



Comptroller General
of the United States
Washington, D.C. 20548

1452410

Decision

Matter of: Town Development Inc.
File: B-257585
Date: October 21, 1994

Thomas R. Solomich, Esq., Rothman Gordon, and Paul Kossman for the protester.
Robert J. McCall, Esq., General Services Administration, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where a solicitation for leased space provided an absolute preference for offered space that is in full compliance with the new construction handicapped accessibility requirements contained in the Uniform Federal Accessibility Standards, the protester's low-priced proposal of less than fully compliant space was properly rejected where the agency received an acceptable offer of space fully complying with the new construction standards.
2. Agency's determination that the awardee's offered lease price was reasonable does not reflect an abuse of discretion where it was based on an independent appraisal, a market survey, present value analysis, and the proposed building's current fair annual rental.

DECISION

Town Development Inc. protests the rejection of its proposal under solicitation for offers (SFO) No. MPA92173, issued by the General Services Administration (GSA), for approximately 17,660 net usable square feet (NUSF) of office space. GSA rejected the proposal because it failed to fully meet the SFO's handicapped accessibility requirements. Town contends that GSA acted improperly because its proposal substantially met these requirements and was the lowest priced.

We deny the protest.

GSA issued this SFO on September 16, 1993, to lease office and related space in Pittsburgh, Pennsylvania, to house the offices of the Social Security Administration (SSA) Office

of Hearing and Appeals for a term of 10 years, with a government option to cancel after the first 5 years.

Award of the lease was to be made to the responsible offeror whose offer conformed to the SFO requirements and proposed the lowest price. Paragraph 2.2 of the Award Factors section of the SFO entitled "Handicapped" stated as follows:

"All offers received in response to the request for "Best and Final" offers [BAFO] will be initially evaluated to determine whether the offers fully meet the handicapped accessibility requirements for new construction of the Uniform Federal Accessibility Standard (UFAS) All technical requirements for handicapped accessibility in this solicitation are the same as those in Section 4.1.2 Accessible Buildings, New Construction, of UFAS. When clarification is required, UFAS shall be consulted. If any offers are received which fully meet handicapped requirements of new construction, then other offers which do not fully meet these requirements will not be considered."

Paragraph 2.2 defined the term "fully meets," as used with respect to the handicapped requirements, to mean that the offer fully complied with the SFO's "new construction" sections on handicapped accessibility. Paragraph 2.2 further provided that if no offers fully complied with the UFAS requirements for new construction, substantially compliant offers would be preferred over less than substantially compliant offers. Substantially compliant offers were those that complied with only designated areas of the SFO handicapped accessibility requirements. The paragraph also stated that if no substantially compliant offers were received, then less than substantially compliant offers, based upon compliance with a minimal number of handicapped accessibility requirements, would be preferred unless the requirements were waived.

The SFO set forth the specific "new construction," handicapped accessibility requirements to which a proposal had to adhere to be fully compliant and entitled to the SFO preference. Among these requirements were that the offered space provide at least one passenger elevator complying with the UFAS new construction requirements and, if more than one passenger elevator was provided, each elevator was to be equally accessible. To be fully compliant, the toilet rooms were required, among other things, to have specified minimum unobstructed maneuvering clearances.

On December 13, GSA received two offers in response to the SFO, which included an offer of space in the Kossman

building from Town and one from SMWNPF Holdings, Inc. for an offer of space in the Porter building.¹ GSA determined that SMWNPF's space fully complied with the UFAS requirements for new construction, but that Town's space was incapable of fully meeting the requirements because of its building's structural limitations. That is, Town's building contained three existing passenger elevators that did not meet the requirements and which could not be modified to meet the space requirements because the elevator shafts were too small. Town proposed to substantially meet the UFAS new construction requirements with a separate fully compliant elevator, approximately 60 feet from the other elevators. During discussions, GSA specifically cautioned Town that since its space could not fully comply with the UFAS requirements for new construction, if an acceptable, fully compliant offer were received, Town's offer would not be considered.

GSA received BAFOs from both Town and SMWNPF. Town offered a BAFO price of \$14.95 per NUSF for the first 5 years and \$16.95 per NUSF for the remaining term. SMWNPF's BAFO was \$22.40 per NUSF. Based upon the pre-solicitation market survey and appraisals, GSA determined both offerors' prices were fair and reasonable for the offered space. After reviewing Town's BAFO--including floor plans--and consulting with the Handicapped Accessibility Program Manager, GSA determined that Town's offer was required to be rejected because the elevators and toilet rooms did not fully meet the UFAS new construction requirements. Besides the inherent problems with the elevators, GSA also found that, as depicted in Town's floor plans, its toilet rooms failed to satisfy the UFAS requirements for unobstructed wheelchair turning space--due to the location of the entrance door to the toilet rooms and the location of the door to the handicapped stalls. Because SMWNPF's space was fully compliant with the UFAS new construction requirements, GSA rejected Town's BAFO, even though it offered the lowest price, and made award to SMWNPF on May 31. This protest followed.

Town concedes that its space did not fully comply with the UFAS requirements for new construction (because of its elevators), but argues that GSA could not reasonably reject its lower-priced offer because of a recently consummated lease with GSA in which its elevators and toilet facilities were found to acceptably meet handicapped accessibility requirements; and because other federal facilities lease space in its building.

¹Neither building was newly constructed; however, the Porter building had been completely renovated to meet the new construction UFAS handicapped accessibility requirements.

We find that GSA properly rejected Town's proposal because the evaluation scheme set forth in the SFO provides an absolute preference to offerors of space that fully met the UFAS accessibility requirements for new construction.² In accordance with paragraph 2.2, GSA was not required to consider BAFOs like Town's, notwithstanding their low price, that failed to fully comply with the UFAS handicapped accessibility requirements for new construction where any BAFO was received that was fully compliant. 12th & L Sts. Ltd. Partnership, B-247941.3, Oct. 9, 1992, 92-2 CPD ¶ 233. Our review of the record, including the detailed floor plans, confirms that SMWNPF's BAFO proposed to fully meet the UFAS handicapped accessibility requirements for new construction. Thus, GSA properly rejected Town's admittedly less than fully compliant proposal.³ Id. Even though GSA may have previously determined the handicapped accessibility of Town's less than fully compliant space was acceptable under other procurements, each procurement is a separate transaction; and agency action under one procurement does not affect the propriety of the agency's action under a different procurement.⁴ See Anderson Hickey Co., B-250045.3, July 13, 1993, 93-2 CPD ¶ 15.

Town protests that the lease price offered by SMWNPF was not fair and reasonable, particularly when compared to Town's lower-priced space. In making this argument, Town has submitted the opinion of an appraiser, who asserts that both the Kossman and Porter buildings are "Class B" buildings, which should lease space in the same price range and that

²GSA reports that the SSA office has a number of disabled employees and many disabled claimants who must have access to the office. To the extent that Town challenges the SFO evaluation scheme, such protest is untimely under our Bid Protest Regulations, as it concerns an alleged defect apparent from the face of the solicitation that must be protested prior to the time for receipt of initial offers. 4 C.F.R. § 21.2(a) (1) (1994).

³Town argues that it could have modified its toilet rooms to fully comply with the UFAS requirements if GSA had pointed out this deficiency during discussions. We need not resolve this issue because Town's proposal, even with this modification, would not be fully compliant because of its building's elevators.

⁴GSA reports that even though the Kossman building's handicapped accessibility had previously been determined to be acceptable for other leases, GSA did not determine that the space fully complied with the UFAS requirements for new construction.

SMWNPF's higher lease price for comparable space is therefore unreasonable.

A determination concerning the reasonableness of price is a matter of administrative discretion involving the exercise of business judgment which we will not question unless the determination is unreasonable or there is a showing of bad faith or fraud. 12th & L Sts. Ltd. Partnership, supra. Here, GSA determined that SMWNPF's price was reasonable after a present value analysis; a comparison with an independent appraisal; and a market survey. For example, SMWNPF'S lease price is less than that charged other occupants of the building. The price negotiation memorandum indicates that GSA's appraisal staff found that SMWNPF's price was below the "Fair Annual Rental" for the building, that SMWNPF's building where the space was located had been recently renovated to meet all fire safety requirements and UFAS accessibility requirements for new construction, and that SMWNPF's price was the lowest offer available satisfying all of the agency's needs. Although Town's appraiser's opinion is inconsistent with the agency's price reasonableness determination, we cannot conclude that the agency's determination lacked a reasonable basis. Id.

Town argues that a hearing should have been conducted in this case. In appropriate cases, a hearing may be held, within the sole discretion of our Office, to develop the protest record through oral argument and/or oral testimony. 4 C.F.R. § 21.5(a); see Border Maintenance Serv., Inc.--Recon., 72 Comp. Gen. 265, 93-1 CPD ¶ 473; TRI-COR Indus., Inc., B-252366.3, Aug. 25, 1993, 93-2 CPD ¶ 137. As a general rule, we conduct hearings where there is a factual dispute between the parties which cannot be resolved without oral examination and which requires us to assess witness credibility; or where an issue is so complex that proceeding with supplemental written pleadings clearly constitutes a less efficient and burdensome approach than developing the protest record through a hearing. In short, absent evidence that a protest record is questionable or incomplete, this Office will not hold a bid protest hearing merely to permit the protester to orally reiterate its protest allegations or otherwise embark on a fishing expedition for additional grounds of protest; such a result would undermine our obligation to resolve protests expeditiously without unduly disrupting or delaying the procurement process. See Border Maintenance Serv., Inc.--Recon., supra. Here, the record provided clear support for the agency's determination that Town's building was not fully compliant with the UFAS

handicapped accessibility standards and for the agency's determination that SMWNPF's price was reasonable, and there was no useful purpose for calling a hearing.

The protest is denied.

Ronald Berger
for Robert P. Murphy
Acting General Counsel