U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: BOF GA Lenox Park, LLC

File: B-421522

Date: June 20, 2023

Gordon Griffin, Esq., Hillary J. Freund, Esq., and Richard Ariel, Esq., Holland & Knight LLP, for the protester.
Seamus Curley, Esq., Stroock & Stroock & Lavan LLP, for FDS Vegas LLC, the intervenor.
Benjamin D. Lorber, Esq., General Services Administration, for the agency.
Kasia Dourney, Esq., and Alexander O. Levine, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency unreasonably evaluated awardee's proposal as complying with the terms of the solicitation is sustained where the record shows that the agency failed to evaluate a requirement for proximity to rapid transit in accordance with a reasonable interpretation of the solicitation term at issue.

DECISION

BOF GA Lenox Park, LLC, of Brookhaven, Georgia, protests the award of a lease to FDS Vegas LLC, of Arlington, Virginia, under request for lease proposals (RLP) No. 0GA2209, issued by the General Services Administration (GSA) on behalf of the Drug Enforcement Agency (DEA), for the provision of commercial office space in the Atlanta, Georgia area. The protester contends that the agency improperly found FDS Vegas's proposal technically acceptable.

We sustain the protest.

BACKGROUND

The RLP, issued on May 23, 2022, provided for the award of a 20-year lease of office space in the Atlanta, Georgia area.[1] Agency Report (AR), Tab 3, RLP at 1. GSA sought to lease approximately 77,529 American National Standards Institute/Building Owners and Managers Associate Office Area square feet (ABOA SF)[2] of contiguous space and 326 parking spaces within a delineated area of Atlanta.[3]

The solicitation advised that the lease would be awarded to the responsible offeror whose proposal "conforms to the requirements of this RLP and the [l]ease documents," and is the lowest-priced, technically acceptable lease proposal. *Id.* at 20.

As relevant here, the RLP included certain public transportation requirements. Specifically, the solicitation provided that:

> A subway, light rail, or bus rapid transit stop shall be located within the immediate vicinity of the Building, but generally not exceeding a safely accessible, walkable 5,280 feet from the principal functional entrance of the building, as determined by the LCO [lease contracting officer].

Id. at 3. Additionally, and of importance to this protest, the RLP advised that an offeror must provide its unique entity identifier, and that it:

> must have an active registration in the System for Award Management (SAM) . . . at http://www.sam.gov prior to the Lease Award Date. Offerors must be registered for purposes of "All Awards," including completion of all required representations and certifications within SAM.

Id. at 16.

GSA twice received questions from potential offerors regarding the solicitation but none of the questions sought clarification of the transit accessibility requirement, or the

[1] The RLP provided that the term of the lease was 20 years, with government termination rights effective after a 15-year firm term of the lease. RLP at 1.

[2] ABOA SF refers to the area available for use by a tenant for personnel, furnishings, and equipment. *See The Metropolitan Square Assocs., LLC*, B-409904, Sept. 10, 2014, 2014 CPD ¶ 272 at 2 n.2.

[3] The delineated area consisted of roughly 33 square miles in the northeastern part of the Atlanta metro area. RLP at 2; AR, Tab 6, Map of Delineated Area; *see also* AR, Tab 7, SAM Advertisement. The tenant agency requested that the desired property be "serviced by public transit." AR, Tab 3.6, RLP, exh. F, DEA Facilities Design Guide at 12.

definition of the term bus rapid transit. AR, Tab 5.1, Questions & Answers 1; AR, Tab 5.2, Questions & Answers 2.

The agency received four timely proposals. Contracting Officer's Statement (COS) at 3. The protester's initial proposal did not include a unique entity identifier or a proof of an active SAM registration. *Id.* at 5. After commencing discussions with the offerors, GSA instructed Lenox Park to provide the missing information, *i.e.*, a unique entity identifier, and to register its company on sam.gov. *Id.*

The protester obtained a unique entity identifier and submitted it with its first revised proposal. *Id.* After three rounds of discussions with the agency, and despite having been instructed by the agency each time to submit proof of an active SAM registration, Lenox Park's revised final proposal failed to include one. *Id.* Instead, the protester indicated that its SAM registration was pending. *Id.*

After the receipt of final proposals, the agency calculated the present value of Lenox Park's proposed lease rate as $31.61 per ABOA SF, or slightly more than the present value of FDS Vegas's lease rate of $31.16 per ABOA SF. AR, Tab 12, Price Negotiation Memorandum at 7, 12. GSA then conducted a technical evaluation of FDS Vegas' proposal--the lowest-priced proposal received--and found it technically acceptable. *Id.* at 26-31; Memorandum of Law (MOL) at 4.[4]

Accordingly, award was made to FDS Vegas as the firm offering the lowest-priced, technically acceptable proposal. This protest followed.

DISCUSSION

The protester argues that the awardee should have been evaluated as technically unacceptable because its proposed property does not meet a material RLP requirement for proximity to the public transportation options required by the solicitation, including, as relevant here, a "bus rapid transit stop."[5] The agency counters that it reviewed the FDS Vegas proposal, and the building offered by the awardee fully satisfied the solicitation requirements in this regard.

[4] Having found FDS Vegas's proposal to be the lowest-priced, technically acceptable proposal, the agency states that it did not further evaluate Lenox's technical acceptability. MOL at 4. The record contains no indication that the agency evaluated the technical acceptability of any other offeror other than FDS Vegas, nor does the agency rebut the protester's contention that the agency did not evaluate the technical acceptability of any other offeror.

[5] The protester also initially alleged that the agency improperly awarded the lease to an entity that does not own or possess the property it proposed to lease but later withdrew this protest ground. Comments at 5 n.2.

In reviewing protests challenging the evaluation of proposals, we do not conduct a new evaluation or substitute our judgment for that of the agency but instead examine the record to determine whether the agency's judgment was reasonable and in accord with the evaluation criteria. *The Metropolitan Square Assocs., LLC*, *supra* at 6. Where a dispute exists as to the meaning of a particular solicitation provision, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, an interpretation must be consistent with such a reading. *Blue Origin, LLC*, B-408823, Dec. 12, 2013, 2013 CPD ¶ 289 at 11. Here, we find that FDS Vegas's proposal was noncompliant with a material solicitation requirement, and, on this basis, we sustain the protest.

Interested Party Status

The agency first requests that we dismiss the protest, arguing that Lenox Park is not an interested party to challenge the award to FDS Vegas. Specifically, the agency asserts that the protester did not have an active registration in the SAM database prior to the lease award date, and hence, its proposal is technically unacceptable, and therefore ineligible for award.[6]

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557, only an interested party may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). In a post-award context, we have generally found that a protester is an interested party to challenge an agency's evaluation of proposals only where there is a reasonable possibility that the protester would be next in line for award if its protest were sustained. *CACI, Inc.-Fed.*, B-419499, Mar. 16, 2021, 2021 CPD ¶ 125 at 5. In this regard, in cases where there are intervening offerors who would be in line for award even if the protester's challenge was sustained, the intervening offerors have a greater interest in the procurement than the protester, and we generally consider the protester's interest to be too remote to qualify as an interested party. *HCR Constr., Inc.; Southern Aire Contracting, Inc.*, B-418070.4, B-418070.5, May 8, 2020, 2020 CPD ¶ 166 at 6-7 n.6.

As stated above, the record here does not indicate that the agency has evaluated the technical acceptability of any offeror other than FDS Vegas. In this regard, we have long declined to dismiss a protest on the basis that a protester is not an interested party where the agency has not yet evaluated the intervening offerors' proposals or quotations for acceptability. *See, e.g., Sierra7, Inc.; V3Gate, LLC*, B-421109 *et al.*, Jan. 4, 2023, 2023 CPD ¶ 55 at 5; *see also AllWorld Language Consultants, Inc.*,

[6] While Lenox Park indicated during discussions with the agency that its SAM registration was pending, the contracting officer reports that even as of April 4, 2023 (which was after this protest was filed), the protester still did not have an active SAM registration. COS at 5; *see also* AR, Tab 10.4, Protester's April 4, 2023, SAM Registration Status at 1.

B-414244, B-414244.2, Apr. 3, 2017, 2017 CPD ¶ 111 at 3 n.2; *cf. LT4-5, LLC*, B-421243 *et al*., Jan. 12, 2023, 2023 CPD ¶ 23 (technically unacceptable protester is not an interested party to challenge the technical acceptability of the awardee's proposal where there were other intervening offerors in line for award).

Additionally, our Office has explained, specifically in a context of a lease award, that a technically unacceptable offeror was an interested party to raise issues that pertain to the acceptability of the awardee's proposal, where that proposal was the only proposal found technically acceptable. *Federal Builders, LLC--The James R. Belk Trust*, B-409952, B-409952.2, Sept. 26, 2014, 2014 CPD ¶ 285 at 3 n.1 (citing *Baltimore Gas & Elec. Co.*, B-406057 *et al.*, Feb. 1, 2012, 2012 CPD ¶ 34 at 15 n.15).

Here, even assuming the protester was ineligible for award because it lacked an active SAM registration at the time of lease award, the protester is an interested party nonetheless. In this regard, the record reflects that the agency has only evaluated FDS Vegas's proposal for technical acceptability. Accordingly, if the protest was sustained, and FDS Vegas found ineligible for award--leaving GSA without any technically acceptable proposals--the agency might be faced with resoliciting the requirement. *Hope Village, Inc.*, B-414342.2 *et al.*, Feb. 21, 2019, 2019 CPD ¶ 86 at 8 n.7. While there were other proposals received by the agency, we are unable to conclusively state whether any of them were technically acceptable, and hence, whether any other offeror would be in line for award if we sustained this protest.

We resolve any doubts about Lenox Park's interest here in favor of the protester. *See Wyle Labs., Inc.; Latecoere Int'l, Inc.*, B-239113, B-239113.2, Aug. 6, 1990, 90-2 CPD ¶ 107 at 6 n.4. Because the record does not establish that there is a technically acceptable, intervening offeror that would be next in line for award ahead of the protester, we find that the protester is an interested party to challenge the award in this procurement. *AllWorld Language Consultants, supra.*

Compliance with the RLP Requirement

Turning to the protest allegations, Lenox Park challenges the agency's determination that the awardee's property meets the RLP's material requirement for proximity to rapid transit. In this regard, the protester argues that the awardee's property is not located within the immediate vicinity of a subway, light rail, or bus rapid transit stop, as required by the solicitation. Protest at 2. While the awardee's property is located within the immediate vicinity of a Metro Atlanta Rapid Transit Authority (MARTA) bus stop, the protester contends that MARTA's bus lines are not bus rapid transit lines but rather traditional, standard bus lines.[7] *Id*. Relying on various definitions of bus rapid transit, including one established by GSA in its internal agency guidance documents, Lenox Park alleges that the defining characteristic of a bus rapid transit line is its ability to

[7] While at issue in this protest is the proximity of FDS Vegas's property to bus rapid transit, the awardee's property is not in proximity to any of the other means of rapid transit listed in the solicitation, *i.e.*, light rail or subway.

avoid traffic congestion through the use of dedicated lanes, and traffic signal priority, among other things. *Id.* at 2, 8-12. The protester contends that applying these definitions means that the MARTA bus stop servicing the awardee's property cannot be considered a bus rapid transit stop. *Id.* Lennox Park also notes that there is currently no bus rapid transit system in the Atlanta metropolitan area. *Id.* at 9 (citing the Federal Transit Authority's (FTA) and the National Bus Rapid Transit Institute's websites, and MARTA statements to that effect).

GSA acknowledges that, under the definition urged by the protester, there is no qualifying bus rapid transit in Atlanta but argues that this definition is too restrictive and that the awardee's building, directly adjacent to a MARTA bus stop (route 126), satisfied the transit accessibly requirement. MOL at 5-6. The agency contends that MARTA is a "holistic rapid transit system," providing "Atlanta's combined bus, rail and streetcar transit system," and as such, based on the fact that the MARTA route 126 bus connects to a rail line, the awardee's proposal satisfied the RLP requirement. *Id.* at 6, 12. According to GSA, the tenant agency only required reasonable access to public transit; the term bus rapid transit was not defined in the RLP; and the protester uses an overly restrictive definition of bus rapid transit. *Id.* at 6-7. Finally, the agency maintains that because bus rapid transit "is not capitalized in the RLP . . . [, n]othing on the face of the RLP suggests that 'Bus Rapid Transit' refers to a specific type of bus transit system." *Id.* at 10.

Where a dispute exists as to a solicitation's actual requirements, we will first examine the plain language of the solicitation. *Intelsat Gen. Corp.*, B-412097, B-412097.2, Dec. 23, 2015, 2016 CPD ¶ 30 at 8. Where a protester and agency disagree over the meaning of solicitation language, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all of its provisions; to be reasonable, and therefore valid, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. *Crew Training Int'l, Inc.*, B-414126, Feb. 7, 2017, 2017 CPD ¶ 53 at 4. Here, we agree with the protester that the only reasonable reading of the solicitation, in light of multiple authorities cited by the protester, as well as GSA's internal agency guidelines, is that the MARTA bus line servicing the awardee's property does not meet the solicitation requirement for bus rapid transit.

As noted above, the solicitation required proximity to a "subway, light rail, or bus rapid transit stop . . . [to] be located within the immediate vicinity" of the sought property. RLP at 3. Bus rapid transit was not defined in the RLP. The contracting officer states that because the solicitation did not define bus rapid transit, he "looked up the definition" for that term on the FTA website. COS at 3. The contracting officer explains that the FTA defines bus rapid transit as:

> a high-quality bus-based transit system that delivers fast and efficient service that *may* include dedicated lanes, busways, traffic signal priority, off-board fare collection, elevated platforms and enhanced stations.

Id. He continues that "[t]he fact that MARTA is a fast and efficient interconnected public transportation system providing high-quality bus and train services on the same fare card seemed to satisfy this requirement." *Id.*

Based on the record before us, we disagree that the MARTA bus stop servicing the awardee's property satisfied the solicitation requirement. In this regard, the MARTA bus stop at issue does not have the characteristics of a bus rapid transit stop, as defined by either the FTA, MARTA, or GSA itself, in its internal agency guidelines. Protest at 8-12; *see also id.,* exh. D, Lease Alert--GSA New Project Management and Acquisition Plan Template and Revised Request for Lease Proposal at 1.

With respect to the definition provided by the FTA, apparently used by the contracting officer during the evaluation of proposals, we agree with the protester that the agency captured only part of the high-level description of what constitutes bus rapid transit, provided on the FTA's website. Specifically, in a document entitled Characteristics of Bus Rapid Transit for Decision-Making, the FTA elaborates that a critical element of bus rapid transit systems is "how running ways are incorporated into a [bus rapid transit] system," and states that bus rapid transit requires either "segregation" or "marking" of the bus's running ways. Protest at 8-9 (citing FTA's Characteristics of Bus Rapid Transit for Decision-Making, available at https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/CBRT.pdf (last visited on Jun. 12, 2023.)).

Additionally, Lenox Park correctly points out that MARTA indicates on its website that there are currently no bus rapid transit lines operating in the Atlanta metro area, and that the anticipated first bus rapid transit lines, to start operating in 2025, will be "supported by 85 [percent] dedicated travel lanes and transit signal priority." Protest at 10 (citing MARTA's website discussing its projected Summerhill bus rapid transit line, available at https://www.itsmarta.com/summerhill.aspx#:~:text=MARTA's%20first%20Bus%20Rapid%20Transit,%2D%20to%2012%2Dminute%20frequency).

Finally, the protester notes--and we agree--that the agency itself established a definition of bus rapid transit in its internal agency guidance.[8] Specifically, in a GSA internal guidance document titled "Lease Alert," issued in December 2015, the agency provided

[8] Our Office has explained that protests that assert a violation of internal agency policy or guidance, rather than procurement statute or regulation, do not establish a valid basis for protest as they are, generally, not binding on the agency and do not create any rights for offerors. *See, e.g., Triad Logistics Servs. Corp.*, B-403726, Nov. 24, 2010, 2010 CPD ¶ 279 at 2-3; *see also* 31 U.S.C. §§ 3552, 3553(a) (providing that under the Competition in Contracting Act of 1984, our Office is authorized to resolve bid protests "concerning an alleged violation of a procurement statute or regulation."). Here, even if the lease alert at issue was not binding on the agency and did not create any rights for offerors, we find that the lease alert's definition nonetheless provides further support for the protester's reading of what is meant by bus rapid transit, as that term is used in the solicitation and GSA's lease templates.

a definition of bus rapid transit as part of a new project management and acquisition plan template and RLP language that incorporated economic catalyst policies, established by GSA Order ADM 1097.1. We note that the lease alert instructs that it "is mandatory and applies to all [GSA] real property leasing activities." *Id.* at 2.[9]

As relevant here, the lease alert provides that bus rapid transit systems:

> feature separated right-of-way or exclusive lanes, signal priority, off line fare collection, and express service between stops.

Id. The GSA definition also instructs that bus rapid transit "operates similar to a rail system but without the tracks." *Id.*

Here, the protester asserts that the MARTA route 126 bus line does not feature separated right-of-way or exclusive lanes, does not have running way segregation or traffic signal priority, nor does it offer express service between stops. Protest at 11. Responding to this protest ground, the agency does not rebut, or otherwise dispute, this claim.

In addition, the agency report fails to address Lenox Park's contentions that the agency selectively applied the definition of bus rapid transit provided by the FTA, or that the GSA lease alert definition was mandatory for the agency to use in this procurement. Instead, the agency devotes a large portion of its memorandum to explaining the background of the procurement and arguing that the tenant agency's needs, and the public marketing materials, reflect a less restrictive requirement. MOL at 7-10.

We reject these arguments. The solicitation here includes a specific term, provided at the direction of the lease alert discussed above and regularly used in all GSA leases, intended to require proximity to a particular type of transit service.

In fact, the agency's RLP template clearly differentiates between bus rapid transit and regular bus services. COS at 2 (providing examples of the possible transit options to choose from in an RLP template the contracting officer considered when developing the instant solicitation). The public transit options in the RLP template distinguish between commuter rails service, subway, light rail, bus rapid transit, bus, or streetcar service. *Id*.

In this context, we disagree with the agency's representation that "[n]othing on the face of the RLP suggests that 'Bus Rapid Transit' refers to a specific type of bus transit system."[10] MOL at 10. Accordingly, we cannot conclude on this record that the agency

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[9] Additionally, as the protester points out, the language of the rapid transit requirement in the instant RLP appears to "come[] directly from the [same] GSA Lease Alert that defines Bus Rapid Transit." Comments at 16.

[10] Furthermore, we are not persuaded by the agency's argument that it would be unreasonable to read the RLP in the manner advocated by the protester because bus

reasonably concluded that MARTA route 126 is a bus rapid transit line, or that this route's connection to a rail line otherwise satisfies the RLP's requirement. *Id.* at 6, 12. We find, therefore, that GSA improperly evaluated FDS Vegas's proposal with regard to the proximity of the proposed property to rapid transit.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was competitively prejudiced by the agency's actions; that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. *XPO Logistics Worldwide Gov't Servs., LLC*, B-412628.6, B-412628.7, Mar. 14, 2017, 2017 CPD ¶ 88 at 15. Here, Lenox Park states that it considered purchasing the property offered subsequently by the awardee but "had discounted it because of the lack of proximity to rapid transit required by the RLP." Protest at 7.

The agency disputes the protester's assertions of prejudice, arguing that Lenox Park failed to sufficiently allege prejudice in its initial protest, and that arguments raised later in the protest development process amounted to a piecemeal presentation of protest grounds. MOL at 12-18. GSA also questions the protester's allegation that it considered purchasing the property offered subsequently by the awardee as a "speculative assertion" that does not appear credible based on the timeline of the procurement. *Id.* at 18.

We have considered the agency's position and do not find the protester's additional support for its prejudice claims to be improper, where it is consistent with its initial claim of prejudice, discussed above. With respect to the credibility of the protester's assertion that it considered purchasing the awardee's property, our Office has explained that a reasonable possibility of prejudice is a sufficient basis for sustaining a protest. *See Supreme Foodservice GmbH*, B-405400.3 *et al.*, Oct. 11, 2012, 2012 CPD ¶ 292 at 14; *Kellogg, Brown & Root Servs., Inc.--Recon.*, B-309752.8, Dec. 20, 2007, 2008 CPD ¶ 84 at 5. While we cannot ascertain, with certainty, the merit of Lenox Park's specific assertions in this regard, we generally resolve doubts regarding prejudice in favor of a protester. *Supreme Foodservice GmbH, supra.* Accordingly, we conclude that Lenox Park has established the requisite competitive prejudice and sustain the protest.

RECOMMENDATION

The lease here has been awarded and signed by the agency and awardee, and the lease does not contain a termination for convenience clause. Supp. AR, Executed Lease at 6. In the absence of a termination for convenience of the government clause,

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rapid transit, as defined by the protester, does not exist in the Atlanta area. MOL at 6. We note that there are two other possible transit options that could satisfy the RLP's requirement for proximity to public transit, *i.e.*, subway or light rails. In fact, it appears that Lenox Park's proposed property is located on a MARTA Gold line stop, which is a subway stop. *See* Comments at 10.

we ordinarily do not recommend termination of an awarded lease, even if we sustain the protest and find the award improper. Here, we do not find any basis to recommend termination. *New Jersey & H Street, LLC*, B-311314.3, June 30, 2008, 2008 CPD ¶ 133 at 7; *Peter N.G. Schwartz Cos. Judiciary Square Ltd. P'ship*, B-239007.3, Oct. 31, 1990, 90-2 CPD ¶ 353 at 11. Consequently, we recommend that the protester be reimbursed its proposal preparation costs, as well as the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly with the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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