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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Sletten Companies/Sletten Construction Company

File: B-402422

Date: April 21, 2010

Timothy E. Heffernan, Esq., and Brian R. Dugdale, Esq., Watt, Tieder, Hoffar & Fitzgerald, LLP, for the protester.

John E. McCarthy, Jr., Esq., Peter J. Eyre, Esq., and James G. Peyster, Esq., Crowell & Moring LLP, for M.A. Mortenson Company, an intervenor.

Leigh Ann Bunetta, Esq., General Services Administration, for the agency.

Linda C. Glass, Esq., Jonathan L. Kang, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the evaluation of the protester's proposal and the agency's selection decision is denied, where record shows that the protester's proposal failed to meet material requirements of the solicitation and was technically unacceptable.

DECISION

Sletten Companies/Sletten Construction Company, of Great Falls, Montana, protests the award of a contract to M.A. Mortenson Company, of Bellevue, Washington, under request for proposals (RFP) No. GS-08P-09-JFC-0009, issued by the General Services Administration (GSA) for the design and construction of a federal courthouse in Billings, Montana. The protester argues that GSA miscalculated the firm's proposal and failed to consider its lower price in the selection decision.

We deny the protest.

BACKGROUND

The RFP, which is being funded under the American Recovery and Reinvestment Act, provided for the award of a fixed-price contract for the design and construction of a new federal courthouse in Billings, Montana. In accordance with Federal Acquisition Regulation (FAR) part 36.3, "Two-Phase Design-Build Selection Procedures," the procurement was to be conducted in two phases. Under phase I, the agency sought submissions from interested firms to determine which qualified firms would be invited to provide technical and price proposals under phase II. In

phase I, GSA received 20 responses and selected six offerors, including Sletten and M.A. Mortenson, to participate in phase II.

The Phase II RFP provided for award on a best value basis and identified the following technical evaluation factors in descending order of importance: design concept, no-cost test fit, and project management plan. The RFP provided that the technical factors, when combined, were significantly more important than price. RFP ¶ 2.1.2. Offerors were informed that the agency may award a contract on the basis of initial proposals without conducting discussions. RFP ¶ 3.1.1. The solicitation also provided for “concept presentations” after the submission of proposals. RFP ¶ 3.1.2.

Proposal preparation instructions were provided that described the information that offerors were required to provide for each evaluation factor. Under the design concept evaluation factor, offerors were required to submit, among other things, a narrative explaining their design concept and to provide a site plan reflecting all of the required elements in both size and scaled formats. Offerors’ floor plans were required to provide Building Owners and Managers Association (BOMA) occupiable square footages calculations.¹ RFP ¶ 1.2.1. Under the no-cost test fit evaluation factor, offerors were required to provide a test fit plan for each floor, including basement and parking areas, and were also required to submit size and scaled format plans for each floor, including basement and parking areas, reflecting all the required elements.

Offerors were also provided with a “program of requirements” that identified work space requirements for court personnel and various other tenant agencies, such as the United States Marshal Service, Executive Office of the United States Attorney, United States Probation Office and the GSA Public Building Service. For example, specific net square footage requirements were identified for the district judge facilities in the court. See Program of Requirements at 9. The total gross square feet for the courthouse and parking was stated to be 145,088. Id. at 4.

The agency received proposals from all six of the offerors selected to participate in phase II; the proposals were first evaluated by the agency source selection evaluation board (SSEB). As the record in this procurement raises questions about both the adequacy of the proposal Sletten submitted, and the fairness of the evaluation scores assigned, we set forth below a detailed recitation of the facts in the record on both subjects.

¹ GSA states that BOMA is an international organization recognized as setting real estate industry standards for space measurement in office buildings. Agency Report (AR) at 3 n.2.

Additional Facts Regarding the Adequacy of Sletten's Proposal

In its initial review of Sletten's technical proposal, the SSEB found that Sletten's proposal did not comply with a number of solicitation requirements, including that Sletten did not submit scalable drawings of the site plan, failed to provide mandatory BOMA space calculations on the drawings, and submitted floor plans that were missing required items. AR at 5; see also AR, Tab 12, SSEB Report, at 6. GSA states that, because of the lack of required detail in Sletten's proposal, the SSEB could not determine "whether what was being shown actually met the solicitation requirements." AR at 6.

After the closing date for receipt of initial proposals, Sletten informed the contracting officer (CO) by email that there was a problem with the space summary table in the firm's proposal, stating that "we identified that some of the US Attorney's fourth floor space was added to the Courts Program Space thus distorting the actual space provided for the US Courts, US Attorneys, and ultimately the BOMA Calculations." Sletten provided a revised space summary table. See GSA Dismissal Request, Exh. 3, Sletten Email to GSA, Nov. 10, 2009. GSA states that Sletten's revised space summary table was also inconsistent with the program requirements and that Sletten's space allocations could not be verified because Sletten failed to provide scalable drawings and BOMA room calculations on the drawings. See AR, Tab 11, CO's Evaluation Memorandum, at 3.

The proposals were subject to a peer review, which was limited to evaluating the proposals under the concept design and no-cost test fit evaluation factors. See AR, Tab 10, Peer Review Evaluation. Sletten's proposal was evaluated under this peer review as being "marginal," which was the rating reserved for submissions that lacked essential information and contained deficiencies and/or significant weaknesses that could be correctable. Id. at 2.

Prior to the "concept design" oral presentations, Sletten again contacted the CO, acknowledging that its proposal did not satisfy solicitation requirements with respect to minimum stair width. Sletten requested that it be allowed to offer a different design to satisfy the solicitation requirements. See GSA Dismissal Request, Exh. 4, Sletten Email to GSA, Nov. 16, 2009. Sletten also informed the CO that all BOMA calculation requirements would be met should Sletten become the successful offeror. The CO characterized Sletten's requests as changes to its design concept, and denied Sletten's requests. Id. at 3. Nonetheless, in its concept design oral presentation, Sletten provided information that was inconsistent with the design offered in its initial proposal.

After Sletten's oral presentation, the CO asked Sletten to provide the BOMA calculations that were missing from its initial proposal. AR at 7; GSA Dismissal Request, Exh. 6, GSA Email to Sletten, Nov. 19, 2009. In response, Sletten transmitted a space summary comparison table that, for the first time, identified the

program spaces, the required square footage and the space provided. According to the agency, the table attached to Sletten’s submission was both inconsistent with Sletten’s initial proposal, and inconsistent with the revised space summary table that the firm provided to the agency in its November 10 email. AR at 7-8.

The Scoring of Sletten’s Proposal and the Selection Decision

The SSEB members evaluated Mortenson’s and Sletten’s proposals, as follows:

Evaluator	A	B	C	D	E	Average Score	Price
Mortenson	80	72.5	95	90	90	85.5	\$59.5M
Sletten	62.5	75	20	10	80	49.5	\$51.8M

AR, Tab 12, SSEB Evaluation Report at 28. Sletten’s evaluation scores reflected the evaluators’ concerns that, although Sletten’s proposal presented some strengths, it was deficient in a number of regards.² Among other things, the evaluators noted, as deficiencies, that Sletten had failed to provide required drawings, that Sletten’s floor plans were not the plans utilized for the BOMA calculations, and that Sletten’s BOMA calculations did not represent the solicitation’s requirements. *Id.* at 6. The evaluators also identified deficiencies associated with proposed space; for example, the evaluators noted that “[a]ll district judge chambers are unacceptably small -- clear lack of understanding on a key square footage,” and that Sletten proposed placing jury deliberation rooms for the fourth floor courtrooms on the third floor. *Id.* at 7.

Mortenson’s higher evaluation scores reflected the SSEB’s judgment that Mortenson had presented a superior proposal. In this regard, the SSEB noted, among other things, that Mortenson’s “proposal incorporates the most energy performance and sustainability concepts of all the final proposals and is the most High Performing Green Building concept.” AR, Tab 12, SSEB Evaluation Report, at 5. The SSEB recommended award to Mortenson.

The SSEB’s assessments were reviewed by both the CO, and the agency’s source selection authority (SSA). The CO agreed that Mortenson submitted the technically superior proposal with a low performance risk and that Mortenson submitted a fair

² The SSEB chair was concerned that the very low scores assigned to Sletten’s proposal by evaluators C and D were not justified and asked these two evaluators for additional justification for their scores. One evaluator provided additional narrative information, which was included in the SSEB Report. The other evaluator provided additional information after the SSEB’s report was finalized; this evaluator’s comments were attached to the report and presented to the SSA. AR at 9 n.5.

and reasonable price that, although it was not the lowest proposed price, was below the government estimate. In this regard, the CO noted that Mortenson's proposal satisfied all solicitation requirements and did not require discussions. AR, Tab 11, CO's Evaluation Memorandum, at 2.

With respect to Sletten's proposal, the CO noted that the peer review assessment had rated the firm's proposal as marginal overall, and agreed with the SSEB that Sletten's proposal presented a high performance risk. In this regard, the CO noted the SSEB's finding that Sletten's proposed design would require "a significant amount of redesign and further adherence to the program specifications." *Id.* at 2.

The CO concluded that all proposals, except Mortenson's, required extensive revisions through discussions and that, based upon her experience, she expected that offerors' proposed prices would increase as a result of the revisions. The CO determined that there was no benefit in conducting discussions and recommended award to Mortenson. *Id.* at 3.

The SSA ultimately agreed with the conclusions of the SSEB and CO that Mortenson's proposal should be selected for award as the only proposal that was fully compliant with the solicitation. AR at 10; Tab 14, Source Selection Decision, at 4. Specifically, she determined that the other five offerors' proposals, including Sletten's, required discussions and significant proposal revisions to become eligible for award.

In making her selection decision, the SSA decided to address the very low point scores assigned to Sletten's proposal by two evaluators. Upon review, the SSA concluded that these two scores were not supported by the evaluation record. As a result, the SSA removed the scores given by these two evaluators from the evaluations of all of the offerors. Without scores from these evaluators, GSA increased Sletten's average technical score to 72.5 points, and decreased Mortenson's average score to 80.3.³ AR, Tab 14, Source Selection Decision, at 3-4. (It was these scores that were provided to Sletten in its debriefing. Initial Protest at 8.) The increase in Sletten's technical point score, however, did not change the SSA's decision that only Mortenson's proposal was fully compliant with the solicitation requirements and that award should be made to Mortenson without conducting discussions.

Award was made to Mortenson. Following a debriefing, Sletten filed this protest with our Office.

³ By our calculations, Mortenson's average technical score should have been 80.8 $((80 + 72.5 + 90) / 3 = 80.8)$, rather than 80.3. See AR Tab 12, SSEB Evaluation Report. In any event, Sletten was not harmed by this understatement of Mortenson's recalculated score.

DISCUSSION

Sletten challenges the agency's evaluation of its technical proposal, arguing that the identified concerns were not deficiencies and could, in any event, have been corrected through clarifications or discussions. Sletten also complains that GSA did not consider the firm's lower proposed priced in selecting Mortenson's proposal for award.

Where a protester challenges an agency's evaluation of a proposal's technical acceptability, our review is limited to considering whether the evaluation is reasonable and consistent with the terms of the RFP and applicable procurement statutes and regulations. National Shower Express, Inc.; Rickaby Fire Support, B-293970, B-293970.2, July 15, 2004, 2004 CPD ¶ 140 at 4-5. Clearly stated RFP technical requirements are considered material to the needs of the government, and a proposal that fails to conform to such material terms is technically unacceptable and may not form the basis for award. Id.; Outdoor Venture Corp., B-288894.2, Dec. 19, 2001, 2001 CPD ¶ 13 at 2-3.

Here, the record shows that Sletten's proposal did not comply with a number of solicitation requirements, which the SSEB found to be proposal deficiencies. For example, the SSEB found that Sletten had failed to provide required drawings, that Sletten's floor plans were not the plans utilized for the BOMA calculations, that Sletten's BOMA calculations did not represent the solicitation's requirements, and that Sletten's design did not satisfy the minimum space requirements (such as for the district judges' chambers). See AR, Tab 12, SSEB Evaluation Report, at 6-7.

Sletten does not contend that its proposal satisfies these requirements, but instead argues that these deficiencies do not render its proposal technically unacceptable.⁴ We disagree. First, GSA found that Sletten's failure to provide required information in its proposal, such as scalable drawings and BOMA calculations, prevented the SSEB from being able to evaluate properly Sletten's proposal. Sletten has not shown that the agency's judgment in this regard was unreasonable. Moreover, the solicitation's space and allocation requirements can only be viewed as material

⁴ In this regard, Sletten argues that GSA never stated in its contemporaneous evaluation record that Sletten's proposal was technically unacceptable. While true, we think the contemporaneous record reasonably supports a conclusion that this proposal was unacceptable as tendered. First, the record shows that the SSA expressly found that only Mortenson's proposal was "fully compliant with the solicitation" and that Sletten's proposal would require revisions through discussions. AR, Tab 14, Source Selection Decision, at 4. The CO also specifically determined that Sletten's initial proposal was not compliant with the RFP, and included significant weaknesses and deficiencies that could not be improved without discussions and revisions. AR, Tab 11, Evaluation Memo at, 3.

requirements, which Sletten failed to satisfy. In fact, Sletten's actions throughout the procurement demonstrate its recognition of the materiality of the solicitation requirements, given its repeated attempts to revise its proposed design after the closing date for receipt of proposals.

We also disagree with Sletten that, to the extent the agency wanted to avoid holding discussions, these deficiencies could easily be corrected through clarifications. "Clarifications" are limited exchanges between the government and offerors that may occur when award without discussions is contemplated. Such communications with offerors, however, may not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. FAR § 15.306(b)(2). The evaluated deficiencies in Sletten's proposal could only be corrected through discussions, as this would require a material revision of its proposal.

With respect to conducting discussions with Sletten, we have found that a contracting agency is generally not required to conduct discussions where, as here, the RFP specifically instructs offerors of the agency's intent to award a contract on the basis of initial proposals. See FAR § 15.306(a)(3); Colomek Sys. Eng'g., B-291931.2, July 9, 2003, 2003 CPD ¶ 123 at 7. In this regard, the CO's discretion in deciding not to hold discussions is quite broad. Our Office will review the exercise of such discretion only to ensure that it was reasonably based on the particular circumstances of the procurement. Colomek Sys. Eng'g., supra. The fact that the protester in its initial proposal failed to comply with the RFP requirements does not give rise to an obligation on the agency's part to hold discussions, where discussions are not otherwise necessary.⁵

Sletten also challenges the source selection decision, complaining that the SSA failed to consider Sletten's lower price. Because we conclude that the agency found the protester's proposal to be technically unacceptable, the agency was not required to consider the firm's lower proposed price in its tradeoff decision, since it is well established that a technically unacceptable proposal cannot be considered for award. EMSA Ltd. P'ship, B-254900.4, July 26, 1994, 94-2 CPD ¶ 43 at 5.

Finally, in its comments on the agency report, Sletten complains that GSA evaluated proposals inconsistently, and argues that the awardee's proposal should also have been viewed as technically unacceptable. In making this argument, Sletten alleges that the SSEB found the Mortensen proposal to be deficient for failing to include

⁵ Although Sletten contends that GSA failed to conduct discussions with it, the record shows that GSA had communications with Sletten and permitted the firm to submit BOMA calculations. The agency's limited discussions with only Sletten was not protested to our Office. In any event, Sletten failed to allay the agency's concern with its BOMA calculations, despite the opportunity to submit these calculations.

information in its project management plan “on identifying, coordinating and cooperating with all entities.” Protester’s Comments at 29 (citing the SSEB Report). In response to a request from our Office to address this issue, GSA states that the “deficiencies” identified in the awardee’s proposal were actually raised in the underlying comments of one SSEB member, who ultimately determined that the awardee’s proposal was fully compliant with the solicitation requirements. GSA also states that the SSA independently determined that Mortenson’s proposal was fully compliant.⁶ GSA Response, April 9, 2010, at 2.

The protest is denied.⁷

Lynn H. Gibson
Acting General Counsel

⁶ On this issue--and in answer to our request for additional information--the agency provided declarations from the relevant SSEB member (who served as the SSEB chair) and the SSA. The SSEB chair identifies the specific pages in Mortenson’s proposal that provided the information he initially concluded was absent. Declaration of the SSEB Chair, Apr. 9, 2010, at 1-4. In our view, this response adequately answered the protester’s allegation. While we generally accord greater weight to contemporaneous evidence of an evaluation and source selection decision, we will consider post-protest explanations that provide a rationale for contemporaneous conclusions where, as here, those explanations are credible and consistent with the contemporaneous record. ITT Fed. Servs. Int’l Corp., B-283307, B-283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76 at 6.

⁷ Sletten made a number of arguments in its protest, and we have addressed the significant arguments. Although we do not specifically address every one of Sletten’s arguments, we have reviewed all Sletten’s arguments and find no basis to sustain the protest.