Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Charles E. Smith Companies

File: B-277391

Date: September 25, 1997

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DIGEST

In a procurement for leased office space where the solicitation contemplated a two-phase proposal submission and evaluation process, an offeror may not wait to protest the terms of the solicitation until it learns that its phase I proposal was acceptable and that it was selected to submit a phase II technical and design proposal where the alleged improprieties in the terms of the solicitation were apparent prior to the closing time for receipt of phase I proposals.

DECISION

The Charles E. Smith Companies[1] protests the terms of solicitation for offers (SFO) No. 96.004, issued by the General Services Administration (GSA) for the long-term, consolidated headquarters space requirements for the Patent and Trademark Office (PTO). The protester, the incumbent lessor which is offering the site of its existing buildings, basically contends that the technical specifications and other terms of the SFO are defective as they unduly favor newly constructed buildings.

We dismiss the protest.

[1]Plaza Associates Limited Partnership, First Crystal Park Associates Limited Partnership, Second Crystal Park Associates Limited Partnership, Third Crystal Park Associates Limited Partnership, and Alder Branch Realty Limited Partnership are collectively known as The Charles E. Smith Companies.

The SFO was issued on June 26, 1996, and contemplated a two-phase proposal submission and evaluation process. Under the terms of the SFO, phase I proposals, which were evaluated for quality of site, quality of design team, and quality of developer, were submitted by the amended closing date of December 23, 1996. Based on the phase I proposals, GSA selected the protester, the incumbent lessor which proposed the site of its existing buildings, and three other firms, which proposed sites where new buildings would be constructed, to continue to participate in the procurement by submitting phase II proposals by the amended closing date of October 27, 1997.[2] Phase II proposals will be evaluated for quality of site, quality of facility design, quality of interior architect, quality of operations and maintenance firm, and price. The SFO stated that the award would be made to the firm whose proposal provides the greatest value to the government, with price being considered significantly less important than the combined weight of the technical evaluation factors. By letter dated March 11, 1997, the contracting officer advised the protester that it had been selected to proceed to phase II of the PTO space consolidation project. This protest, challenging the technical specifications and other terms of the SFO, was filed on June 30, 1997.

Technical specifications

Section G of the original SFO, captioned "Lessor's Base Building Requirements," contained 43 pages of detailed building specifications. In its protest, the protester challenged as unduly restrictive of competition several of these specifications, including the following: structural live load requirements (¶ G.7.6); toilet rooms (¶ G.8.6); passenger elevator performance criteria (¶ G.8.12); service elevators (¶ G.8.13); environmental requirements (¶ G.10.2); primary electrical service (¶ G.11.1); electrical distribution (¶ G.11.2); communication rooms (¶ G.12.4); and floor-to-ceiling heights in the central computer facility (¶ G.15.2). The protester contends that the substantive requirements of these specifications exceed the government's minimum needs, effectively limiting the competition to new buildings, and therefore should be relaxed. For example, the structural live load requirements of the SFO call for a capacity of 150 pounds per square foot in 20 percent of the space. The protester objected, requesting that the requirement be relaxed to 150 pounds per square foot "as needed." As another example, the SFO required single use service elevators with an amended minimum loading capacity of 4,000 (originally 6,000) pounds. The protester objected, requesting that the requirement further be relaxed to permit dual use service elevators with a minimum loading capacity of 3,000 pounds.

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[2]GSA extended the phase II closing date by 2 months in response to the protester's request during the pendency of this protest.

In its administrative report filed in response to the protest, GSA argues that the protester's objections to the technical specifications should be dismissed as untimely since those matters were not raised prior to the closing time for the submission of phase I proposals. In response, the protester maintains that its protest of the technical specifications is timely because it was filed prior to the closing time for the submission of phase II technical and design proposals. The protester maintains that a protest of the specifications filed prior to the phase I closing time would have been premature since at that point, the protester did not know, based on its phase I proposal, whether it would be selected to proceed to phase II of the procurement and the SFO did not require that the section G specifications be addressed in an offeror's phase I proposal for evaluation.

Protests based upon alleged improprieties in a solicitation which are apparent prior to the closing time for receipt of initial proposals must be filed prior to that closing time. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1997). Here, we conclude that the protester could not wait to protest the technical specifications, as well as other terms of the SFO, until it learned that its phase I proposal was acceptable and that it had been selected to submit a phase II technical and design proposal where the alleged improprieties in the specifications and other terms of the SFO were apparent prior to the closing time for receipt of phase I proposals. See, e.g., University of New Orleans, B-184194, Jan. 14, 1976, 76-1 CPD ¶ 22 at 4-5, 7-8 (the protester's failure to timely protest allegedly defective solicitation terms prior to the closing time for receipt of phase I proposals is analogous to an untimely protest of alleged solicitation improprieties after an offeror's proposal is included in the competitive range (in the cited case, after the firm's protest is sustained and corrective action is recommended), that is, an offeror is not timely to protest terms which appeared in the solicitation at the initial closing time after it learns its proposal is included in the competitive range). Therefore, the protester's objections, raised 6 months after the closing time for receipt of phase I proposals on December 23, 1996, are clearly untimely.

More specifically, while the agency contemplated a two-phase proposal submission and evaluation process, the agency issued the entire SFO, that is, all requirements for both phase I and phase II submissions and evaluations, as a single package on June 26, 1996. Although phase I was essentially a qualifying round where offerors which did not have a reasonable chance for award were eliminated from further participation and therefore not required to expend additional time and costs in preparing and submitting phase II technical and design proposals, it is clear from a review of the SFO that in order to submit an acceptable phase I proposal to qualify to advance to phase II, an offeror had to select and propose a qualified design team (lead designer and architect/engineer firm) and developer in light of the technical specifications and other requirements contained in the SFO.

The protester recognized that an understanding of the technical specifications was necessary for the preparation of its phase I proposal. The record shows that in response to the contracting officer's request that potential offerors submit questions, comments, and concerns regarding the SFO prior to the closing time for the submission of phase I proposals, the protester, on August 13, 1996, met with officials from GSA and PTO and submitted to these officials an 18-page document, captioned "Items for Clarification--PTO Space Consolidation Project." Numerous questions from the protester involved section G specifications. In addition, by letter dated August 26, 1996, the protester submitted a supplemental 6-page document to the contracting officer in which it outlined, among other things, section G requirements which in its view were "impossible or impractical to comply with for existing buildings."[3] On September 16, 1996, the agency issued amendment No. 1 to the SFO which made various changes to the terms of the SFO, including section G specifications, and provided answers to the concerns raised by the potential offerors. By letter dated September 20, 1996, the protester thanked the contracting officer for "responding to our items for clarification and issuing Amendment Number One. This will now enable us to focus on preparation of our response to Phase I." The protester continued by requesting a 3-month extension of the closing date for the submission of phase I proposals to "enable us to properly prepare our response armed with the new information that has just been provided [in amendment No. 1 to the SFO]." The contracting officer extended the closing date for all offerors by 6 weeks.

As evidenced by this chronology, several months prior to the closing time for the submission of phase I proposals, the protester was aware of what it considered unduly restrictive specifications as described in the SFO and acknowledged the relevance of section G specifications in preparing its phase I proposal. The protester was obligated to raise its objections to the technical specifications prior to the closing time for receipt of phase I proposals since to do otherwise would unduly delay the procurement process and GSA's resolution of the protester's concerns. See Air Inc.--Request for Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129 at 2. Having failed to file a timely protest, the protester must compete according to the original terms of the SFO unless GSA otherwise amends these terms.[4]

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[3]Contrary to GSA's position, we do not believe that the protester's requests in August 1996 for clarification of the specifications, at GSA's invitation, constituted agency-level protests.

[4]The record shows that in response to the protester's concerns, even those expressed as late during the course of this protest, GSA has relaxed a number of technical specifications (e.g., service elevator lobbies (¶ G.8.4); electrical room size and wiring runs (¶ G.11.4); and ceiling heights in receiving areas (¶ G.15.11)) to accommodate the protester where to do so would not, in GSA's view, compromise the minimum needs of PTO.

Fit-out allowance

In accordance with the Public Buildings Act of 1959, 40 U.S.C. § 606 (1994), on July 18, 1995, GSA submitted to the two appropriate congressional committees a lease prospectus requesting appropriations approvals for the PTO space consolidation project. The prospectus included information such as the justification for the consolidation project, the maximum annual cost limitation, the rental range per square foot, the maximum length of the lease, and the range of rentable square feet to be leased. The prospectus providing for the lease of space for PTO was approved by each committee in the fall of 1995.

Paragraph A.7.2 of the original SFO contained the following provision:

> In order to minimize such risks, the Government will not request a "turn-key" lease with standard build-out and unit prices. Instead, the Government will require that the Offeror provide at its cost a level of build-out approximating a building shell with core areas and base systems in place, with specialized systems for certain special purpose spaces in place, but with the bulk of the tenant spaces resembling a "cold dark shell" (hereinafter called the "Base Building," and described in more detail in Section G), together with a tenant improvement allowance (the "Fit-Out Allowance") of $88,000,000 to provide tenant improvements, interior finish and fit-out (the "Fit-Out," as described in more detail in Section G). The Offeror's construction of the Base Building and the Fit-Out shall proceed in accordance with the provisions set forth in Sections D and G.

Paragraph A.11 of the original SFO provided that as part of the rental consideration, offerors were responsible for all lease requirements, including the $88 million fit-out allowance. Paragraph G.1.2 of the original SFO provided that this fit-out allowance was to be amortized over the term of the lease as part of the base rent.

Paragraph A.19.1 of the original SFO contained the following provision:

> Prospectus No. PVA-96WO7, dated July 18, 1995, together with the Congressional authorizations made in connection therewith, contains certain limitations. The Offeror acknowledges that the Government is in no way obligated to make an award to any Offeror whose offer terms and provisions, including without limitation, the annual rent (as adjusted), exceed the scope of said prospectus.

In its protest, the protester complains that the SFO's $88 million fit-out allowance, standing alone and excluding the first year's rent, exceeds the maximum annual cost limitation for the PTO consolidation project as imposed by the congressionally approved prospectus. In this regard, the protester argues that the $88 million is

incurred and is payable in the first year of the lease, regardless of the fact that the SFO requires the fit-out amount to be amortized over the term of the lease as part of the base rent. The protester also complains that the prospectus itself is deficient because GSA did not separately obtain prospectus approval for the $88 million fit-out allowance. We conclude that these complaints, just as those challenging the technical specifications, constitute alleged solicitation improprieties which were not timely raised prior to the phase I closing time. 4 C.F.R. § 21.2(a)(1).

In essence, 1 year after GSA issued the SFO and began the formal proposal submission and evaluation process, the protester decided to challenge GSA's underlying statutory authority and methodology for conducting this procurement as described in the SFO. As evident from the provisions quoted above, it was apparent from the face of the SFO that GSA expected the $88 million fit-out allowance to be a cost amortized over the term of the lease as part of the base rent, rather than a cost incurred and payable in whole in the first year of the lease. In addition, the SFO specifically referenced the publicly available prospectus and related congressional authorizations for the PTO consolidation project. If the protester had concerns with GSA's underlying statutory authority and methodology for conducting this procurement, the time to raise these matters was not later than the closing time for receipt of phase I proposals. See, e.g., Federal Data Corp., B-211357, Sept. 7, 1983, 83-2 CPD ¶ 309 at 1-3 (protest of an apparent solicitation impropriety--the failure of the agency's solicitation to effectuate the terms in the delegation of procurement authority which was publicly accessible--was untimely when filed after the closing time for receipt of initial proposals). This protest, filed 6 months after the phase I closing time (and 1 year after GSA began the formal proposal submission and evaluation process under which the protester has been, and continues to be, an active participant) is clearly untimely.

Price evaluation

Paragraph A.18 of the original SFO explained how an offeror's price would be evaluated in terms of present value. The SFO did not contain a provision for the consideration of the value of any existing fit-out. The protester complains that GSA must consider the cost savings associated with its existing fit-out.

Again, we conclude that the protester has failed to timely protest this alleged solicitation impropriety apparent from the face of the SFO prior to the closing time for receipt of phase I proposals. 4 C.F.R. § 21.2(a)(1). We also point out that the SFO does not provide for the consideration of cost savings associated with any existing fit-out or cost savings which offerors of new buildings might propose.

Compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et seq.

Paragraph C.4.1 of the SFO as originally issued contained the following provision:

> If a site has environmental conditions that cannot be mitigated to an acceptable level to execute the project based upon a joint determination by PTO and GSA, as such conditions are reflected in the Environmental Impact Statement record of decision (based on [NEPA] implementation policy and requirements), then the Offer will no longer be considered viable.

For the first time in its protest, the protester objected to this provision,[5] contending that offerors could not submit, and GSA could not evaluate, phase II proposals because required environmental mitigation measures and related costs would not be known until the environmental impact process was completed (completion expected in the spring of 1998).

In its report, GSA agreed that it would not be possible for offerors or the agency to appreciate the costs associated with environmental mitigation measures at the time of submission in October 1997 of phase II proposals because the draft environmental impact statement would not be available until the winter of 1998. In addition, GSA recognized that it could not reject a phase II proposal pursuant to the provision at ¶ C.4.1 until the environmental impact process was completed and only then could it reject a proposal based on this provision if an offeror failed to demonstrate that its proposed site would comply with the applicable environmental findings. In other words, GSA expected an offeror to submit its phase II proposal with the understanding that pursuant to, and consistent with, the terms of the SFO, when environmental mitigation measures were identified for the offeror's site, the offeror would be obligated to demonstrate it would comply with these measures and incur related costs in order for its proposal, at that time, to continue to be considered viable in accordance with the referenced provision.[6]

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[5]This objection, just like the protester's other challenges to the technical specifications and other terms of the SFO, was not timely raised prior to the phase I closing time. 4 C.F.R. § 21.2(a)(1).

[6]We note that as part of an offeror's phase I proposal, the SFO required an offeror to provide a legal opinion describing in detail its site's compliance with all current zoning and other land use restrictions. The legal opinion was required to confirm that the master planning and zoning for the site was completed in a manner sufficient to meet all SFO requirements. The SFO further required an offeror to certify that all necessary site infrastructure, public services, utilities, and roadways

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Nevertheless, to allay the protester's concern with the provision at ¶ C.4.1, GSA announced in its report that it would relax this requirement by issuing an amendment (which GSA did) removing the referenced provision from the SFO. GSA still required offerors to comply with "[a]pplicable [l]aw[s] dealing with safety and environmental matters" in accordance with the provision at ¶ F.1 of the SFO. GSA explained in its report, and as reflected in the amendment, that it would not reject any phase II proposal submitted in October 1997 based on an offeror's plan to comply with NEPA since the draft environmental impact statement would not be available at the time these proposals were submitted and evaluated. In other words, as stated in the amendment, "all [o]fferors [would] be treated equally." The amendment stated that an offeror's ability and willingness to resolve identified environmental impacts and to implement identified mitigation measures would be evaluated under the quality of site technical evaluation factor. According to the amendment, once the draft statement is issued, such environmental impacts, mitigation measures, and related costs will be the subject of discussions with the offerors and these matters will be required to be addressed in an offeror's best and final offer. In addition, GSA stated that no award will be made before the final environmental impact statement is completed.

In its comments on the agency report, the protester now objects to GSA's relaxation of the provision at ¶ C.4.1, complaining that offerors must still comply with NEPA, an "applicable law," and complaining that GSA cannot make an award based on a draft environmental impact statement. In light of GSA's amendment of the SFO and the information provided in its report, we believe the protester's current complaints are academic.

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[6](...continued)
were available to and at the site, with limited improvements necessary to satisfy the SFO requirements. The SFO required an offeror to provide a detailed description of existing site conditions, including a description of any existing structures or improvements, vegetation, ponds, streams, unusual features, wetlands, or particular wildlife habitat. The SFO required an offeror to identify wetlands, floodplains, and coastal zones on, adjacent to, or in the immediate vicinity of the site. In addition, the SFO required the offeror to provide an independent phase I environmental assessment for the entire site indicating whether there is any actual contamination or a material potential for environmental contamination at the site; the offeror also was required to complete an environmental questionnaire. GSA states that environmental mitigation measures identified as part of the NEPA process likely will include a discussion of issues previously identified by an offeror during the phase I process. Thus, in submitting a phase II proposal, an offeror should have more than a vague notion, based on the zoning, infrastructure, environmental, and other site information identified during phase I, of what the environmental mitigation measures and related costs for its site may be.

The record shows that while the SFO requires offerors to comply with applicable laws, which would include NEPA, under the original and amended terms of the SFO, an offeror's phase II proposal cannot be rejected on the basis of the offeror's plan to comply with NEPA requirements until such time as those requirements are identified and the offeror then fails to demonstrate that it will comply with these requirements. Further, GSA specifically stated that no award will be made before the final environmental impact statement is completed.[7]

Conclusion

For the reasons discussed above, we conclude that the protester has failed to timely pursue its bases of protest involving objections to the technical specifications and other terms of the SFO prior to the closing time for receipt of phase I proposals. Accordingly, the protest is dismissed.

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[7]We also point out that as the incumbent lessor proposing a previously developed site, the protester was required to incur costs to address zoning, infrastructure, and environmental matters in the original development of its site. It is likely the protester will not have to incur these same costs in this procurement. In contrast, offerors of the currently undeveloped sites will have to fully account for, and include in their proposals, the costs associated with zoning, infrastructure, and environmental issues as part of the proposed development of their sites for this procurement. We think in this respect that the protester arguably has a natural competitive advantage and as a result cannot reasonably be heard to complain about the requirement to comply with applicable zoning, infrastructure, and environmental laws.