Ms. Williams

Comptroller General
of the United States

Washington, D.C. 20548

207214

Decision

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

File: B-255886; B-255886.2

Date: April 15, 1994

Melvin Mark, Jr., for the protester.
Amy J. Brown, Esq., General Services Administration, for the agency.
Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that amended seismic safety standards compliance requirements are contrary to law or regulation, and unfairly prejudicial to offerors which can meet the original requirement is denied where the record shows that no substantive changes were actually made in the requirement and the requirement, as amended, does not conflict with any law or regulation.

DECISION

Mark Group Partners and Beim & James Properties III, a joint venture (Mark Group) protests the terms of solicitation for offers (SFO) No. MOR93038, issued by the General Services Administration (GSA) for the lease of office space in Portland, Oregon. Mark Group contends that the solicitation is defective and objects to the agency's decision to request best and final offers (BAFO) notwithstanding the protest.[1]

We deny the protest.

The SFO, issued on June 9, 1993, solicited offers for a 10-year lease for office and related space for the Soil Conservation Service and the Farmers Home Administration in Portland, Oregon. The SFO stated that the space had to be available for occupancy by March 15, 1994, or as soon thereafter as possible. The SFO required that offered buildings comply with the Uniform Federal Accessibility

[1]On February 2, 1994, a letter was sent to all offerors, including Mark Group, requesting BAFOs.

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Standards (UFAS)[2] for new construction and the seismic safety requirements of the Uniform Building Code (UBC). The solicitation contained separate definitions for the term "fully meets" with regard to the UFAS and seismic safety standards.

Mark Group submitted an initial offer by the October 8 due date. In its offer, Mark Group proposed new construction with an occupancy date of January 1, 1995, and further provided that "temporary space could be provided (by the protester) between March 1994 and January 1995." Shortly after the receipt of offers, GSA issued amendment No. 1, which deleted the following sentence in paragraph 2.2 of the SFO, "Handicapped and Seismic Safety":

> "If any offers are received which fully meet both the UBC for seismic safety and the handicapped requirements for new construction, then other offers which do not fully meet these requirements will not be considered."

Mark Group immediately challenged the agency action on the basis that the language was a mandatory requirement of the SFO and could not be deleted. On November 18, GSA issued amendment No. 2, which (1) reinstated the previously deleted sentence, (2) modified the definition of the term "fully meets" with regard to the seismic safety standards, and (3) changed the occupancy date from March 15, 1994, or as soon thereafter as possible, to March 15, 1994, but no later than May 31, 1994. This protest followed.

The primary issue in this protest concerns the amended definition of the term "fully meets" with regard to the seismic safety standards. The original language defining the term "fully meets" with regard to the seismic safety standards set forth in paragraph 2.2 of the SFO, and below in pertinent part, reads:

> "Fully meets with regard to seismic safety means the offer contains a certification by a registered structural engineer that the building conforms to seismic requirements for new construction of the current (as of the date of this solicitation) edition of the UBC or the 1970 edition if the lateral load resisting system is of steel construction or the 1976 edition if the lateral load resisting system is of concrete or masonry construction."

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[2]These standards implement the Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4157 (1988), and are contained in 41 C.F.R. § 101-19.6, App. A (1993).

As amended,[3] the definition in paragraph 2.2, reads:

> "Fully meets with regard to seismic safety means the offer contains a certification by a registered structural engineer that the building will conform to seismic requirements for new construction of the current (as of the date of this solicitation) edition of the UBC **or a certification by a registered structural engineer that the building when constructed complied with the seismic requirements in the 1970 edition if the lateral load resisting system is of steel construction** or the 1976 edition if the lateral load resisting system is of concrete or masonry construction." [Emphasis added.]

Mark Group essentially contends that by amending the definition for the term "fully meets," GSA improperly relaxed the seismic safety requirements for existing buildings in violation of the Earthquake Hazards Reduction Act of 1977, 42 U.S.C. §§ 7701 et seq. (1988), as amended, and Executive Order No. 12699. The protester further alleges that the net effect of the revision to the term "fully meets" is to allow existing buildings that actually are not in substantial compliance with the seismic safety standards to meet the SFO requirement for full compliance, to the competitive prejudice of offerors of new construction, such as itself, whose buildings must fully meet the new construction requirements set forth in the UFAS.

The determination of an agency's minimum needs and the best method of accommodating them are primarily within the agency's discretion. Information Technology Solutions, Inc., B-254438, Sept. 27, 1993, 93-2 CPD ¶ 188. Without a showing that competition is restricted, agencies are permitted to determine how best to accommodate their needs, and are entitled to use relaxed specifications when they reasonably conclude that they can increase competition and meet their needs at the same time. See Mine Safety Appliance Co., B-242379.2; B-242379.3, Nov. 27, 1991, 91-2 CPD ¶ 506. Our role in reviewing bid protests is to ensure 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

[3]Amendment No. 3, issued on January 11, 1994, added a sentence which the agency states was inadvertently omitted from the definition of the term "fully meets" in amendment No. 2.

necessary. Mark Group Partners; et al., B-255762 et al., Mar. 30, 1994, 94-1 CPD ¶ 224. Consequently, we will not consider allegations that specifications should be made more restrictive. Id.

To the extent Mark Group argues that the change in the definition of the term "fully meets" (which allegedly reduces the level of compliance with the seismic safety standards for existing buildings) violates the Earthquake Hazard Reductions Act of 1977, as amended, that argument is without merit. The statute contains no substantive requirement relevant to this lease acquisition inasmuch as it provides no seismic safety standards for existing buildings leased by the federal government and provides no guidance as to what might constitute adequate seismic design and construction standards. In addition, Executive Order No. 12699, which was issued by the President pursuant to Pub. L. No. 101-614, the Earthquake Hazards Reduction Program Reauthorization Act of 1990, simply requires that the Administrator of GSA insure that for new construction, the building is designed and constructed according to appropriate seismic design and construction standards. The Order neither contains seismic safety standards for existing buildings, nor prohibits agencies from procuring leased space in existing buildings. Under these circumstances, neither definition of the term "fully meets" with regard to the seismic standards for existing buildings--as initially contained in the SFO or as subsequently revised in amendment No. 2--violates the requirements of the statute or the order. As we understand the amendment, offerors must provide a certification from a registered structural engineer that an existing building, when constructed, conformed to the 1970 or 1976 editions of the UBC. In other words, the SFO, both as initially issued and as subsequently amended, required that offerors proposing space in an existing building provide a certification by a registered structural engineer that the building conforms to either applicable edition of the UBC. Thus, no substantive changes were made to the SFO requirements for seismic safety standards, and the protester's argument that the exceptions allowed for existing buildings is unfair to those offering newly constructed buildings provides no basis for protest. See Mark Group Partners; et al., supra.

Mark Group also protests that the amended occupancy date in the SFO, requiring occupancy by March 15, 1994, but no later than May 31, 1994, was "designed to effectively eliminate" the firm from competing. In support of this argument, the protester references a market survey meeting held on June 2, with GSA and representatives of the Mark Group, during which the attendees discussed the protester's build-to-suit offer, including the timing associated with such a proposal. Mark Group maintains that GSA misled the firm during this meeting

to believe that a build-to-suit offer would meet the minimum needs of GSA's tenant agencies. Mark Group states it was further misled because GSA issued a SFO and invited the firm to submit an initial offer.

GSA denies that Mark Group representatives were ever reasonably led to believe that a build-to-suit proposal could meet its minimum needs. According to the agency, the protester was advised by the contracting officer that the time frame for relocating its tenant agencies would not allow for the construction of a new building and Mark Group's offer to provide temporary space "between March 1994 and January 1995" is illustrative of the firm's understanding that GSA's tenant agencies had a need to move much earlier than January 1995. Since the protester had proposed space in an existing building (in a May 20, 1993, letter to GSA, Mark Group offered three sites; two involved the construction of a new building, the third was an offer for space in an existing building), the agency asserts that the contracting officer reasonably issued the SFO to the firm.

The record does not conclusively show exactly what was discussed by the parties during the market survey meeting. The protester has furnished a statement from its development coordinator in support of its contentions while GSA has submitted a statement from the contracting officer. Neither party has furnished contemporaneous notes of the discussions. Even assuming that GSA did advise Mark Group (during the market survey and/or prior to the issuance of the SFO) that it would consider new construction with a projected occupancy date of January 1995, Mark Group's reliance on such advice was misplaced and unreasonable. As discussed above, the SFO was issued subsequent to the market survey and it initially required occupancy by March 15, 1994, or as soon thereafter as possible; therefore, the SFO requirement is not consistent with the alleged GSA advice; the SFO language governs this acquisition, not the prior oral advice. See Sharp Elec., Corp., B-242302, Apr. 15, 1991, 91-1 CPD ¶ 374. Nor is it clear from the record why Mark Group offered to provide temporary office space between March 1994 and January 1995 if the firm believed that GSA would give it adequate time to complete the new construction. Moreover, we find Mark Group unreasonably interpreted the phrase "as soon thereafter as possible" to mean that the agency would wait an additional 9 months after March 15, 1994, to relocate its tenant agencies. In sum, there is no evidence in the record to show that GSA acted intentionally to preclude Mark Group from competing for or receiving the award.

Mark Group's initial offer was rejected and found outside the competition range because it did show that the SFO occupancy requirements would be met. Mark Group concedes that it cannot meet the occupancy date. Accordingly, the protester is not an interested party to challenge the propriety of the agency's decision to conduct further negotiations with competitive range offerors or to call for BAFOs. Under our Bid Protest Regulations, a party is not interested to maintain a protest if, as here, it would not be in line for award if its protest were sustained. 4 C.F.R. §§ 21.0(a), 21.1(a) (1993); LHL Realty Co.--Protest and Request for Recon., B-249073.2 et al., Nov. 23, 1992, 92-2 CPD ¶ 363.

Accordingly, the protest is denied.

for Robert P. Murphy
Acting General Counsel