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**Comptroller General
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Decision

Matter of: JBG/Naylor Station I, LLC

File: B-402807.2

Date: August 16, 2010

Alex D. Tomaszczuk, Esq., and Jack Y. Chu, Esq., Pillsbury Winthrop Shaw Pittman LLP, for the protester.

Robert A. Hauser, Esq., General Services Administration, for the agency.

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DIGEST

Protest challenging permit requirements in solicitation for lease of office space is denied where agency reasonably found requirements necessary to meet its needs.

DECISION

JBG/Naylor Station I, LLC (JBG), of Wilmington, Delaware, protests the terms of solicitation for offers (SFO) No. 8DC2175, issued by the General Services Administration (GSA) for the lease of office space to house portions of the Department of Homeland Security (DHS). The protester asserts that the terms of the SFO improperly limited competition by effectively precluding the offer of new construction.

We deny the protest.

BACKGROUND

This procurement is for a total of 1,136,000 rentable square feet of office space, to be apportioned among no more than five buildings, to house three main DHS

components: Citizenship and Immigration Services, Science and Technology Directorate, and Undersecretary for Management.¹ AR at 2.

On December 4, 2009, the agency posted a request for information (RFI) on the Federal Business Opportunities (FedBizOpps) website seeking market feedback from potential sources concerning GSA's procurement strategy. Specifically, the intent of the RFI, which did not identify DHS as the lease occupant, was to "assess the availability of suitable space and to assist the Government in establishing the methodology by which suitable space will be procured." AR, Tab 7, RFI at 1. The requirement was for "existing and/or new construction," *id.* at 3, and the estimated occupancy date was the second half of calendar year 2013. The RFI contained no anticipated lease award date, but it did request that firms include an availability date. *Id.* at 5. According to the agency, the 19 responses to the RFI "demonstrated that there was a reasonable amount of potential competition in the referenced delineated area involving a mixture of existing buildings, new construction, smaller building sizes and/or a single building solution." AR at 3.

On February 18, 2010, shortly after the final acquisition plan was approved, the agency posted an expression of interest (EOI) on FedBizOpps to gauge the level of interest from potential sources for essentially the same minimum requirements in the RFI, including the same estimated occupancy date of the second half of 2013. AR, Tab 9, EOI at 1. The EOI, which identified DHS as the user agency, stated that the "Government will also consider new construction that, in the opinion of the Government, can provide occupancy consistent with the estimated occupancy date." *Id.* at 2. Again, the agency announced no anticipated lease award date. The agency states that it received 22 responsive submittals that, through different combinations of buildings, represented 54 potential solutions that included new and existing buildings located in each of the three geographic regions. Contracting Officer's Statement of Facts at 4. According to the agency, of the 54 potential solutions, one was for existing space that would satisfy the entire requirement, 15 were for existing space that would satisfy part of the requirement, 9 were for new construction that would satisfy up to the total requirement, and 29 were for new construction that would satisfy part of the requirement.

In March and April 2010, agency officials toured or received a graphic presentation of eight existing buildings and 14 proposed sites. Two of the toured sites were under construction; a representative for another site reported that the offeror had site plans and building permits that were approved and stamped.

¹ The record indicates that the leased space will also house the DHS University System and DHS Employee Career Development Center. Agency Report (AR), Tab 3, Justification at 3. Offerors could propose to supply all or part of the total space requirement. SFO § 1.2(C).

On April 1, 2010, the agency issued the SFO, which in relevant part required that offers contain

copies of all existing final base building zoning, subdivision and site plan approval(s) for the offered site(s). . . . These approvals must be complete and in place at the time of the offer such that no other approvals--other than building permits--would be required to construct and/or occupy the offered building(s).

SFO § 1.2(B). The SFO also included the following requirement:

Prior to award of the lease, but no later than December 31, 2010, all prospective Offerors shall provide to the Contracting Officer evidence of all base building “Core and Shell” Building Permits, issued by the local jurisdiction as necessary to renovate, construct and/or modify all offered building(s).

Id. The completion of all tenant improvements was required “no later than the end of [the] second quarter of calendar year 2014.” SFO § 1.11.

In late April, the agency published the first set of offeror questions and GSA responses. Question 2, submitted by the protester,² asked GSA to clarify the requirement that all permits, other than the building permit, be in place at the time of offer submission. The protester asserted that the requirement “makes it impossible to create a tailored solution utilizing a new structure on an existing site.” AR, Tab 15, Questions and Responses, Apr. 23, 2010, at 1. The protester also asked why the agency required that the “core and shell” building permits be in place by December 31. Id. The agency did not directly address the protester’s question regarding the permits due with the initial offer, but, with respect to the core and shell building permits, GSA responded that the “Government requires [the core and shell building permits] in order to substantiate the ability of offerors of prospective buildings to deliver in accordance with the Government’s timelines.” Id. The closing date for submission of offers was May 14.

In response to the issuance of the SFO, [DELETED] firms, including the protester, submitted offers, [DELETED] of which proposed new development or redevelopment.

The protester’s offer [DELETED]. Agency Response, July 30, 2010, Attachs. 2 and 3. By letter dated June 16, the agency requested that the protester [DELETED]. In response, according to the agency, the protester [DELETED].

² AR at 4.

ANALYSIS

The protester alleges that the SFO improperly limited competition by effectively precluding an offer of new construction. As explained below, we disagree.³

A contracting agency has the discretion to determine its needs and the best method to accommodate them. Parcel 47C LLC, B-286324, B-286324.2, Dec. 26, 2000, 2001 CPD ¶ 44 at 7. In preparing a solicitation, a contracting agency is required to specify its needs in a manner designed to achieve full and open competition and may include restrictive requirements only to the extent they are necessary to satisfy the agency's legitimate needs. 41 U.S.C. § 253a(a)(2); Innovative Refrigeration Concepts, B-272370, Sept. 30, 1996, 96-2 CPD ¶ 127 at 3. Where a protester challenges a requirement as unduly restrictive, the agency has the responsibility to establish that the requirement is reasonably necessary to meet its needs. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. Chadwick-Helmuth Co., Inc., B-279621.2, Aug. 17, 1998, 98-2 CPD ¶ 44 at 3.

A protester's mere 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. Dynamic Access Sys., B-295356, Feb. 8, 2005, 2005 CPD ¶ 34 at 4. Further, the fact that a requirement may be burdensome or even impossible for a particular firm to meet does not make it objectionable if the requirement properly reflects the agency's needs. Computer Maint. Operations Servs., B-255530, Feb. 23, 1994, 94-1 CPD ¶ 170 at 2. Specifically, the fact that SFO requirements limit the number of viable offers—for example, to those offering existing rather than newly constructed buildings—does not establish that the requirements are unreasonable. CESC Skyline, LLC, B-402520, B-402520.2, May 3, 2010, 2010 CPD ¶ 101 at 4-5. Moreover, there is no requirement that an agency equalize a competitive advantage

³ The protester also asserts that the evaluation scheme failed to account for the differences, by jurisdiction, in rental rate caps. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (2006), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. Bid Protest Regulations, 4 C.F.R. § 21.0(a)(1) (2010). Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Sales Res. Consultants, Inc., B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102 at 5. As explained below, we view the permit requirements of the SFO as reasonable. Given that the protester's offer [DELETED], the protester is not eligible to receive award and thus is not an interested party to raise its other protest allegations. Outdoor Venture Corp.; Applied Cos., B-299675, B-299676, July 19, 2007, 2007 CPD ¶ 138 at 6.

that a firm may enjoy because of its own particular business circumstances, where that advantage does not result from a preference or unfair action by the government. Carr's Wild Horse Ctr., B-285833, Oct. 3, 2000, 2000 CPD ¶ 210 at 4. As explained below, we think that the requirements at issue here are unobjectionable.

The agency's project schedule for this procurement is set forth in a lengthy flow chart, beginning in September 2009, and concluding in October 2014, containing 125 discrete steps. See AR, Tab 11, New Lease Space Comprehensive Project Schedule (Project Schedule). In developing this schedule, the agency weighed a number of considerations against DHS's desire to achieve consolidation of its offices as soon as possible. Those considerations included the length of time that a procurement of this size requires; whether there would be sufficient existing space in the market to satisfy the requirement; how long to allow for the construction of tenant improvements; and the termination date of existing leases. AR at 7. At the far end of the planning horizon were the occupancy dates, which were driven by the current lease expiration dates. The agency determined that a staggered phase-in, with lease occupancy in 2013 and 2014—rather than in 2013 as contemplated in the RFI and EOI—would be least costly in terms of vacancy risk. AR at 8. Working forward from the present, the agency estimated a lease award date of June 20, 2011. AR, Tab 11, Project Schedule at 2. Given these constraints, the agency faced a project schedule containing occupancy dates that ranged from 27 months to 36 months from the anticipated lease award date.

The agency then considered the following calculations in arriving at the SFO permit requirements. Site plan approval would take an estimated 1-2 years for a new construction project, and the design and completion of construction documents through permit approvals could take that length of time again. AR at 8. According to the agency's timeline, an offeror starting from bare ground could require from 2 to 4 years to obtain the permits required under the SFO and would still need to construct the facility.⁴ Because the total space requirement must be available, at the latest, within approximately 36 months of the anticipated lease award date, the agency considered timely delivery of the space achievable for an offeror proposing new construction, but only if construction could begin immediately after award. The government asserts that it reasonably included the site plan and building permit requirements in the SFO in order to reduce the delivery risk associated with what it characterizes as an aggressive, but not unreasonable, schedule. AR at 8. In our view, the agency has reasonably explained the nexus between its need to have new leases in place for timely occupancy and the requirement that offers include site plans and certain permits and that offerors produce building permits by

⁴ Besides the simple declaration that "permits need not be secured by December 2010 in order to ensure delivery of the building by June 2014," Protest at 9, the record contains no challenge by the protester to reasonableness of this estimated agency timeline. See id. at 9-10; Comments on AR at 1-4.

December 31; accordingly, we think the agency has established that the site plan and permit requirements are reasonably necessary to meet its needs.⁵

Underlying the protester's assertion that new construction is not a viable option under the SFO is its failure to distinguish between the feasibility of offering new construction that is already permitted, and new construction that is not. [DELETED]; the fact that JBG is burdened by the requirement is not sufficient to demonstrate that the requirement is unreasonable. CESC Skyline, LLC, supra.

The protester asserts that the agency "never truly intended to permit a new construction solution," Comments, June 21, 2010, at 2 n.1, and argues that GSA acted improperly by, in effect, misleading the protester regarding the agency's actual needs and inducing it to propose a new construction solution. In support of its position, the protester cites the following statement by the agency:

The Protester appears to believe that the Government either intended, or is required, to structure this procurement in a way that prefers, or at least allows, a tailored, "build to suit" construction solution, where the Government has substantial input into the design of the base building as well as the tenant interiors. . . . That is not the intent of this solicitation. This solicitation is designed to solicit offers of space in existing buildings or in new development where the developer is designing a [speculative] office building – that is, somewhat generic office space generally suitable for use by many different users.

AR at 4 (emphasis added).⁶

JBG's argument is unpersuasive because its premise is flawed. In the excerpt from the agency report quoted above, the agency reiterates that it was not seeking

⁵ By statute, funds may be appropriated for the lease or leases that are the subject of this protest only if the Committee on Transportation and Infrastructure of the House of Representatives adopts an approving resolution. 40 U.S.C. § 3307(a) (2006). The protester points out that the House resolution calls for "full and fair consideration of lease construction proposals," House Resolution, Committee on Transportation and Infrastructure, July 1, 2010, and asserts that such language renders the permit requirements unreasonable. Leaving aside the issue of whether that phrase "trumps" the SFO requirements, as the protester claims, nothing in that language, in our view, precludes the inclusion of reasonable permit requirements in the SFO. See 41 U.S.C. § 253a(a)(2)(B) (permitting "restrictive provisions or conditions" under full and open competition where "necessary to satisfy the needs of the executive agency"); CESC Skyline, LLC, supra.

⁶ The underlined portion is that quoted by the protester in its supplemental protest.

DHS-specific, “built-to-suit” construction; generic office space, newly constructed or existing, would meet the requirement. We see no basis in the above statement, or anywhere else in the record, for the protester’s assertion that the agency never intended to permit a new construction solution. On the contrary, as the protester states, “a proposed facility that is yet to be constructed would constitute a viable competitive option,” Comments, supra, at 3—provided that the offeror also had the necessary permits in place. It is because the protester [DELETED].⁷

In its initial protest, JBG asserted that the agency failed to provide a reasonable amount of time for offerors to respond to an alleged change to the SFO, namely, the acceleration of the occupancy schedule for one DHS component—Citizen and Immigration Services (CIS)—from the second quarter of 2014 to the third quarter of 2013.⁸ The agency notes that the SFO required completion of all tenant improvements “no later than the end of [the] second quarter of calendar year 2014,” SFO § 1.11 (emphasis added); moreover, it also reserved the right under the standard Progressive Occupancy clause to occupy the space sought in increments. See SFO, General Clauses, No. 12. Thus, the agency argues, it was not amending the SFO by announcing the 2013 occupancy date but merely exercising its discretion under the SFO to stagger the occupancy dates, in this case advising offerors that it anticipated an occupancy date in the third quarter of 2013 for CIS. In any event, while the protester asserts that it was prejudiced by the timing of the announcement of the agency’s decision regarding the occupancy schedule, there is no evidence in the record to show that the timing adversely affected the protester’s ability to compete. JBG nowhere states what it would have done differently to enhance its offer, or, more importantly, [DELETED], if the information had been communicated earlier, and thus there is no showing that the protester was prejudiced. See Armed Forces Hospitality, LLC, B-298978.2, B-298978.3, Oct. 1, 2009, 2009 CPD ¶192 at 9-10; McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3 (competitive prejudice is an essential element of a viable protest, and where the protester fails to demonstrate prejudice, our Office will not sustain a protest).

In a supplemental protest filed on June 21, the protester alleged that the timing of the agency’s modification to the CIS occupancy date, combined with the announcement of the lease award date, was “prejudicial” and “anti-competitive.” Supp. Protest at 4. Given that the occupancy date and lease award date were included in the set of offeror questions and GSA answers issued to all potential offerors on May 5, this protest ground, raised well after the closing time for receipt of proposals of May 14, is untimely. See 4 C.F.R. § 21(a)(1); see also Benchmade Knife Co., Inc., B-299366.3, B-299366.4, July 16, 2007, 2007 CPD ¶ 137 at 3 (finding supplemental protest

⁷ [DELETED].

⁸ GSA advised offerors of the occupancy date for CIS in its answer to offeror question No. 1, issued on May 5. AR, Tab 15, Questions and Responses, May 5, 2010, at 1.

challenging terms of solicitation untimely, even though original protest was timely filed). Moreover, as discussed above, the record lacks evidence of any prejudice to the protester as a result of the timing of the agency's announcement.

The protest is denied.

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