



Comptroller General
of the United States

1054245

Washington, D.C. 20548

Decision

Matter of: Wayne D. Josephson

File: B-256243

Date: May 12, 1994

Wayne D. Josephson for the protester.
Allen W. Smith, Department of Agriculture, for the agency.
M. Penny Ahearn, Esq., and David A. Ashen, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protest against award to higher-priced offeror is denied where awardee submitted technically more advantageous proposal, protester's proposed building and site failed to comply with solicitation requirements, and the cost to bring protester's building and site into compliance exceeded difference in prices.

DECISION

Wayne D. Josephson protests the award of a lease to Mattison & Mattison under solicitation for offers (SFO) No. R4-93-13, issued by the Forest Service, Department of Agriculture, for office and related space. The protester, the incumbent lessor, challenges the agency's evaluation of proposals.

We deny the protest.

BACKGROUND

The Forest Service issued the SFO for 4,263 net usable square feet of space in Driggs, Idaho. The SFO contemplated the award of a 10-year lease, with two additional 5-year option periods, to the technically acceptable offeror whose offer was deemed to have the most advantageous technical/cost relationship to the government. The SFO listed in descending order of importance the following technical evaluation factors: (1) site, including subfactors for public visibility, parking layout, building relationship to the site, snow removal, public access, service/delivery access, on-off access, site safety, and landscaping; (2) space layout; and (3) energy conservation. Price was to be evaluated on the basis of the total annual

price per square foot for the base and option periods, expressed as a present value.

Several initial offers were received, including those from the protester and the awardee. Mr. Josephson offered the existing building which he has leased to the Forest Service for 16 years. The evaluators, however, determined that the existing building needed to be remodeled in order to meet the SFO requirements here. Since Mr. Josephson failed to indicate in his offer that appropriate remodeling would be completed, his initial proposal received poor ratings under most of the evaluation criteria. (In evaluating proposals, descriptive ratings of excellent, good, acceptable, or poor were utilized.)

After discussions with offerors, the Forest Service requested best and final offers (BAFO). Although Mr. Josephson submitted a revised site and floor plan drawing and remedied some areas of his initial proposal considered deficient, the agency concluded that many deficiencies remained. Specifically, with respect to site, the most important technical evaluation criterion, the protester's proposal received poor ratings under four of the nine subfactors--parking layout, public access to the building, on-off access to the site, and safety. In addition, while the protester's proposal received an acceptable rating under the subfactor for snow removal, the evaluation narrative nevertheless indicated that because this area was not addressed in the proposal it was also deficient. The proposal also received poor ratings with respect to quality of space, a subfactor under the space layout factor, and energy conservation. As a result, Mr. Josephson's BAFO was rated poor overall. In contrast, Mattison's proposal received an overall technical rating of excellent.

Although Mr. Josephson's offer had a lower present value rental rate (\$7 per square foot) than Mattison's offer (\$8 per square foot), the Forest Service concluded that Mr. Josephson's price advantage was offset by the fact that his building and site failed to meet many of the technical requirements and the fact that the cost to remedy the deficiencies could easily exceed the difference in rental rates. In these circumstances, the agency determined that Mattison's technically superior proposal offered the most advantageous technical/cost relationship to the government. Upon learning of the resulting award to Mattison, Mr. Josephson filed this protest with our Office.

TECHNICAL EVALUATION

Mr. Josephson primarily argues that his proposal in fact met all specification requirements; according to the protester,

he agreed to make the modifications to the existing building and site which were necessary for compliance with the specifications. Based on our review of the record, we disagree.

In reviewing an agency's technical evaluation, we will not reevaluate the proposal; we will only consider whether the agency's evaluation was reasonable and in accord with the evaluation criteria listed in the solicitation. CORVAC, Inc., B-244766, Nov. 13, 1991, 91-2 CPD ¶ 454. A protester's mere disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. United HealthServ Inc., B-232640 et al., Jan. 18, 1989, 89-1 CPD ¶ 43.

The record shows that while Mr. Josephson proposed some remedial improvements, and was given credit for them, he was reasonably evaluated as failing to commit to, or furnish details concerning, the remedial actions and improvements necessary to address the deficiencies or weaknesses in his site with respect to five of nine site subfactors (parking layout, snow removal, public access, on-off access, and safety), the quality of space subfactor under space layout, and energy conservation. We discuss several examples below.

Site--Parking Layout

The SFO established detailed requirements for public and government parking and access. For example, offerors were required to include "two oversized spaces [i.e., 10 feet wide] for recreation vehicles and vehicles pulling travel trailers. . . . located so they will allow to pull through without required backing." With respect to handicapped parking and access, the SFO required compliance with the Uniform Federal Accessibility Standards, 41 C.F.R. § 101-19.6, App. A (1993), which call for at least one accessible route, i.e., one that "can be approached, entered, and used by physically disabled people, within the boundary of the site from accessible parking to an accessible entrance." In addition, the SFO required concrete sidewalks from the parking area to the building entrance(s).

Mr. Josephson's building is contained within the eastern half of a site, the eastern end of which borders State Highway 33. Proposed visitor parking is between the building and the highway. Fenced government parking is on the western half of the site, with two access points on the northern side exiting onto a gravel city street. On the southeastern side of the site, a narrow lane between the building and the adjacent property to the south connects the fenced government parking on the western end of the site with the state highway to the east. Another narrow lane on

the northeastern side of the site, running between the building and the gravel city street to the north, and opening onto the government parking to the west and the gravel street to the north, is designated as the proposed recreational vehicle (RV) parking. The evaluators considered Mr. Josephson's parking layout to be generally congested and the government parking inaccessible for the handicapped, which resulted in a poor rating under the parking layout subfactor of the site factor.

Although Mr. Josephson generally argues that his proposed parking provided easy on-off access to the site for RVs and accessibility for the handicapped, our review of the record indicates otherwise. Concerning RV parking, the drawing submitted with the protester's BAFO shows that the protester's RV parking was contained in a narrow 11.25-foot lane backing onto a public parking space on the eastern end, bordered on the southern side by the existing building and on the northern side by a curb and gutter (presumably so, since the SFO required a concrete curb and gutter around the perimeter of the parking area), with the only access points to the west into the government parking area and to the north onto the gravel city street. As noted by the evaluators, this arrangement essentially resulted in a dead-end space, which would not permit RVs to pull through, but instead would force them to back either in or out, contrary to the solicitation's prohibition in this regard. Further, not only did the drawing place the handicapped government parking spaces at least 75 feet from the nearest entrance, but Mr. Josephson also failed to offer in his BAFO to repair the existing crumbling sidewalks. Given these deficiencies with respect to parking and handicapped access, we conclude that the protester's proposed parking layout was reasonably evaluated as poor.

Site--Safety

We also find no basis to question the poor rating given to Mr. Josephson's proposal under the site safety subfactor. In this regard, the evaluators determined that the lack of pull-through RV parking and the crumbling concrete sidewalks posed safety hazards which could result in accidents. The protester does not dispute the safety hazards associated with the RV parking and the crumbling sidewalks. In addition, the evaluators questioned the safety of the narrow 11.75-foot-wide lane on the southeastern side of the site, with access points at either end, one exiting into the government parking and the other onto the state highway. The record indicates that during discussions, the agency advised Mr. Josephson that, because of the lane's narrow width, it should be designated as one-way so as to reduce the likelihood of accidents. The protester's BAFO, however, did not propose any remedial action in this area. While the

protester notes that its traffic lane "is more than the normal traffic lane of 12 feet in width," he does not dispute that no more than one directional lane of cars at a time could use the lane, and he does not explain why his failure to designate the lane for one-way traffic did not constitute a safety hazard. The evaluation in this area thus was reasonable.

Energy Conservation

With respect to energy conservation, the SFO required that all building windows be energy efficient and walls be insulated. Although the agency advised Mr. Josephson during discussions that the windows in the existing building leaked cold air in the winter and the walls were poorly insulated, he did not propose any remedial action in his BAFO. Since the protester has not disputed these perceived deficiencies in his building, we have no basis to question the reasonableness of the poor rating of the firm's proposal under the energy conservation factor.

BIAS

The protester further alleges that the agency had a "personal vendetta" against him. As evidence of this alleged bias, the protester cites the agency's failure to exercise the second 5-year option under his incumbent contract. According to the protester, the agency was biased in favor of a new office facility (and against the protester's existing facility) and the evaluators created a technical evaluation record to support this bias. We find no evidence of bias in the record.

To show bias, there must be proof that the agency had a specific intent to injure the protester. Hill's Capitol Sec., Inc., B-250983, Mar. 2, 1993, 93-1 CPD ¶ 190. There is nothing inherently biased in an agency's determination not to exercise an option since options are generally exercisable at the sole discretion of the government--that is, a contractor has no legal right whatsoever to compel the government to exercise an option. See Digital Sys. Group, Inc.--Recon., B-252080.2, Mar. 12, 1993, 93-1 CPD ¶ 228. The agency's determination here not to exercise the option under the protester's incumbent contract therefore does not demonstrate bias. Moreover, the evaluation record supports the reasonableness of the evaluation, including the reasonableness of the agency's determination that Mr. Josephson's existing building, including any proposed modifications, did not meet all of the specification requirements. Consequently, we see no evidence in the record supporting this argument. See Canaveral Maritime, Inc., 69 Comp. Gen. 604 (1990), 90-2 CPD ¶ 41.

PRICE/TECHNICAL TRADEOFF

Mr. Josephson also challenges the agency's price/technical tradeoff. The protester argues that the agency's selection of Mattison's offer as the most advantageous to the government was unreasonable given that his own proposal was lower in price.

In a negotiated procurement, award may be made to a higher-rated, higher-priced offeror where the decision is consistent with the solicitation's evaluation factors and the agency reasonably determines that the technical superiority of the higher-priced offeror outweighs the price difference. JCI Envtl. Servs., B-250752.3, Apr. 7, 1993, 93-1 CPD ¶ 299. Here, the agency considered Mr. Josephson's lower proposed price in its cost/technical tradeoff, determined that the cost to remedy the deficiencies in the protester's building and site exceeded the difference in price, and ultimately concluded that Mattison's technically superior offer was more advantageous than Mr. Josephson's under the stated evaluation criteria. Given the numerous deficiencies in the protester's offer, we see nothing unreasonable in this determination.

The protest is denied.

/s/ John M. Melody
for Robert P. Murphy
Acting General Counsel