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## Decision

**Matter of:** Federal Builders, LLC-The James R. Belk Trust

**File:** B-409952; B-409952.2

**Date:** September 26, 2014

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### DIGEST

Protest that agency unreasonably evaluated awardee's proposal as responsive to the terms of the solicitation is sustained, where the record shows that when the agency inquired about whether the awardee's price included a commitment to pay solicitation-required wage rates for reconstruction of the existing building it offered, the awardee's response did not expressly commit to pay those rates, and, in fact, expressly committed only to pay those rates for a subset of the work anticipated.

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### DECISION

Federal Builders, LLC-The James R. Belk Trust (Federal Builders), of Castle Rock, Colorado, protests the award of a lease to Presidio Bay Capital, LLC (Presidio Bay), of San Francisco, California, under request for lease proposals (RLP) No. 3AZ0168, issued by the General Services Administration (GSA) on behalf of the Department of Interior, Bureau of Land Management (BLM), for leased office and warehouse space. Federal Builders asserts that Presidio Bay's proposal was unacceptable for failure to meet a material solicitation requirement.

We sustain the protest.

### BACKGROUND

The RLP sought proposals for the lease of between 12,500 and 12,580 American National Standards Institute/Building Owners and Managers Association (ANSI/BOMA) Office Area (ABOA) square feet (SF) of contiguous space--a minimum of 9,100 ABOA SF of office and 3,400 ABOA SF of warehouse--and

40,000 SF of attached wareyard space, as well as parking, in Lake Havasu City, Arizona. RLP § 1.02. Federal Builders is the incumbent lessor under a lease which expired on August 19, 2014. Agency Report (AR), Tab 3, BLM Supplemental Lease Agreement. The RLP specified a term of up to 20 years. RLP § 1.02. Award was to be made to the responsible offeror with the lowest-priced, technically acceptable offer. RLP § 4.03.

The solicitation informed offerors that the agency would evaluate offered prices based on the annual price per ABOA SF, including all required option periods, with the government performing a present value calculation (PVC) to arrive at a “composite annual price.” RLP § 4.05. The gross PVC was to be increased by the “cost of Government-provided services not included in the rental escalated at 2.5 percent compounded annually and discounted annually at 5 percent,” and the “annualized (over the full term) cost of any items, which are to be reimbursed in a lump sum payment.” RLP Amend. 2, § 4.05.C.7. The PVC was to incorporate moving costs of \$5.00 per SF. *Id.* The RLP set the tenant improvement (TI) allowance--for the finishes and fixtures that typically take space from the shell condition to a finished, usable condition--at \$36.484793 per ABOA SF. RLP § 3.06.

In order to substantiate the offeror’s ownership in the offered property, the RLP required that an offeror that does not yet have “a vested interest” in the property, but rather has “a written agreement to acquire an Interest,” shall submit the written agreement as well as the current owner’s statement that the offeror “has performed all conditions precedent to closing.” RLP § 3.06(E). The RLP further provided that Davis-Bacon wage rates would apply “to all work (including shell and TIs) performed prior to the Government’s acceptance of the space as substantially complete,” if “the lessor proposes to satisfy the requirements of this lease through the construction of a new Building or the complete rehabilitation or reconstruction of an existing Building, and the Government will be the sole or predominant tenant.” RLP § 3.01 (applying Federal Acquisition Regulation § 52.222-6, Davis-Bacon Act, to the defined work).

The government received two proposals, from Presidio Bay and Federal Builders, in response to the RLP. AR, Tab 46, Abstract of Offers. While the protester proposed the building currently occupied by BLM under the contract, Presidio Bay proposed a building at 1785 Kiowa Avenue in Lake Havasu City that currently includes approximately 7,000 SF, but which Presidio Bay indicated would be expanded to meet the RLP requirements. Since Presidio Bay did not own the building on Kiowa Avenue, it furnished a letter of intent to acquire the property. AR, Tab 22, Presidio Bay Initial Proposal, Letter of Intent at 23-25. The awardee’s proposal was evaluated as technically acceptable.

The agency evaluated the protester’s proposal as “non-responsive” due to errors on Form 1364, Proposal to Lease Space, the agency standard form to be completed by the offeror. Specifically, the agency determined that Federal Builders entered

inaccurate square footage measurements for its building, and did not include the full tenant improvement allowance in its proposal. AR, Tab 42, Debriefing Notification, June 11, 2014.

Notwithstanding its finding that the protester's proposal was "non-responsive," the agency calculated the present value (PV) of Federal Builders' proposed lease rate as \$19.95 per ABOA SF, or slightly more than the PV of Presidio's lease rate of \$19.82 per ABOA SF; the calculation for Presidio Bay included the cost of one move. AR at 8 n.35 (noting the corrected calculation of Federal Builders' lease PV); AR, Tab 34, PV Analysis, Presidio Bay, at 1. Accordingly, award was made to Presidio Bay as the firm offering the lowest-priced, technically acceptable proposal. This protest followed.

## DISCUSSION

The protester argues that Presidio Bay's proposal was unacceptable, asserting that its proposal took exception to, or failed to comply with, two material requirements of the solicitation: that offerors commit to paying Davis-Bacon wage rates for the reconstruction of the existing building, shell build out, and TIs; and that proposals include a written agreement (with confirmation from the current owner) to acquire an interest in the proposed property.

In reviewing an agency's evaluation of proposals and source selection decision, it is not our role to reevaluate submissions; rather, we examine the supporting record to determine whether the decision was reasonable, consistent with the stated evaluation criteria, and adequately documented. C.L.R. Dev. Group, B-409398, April 11, 2014, 2014 CPD ¶ 141 at 5. A protester's disagreement with the agency's evaluation judgments, or with the agency's determination as to the relative merits of competing proposals, does not establish that the evaluation or the source selection decision was unreasonable. Id. Here, we find that the proposal was noncompliant with a material solicitation requirement, and, on this basis, we sustain the protest.<sup>1</sup>

### Davis-Bacon Wage Rates

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<sup>1</sup> GSA also contends that the protester's proposal was "non-responsive," and thus the protester should not be viewed as an interested party. We disagree. The protester is an interested party to raise issues that pertain to the acceptability of the awardee's proposal, in as much as Presidio Bay's proposal was the only proposal found acceptable. See Baltimore Gas & Elec. Co., B-406057 et al., Feb. 1, 2012, 2012 CPD ¶ 34 at 15 n.15.

Federal Builders asserts that Presidio Bay took exception to the solicitation requirement that Davis-Bacon wage rates apply “to all work (including shell and TIs) performed prior to the Government’s acceptance of the space as substantially complete,” if the lessor proposes “to satisfy the requirements of this lease through . . . the complete rehabilitation or reconstruction of an existing Building, and the Government will be the sole or predominant tenant.” RLP § 3.01. In this regard, Presidio Bay proposed a building that currently included approximately 7,000 SF of space to meet a requirement for a building with at least 12,500 ABOA SF; according to its final FPR, Presidio Bay intended to comply with the solicitation space requirements by increasing the size of the building to 13,563 rentable SF. AR, July 18, 2014, at 6; AR, Tab 33, Presidio Bay Third FPR, at 1.

After submission of initial proposals and before the deadline for final proposals, the broker assisting the agency sent the following email to the Presidio Bay: “Although we did not include the specific Davis-Bacon wage schedule with the RLP file, construction of shell improvements are to be done by trades paid per the Davis-Bacon rates per lease paragraph 3.01. Please confirm that this pricing is incorporated into your proposal.” AR, Tab 35 at 251, Email Exchange, March 27, 2014. Presidio Bay responded that it “will be completing the expansion work prior to initiation of TI construction under separate contract. The TI construction will be Davis-Bacon.” Id. Prior to submission of final proposals, the agency sent Presidio Bay the “appropriate Davis-Bacon wage rates for this project,” and directed it to review them, “ensure these costs are incorporated in your proposal per Lease paragraph 3.01,” and return one initialed copy with the final proposal revision. AR, Tab 32 at 1, Letter from Agency to Presidio Bay, April 16, 2014. In its subsequent final FPR, submitted on April 21, Presidio Bay included the applicable Davis-Bacon wage rate determination, but did not again address which work would be subject to those rates. AR, Tab 33, Presidio Bay Third FPR.

Federal Builders asserts that in its response to the agency’s inquiry concerning compliance with the Davis-Bacon requirement, Presidio Bay, by committing to pay Davis-Bacon wage rates only for the TI work, took exception to the requirement in RLP ¶ 3.01 that an offeror proposing the reconstruction of an existing building shall pay Davis-Bacon wage rates for “all work (including shell and TIs)” proposed “to satisfy the requirements of this lease.” RLP ¶ 3.01.

In defense of its decision to award the lease to Presidio Bay, GSA notes that the awardee’s final FPR, signed nearly one month after the above-described email exchange, took no exception to the terms of the solicitation. Thus, according to the agency, GSA saw “no reason to suspect” that Presidio Bay would not comply with the solicitation requirement to pay Davis-Bacon wage rates for covered work. Agency Additional Statement, Aug. 4, 2014 at 19.

We agree with the protester. Presidio Bay’s response distinguished the building expansion work, to be done “under separate contract,” from the tenant improvement

work, and committed to pay Davis-Bacon wage rates only for the latter. In our view, the response does not indicate that Davis-Bacon wage rates will be paid for the building expansion. The building expansion work, however, was necessary to increase a 7,000 SF building to one capable of meeting the solicitation requirement for at least 12,500 ABOA SF, and thus represented “reconstruction” “work (including shell and TIs) performed prior to the Government’s acceptance of the space,” and proposed “to satisfy the requirements of this lease.” RLP ¶ 3.01. As such, the RLP required that the reconstruction work be performed paying Davis-Bacon wage rates.

The agency’s assertion that there was “no reason to suspect” the awardee’s lack of commitment to paying the required Davis-Bacon wage rates is unsupported by the record. Even where a proposal does not expressly take exception to a material term of a solicitation, we may determine that aspects of a proposal should have led to further inquiry by the agency. See L&G Tech. Servs., Inc., B-408080.2, Nov. 6, 2013, 2014 CPD ¶ 47 at 4 n.5. Here, as noted, Presidio Bay’s response to the agency’s inquiry regarding compliance with the solicitation’s Davis-Bacon requirement did not commit to the full extent of that requirement. Instead, the response suggests that Presidio Bay views the expansion work as outside the scope of the work covered by the requirement to pay Davis-Bacon wage rates. The response, together with the failure of Presidio Bay’s subsequent FPR to expressly address the requirement, should have led to further inquiry by the agency. Absent such inquiry, and an affirmative response from Presidio Bay, we believe that the agency could not reasonably find Presidio Bay’s proposal to be compliant with the applicable Davis-Bacon requirement. This is especially so where, as here, between the time of its initial and final proposal submissions, the awardee’s price did not change, further suggesting that Presidio Bay, after first taking exception to the full extent of the Davis-Bacon requirement, did not subsequently incorporate into its proposal the cost of Davis-Bacon compliance for the expansion work. Compare AR, Tab 30, Presidio Bay Initial Proposal at 1, with AR, Tab 33, Presidio Bay Final Proposal at 1 (showing no change in the offered lease rate between the initial and final proposals). We therefore find that GSA had an insufficient basis to conclude that Presidio Bay’s proposal complied with the Davis-Bacon requirement set forth in the RLP at section 3.01, and we sustain the protest on this basis.

#### Written Agreement to Acquire Property

Federal Builders also asserts that Presidio Bay’s proposal failed to include the required written agreement to acquire an interest in the property it intended to purchase to meet the BLM’s space requirements here. The agency argues that the letter of intent (LOI) furnished by Federal Builders evidenced the intent of the parties to enter into a purchase agreement, and noted that the awardee furnished a purchase agreement after lease award that had been executed prior to award.

Here, the RLP required that an offeror that does not yet have “a vested interest” in the offered property, but rather has only “a written agreement to acquire an interest,” shall submit

a fully executed copy of the written agreement with its offer, together with a statement from the current owner that the agreement is in full force and that the Offeror has performed all conditions precedent to closing, or other form of documentation satisfactory to the lease contracting officer.

RLP § 3.06(E).

The LOI submitted by Presidio Bay, however, merely stated that the parties “will work in good faith to execute a mutually acceptable Purchase and Sale Agreement.” Presidio Bay Initial Proposal, LOI at 23-25. Id. at 23. Further, the LOI also contained the following disclaimer: “[N]othing contained herein shall be deemed to legally bind the parties hereto. The transaction contemplated herein is subject to the negotiation, approval, and execution of a definitive Agreement.” Id. at 24. In our view, the LOI indicated no more than an intent to agree, rather than an enforceable agreement, and clearly did not indicate that the offeror had “performed all conditions precedent to closing.” RLP § 3.06(E); see W.D.C. Realty Corp., B-225468, Mar. 4, 1987, 87-1 CPD ¶ 248 at 6 (sustaining protest where LOI did not meet material requirement of the solicitation that offers show “evidence of site ownership or access to ownership through held options”).

In response to the protest, GSA asserts that the broker acting on behalf of the agency was advised during a phone call with a Presidio Bay representative of the existence of a purchase agreement to acquire the subject property. Specifically, “[a]t some time near the end of April,” Presidio Bay requested information on the status of the procurement, indicating that the due diligence period contained in their purchase agreement for the property expired 5/15/14, and their deposit would become non-refundable.” Agency Additional Comment, Aug. 4, 2014, Declaration of Agency Broker. The agency further notes that, in fact, it received after award a copy of a “Purchase and Sale Agreement” for the subject property, originally dated October 31, 2013 and subsequently amended on January 29, February 26, April 11, May 15, and July 21, 2014. Agency Additional Comment, Aug. 4, 2014 at 3.

Again, however, the solicitation required an offeror that lacked a vested interest in the proposed property to furnish a “written agreement with its offer.” RLP § 3.06(E). Notice from the offeror of the existence of a purchase agreement did not satisfy the requirement for a copy of the written agreement. Nor did such notice from the offeror satisfy the requirement for “a statement from the current owner that the agreement is in full force and that the Offeror has performed all conditions precedent to closing.” Id. Presidio Bay’s oral indication that a purchase agreement existed did not provide the agency with the assurance its RLP required, that is,

written evidence of an agreement for purchase of the offered property not currently owned by the offeror. See The Mary Kathleen Collins Trust, B-261019.2, Sept. 29, 1995, 96-1 CPD ¶ 164 at 4. Likewise, furnishing the purchase agreement after award did not satisfy the requirement to furnish the written agreement as well as confirmation from the current owner with its offer, and it deprived the agency of the assurance that the selected offeror could provide the proposed space.

In sum, we find that GSA waived for Presidio Bay the solicitation requirement for the submission with its offer of written evidence of an agreement for purchase of the offered property not currently owned by the offeror. Competitive prejudice, however, is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. See, e.g., Special Servs., B-402613.2, B-402613.3, July 21, 2010, 2010 CPD ¶ 169 at 4. The pertinent question where the agency waives a requirement for the awardee but not the protester is whether the protester would have submitted a different offer that would have had a reasonable possibility of being selected for award had it known that the requirement would be waived. LASEOD Group, LLC, B-405888, Jan. 10, 2012, 2012 CPD ¶ 45 at 5; see Brown & Root, Inc. and Perini Corp., a joint venture, B-270505.2, B-270505.3, Sept. 12, 1996, 96-2 CPD ¶ 143 at 11. Here, Federal Builders was the incumbent contractor proposing the building currently occupied by BLM, and Federal Builders has furnished no basis for concluding that it would have altered its proposal to its competitive advantage had it known that the agency would not require submission with the proposal of written evidence of an agreement for purchase of offered property not currently owned by the offeror. Thus, GSA's waiver of this requirement furnishes no basis for sustaining the protest in this regard.<sup>2</sup>

## 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. Agency Additional Statement, Aug. 4, 2014, at 9. In the absence of a termination for convenience clause, 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 think there is any basis to recommend termination. New Jersey & H Street, LLC, B-311314.3,

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<sup>2</sup> Federal Builders raises numerous other challenges to the agency's proposal evaluations. We reviewed each of the other allegations, and they provide no further basis on which to question the award.

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) (2014). 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). In addition, we recommend that the agency take steps to ensure that the RLP's requirement for Davis-Bacon wage rates will be met, if appropriate.

The protest is sustained.

Susan A. Poling  
General Counsel