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

Decision

Matter of: Ralvin Pacific Development, Inc.

File: B-251283.3

Date: June 8, 1993

Richard L. Moorhouse, Esq., and Michael L. Martinez, Esq., Dunnells, Duvall & Porter, for the protester.
Barry D. Segal, Esq., Robert W. Schlattman, Esq., and Robin E. Goodno, Esq., General Services Administration, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where a solicitation for the lease of office space stated that the lease would be awarded to the most advantageous offeror, technical evaluation factors and price considered of equal importance, and where one offeror submitted the low price and was clearly more advantageous than the protester under two technical evaluation factors and, to a lesser degree, more advantageous than the protester under a third technical evaluation factor, the agency reasonably awarded the lease to that offeror.

DECISION

Ralvin Pacific Development, Inc. protests the award of a lease to M.V. Associates under solicitation for offers (SFO) No. MCA91495, issued by the General Services Administration for outpatient clinic and regional office space for the Department of Veterans Affairs (VA) in San Diego, California. Ralvin challenges the agency's evaluation of offers.

We deny the protest.

The agency issued the amended SFO for a minimum of 74,926 to a maximum of 78,672 net usable square feet of space, on a floorplate of 21,000 square feet:

> "in an office, research, technology, or business park . . . modern in design with a campus-like atmosphere, or on an attractively landscaped site containing one or more modern office buildings

> that are professional and prestigious in appearance with surrounding development well-maintained and in consonance with a professional image."

Among other things, the SFO stated that adequate eating facilities were to be located within four blocks of an offeror's site and "other employee services [characterized as location amenities] such as retail shops, cleaners, banks, etc., should be located within one-half mile of the facility." The SFO also stated that "public transportation and/or employee parking [characterized as a unique requirement] within three (3) blocks sufficient to cover commuting and visitor needs [was] required."

The amended SFO provided for the award of a 20-year lease, with the government having termination rights after 10 years, to the responsible offeror whose offer, conforming to the solicitation, was most advantageous to the government, price and other factors considered. The SFO listed in descending order of importance the following technical evaluation factors: (1) handicapped accessibility (when no offer fully or substantially meets the SFO requirements); (2) early delivery of space for government occupancy; (3) availability of space for future expansion needs; and (4) use of renewable energy in the offered space. The SFO stated that price was to be considered of equal importance to the combination of technical evaluation factors.

Several offers were submitted by the initial closing date of June 14, 1991. Relevant to this protest, the protester and M.V. Associates each offered three-story, build-to-suit facility sites within the geographic boundaries outlined in the SFO. The protester's site was located adjacent to the 20-year-old building owned by an affiliate of the protester and currently occupied by the VA.[1] M.V. Associates's site was located adjacent to a fully landscaped corporate office park, which included three modern office buildings occupied, for example, by Pacific Bell, the Eastridge Group, and the Department of Housing and Urban Development. M.V. Associates's site would be integrated into this corporate center. Each of these sites had access to the surrounding

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[1]The protester's affiliate initially submitted an offer to retrofit its building, but this offer was rejected by the agency in 1991, because, for example, the building did not meet the SFO's floorplate requirement and the building contained asbestos. Because the record is clear that the focus of this protest was the agency's evaluation of the protester's build-to-suit facility site, not the agency's rejection of its affiliate's existing building, our Office has not captioned this decision to include the protester's affiliate.

highway systems, bus lines, and future light rail trolley stops. Each site had access to eating facilities. The protester's site was near a local shopping mall and some banks. M.V. Associates's site was near a dry cleaner and a daycare center. Following discussions, both the protester and M.V. Associates submitted best and final offers in November 1991 and March 1992.

The agency considered both the protester and M.V. Associates equal with respect to handicapped accessibility, but considered M.V. Associates more advantageous than the protester with respect to early delivery of space, expansion space, and the use of renewable energy sources. M.V. Associates's price was lower than the protester's price. On October 31, 1992, the agency awarded a lease to M.V. Associates, deemed the most advantageous offeror, technical evaluation factors and price considered. The protester subsequently filed this protest challenging the evaluation of its offer and that of the awardee under each technical evaluation factor. The protester maintains that although it offered a higher-priced building and facility site, it, not the awardee, submitted the most advantageous offer based on the technical evaluation factors.[2]

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[2]On March 24, 1993, while the protest docketed as B-251283.2 was pending in our Office, the protester filed suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief. Ralvin Pacific Properties, Inc.; Ralvin Pacific Development, Inc. v. United States of America, et al., Civil Action No. 93-0610. On March 25, our Office dismissed protest B-251283.2 because the matter involved was currently pending before a court. Bid Protest Regulations, 4 C.F.R. § 21.9(a) (1993). By Order dated April 23, the court requested that our Office issue a decision on the protested matter and provide the parties with an opportunity for a hearing. A hearing was held at our Office on May 19, and, in accordance with our procedures, recorded on videotape. The parties filed post-hearing comments on May 24.

Attorneys initially employed by the protester (with the law firm of Dunnells, Duvall & Porter) were not admitted to the protective order issued by our Office on November 16, 1992, and December 8, 1992, for protest B-251283.2 because there was evidence in the record that these attorneys were involved in competitive decisionmaking, specifically, on-going lease negotiations with the agency on behalf of the protester's affiliate. Both the agency and the awardee raised objections to admitting these attorneys to the protective order. For this reason, while still being retained as counsel for the protester, these attorneys

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The evaluation of proposals is primarily within the discretion of the procuring agency, not our Office; the agency is responsible for defining its needs and the best method of accommodating them, and must bear the burden resulting from a defective evaluation. Consequently, we will not make an independent determination of the merits of offers; rather, we will examine the agency evaluation to ensure that it was reasonable and consistent with the stated evaluation factors. The Montgomery Cos., B-242858, June 10, 1991, 91-1 CPD ¶ 554. Here, we conclude that the agency reasonably evaluated offers and reasonably selected M.V. Associates as the most advantageous offeror.

First, concerning handicapped accessibility, the record shows that the agency considered the protester and the awardee equal for this evaluation factor because each firm's build-to-suit facility fully or substantially satisfied the SFO's requirements for handicapped accessibility. These requirements, described in detail in 17 sections in the SFO and applicable to the building itself, covered parking and loading zones, routes, entrance and egress, ramps, stairs, handrails, doors, elevators, telephones, controls, signage, alarms, drinking fountains, storage facilities, assembly

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withdrew their applications for admission to the protective order. The protester employed another law firm and two attorneys from this law firm were admitted to the protective order with access to all documents released as part of the agency's administrative report. The protester's original attorneys were admitted to a protective order issued by the court on April 22, 1993, and, without objection, participated fully in the subsequent proceedings at our Office.

To the extent the protester complains that our Office denied its request for documents relating to the on-going lease negotiations between the agency and the protester's affiliate, we concluded that those documents were not relevant to the resolution of the protest issues involving the agency's evaluation and award decisions under this SFO for a different building, and the protester otherwise failed to demonstrate their relevancy.

Finally, we note that the SFO contained no termination for convenience clause. See RKR, Inc., B-247619.2, Oct. 28, 1992, 92-2 CPD ¶ 289. On November 25, 1992, we received the agency's written determination and findings, dated November 20, stating that pursuant to the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d)(2) (1988), the agency authorized the awardee to continue contract performance as being in the best interest of the government.

areas, seating and work surfaces, and restrooms. The SFO language specifically stated that handicapped accessibility would be evaluated "when no offer fully or substantially me[t] the SFO requirements." We think, and the protester does not argue otherwise, that since the protester's and the awardee's build-to-suit facility sites fully or substantially satisfied the SFO requirements for handicapped accessibility, a comparative evaluation of these offers under this evaluation factor was not necessary.

In its comments to the agency's administrative report and at the hearing, Video Transcript (VT) 10:38, the protester argues that it should have been considered more advantageous than the awardee for the handicapped accessibility evaluation factor because its facility site has access to more bus routes and bus stops than does the awardee's facility site. The protester asserts that in evaluating handicapped accessibility, the agency should have considered accessibility for handicapped individuals from public transportation points to each offeror's facility site, not just handicapped accessibility at the building itself, in light of the SFO requirement that "public transportation and/or employee parking within three (3) blocks sufficient to cover commuting and visitor needs" be available.

The requirements for handicapped accessibility were described in detail in the SFO; accessibility to public transportation was not included. Since the evaluation factor itself references the "SFO requirements" and since these requirements were set forth in detail in the SFO, we find no basis for the protester's assertion that the agency "should have considered" something that was not included among the SFO requirements for handicapped accessibility.

Moreover, the public transportation/employee parking requirement was not an evaluation factor; it was one of several SFO requirements that offerors had to meet. While the protester's facility site does have access to more bus routes and bus stops than does the awardee's facility site, the awardee, as evidenced by its offer and a provision in the executed lease, agreed to provide and to maintain at the site during the lease term a suitable vehicle for use at the site and between public transportation points for individuals requiring such transportation services and also to provide sufficient on-site parking. We believe the agency thus could reasonably conclude that the protester and the awardee each satisfied the public transportation/ employee parking requirement in the SFO; a comparative evaluation between the two offerors on this aspect of their offers simply was not included in the evaluation scheme established in the SFO.

Second, concerning the early delivery of space for government occupancy, the agency considered the awardee more advantageous than the protester for this evaluation factor because of a perceived 20-day delivery advantage for the awardee and because the awardee will use overtime, at its own expense, to complete the facility. The record shows that the agency believed that this use of overtime would provide a strong incentive to the awardee to complete the job on time and made the awardee's offer more attractive. While it is not clear from the record why the agency believed the awardee provided a 20-day delivery advantage, we think the agency could reasonably view the awardee's offer as more advantageous than the protester's offer in light of the awardee's proposed use of overtime, and could evaluate the offers accordingly. In any event, as discussed below, even if there were no basis to differentiate between the two offers under this factor, in light of the evaluation under the other factors, including cost, the propriety of the current decision would not be affected.

Third, concerning the availability of space for future expansion needs, the protester offered expansion space in its affiliate's building, located adjacent to its facility site and currently occupied by the VA. The record shows that the agency rejected this space because, among other things, the building did not satisfy the SFO's 21,000 square foot floorplate requirement and an extensive asbestos abatement program would have to be implemented before the building could be used. The protester argues that since the SFO did not specify whether the floorplate requirement would be applied to an offeror's proposed expansion space, the agency improperly rejected its expansion space on this basis.

We need not address the propriety of the agency's application of the SFO's floorplate requirement to the protester's expansion space because, ignoring this basis for rejection, we conclude, and the protester does not argue otherwise, that the agency reasonably rejected this expansion space because of the presence of asbestos. Thus, we have no basis to disagree with the agency's conclusion that the awardee, which offered expansion space at its facility site and in office buildings at the corporate center, was more advantageous than the protester under this evaluation factor.[3]

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[3]Although not previously raised in its protest, the protester suggests in its post-hearing comments and in the court suit that the awardee's build-to-suit facility will not satisfy the future additional space requirements of the VA. The record, however, contains an interoffice memorandum

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Fourth, as for the use of renewable energy in the offered space, the protester offered a cement plaster exterior with high performance tinted glass window walls. In contrast, the awardee offered architectural concrete with reflective, energy efficient glass, a solar powered water preheat system, and fan powered mixing boxes and outside air economizers in the heating, ventilation, and air conditioning system. Since the awardee obviously will use more renewable energy sources in its facility, as compared to what was offered for the protester's facility, we conclude that the agency reasonably considered the awardee more advantageous than the protester under this evaluation factor.

Finally, the SFO contained a location amenities requirement which stated that "other employee services such as retail shops, cleaners, banks, etc., should be located within one-half mile of the facility." The protester contends that in evaluating offers, the agency failed to give appropriate weight to this requirement because, unlike the protester's facility site, the awardee's facility site was not located within one-half mile of retail shops and banks.

The location amenities requirement, like the public transportation/employee parking requirement, was not an evaluation factor under which a comparative assessment of competing offers was to be made; it was simply a requirement that had to be met. We believe the agency reasonably concluded that both the protester and the awardee satisfied the location amenities requirement. The record shows that there currently are more location amenities, for example, a shopping mall and banks, in the vicinity of the protester's facility site than at the awardee's facility site. However, the record also shows that while the awardee's facility site may not currently be located within one-half mile of retail shops and banks, its site is located near a dry cleaner, is adjacent to a daycare center, and will be integrated into a phased development project which, concurrent with the term of the awarded lease, will be developed to include more commercial buildings, retail amenities, multi-family residential units, a hotel, and landscaped and open space. While the SFO listed retail shops, cleaners, and banks as location amenities, it is clear, based on the SFO's use of the phrases "such as" and "etc.," that the listed location amenities were simply examples of employee services which the agency would find acceptable, but did not reflect an

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from the director of the VA's real property program management division, dated September 29, 1992, which shows that the VA concurred with the agency's decision to proceed with this award.

all-inclusive, mandatory list of employee services which would have to be available at an offeror's facility site in order for the offeror to be deemed to have satisfied the SFO requirement. In our view, the agency could reasonably determine that the awardee satisfied the location amenities requirement in light of its facility site's proximity to a dry cleaning establishment and a daycare center and the future planned development that, during the lease term, will provide additional amenities.

The SFO provided that the lease would be awarded to the most advantageous offeror, technical evaluation factors and price considered of equal importance. Based on our review of the entire record, including photographic evidence submitted by all parties, oral arguments and hearing exhibits, and post-hearing comments, we conclude that the agency reasonably determined that the protester and the awardee were equal with respect to handicapped accessibility, that the awardee was clearly more advantageous than the protester with respect to expansion space and the use of renewable energy sources, and that, to a lesser degree, the awardee was more advantageous than the protester with respect to early delivery of space. Thus, we believe that the agency reasonably awarded the lease to M.V. Associates as the most advantageous and low-priced offeror. As the agency asserts in its submissions, even if the protester and M.V. Associates were deemed technically equal in satisfying the SFO's technical evaluation factors, price properly would be the determining factor in the selection of the awardee, and an award to M.V. Associates would still be appropriate since it submitted the low price. Conax Florida Corp., B-241743, Feb. 26, 1991, 91-1 CPD ¶ 214.[1]

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[1]The SFO also stated that a lease would not be awarded to a firm whose property was located within a base flood plain or wetland unless the government determined it to be the only "practicable alternative." In addition to being the most advantageous, low-priced offeror, the awardee offered a facility site which was located outside of a base flood plain. With respect to the protester, the agency found that the firm failed to demonstrate, through the submission of acceptable documentation, that its facility site was located outside of a base flood plain. Although the protester argues that the agency did not conduct meaningful discussions concerning the flood plain matter, even if this were true, the protester was not prejudiced because it otherwise was not the most advantageous, low-priced offeror. Even assuming that the protester had demonstrated that its facility site was not located within a base flood plain, the agency's award decision would not have changed. VT 11:21-11:22.

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Accordingly, the protest is denied.

for James F. Hinchman
General Counsel

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The protester also argues that it was improperly kept in the competition in view of the agency's position that it did not demonstrate that its facility site was located outside of a base flood plain. While the protester believes that this action evidenced bias on the part of the agency, we find no evidence in the record that the agency was biased against the protester. Rather, the record shows that the protester was kept in the competition because there was the possibility that the Federal Emergency Management Agency, which issues flood plain classifications, could have reclassified, prior to award, the protester's facility site as being outside of the base flood plain; the protester itself could have submitted acceptable documentation showing that its facility site was not located in a base flood plain; or there could have been no practicable alternative but to award to the protester, whose facility site was located in a base flood plain, if no other offerors, including the awardee, were found acceptable. VT 11:14-11:15.

Finally, to the extent the protester argued at the hearing and in its post-hearing comments that the delineated geographic area, as reflected in the SFO, unduly restricted competition because the majority of the land in the geographic area was in a base flood plain, VT 10:27-10:29, 11:06-11:07, we note that the protester did not raise this or any other flood plain related issue in the court suit and, as the issue involves an alleged solicitation impropriety, it is untimely under our regulations, 4 C.F.R. § 21.2(a)(1), because it was not raised until after award. We therefore see no need to consider the issue.