



## Decision

**Matter of:** Centre Market Building, LLC

**File:** B-417413.2; B-417413.3

**Date:** August 7, 2019

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### DIGEST

1. Protest that terms of solicitation for lease of building space do not adequately communicate the agency's requirements is denied where the solicitation provides sufficient information to allow offerors to compete intelligently and on an equal basis.

2. Protest challenging the conduct of discussions is dismissed as premature when brought prior to the receipt of final proposal revisions and the source selection decision.

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### DECISION

Centre Market Buildings, LLC (Centre), of Chicago, Illinois, challenges the amended terms of request for lease proposal (RLP) No. 4NJ0222, issued by the General Services Administration (GSA) for a fully-serviced lease of office and laboratory space for the Department of Homeland Security, United States Customs and Border Protection (CBP) in the vicinity of Newark, New Jersey. Centre challenges the agency's revisions to the solicitation, made as corrective action in response to a prior protest. Centre primarily argues that the amended RLP still contains ambiguities and other flaws.

We deny the protest in part and dismiss the protest in part.

### BACKGROUND

Centre identifies itself as the current lessor of office and laboratory space to CBP under a GSA lease. On July 10, 2018, GSA issued the RLP requesting a space not to exceed 123,000 rentable square feet of office space, including parking, for a 15-year lease term with 10 years firm. Agency Report (AR), Tab A, RLP at 4. The RLP outlined

the government's various requirements for the building, such as specified ceiling heights and specific requirements pertaining to laboratory space; and conditions for award, such as giving preference to offers of space in historic properties or districts. See e.g., Id. at 4-15. As relevant here, the RLP required offerors to propose a maintenance plan and tenant improvement costs for building out the space for the government's use, including laboratory construction costs.<sup>1</sup> Id. at 21-22, 35, 66, 71. GSA estimates that the total value of the lease is approximately \$69 million. Contracting Officer's Statement (COS) at 1.

The agency amended the RLP twice, extending the closing date for receipt of lease proposals to September 18, 2018. Centre submitted its initial proposal by the amended closing date.<sup>2</sup> The agency evaluated proposals and conducted discussions by issuing deficiency letters, and requested revised proposals. After accepting and evaluating revised proposals, and issuing a second round of deficiency letters, the agency requested second revised proposals to be submitted by March 22, 2019.

On March 22, 2019, Centre protested the terms of the RLP with our Office, asserting that the second deficiency letter introduced "material deficiencies and defects" into the procurement and essentially complaining in a variety of ways that the RLP did not provide sufficient information concerning the agency's actual requirements. On April 9, GSA filed a notice of its intention to take corrective action by amending the RLP to provide additional detail regarding the requirements and to remove certain elements of the RLP from the present value analysis. As a result, Centre's protest, docketed as B-417413, was dismissed as academic. See Centre Marketing Bldg., LLC, B-417413, Apr. 12, 2019 (unpublished decision).

On April 19, as part of its corrective action, CBP issued RLP amendment 5. As relevant here, this amendment clarified that the lessor would be responsible for the total maintenance and repair of the leased premises and identified the lessor's maintenance responsibilities as including all supplies, materials, and equipment necessary to provide reliable, energy-efficient service without interruption or disruption to the government's ability to use the space for its intended use.<sup>3</sup> AR, Tab F, RLP Amend. 5, at 1. The

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<sup>1</sup> The agency identifies the build out of building space, including the laboratory, as a tenant improvement (TI) cost. Memorandum of Law (MOL) at 8. The RLP identified a tenant improvement allowance (TIA) by square footage and states that it shall be used for the build out of the space in accordance with the government-approved design intent drawings. RLP at 22. The RLP also explained that the TIA is the amount that the lessor should make available for the government to be used for TIs and identified the options available if the government anticipates exceeding the identified TIA. Id. at 35.

<sup>2</sup> Centre did not file a protest prior to the initial closing date.

<sup>3</sup> Amendment 5 also clarified, for example, the change order markup rates and provided an attachment exhibit for laboratory and electrical and heat requirements by room. RLP  
(continued...)

amendment noted that the lease outlined the maintenance requirements in two sections: standard maintenance, which would be included in the rental consideration; and above-standard maintenance costs, which would be submitted as a lump-sum annual dollar value not to be included in the rent.<sup>4</sup> Id. As also relevant here, the amendment required offerors to submit an “above-standard maintenance plan” (ASMP) for the building being offered, for the cost to inspect, repair, and maintain the lessor-provided and installed above-standard equipment and systems in accordance with the revised Special Requirements for CBP Newark, which identified space requirements by net usable square footage.<sup>5</sup> Id. at 4; RLP, Exh. B, Agency Special Requirements, at 76. Amendment 5 provided a list of examples of the above-standard equipment and systems that would be necessary for the government to use the facility for its intended purpose. RLP Amend. 5, at 3. Offerors were advised to prepare the ASMP in conjunction with a qualified engineer with experience maintaining laboratories and above-standard equipment and systems. Id. Amendment 5 advised that the ASMP should provide a list of factors and assumptions that have been used to calculate the overall price. Id.

On April 29, Centre filed this protest with our Office,<sup>6</sup> challenging the specifications and, after receiving the agency report, filed a supplemental protest.

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Amend. 5, at 1. Consecutive numbers have been added to the pages of this document. The citations to this tab in this decision are to the page numbers assigned by our Office.

<sup>4</sup> The agency clarifies that the government is responsible for payment of above-standard maintenance costs. COS at 11. Amendment 5 also updated the manner in which the above-standard maintenance cost would be evaluated, now stating that it would not be considered in the present value analysis; instead, it would be reviewed to determine if it met the technical requirement of the lease. RLP Amend. 5, at 1.

<sup>5</sup> Amendment 5 provided for submission of a revised ASMP price proposal post-award, after the lessor’s design for the premises had been added. Id. Additionally, the revised Special Requirements for CBP Newark, an attachment to the RLP, provided a list of the types of above-standard equipment and systems typically required to support a CBP laboratory, including types of equipment, potential quantities, room types, and specific support systems. See, e.g., RLP, Exh. B, Agency Special Requirements, at 133-158. The special requirements identified categories of space, and the specific uses and square footage within that space. For example, the special requirements identified a general category of laboratory space that included a 400 square foot library. Id. at 74.

<sup>6</sup> While amendment 5 provided only a date by which offerors had to acknowledge the amendment, it did not provide a date for submitting proposal revisions. However, the agency issued a third round of deficiency letters on May 14, requesting 3rd revised proposals to be submitted by June 10. On this basis, we find Centre’s challenges to the terms of amendment 5 to be timely. See 4 C.F.R. § 21.2(a).

## DISCUSSION

The protester challenges various revisions in amendment 5 to the RLP, primarily arguing that the RLP's specifications, as amended, continue to be ambiguous and fail to provide sufficient information to allow offerors to compete on an intelligent and equal basis; the solicitation imposes an unreasonable amount of risk on offerors; and the agency failed to conduct meaningful discussions.<sup>7</sup> We find no merit to any of Centre's arguments, as discussed through several examples below.

### Solicitation Ambiguities

Centre argues that there are "still numerous ambiguities and material flaws with the current RLP which have not been sufficiently addressed." Protest at 1-2. For example, the protester contends that it "cannot intelligently bid on a common and equal basis" on the ASMP because the RLP allegedly lacks "specifications or drawings as to the infrastructure, equipment, etc.," and that it cannot clearly understand its responsibilities under the plan. Id. at 2-3. In another example, the protester complains that the RLP does not specify "the amount of exterior (rooftop) and weather protected/interior spaces needed for mechanical areas, infrastructure, and equipment pertaining to the lab[oratory]." Id. at 5. Centre acknowledges that, as the incumbent lessor, it understands the agency's space needs, but complains that it "cannot propose on an equal basis as other offerors who are presently unaware of the materiality of these additional space needs." Id.

The agency responds that the RLP is a performance specification, which attempts to achieve the desired results without specifying in detail the methods that may be employed to accomplish them, rather than a design specification, which provides drawings prescribing the method to be used. In this regard, the agency notes that the terms of the RLP specifically advise offerors that the "determination of the required [l]essor-provided and installed above-standard equipment and systems should be tailored to each [o]fferor's respective building." MOL at 5, citing RLP, Amend 5 at 2. The agency explains that the RLP is designed to encourage the widest range of competition by allowing offerors to determine if the government's requirement will fit their building. Id. In response, Centre asserts that the list of examples of equipment and systems is insufficient because it is solely an example, rather than a complete list of

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<sup>7</sup> In its protest submissions, Centre has raised arguments that are in addition to, or variations of those specifically discussed above, including, for example, alleging that GSA must disclose the estimated cost of the laboratory; disclose how the agency will pay for the laboratory; confirm that the necessary funds are available in CBP's annual appropriations; and raising various complaints about terms that were present in the original RLP but were not timely protested. We have considered all of Centre's various arguments and allegations and find no basis to sustain the protest.

the equipment and systems the government expects the lessor to maintain. Comments and Supp. Protest at 3. Similarly, with regard to the argument that the agency failed to prescribe a specific square footage for maintenance and rooftop space, the agency responds that the space required is “largely dependent on the lessor-provided design and the existing building systems, neither of which are within the [g]overnment’s control.” MOL at 11.

Generally, a contracting agency must provide offerors with sufficient detail in a solicitation to enable them to compete intelligently and on a relatively equal basis. CWTSatoTravel, B-404479.2, Apr. 22, 2011, 2011 CPD ¶ 87 at 10. The determination of a contracting agency’s needs, including the selection of evaluation criteria, is primarily within the agency’s discretion and we will not object to the use of particular evaluation criteria so long as they reasonably relate to the agency’s needs in choosing a contractor that will best serve the government’s interests. SML Innovations, B-402667.2, Oct. 28, 2010, 2010 CPD ¶ 254 at 2. Specifications must not be ambiguous--that is, subject to more than one reasonable interpretation. See Toxicology Testing Serv., Inc., B-219131.2, Oct. 28, 1985, 85-2 CPD ¶ 469. However, there is no legal requirement that a competition be based on specifications drafted in such detail as to eliminate completely any risk or remove every uncertainty from the mind of every prospective offeror. A&C Bldg. and Indus. Maint. Corp., B-230270, May 12, 1988, 88-1 CPD ¶ 451 at 3. In this regard, a protester’s disagreement with the agency’s judgment concerning the agency’s needs and how to accommodate them does not show that the agency’s judgment is unreasonable. Caduceus Healthcare, Inc., B-414965; B-414965.2, Nov. 1, 2017, 2017 CPD ¶ 329 at 7.

First, none of Centre’s arguments identifies any legal basis mandating that the agency provide the information Centre seeks. Additionally, the record shows that the RLP as amended provided revised special requirements for CBP outlining the tenant’s specific requirements for the building, and provided a list of examples of the types of equipment and systems typically required to support a CBP laboratory. See RLP Amend. 5, at 2-3. As stated above, the RLP also advises offerors that the equipment and systems included in the ASMP “should be tailored to each offeror’s respective building.” Id. at 2. In this regard, the offeror, not the government, is responsible for identifying the equipment and systems included in the ASMP. On this record, and in the context of the performance specifications in this solicitation, we find no basis to sustain the protest.

#### Imposition of Risk

The protester also contends that various “ambiguities” in the RLP, such as the agency’s alleged failure to identify the magnitude of the expected costs associated with laboratory construction, infrastructure, and equipment; and the timing of payment of these costs, is unreasonable and, in essence, creates excessive risk for offerors. Protest at 3-4. In this regard, the protester does not specify a term in the solicitation that is susceptible of two or more reasonable meanings, but rather contends that GSA must identify the magnitude of costs in order to prevent an offeror unfamiliar with government laboratory construction from underestimating costs. The protester also contends that the agency

must provide timing for payment of laboratory construction costs to ensure that GSA will have funds sufficient to pay the awardee. Comments and Supp. Protest at 4-5. We disagree.

The mere presence of risk in a solicitation does not make the solicitation inappropriate or improper. CWTSatoTravel, supra, at 9. It is within the discretion of an agency to offer for competition a proposed contract that imposes maximum risks upon the contractor and minimum burdens on the agency, and an offeror should account for this in formulating its proposal. JRS Mgmt., B-402650.2, June 25, 2010, 2010 CPD ¶ 147 at 5. Risk is inherent in most types of contracts, especially fixed-price contracts, and firms are expected to allow for that risk, and use their professional expertise and business judgment, in preparing their proposals. See, e.g., Katmai Info. Techs., LLC, B-406885, Sept. 20, 2012, 2012 CPD ¶ 277 at 5.

In our view, the gravamen of these arguments is not that the solicitation is ambiguous or unreasonable, but rather that the solicitation does not sufficiently shield the protester from the risk of being undercut by non-incumbent competitors. While we appreciate that the solicitation here requires offerors to estimate the financial undertaking required to build out the laboratory, risk is inherent in most contracts, especially fixed-price contracts, and firms must use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. See CWTSatoTravel, supra. Further, given that each offeror will be proposing its own space within which the laboratory must fit, we conclude that GSA could not possibly eliminate all performance uncertainties and risks in drafting its specifications. In sum, we do not find, on the record before us, that the solicitation exposes offerors to unacceptable or undue risk.

## Discussions

The protester also asserts that the agency's conduct of discussions was not meaningful. Comments and Supp. Protest at 1. Centre's assertion is based on statement in the COS that there are "more up to date" laboratories than the laboratory in Centre's building. Using this statement, Centre contends that the agency's multiple rounds of discussions did not raise this issue. Id. at 1-2.

We dismiss this protest because allegations, such as these, brought prior to award are generally treated as premature. Nuclear Product. Partners, B-407948.9, Sept. 24, 2013, 2013 CPD ¶ 228 at 7. Because the agency does not represent that either its requirements or the evaluation scheme have changed, we do not view the ground rules of this procurement to have been changed in a manner that warrants our pre-award review of discussion issues. Cf. Domain Name All. Registry, B-310803.2, Aug. 18, 2008, 2008 CPD ¶ 168 at 7-8.

In this regard, the agency explicitly states that "the discussion process is ongoing as GSA has yet to receive final proposal revisions" and the record shows that no source selection decision has been made. Supp. MOL at 4. Accordingly, based on the record

before us, we decline to reach any conclusions, at this time, as to the adequacy of discussions, and we dismiss Centre's protest regarding this matter as premature.

The protest is denied in part and dismissed in part.

Thomas H. Armstrong  
General Counsel