

**Matter of:** Peterson Brothers Investments

**File:** B-254338; B-254338.2

**Date:** December 10, 1993

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#### **DIGEST**

1. Protest that award to lower-priced offeror under solicitation for leased space failed to give consideration to aesthetic and technical factors is denied, where record shows that agency considered offeror's ability to provide an aesthetically pleasing building, as well as all technical factors listed in the solicitation, and decision to select awardee based on price was consistent with solicitation, which did not give technical factors any greater weight than price in the selection decision.

2. Where request for best and final offers (BAFO) did not require offerors to submit signed offer forms, cover letter to awardee's offer demonstrated offeror's intent to be bound, so that later submission of signed form did not constitute submission of a late BAFO.

3. Where agency instructed offerors during discussions to include cost of services and utilities in lease price, agency's verification that low offeror had followed instructions constituted a clarification, not discussions, since it was merely an inquiry for the purpose of eliminating a minor uncertainty in the proposal.

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#### **DECISION**

Peterson Brothers Investments protests the award of a contract to Mattison & Mattison under solicitation for offers (SFO) No. R4-93-11, issued by the Forest Service for the lease of office space in Dubois, Idaho. The protester

asserts that the agency failed to give appropriate weight to aesthetic considerations in its award decision and that the awardee did not submit a timely best and final offer (BAFO).

We deny the protest.

On April 2, 1993, the agency issued the solicitation for a 10-year firm, fixed price lease, with an option to renew for two additional 5-year periods, for approximately 6,034 net usable square feet of office and related space, including parking, utilities, maintenance, and janitorial services, in conformance with standards set forth in the solicitation. The solicitation provided for award to the offeror whose proposal was technically acceptable and whose price/technical relationship was most advantageous to the government, considering the significance of any difference in technical scores and the cost to the government of the advantages of award to the offeror with the higher technical score. The solicitation did not state that either price or technical factors would be of greater weight, but provided for the consideration of three technical factors, as follows:

1. Site, including visibility within the boundary of interstate 15 and Main Street in Dubois; parking layout; snow removal; public access; service access; on-off access; safety; and landscaping.
2. Building design, including space layout relationships, quality of space, and provision for future expansion.
3. Energy conservation, including design features such as use of earth berm, roof projections, vestibule entryways, window exposure and construction, blinds, or insulated draperies, insulation, use of new construction materials made from recycled products, and use of recycling in janitorial/maintenance areas.

The agency received three offers on May 17 and visited the proposed sites on May 25; on the following day, the contracting officer notified offerors of the areas in their proposals about which the agency had concerns. The agency confirmed its list of concerns by letters dated June 9 and conducted oral negotiations on June 28. The agency discussed all aspects of the technical proposals with the offerors; as a result of these discussions, the evaluators advised the contracting officer that the Peterson and Mattison proposals were "equally acceptable" and somewhat superior to that of the third offeror.

The agency requested submission of BAFOs by July 6. Based upon the lower price of the Mattison proposal, the agency awarded a contract to Mattison and this protest followed.

In its initial protest, Peterson alleged that the evaluation did not give adequate consideration to aesthetic considerations. In this regard, paragraph 4.1 of the SFO, Quality and Appearance of Building Exterior, states as follows:

"The space offered should be located in a new or modern office building with facade of stone, marble, brick, stainless steel, aluminum, wood or other permanent materials in good condition acceptable to the contracting officer. The building should be compatible with its surroundings. Overall the building should project a professional and aesthetically pleasing appearance including an attractive front and entrance way. . . . If not in a new or modern office building, the space offered should be in a building that has undergone, or will complete by occupancy, first class restoration or adaptive reuse for office space with modern conveniences. If the restoration work is underway or proposed, then architectural plans acceptable to the contracting officer must be submitted as part of the offer."

The protester asserts that the awardee's building is not a new or modern office building, but an old automobile garage with a deficient foundation and crumbling exterior. It is impossible, the protester argues, for the restoration to be "first class" as required by the SFO.

The record shows that the awardee submitted the architectural plans called for by the SFO with its initial offer. The contracting officer states that she reviewed these plans and material boards showing samples of carpet, tile, and proposed interior materials. Based on this information, she found that the offered site was capable of meeting the aesthetics requirement. Thus, contrary to the protester's assertions, the contracting officer gave consideration to aesthetic factors. While Peterson disagrees with the contracting officer's judgment that the building can be restored to provide an aesthetically pleasing appearance, Peterson provides no specific basis on which to conclude that the contracting officer's judgment, based on her review of the renovation plans, was unreasonable.

The protester initially contended that the agency failed to take into account other evaluation factors listed in the SFO including the visibility of the building in the area near

Dubois, building design, and energy conservation. In its report responding to the protest, the agency provided evaluation records documenting its consideration of these factors. Based on its review of the agency report, the protester now objects to the agency's conclusion that the awardee's proposal was equal in technical quality to its own, contending that the Mattison proposal received poor evaluations in eight areas, while its own proposal received good or excellent ratings.

We have no basis to question the agency's conclusion that the two proposals were technically equal. All three evaluators initially rated the two offers under the site factor as "excellent" in terms of public visibility, "good" or "excellent" for parking layout, "poor" for snow removal, and "good" or "excellent" for public access. They rated the protester "acceptable" for service access and "excellent" for on/off access versus "poor" and "good" ratings for Mattison; they rated the awardee higher for safety ("excellent" versus "poor") and gave both offerors "poor" ratings for landscaping. Regarding the building design factor, the protester ranked slightly higher ("acceptable" versus "poor"); both offerors were ranked "good" for quality of space and "poor" for future expansion. Mattison generally ranked "acceptable" under the energy conservation factor, while Peterson received a "poor" rating.

The agency conducted discussions concerning the weaknesses noted in the proposals and received revised proposals with the BAFOs. In the final evaluation, the two offerors received nearly identical ratings in the site categories; Peterson was rated "good" for building design, Mattison "poor." There was no change in the scoring for energy conservation; Mattison was rated acceptable and Peterson was rated poor. Peterson's BAFO provided nothing to ameliorate its "poor" rating for energy conservation beyond Peterson's blanket assurance that its system was energy efficient.

In sum, the evaluators found both offerors equal under one technical criterion, site, and superior under another criterion--Peterson in the building design criterion and Mattison in the energy conservation criterion. The protester has provided no basis for objecting to these conclusions. In reviewing selection decisions, we

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<sup>1</sup>Specifically, the protester received two "good" ratings and an "excellent" for parking layout, versus one "good" and two "excellent" for the awardee; one evaluator rated Peterson acceptable under snow removal; one evaluator rated the protester higher for public access, while one rated the awardee higher.

examine the record to determine whether that decision was reasonable and consistent with the criteria listed in the solicitation; it is not the function of our Office to reevaluate proposals. See SeaSpace, 70 Comp. Gen. 268 (1991), 91-1 CPD ¶ 179; Abt Assocs. Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223. In this case, the agency considered the evaluation criteria listed in the solicitation. Based on the evaluation of the three technical factors, the agency reasonably decided that the two proposals were equal in technical merit.

Where, as here, an agency notifies offerors that it intends to perform a price/technical tradeoff but the solicitation does not state that either price or technical factors would be more important, the agency is obligated to give approximately equal weight to technical and price factors in the source selection decision. Logicon RDA, B-252301.4, Sept. 20, 1993, 93-2 CPD ¶ 179. Absent any evidence that the protester's proposal was worth the additional cost, the agency could, as it did here, properly determine that the lower-priced proposal was most advantageous to the government.

Based upon its review of the agency report, the protester raised additional issues regarding the acceptance of the awardee's BAFO. Specifically, the SFO provided a package of forms for submission with initial offers including AD Form 1364, Proposal to Lease Space, and AD Form 1317, Lessor's Annual Cost Statement. The front page of the AD 1364 contains space for offerors to insert their offered prices; the back page contains space for additional remarks, as well as a signature block, with basic information on the offeror, such as the form of the business, the owner's name, and whether the offeror is an agent or the owner. AD 1217 contains a breakdown of services and utilities costs.

On the back page of the AD 1364 submitted with its initial offer, the awardee indicated that its lease price did not include services or utilities; the agency used the information on the AD 1217 to compute a cost of services and utilities for price evaluation purposes. The agency states that during negotiations, it instructed all offerors to include the cost of services and utilities in their BAFO prices. The request for BAFOs did not require submission of a new AD 1364, although the agency advised offerors that it was providing a copy of the forms "for your convenience." Mattison submitted a signed cover letter with its BAFO but only the front page of the AD 1364 with its revised proposed prices.

The protester argues that it was improper to accept the awardee's BAFO, in the absence of the signature portion of the AD 1364, located on the back page. We disagree. First,

the request for BAFOs did not require submission of a signed form AD 1364 as a condition for submitting a BAFO. Further, submission of a cover letter containing a firm's signature is sufficient to demonstrate the firm's intent to be bound; the fact that a signature appears in other than the usual location does not mean the firm is any less committed to the provisions of the solicitation. Johnny F. Smith Truck and Dragline Serv., Inc., B-252136, June 3, 1993, 93-1 CPD ¶ 427. We see no reason to apply a different rule to the submission of BAFOs.

The agency concedes that it asked the awardee to confirm that its proposed BAFO price included services and utilities; the protester argues that these communications constituted improper post-BAFO discussions with one offeror. We disagree.

Discussions are material communications related to an offeror's proposal and are distinguishable from clarifications, which are merely inquiries for the purpose of eliminating minor uncertainties or irregularities in a proposal; it is the actions of the parties that determine whether communications constitute discussions or clarifications. See Federal Acquisition Regulation § 15.601; 4th Dimension Software, Inc. Computer Assocs. Int'l, Inc., B-251936; B-251936.2, May 13, 1993, 93-1 CPD ¶ 420.

There was no evidence in the awardee's BAFO--as there had been in the initial proposal--that it did not intend to include services and utilities in its price. In fact, the BAFO was submitted after the awardee was specifically requested to furnish a total price including services and utilities. Thus, the agency reasonably could presume that Mattison had followed instructions and that the BAFO price included services and utilities. In response to the agency inquiry, the awardee did not alter its proposal in anyway; the awardee confirmed that its BAFO included the pricing as requested. While the awardee argues that the agency's inquiries provided the awardee an opportunity to revise its proposal, there is no evidence that, as Peterson charges, the agency "tipped off" Mattison that its selection for award depended upon whether it confirmed the agency's interpretation of its offer. Rather, the agency contacted Mattison for the limited purpose of eliminating any uncertainty in the matter; this communication thus constituted clarifications, not discussions.

The protester contends that the awardee did not submit other documentation required by paragraph 3.9 of the solicitation, including proof of financial capability to perform and a signed construction contract with a firm completion date. In this regard, the solicitation required satisfactory

evidence of a conditional commitment of funds by a bank; the Mattison proposal, however, did not rely upon bank financing but "personal cash on hand and in lieu fees," as well as a series of third-party tax exchanges. Nor did paragraph 3.9 require a signed construction contract, as Peterson contends; the awardee did submit the documents required--evidence of its proposed construction contractor's experience, competence, and past performance.

The protester argues that the agency should have added a \$2.00 per square foot factor for the initial 2 years of the lease period, as Peterson alleges other agencies do, to represent the costs of moving from its building to the awardee's building. Since the solicitation did not provide for application of such a factor, it would have been inappropriate for the agency to include it in its price evaluation. See U.S. Def. Sys., Inc., B-245006.2, Dec. 13, 1991, 91-2 CPD ¶ 541. To the extent that the protester argues that the solicitation should have provided for application of a \$2.00 per square foot moving expense factor, such protests against improprieties apparent on the face of a solicitation must be filed no later than the time set for receipt of initial proposals, and Peterson's protest, filed on October 1, more than 4 months after the submission of initial proposals, is clearly untimely. See 4 C.F.R. § 21.2(a)(2) (1993).

The protester raised a number of other issues in its initial protest, to which the agency responded in its report to our Office, such as whether the awardee offered a lease in accordance with the terms sought by the solicitation; the compliance of the offered building with state environmental regulations; the adequacy of parking at the new building, and the agency's representations to induce Peterson to agree to a 1-year extension of its prior lease. Where, as here, the protester submits a response to the agency report and fails to address such issues, raised in the initial protest and responded to in the report, we consider such issues abandoned. See The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218.

The protest is denied.

James F. Hinchman  
General Counsel