



Decision

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Matter of: Oppenheim Management, LLC

File: B-417333

Date: March 26, 2019

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DIGEST

1. Protest allegations that, on the face of protester’s submissions, fail to present factually and legally sufficient bases for protest are dismissed.
 2. Post-closing-date protest that challenges the necessity for a solicitation requirement is dismissed as untimely.
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DECISION

Oppenheim Management, LLC, of Brooklyn, New York, protests the General Services Administration’s (GSA) exclusion of Oppenheim’s proposal from further consideration in a procurement, conducted pursuant to request for lease proposals (RLP) No. 7PA2333, to provide leased space for the U.S. Social Security Administration (SSA) in Scranton, Pennsylvania. Oppenheim asserts that the agency incorrectly determined that Oppenheim’s proposal failed to comply with the solicitation’s column spacing requirements, and complains that the agency failed to conduct discussions regarding that requirement. Additionally, Oppenheim asserts that exclusion of Oppenheim’s proposal “lacks a rational basis,” since its proposed building is capable of meeting the agency’s needs. Protest at 2.

We dismiss the protest.

BACKGROUND

In December 2018, the agency issued RLP No. 7PA2333 to provide leased space for the SSA in Scranton, Pennsylvania. Protest, exh. A, RLP. Among other things, the

RLP provided that “space between columns and/or walls cannot be less than nineteen (19’) feet.” Id. at 2.

On December 14, the agency provided a copy of the RLP to representatives of Oppenheim, the incumbent lessor, noting that the SSA’s requirements had been “updated” and specifically advising Oppenheim that: “given the column spacing requirement [the SSA’s] current space does not meet [the updated] needs.” Protest, exh. K, E-mail from Contracting Officer to Oppenheim, Dec. 14, 2018.

On or before the solicitation’s January 11, 2019 closing date, Oppenheim submitted a proposal in which it, nonetheless, proposed the currently-leased building. In its proposal, Oppenheim asserted that its building conformed to the column spacing requirement when measuring from east to west--but expressly acknowledged that, measured from north to south, the “columns . . . are less than 19 feet apart.” Protest, exh. E, Oppenheim Proposal, at 8.

On January 24, the agency sent a letter to Oppenheim, which carried the subject line “Request for Clarifications” and noted that Oppenheim’s proposal contained various “exceptions” to the solicitation requirements. Protest, exh. F, Agency Letter to Oppenheim, at 1-2. Oppenheim acknowledges that, thereafter, on January 31, the agency’s contracting officer and Oppenheim’s representative “discussed the column spacing of the [p]roperty.” Protest at 7. As a follow-up to these discussions, the contracting officer forwarded to Oppenheim’s representative the floor plan for Oppenheim’s building--which expressly confirmed that the “column spacing measurements” were less than 19 feet.¹ Protest, exh. H, E-mail from Contracting Officer to Oppenheim Senior Vice President.

On February 5, Oppenheim submitted certain clarifications/revisions to its proposal, but again expressly acknowledged that, measured from north to south, its proposed building’s columns “are less than 19 feet apart.” Protest, exh. I, Revised Proposal, at 46.

On February 6, the agency notified Oppenheim that its proposal was being excluded from further consideration, stating: “Your offer is not technically acceptable as it does not meet the column spacing requirement stated in the RLP.” Protest, exh. B, E-mail from Contracting Officer to Oppenheim Senior Vice President. This protest followed.

DISCUSSION

Oppenheim’s protest asserts that the agency “incorrectly” determined that Oppenheim’s proposal failed to comply with the solicitation’s column spacing requirements, and complains that the agency failed to conduct meaningful discussions regarding that

¹ The floor plan lists column spacing measurements of: 15 feet 4 inches; 16 feet 8 inches; and 18 feet 8 inches. Protest, exh G, Floor Plan.

requirement. Additionally, the protester asserts that exclusion of Oppenheim's proposal "lacks a rational basis," since its proposed building is capable of meeting the agency's needs. Protest at 2. Thereafter, the agency submitted a request for summary dismissal.

As discussed below, based on the face of Oppenheim's protest and protest exhibits, we dismiss its allegation regarding the agency's alleged "incorrect" determination that Oppenheim's proposal failed to comply with the solicitation's column spacing requirement, and we similarly dismiss Oppenheim's assertions that the agency failed to conduct meaningful discussions regarding that requirement. We also dismiss as untimely Oppenheim's assertion that exclusion of its proposal on the column spacing requirement was irrational.

First, Oppenheim asserts that the agency "incorrectly" concluded that Oppenheim's proposal failed to comply with the solicitation's column spacing requirements because Oppenheim's proposal "offered a space . . . with columns spaced 20 feet apart . . . for the east – west orientation of the property, which is the [furniture] configuration SSA currently enjoys." Protest at 9-10. The protester also asserts, without elaboration, that the agency's discussions "failed to direct Oppenheim to the . . . deficiencies in its proposal." Id. at 12.

In its dismissal request, the agency notes that the plain language of the solicitation, along with the agency's explicit, documented communications with Oppenheim regarding the column spacing requirement, left no doubt that the spacing requirement applied to all of the columns--not just those aligned from east to west. Agency Dismissal Request, Mar. 4, 2019, at 4-8. The agency further points out that the agency communicated its view that Oppenheim's building did not meet the requirements several times throughout the procurement, noting that Oppenheim's own submissions establish the absence of any factual or legal support for either of these allegations.

It is well-settled that a proposal that fails to comply with the solicitation requirements cannot form a valid basis for award. See, e.g., For Your Info., Inc., B-278352, Dec. 15, 1997, 97-2 CPD ¶ 164 at 3. It is similarly well-settled that, while an agency's discussions must be meaningful, an agency need only lead an offeror into the deficient area of its proposal to satisfy the requirement. See, e.g., Hanford Env'tl. Health Found., B-292858.2, B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 8. Finally, our Bid Protest Regulations provide that we will dismiss a protest allegation for failing to state a valid basis of protest when the allegation, on its face, fails to demonstrate improper agency action. 4 C.F.R. §§ 2.1(c)(4), (i); 21.5(f); see Brackett Aircraft Radio Co., B-246282, Jan. 8, 1992, 92-1 CPD ¶ 43 at 1 (dismissing allegation as failing to state valid basis when the allegation did not, on its face, demonstrate improper agency action).

Here, it is clear from the face of Oppenheim's protest submissions that the solicitation unambiguously provided that "space between columns and/or walls cannot be less than nineteen (19') feet," Protest, exh. A, RLP at 2, and that the solicitation did not limit the spacing requirement to any particular alignment of the building columns. Accordingly,

Oppenheim's assertion--based on the proposition that the stated requirement was applicable only to the columns aligned from east to west--fails to state a basis for protest, and is dismissed.

Similarly, with regard to the agency's alleged failure to conduct meaningful discussions, Oppenheim's protest includes the agency's December 14 e-mail, in which the agency advised Oppenheim that the SSA's requirements had been updated and explicitly stated: "given the column spacing requirement [the SSA's] current space does not meet [the updated] needs." Protest, exh. K, E-Mail from Contracting Officer to Oppenheim. Further, Oppenheim's protest, itself, acknowledges that, on January 31, following submission of Oppenheim's proposal, the contracting officer and Oppenheimer's Senior Vice President "discussed the column spacing of the [p]roperty." Protest at 7. Accordingly, on the face of Oppenheim's protest submissions, there is no basis to assert that the agency failed to lead Oppenheim into the deficient area of its proposal, and that protest allegation is dismissed.

Finally, Oppenheim asserts that exclusion of its proposal was irrational because "GSA and SSA have demonstrated that they are able to use the space being offered without any impact to their furniture layout or their operations." Protest at 2.

The agency's dismissal request points out that Oppenheim's complaint in this regard is an untimely challenge to the agency's need for the solicitation's column spacing requirement and, since this allegation was filed after the solicitation's closing date, it must be dismissed.

GAO's bid protest regulations contain strict rules for the timely submission of protests, reflecting the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. See, e.g., Verizon Wireless, B-406854, B-406854,2, Sept. 17, 2012, 2012 CPD ¶ 260 at 3, 4. A protest based on alleged solicitation improprieties must be filed prior to the time set for receipt of proposals. 4 C.F.R. § 21.2(a)(2).

Here, Oppenheim's assertion that exclusion of its proposal "lacks a rational basis" because, in Oppenheim's view, its proposed building would meet the agency's needs, constitutes a challenge to the necessity of the column spacing requirement. As discussed above, this requirement was clearly apparent prior to submission of Oppenheim's proposal. Nonetheless, Oppenheim chose not to challenge that requirement before the solicitation closing date. On this record, its protest challenging the column spacing requirement is untimely, and will not be considered.

The protest is dismissed.

Thomas H. Armstrong
General Counsel