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## Decision

**Matter of:** Progress for Bakersfield Veterans, LLC

**File:** B-418703.7; B-418703.8

**Date:** August 11, 2021

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Elizabeth Jochum, Esq., Zachary Prince, Esq., and Nora Brent, Esq., Smith Pachter McWhorter PLC, for the protester.

Kristin Grotecloss, Esq., Kathryn Downey, Esq., Department of Veterans Affairs, for the agency.

Mary G. Curcio, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Protest that agency was required to amend or cancel solicitation due to changed requirements is denied where neither agency's requirements, nor the terms and conditions of the solicitation, have changed.
  2. Protest that agency improperly considered awardee's proposed lease as an operating lease is dismissed as untimely where the basis of the protest is that the agency should have included certain items in the rent calculation, but the solicitation specifically provided that the items in question would not be included in the rent calculation.
  3. Protest that agency waived requirement that property be free of use restrictions is dismissed as untimely since it was not filed within 10 days after protester knew or should have known the basis of protest.
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### DECISION

Progress for Bakersfield Veterans, LLC (PBV), of Beverly Hills, California, protests the award of a lease to SASD Development Group, LLC, of San Diego, California, under solicitation for offers (SFO) No. 36C10F19R0067, issued by the Department of Veterans Affairs (VA) for the construction and lease of a community-based outpatient clinic in Bakersfield, California. PBV argues that the agency unreasonably failed to cancel or amend the solicitation in response to changed requirements, and that the agency improperly considered the awardee's lease and waived certain solicitation requirements.

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

## BACKGROUND

The SFO was issued on December 9, 2019. Agency Report (AR), Tab 1; Contracting Officer's Statement (COS) at 1. Offerors were required to submit a technical proposal and a price proposal. Technical proposals were evaluated against four factors: technical quality; qualifications and past performance; operations and maintenance plan; and socio-economic status. AR, Tab 4, SFO at 34. For price, offerors were to propose a rental rate per net usable square foot (NUSF).<sup>1</sup> *Id.* For evaluation purposes the agency calculated the present value of the rental rate. *Id.* at 34-35. In addition, to be eligible for award the lease had to meet the requirements of an operating lease as defined by Office of Management and Budget (OMB) Circular A-11, App. B. SFO at 25.

The agency evaluated three offers submitted by PBV (Westwind 1, Westwind 2, and **[DELETED]**), and one offer submitted by SASD. Memorandum of Law (MOL) at 2. The three offers submitted by PBV were eliminated from the competitive range. *Id.* at 3. PBV protested the elimination of its Westwind 1 and Westwind 2 offers to our Office on May 6, 2020. COS at 2. Following development of the record, the attorney assigned to the protest conducted alternative dispute resolution and informed the parties that GAO would likely sustain a number of the protester's asserted grounds. In response, the agency took corrective action, which rendered the protest academic. *Id.* at 5. As a result, GAO dismissed the protest. *Progress for Bakersfield Veterans, LLC, B-418703 et al.*, July 27, 2020 (unpublished decision).

As part of its corrective action, the agency reassessed the offers submitted by PBV and SASD and assigned ratings as follows:

Offeror	Technical Quality	Qualifications/ Past Performance	Operations and Maintenance Plan	Socio-Economic Status	Present Value rate per NUSF
<b>Westwind 1</b>	Marginal	Marginal	Successful	Neutral	\$ 55.52
<b>Westwind 2</b>	Poor	Marginal	Successful	Neutral	\$ 42.08
<b>[DELETED]</b>	Marginal	Marginal	Successful	Neutral	\$ 66.56
<b>SASD</b>	Highly Successful	Highly Successful	Successful	Neutral	<b>[DELETED]</b>

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<sup>1</sup> Offerors were required to submit rates for six scenarios: delivery of the premises in 20 months with lease terms of 20 years firm, 15 years with five 1-year options, and 15 years firm; and delivery of the premises in 24 months with lease terms of 20 years firm, 15 years with five 1-year options, and 15 years firm. Only the requirement for delivery of the premises in 24 months with a 20-year firm lease term is relevant to this protest.

AR, Tab 13, Competitive Range Determination at 3, 4. The three offers submitted by PBV were again eliminated from the competitive range.<sup>2</sup> *Id.* at 6-9; MOL at 3.

On January 5, 2021, the agency notified SASD that its proposal was in the competitive range. *Id.* On January 15, the agency issued to SASD amendment No. 4 to the solicitation. The amendment instructed SASD to submit an offer for the 24-month construction period, with a 20 year firm lease, and to add a cost for additional rent for cleaning mandated by the General Services Administration (GSA) as a result of the COVID-19 pandemic. MOL at 4-5. The amendment also included an updated Department of Labor wage determination, and made several other minor changes. *Id.* On February 3, SASD submitted a revised offer in response to amendment 4. SASD did not make any changes to its technical proposal, but its present value rental rate per NUSF increased to \$[DELETED]. *Id.* at 4; Agency Response to GAO, June 22. After further negotiations with the agency, SASD submitted a second revised offer on February 11 in which the present value rental rate per NUSF was reduced to \$64.42. Again, SASD did not make any changes to its technical proposal. COS at 4; Agency Response to GAO, June 22.

On April 26, the agency awarded the lease to SASD. COS at 4. The agency provided PBV a post-award debriefing for its [DELETED] offer on April 27.<sup>3</sup> COS at 3, 4. On May 6, PBV filed this protest with our Office.

## DISCUSSION

PBV's protest alleges that the increase in SASD's price indicated that the agency changed solicitation requirements. PBV asserts that the agency was thus required to amend or cancel and reissue the solicitation, and permit PBV to respond to the amendment or new solicitation. PBV also contends that the agency improperly considered SASD's lease an operating lease. On May 20, PBV filed a supplemental protest arguing that the agency waived the solicitation requirements that the property be free of use restrictions, and that construction on the project be completed in 24 months. As discussed below, we find that these allegations are untimely or have no merit.<sup>4</sup>

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<sup>2</sup> PBV filed a protest challenging the agency's corrective action and the elimination of PBV's proposals from the competitive range at the Court of Federal Claims on August 20; the protest was denied on December 22. COS at 3.

<sup>3</sup> The agency previously had provided PBV with pre-award debriefings for its Westwind 1 and Westwind 2 offers on September 24 and 25, 2020.

<sup>4</sup> PBV has also raised a number of additional, collateral arguments. While we do not address each of these arguments in the decision, we have considered them and find that none of them have merit.

## Changed Requirements

As explained above, following the issuance of amendment 4 and further negotiations, SASD's evaluated present value rental rate increased from \$[DELETED] per NUSF to the award price of \$64.42 per NUSF. The agency explains that the price increase was not the result of any change in agency requirements. Rather, the price increase was primarily the result of enhanced COVID-19 cleaning protocols, tax increases due to an updated property value appraisal, an updated Department of Labor wage determination, and increased construction costs that resulted from COVID-19 associated regulations. MOL at 5-6. PBV protests that the agency unreasonably failed to cancel or amend the solicitation to reflect the impact of COVID-19 on the price competition.

We disagree. Pursuant to Federal Acquisition Regulation (FAR) section 15.206(a), an agency is required to amend a solicitation when, either before or after the receipt of proposals, the agency changes its requirements, or the solicitation's terms and conditions.<sup>5</sup> Under FAR section 15.206(e), if an amendment proposed for issuance after offers have been received is so substantial as to exceed what prospective offerors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the amendment been known to them, the contracting officer is required to cancel the original solicitation and issue a new one, regardless of the stage of the acquisition. FAR 15.206(e)

Here, we find that neither of these FAR provisions require the agency to amend or cancel the solicitation because the agency did not change its requirements or the terms and conditions of the solicitation in any material way. Rather, the protester is relying on forces caused by a global pandemic that resulted in price increases to the awardee to argue that an amendment should have been issued or the solicitation cancelled. In our view, the effects of COVID-19 on the awardee's price do not amount to changes in the agency's requirements. For example, amendment 4 to the solicitation did not alter the requirements for the community-based outpatient clinic. The fact that the awardee's price increased because of issues arising from COVID-19, a tax increase, and a changed wage determination does not represent a change in requirements that necessitated canceling or amending the solicitation.<sup>6</sup>

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<sup>5</sup> The agency is not required to issue a solicitation amendment to an offeror that is no longer in the competitive range where the subject matter of the amendment is not directly related to the reasons the agency had for excluding the offeror from the competitive range. See, e.g., *The MAXIMA Corp.*, B-222313.6, Jan. 2, 1987, 87-1 CPD ¶ 1; *Amperif Corp.*, B-211992, Apr. 11, 1984, 84-1 CPD ¶ 409; FAR 15.206(c).

<sup>6</sup> An agency does have the discretion to amend or cancel a solicitation if it believes that due to the passage of time, or clarifications to the solicitation, the agency may obtain increased competition by amending or cancelling a solicitation and resoliciting the requirement. See *Noelke GmbH*, B-278324, B-278324.2, Feb. 9, 1998, 98-1 CPD ¶ 46 at 3-4. However, there is no requirement that the agency do so. See *Synchrogenix*

## Capital Lease Requirement

PBV asserts that the agency improperly treated SASD's proposed lease as an operating lease, as opposed to a capital lease, because the agency failed to include the amount proposed for certain lump sum items in the rent calculation. The agency was permitted to issue a lease only if the offered lease could be considered an operating lease under OMB Circular A-11, App. B. SFO at 15. As relevant to this protest, to be considered an operating lease under the circular, the present value of the minimum contractually required payments over the life of the lease (the rent payments) cannot exceed 90 percent of the fair market value of the asset (land acquisition costs and estimated construction costs) at the beginning of the lease term.<sup>7</sup> OMB Circular A-11, App. B at 6; Agency Response to GAO Questions, July 8. For purposes of calculating whether a lease can be considered an operating lease, the amount for items that the agency will pay in a lump sum upfront are excluded from the amount of rent payments if those items are associated with special features or enhancements to meet the government's needs or agency specific customization. OMB Circular A-11, App. B at 7. The VA considered the final revised price of SASD's lease at 83.65 percent, below the 90 percent threshold which classified the lease as an operating lease eligible for award.

PBV asserts that SASD improperly included in the lump sum amount the following items that SASD contends were not associated with special features or enhancements to meet the government's unique needs or specifications: sustainable design and energy efficiency, physical security, independent technical review, canopies and covered walkways, exterior activity areas and yards, exterior signage, lessor-furnished special equipment, and provisions for VA-furnished/lessor-installed equipment. Comments at 9-10. PBV asserts that since these items do not reflect unique needs or specifications of the government, the agency improperly failed to include in the rent amount the costs for these items when evaluating SASD's lease. *Id.*

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*Information Strategies, LLC*, B-414068.4, Sept. 8, 2017, 2017 CPD ¶ 283 (agency is not required to reconsider decision to set aside procurement for small business concerns where it learns during the course of the procurement that only one of two small businesses is capable of submitting a revised proposal).

<sup>7</sup> According to the OMB Circular, an operating lease must meet the following criteria: ownership of the asset remains with the lessor during the term of the lease and is not transferred to the government at or shortly after the end of the lease term; the lease does not contain a bargain-price purchase option; the lease term does not exceed 75 percent of the estimated economic life of the asset; the present value of the minimum contractually required payments over the life of the lease does not exceed 90 percent of the fair market value of the asset at the beginning of the lease term; the asset is a general purpose asset rather than being for a special purpose of the government and is not built to the unique specification of the government as lessee; and there is a private sector market for the asset. OMB Circular A-11, App. B at 6-7. A capital lease is any lease other than a lease purchase that does not meet operating lease criteria. *Id.* at 6.

We find this basis of protest untimely. As the agency explains, the SFO specifically identified nine items that the government would pay for up front as a lump sum, and that would be excluded from the rental rate in scoring the lease. Agency Response to GAO, July 1 at 3; SFO at 363, GSA form 1364A.<sup>8</sup> This includes all of the items for which PBV asserts the associated amounts should have been included in the rental rent amount when evaluating the proposed lease. SFO at 363, GSA form 1364A. Accordingly, if PBV believed that these items should have been included in the rent calculation, PBV was required to file its protest prior to the closing date for the receipt of proposals, not after the lease was awarded. 4 C.F.R. § 21.2(a).

PBV asserts that its protest is timely because it is arguing that SASD's proposed lump sum amounts for certain items were higher than was permissible, and the VA failed to analyze this. We disagree. In its protest PBV states that "[t]hese categories generally do not reflect 'unique needs or specifications' of the Government; they have fair market value and should have been incorporated into the rental cost." Comments at 10. PBV's protest thus challenges the items that were excluded from the rent calculation, but does not challenge the amount proposed for any specific item. Moreover, the SFO did not require offerors to provide details or justifications for the amounts proposed for each of these lump sum items, nor did it require the agency to analyze whether the proposed amounts for these items indicated that the items did not reflect the unique needs or specifications of the government.

#### Use Restrictions

PBV filed a supplemental protest on May 20, in which it argued that the agency waived the solicitation requirement that the property be free of any use restrictions.<sup>9</sup> According to PBV, the agency knew prior to award that SASD's proposed project was subject to discretionary approval by the City of Bakersfield, and that it had not gone through the process of obtaining the discretionary approvals related to zoning and environmental laws, including the California Environmental Quality Act. Supp. Protest at 1-2. According to the protester, under the California Environmental Quality Act, SASD was required to prepare and get approval of an environmental impact report, but had not

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<sup>8</sup> The solicitation explained that offerors should submit GSA form 1364A as part of the price proposal and that it would be used in the price evaluation. SFO at 20. This form included a chart titled "lump sum items" which listed all of the items that PBV contends should not be included as part of the lump sum. *Id.* at 363. The chart expressly stated that these items were "excluded from rental rate." *Id.*

<sup>9</sup> The SFO required that the property be free of any use restrictions that may limit the rights, responsibilities, or liabilities of the parties to the VA lease. SFO at 47.

done so at the time of award. PBV also asserts that the property was not zoned for a VA clinic.<sup>10</sup> This basis of protest is untimely.

Our Bid Protest Regulations contain strict rules for the timely submission of protests. Under these rules, a protest based on other than alleged improprieties in a solicitation must be filed not later than 10 calendar days after the protester knew, or should have known, of the basis for protest, with an exception for protests that challenge a procurement conducted on the basis of competitive proposals under which a debriefing is requested and, when requested, is required. 4 C.F.R. § 21.2(a)(2). In such cases, protests must be filed not later than 10 days after the date on which the debriefing is held. *Id.* Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. *Dominion Aviation, Inc.--Recon.*, B-275419.4, Feb. 24, 1998, 98-1 CPD ¶ 62 at 3.

As relevant here, in its supplemental protest, PBV explains that on April 7, 2021--approximately 3 weeks before award to SASD--PBV filed suit against the City of Bakersfield in Superior Court in Kern County, California. Supp. Protest at 1-2. In that suit PBV argued that SASD's proposed site could not be used as a VA clinic because it is not zoned for a VA clinic, and because the construction of the proposed VA clinic would violate environmental laws, including the California Environmental Quality Act. *Id.* at 2. PBV specifically challenged the decision of the City of Bakersfield to issue a mitigated negative declaration (MND) which would allow SASD to shortcut the appropriate environmental review process under the California Environmental Quality Act.<sup>11</sup> *Id.*

Thus, when PBV was informed on April 26 that the agency awarded the contract to SASD, PBV knew that the agency awarded the lease even though PBV believed that the property was not free of California Environmental Quality Act and zoning use restrictions. Indeed, in its supplemental protest, PBV notes that the proceedings of its lawsuit were public, and that "[t]he VA was undoubtedly aware of the allegations PBV had made and the risk that SASD would not be able to meet the Solicitation

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<sup>10</sup> In its protest PBV has not articulated why the property proposed by SASD does not meet zoning requirements or how the VA waived the requirement that the property be free of zoning restrictions.

<sup>11</sup> According to the protester, an MND may be issued by a governing jurisdiction when a project is subject to discretionary approval, but only if the project is not expected to significantly impact the environment. Supp. Protest at 2. A project that is expected to significantly impact the environment requires a full environmental review under the California Environmental Quality Act that includes, among other things, the preparation and approval of an environmental impact report. *Id.* In its lawsuit, PBV contends that the City of Bakersfield improperly issued the MND because there are "significant adverse environmental impacts associated with SASD's site." *Id.*

requirements because of its site's improper zoning and insufficient environmental review." *Id.* PBV therefore knew the basis of its protest--that the agency allegedly waived the solicitation requirement that the proposed site be free of any use restrictions--on April 26. Supp. Protest at 3. Since PBV did not raise this issue until May 20, more than ten days after its April 27 debriefing, it is untimely.<sup>12</sup>

The protest is denied in part and dismissed in part.

Edda Emmanuelli Perez  
General Counsel

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<sup>12</sup> PBV also argues that the agency waived the requirement that the contractor complete the project in 24 months or pay substantial liquidated damages. PBV contends that SASD would not be able to complete construction of the clinic within 24 months, as required, because of the time required to obtain the environmental impact report. In addition, PBV asserts that the agency's decision to relax the delivery schedule for SASD was prejudicial to PBV because PBV's proposal was assigned a marginal rating under the qualifications and past performance factor due to concerns that its proposed project management plan lacked sufficient detail as to how PBV would meet the delivery schedule. PBV also asserts that the agency relaxed the delivery schedule to permit SASD to comply with the requirement to submit a signed letter of commitment on company letterhead from both the general contractor and architect firms listed in the proposal. The signed lease documents demonstrate that the agency did not waive the 24 month delivery requirement. As such, PBV's arguments are not supported by the record, and therefore we deny these protest grounds. AR, Tab 19, lease; Agency Response to GAO, July 1 at 1.