C.F.R. § 21.2(a)(1) (1992).

⁴In fact, after GSA requested that we summarily dismiss the protest, the agency conceded in its report that "subsequent to the contracting officer's September 24 letter, GSA gave further consideration to the accuracy of its determination that Ellman's [b]uilding does not meet the minimum floor plate requirement" providing further support for our conclusion that the agency had made no final determination at that time, and that GSA's September 24 letter provided no basis for protest.

Failure to Solicit Ellman

The SFO required that the building offered have a minimum of 15,000 NUSF floor plate.⁵ The agency explains that the floor plate requirement is based on BIA's current needs, as well as its immediate future needs, which might fluctuate during the term of the lease. The agency states that the floor plate requirement affords efficient use of space, and will accommodate the agency's needs as they change during the next 8 years. According to GSA, larger floor plates allow greater layout flexibility, provide better use of space, and avoid disruption of the agency's functional units due to use of discontinuous, remnant spaces on separate floors. In sum, GSA states that accommodating the larger operational units of BIA on as few floors as possible promotes management efficiency; fosters camaraderie and coherence, which in turn increase productivity; and facilitates supervision and better work-product control within each division.

The record shows that BIA had initially requested between 19,000 and 21,000 NUSF floor plate. GSA states that since such large floor plates are rare in Phoenix, it concluded that such a requirement would not likely promote adequate competition. In light of BIA's original request (14,800 NUSF), and given its concern regarding occupancy on multiple floors, the requirement was established at a minimum of 15,000 NUSF. According to the agency, that requirement was specifically designed to accommodate BIA's concerns over being scattered throughout various floors of a building, and its current and future needs, while promoting competition.

An agency is required to specify its needs in a manner designed to promote full and open competition and to include restrictive requirements only to the extent necessary to satisfy its minimum needs. North Capitol Ltd. Partnership, B-249403, Nov. 10, 1992, 92-2 CPD ¶ 338. Here, we conclude that GSA has provided adequate justification for the space requirement. Our review of the record shows the required space accurately reflects BIA's actual current minimum needs and its future space needs. Although BIA initially had requested a larger floor plate (between 19,000 and 21,000 NUSF), the record shows that GSA's space designers deter-

⁵The protester notes that there are several apparent inconsistencies within BIA's original space specification document, and between that document and the amount of space required by the SFO. The record shows, however, that BIA's initial space request was amended several times, ultimately resulting in a request for a minimum of 58,040 NUSF as called for in the SFO.

mined that the rarity of such large contiguous space would inhibit competition, and developed a requirement that would reasonably satisfy BIA's office allocation while promoting competition. While the protester generally questions BIA's rationale for its request that its offices occupy no more than four floors, the protester simply has not shown how that request is unreasonable.

Although the protester has had ample opportunity to do so during these proceedings, Ellman has provided no evidence to rebut GSA's measurements of its floor plan drawings. In fact, Ellman concedes that it "has not independently verified the accuracy of GSA's new measurements of the space in One North First Street," and we have no reason to question GSA's measurements. Ellman's argument that the fifth and sixth floors of its building are each minimally below the required NUSF overlooks the fact that GSA's undisputed measurements show that the two other available floors (the third and fourth floors) are 1,743 and 1,814 NUSF, respectively, below the minimum 15,000 NUSF floor plate requirement, variances which are clearly not de minimis. Thus, even assuming that two of the floors would satisfy the minimum NUSF requirement, the record clearly supports the agency's conclusion that the building would not meet the SFO's minimum floor plate requirement with respect to the other floors BIA would occupy.

Based on the results of the survey, and in light of GSA's uncontradicted measurements, the agency reasonably concluded that Ellman's building did not conform to the SFO's minimum floor plate requirement. Ellman does not argue that it can offer a different building that conforms to the SFO; nor does the protester allege that it could expand One North First Street to satisfy the SFO's space requirements. Compare Nevada Federal Centre, B-225954, Mar. 30, 1987, 87-1 CPD ¶ 362 (agency improperly failed to solicit incumbent lessor based on agency's incorrect belief that incumbent was unable to meet increased space requirements). Accordingly, while agencies are expected to solicit their satisfactorily-performing incumbent contractors, see Federal Acquisition Regulation §§14.205-4(b), 15.403; Professional Ambulance Inc., B-248474, Sept. 1, 1992, 92-2 CPD ¶ 145, we find that Ellman was not prejudiced by the agency's failure to solicit it here.⁶ See, e.g., Fiber Materials, Inc.--Recon.,

⁶Since we conclude that the protester was not prejudiced by the agency's failure to solicit the firm because Ellman could not offer a building that conforms to the SFO's minimum NUSF plate requirement, we need not decide whether the One North First Street building conforms to the SFO's neighborhood requirement.

B-246587.2, Aug. 24, 1992, 92-2 CPD ¶ 121; Greenbrier
Indus., Inc., B-241304, Jan. 30, 1991, 91-1 CPD ¶ 92.

The protest is denied.



for James F. Hinchman
General Counsel