



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Mark Group Partners and Beim & James
Properties III, Joint Venture

File: B-255762; B-255762.2; B-255762.3

Date: March 30, 1994

Melvin Mark, Jr. for the protester.
Scott R. Madsen, for Cushman & Wakefield of Oregon, Inc., an interested party.
Amy J. Brown, Esq., Office of General Counsel, General Services Administration, for the agency.
C. Douglas McArthur, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that contracting officer's representative (COR) acted beyond his authority is denied where solicitation advised offerors that COR would conduct negotiations on the contracting officer's behalf and contracting officer verifies COR's authority to issue amendments to the solicitation.
2. Contention that agency acted unfairly in concluding (in a letter to the protester) that solicitation required only offerors of new construction to assume any costs of moving the government from its existing site to proposed interim sites and to the final site is denied where the agency advised all offerors that they would be required to pay for any moves, regardless of whether the offeror was proposing new construction or renovation of an existing building.
3. Where an agency determines that urgent and compelling circumstances require performance notwithstanding a protest, its only obligation is to inform the General Accounting Office (GAO), and the GAO does not review such a determination.

DECISION

Mark Group Partners and Beim & James Properties III, Joint Venture (Mark/James Group) protests the terms of solicitation for offers (SFO) No. MOR93095, issued by the General Services Administration (GSA) for the lease of office space in Portland, Oregon. Mark/James Group objects to certain provisions in the solicitation and argues that

the contracting officer's representative (COR) acted beyond his authority in issuing amendments to the solicitation. The protester also objects to the agency's decision to proceed with award and performance notwithstanding the protest.

We deny the protests in part and dismiss them in part.

On August 9, 1993, the agency issued the solicitation for a 10-year lease of 85,000 to 87,800 square feet of office space in Portland, Oregon, for the Bureau of Land Management (BLM). The solicitation advised potential offerors that negotiations would be conducted on behalf of the government by the contracting officer or his authorized representative and provided for the evaluation of offers on the basis of annual price per square foot, with an evaluation preference for historic buildings.

The SFO required that in order to be considered for award, newly-constructed buildings must fully meet the new construction requirements of the Uniform Federal Accessibility Standards (UFAS).¹ Paragraph 2.2 of the SFO, Handicapped and Seismic Safety, provided that the agency would conduct an initial evaluation of offers to determine whether they fully met seismic safety standards and UFAS accessibility requirements. The SFO also provided that if any offeror fully met the seismic standards and UFAS accessibility requirements, the agency would reject all offers that did not fully meet the requirements. Also, the SFO contained separate definitions for "fully meets" with regard to seismic standards and UFAS.

Section 9 of the solicitation, which contained special requirements, stated as follows:

"If partial occupancy is to be provided within the final space to be occupied, the lessor agrees to physically move the government elsewhere within the space in order to accommodate buildout at no cost to the government.

"If partial occupancy is to be provided at a government approved separate location not within the final space to be occupied, the lessor agrees to move (including physical, data and

¹These standards, set forth at 41 C.F.R. § 101-19.6, app. A (1993), implement the Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4157 (1988).

telecommunications costs) the government into the final space at no cost to the government."

Section 9 also contained a requirement for 85 on-site parking spaces.

The agency received initial offers on August 25. On or about October 13, the agency issued amendment No. 0002 to the SFO, deleting that portion of paragraph 2.2 which had advised offerors of the agency's intent to reject all offers that did not meet seismic safety and UFAS accessibility requirements if any one offer fully met them. By letter dated October 29, Mark/James Group notified the agency of its objections to the deletion, arguing that compliance with seismic and handicapped standards is mandatory and is not within the contracting officer's discretion to delete.

By letter of November 4, part of which constituted a response to Mark/James Group's October 29 letter, the agency advised the protester that under the special requirement regarding partial occupancy (quoted above), lessors providing interim space for build-to-suit space would be responsible for costs of moving the agency to the interim space. Further, on November 8, the agency issued amendment No. 0004 to the solicitation, relaxing the requirement for 85 parking spaces to 30 spaces.

On November 15, Mark/James Group filed a protest with our Office challenging amendment No. 0002, which deleted portions of the seismic and handicapped accessibility requirements, as well as amendment No. 0004, which relaxed the parking requirements. Mark/James Group also challenged the agency's November 4 letter advising that offerors providing build-to-suit space would be required to pay the government's moving costs. On November 17, in partial response to the protest, the agency issued amendment No. 0005, reinstating the language deleted by amendment No. 0002, but slightly revising the definition of "fully meets" with regard to the seismic safety requirement. Mark/James Group submitted a BAFO on November 18 and protested the terms of amendment No. 0005 to our Office on November 22.

Mark/James Group points out that none of the amendments was signed by the contracting officer; that it was never informed that the contracting officer had authorized someone else to act as his representative; and argues that in issuing solicitation amendments, the COR was acting beyond

his authority.² Further, Mark James Group argues that the agency had no authority to modify or waive seismic safety standards or the UFAS accessibility requirements.

As a preliminary matter, Mark/James Group's challenge to the terms of the amendment is untimely because protests of improprieties in a solicitation must be filed not later than the next closing date for receipt of proposals. 4 C.F.R. § 21.3(a)(1) (1993). Here, Mark/James Group filed its protest against the terms of amendment No. 0005 after it had submitted its BAFO.³

In any event, amendment No. 0005, which reinstated the seismic safety standards and UFAS accessibility requirements, rendered academic Mark/James Group's general arguments concerning the agency's authority to delete the requirements. Although Mark/James Group contends that the amendment reduced the solicitation's seismic safety requirements for existing buildings to an unsafe level, unfairly prejudicing offerors of new buildings, we see no substantive change from the original language. The amendment merely required that offerors provide a certification from a registered structural engineer that the offered building met the applicable standards when constructed.

With respect to the protester's challenge to the COR's authority, we note that the solicitation specifically advised potential offerors that the COR would be conducting negotiations on behalf of the contracting officer. In addition, the contracting officer verifies that he authorized the COR to act as his representative, including acting as his representative for the purpose of issuing the solicitation and amendments here. The record therefore shows that the COR acted at all times within his authority to represent the contracting officer.

²Mark/James Group argues that under GSA procurement regulations, 48 C.F.R. § 501-603-70(c), only a warranted contracting officer may issue change orders or otherwise modify a contract. This restriction has no applicability to solicitation amendments.

³Further, despite Mark/James Group's argument that its second protest is really a continuation of its initial protest grounds, its contention that an exception for earlier constructed buildings is unfair to those offering new buildings would have been untimely even if it had been raised prior to the submission of BAFOs, since that exception appeared in the initial solicitation and should have been protested prior to the receipt of initial offers.

With respect to the November 4 letter advising the protester that offerors of new construction would be required to pay the costs of the initial move from BLM's present location to the interim location, Mark/James Group contends that this requirement is unfair to offerors of new construction, since the original solicitation only required offerors to pay for the move from interim facilities to the new location. The agency explains that similar letters requiring offerors to pay moving costs were sent to all offerors, and that the letter sent to Mark/James Group referred only to new construction because Mark/James Group was proposing new construction. According to the agency, all offerors were advised that they would have to pay moving costs. Since the agency is requiring all offerors to pay such costs, we find no merit to the protester's argument that this requirement is unfair to offerors of new construction.

Mark/James Group also protests the terms of amendment No. 0004, reducing the number of required parking spaces, on the basis that such a change is prejudicial to offerors who can meet the more stringent standard, as well as to prospective offerors who may not have submitted proposals initially because their buildings did not have 85 on-site parking spaces. Our role in reviewing bid protests is to insure that the statutory requirements for full and open competition are met, not to consider a protester's assertion that the needs of the agency can only be satisfied under more restrictive specifications than the agency believes necessary. Simula, Inc., B-251749, Feb. 1, 1993, 93-1 CPD ¶ 86. Consequently, our Office will not consider contentions that specifications should be made more restrictive. Information Technology Solutions, Inc., B-254438, Sept. 27, 1993, 93-2 CPD ¶ 188. To the extent that Mark/James Group argues that the agency should have reissued the solicitation to allow offerors who could not meet the original requirement for 85 on-site spaces to compete, Mark/James Group is not the appropriate party to raise the issue of prejudice on behalf of potential offerors who may have been deterred from competing by the initial solicitation's requirement for 85 parking spaces. See Priscidon Enters., Inc., B-238370, Mar. 30, 1990, 90-1 CPD ¶ 345.

Mark/James Group's also objects to the agency's determination to proceed with award and performance notwithstanding the protest. Where an agency determines that urgent and compelling circumstances require performance notwithstanding the stay provisions of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c)(1), its only obligation is to inform our Office of that decision, as GSA has done here. There is no requirement that a protester be allowed to rebut the agency's finding, nor do we review such

a determination. Stevens Technical Servs., Inc., 72 Comp. Gen. 183 (1993), 93-1 CPD ¶ 385.

The protests are denied in part and dismissed in part.

Robert P. Murphy
Acting General Counsel