



## Decision

**Matter of:** The Flaherty Family Trust

**File:** B-414563.3

**Date:** August 16, 2018

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### DIGEST

1. Protest alleging that lease solicitation contains insufficient information for offerors to propose meaningful rental rates is denied where the solicitation provides offerors with the agency's general requirements and any remaining uncertainties can be accounted for within offerors' proposed rental rates.
  2. Protest challenging lease solicitation parking requirements is denied where the spaces being solicited represent the agency's actual requirement and where the requirement is not unduly restrictive of competition or inconsistent with other solicitation provisions.
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### DECISION

The Flaherty Family Trust, a small business located in Atherton, California, protests the terms of request for lease proposals (RLP) No. 6GA0198, issued by the U.S. General Services Administration (GSA) for lease space in Savannah, Georgia for the Department of Homeland Security, U.S. Customs and Border Protection agency (CBP). The protester contends that the solicitation fails to provide offerors with sufficient information regarding the agency's requirements, and is internally inconsistent and ambiguous.

We deny the protest.

### BACKGROUND

The solicitation was issued on March 17, 2017, seeking proposals for a 10-year, fully-serviced lease for office space for the CBP in Savannah, Georgia. The solicitation

anticipated award to the offeror whose offer conforms to the requirements of the RLP and is the lowest-priced, technically acceptable offer submitted. RLP at 16.<sup>1</sup>

The solicitation required the offered space to be located either “in an office, research, technology, or business park that is modern in design with a campus-like atmosphere,” or “on an attractively landscaped site containing one or more modern office [b]uildings that are professional and prestigious in appearance with the surrounding development well maintained and in consonance with a professional image.” Id. at 2. The RLP anticipated that the proposed site would have at least 44 parking spaces reserved for the exclusive use of the government and an additional 96 spaces of public parking within a quarter mile of the offered location. Id. at 1-2.

Offerors’ proposals were to include a fully-serviced lease rate that aggregated the total building shell rental rate, the tenant improvement rate, the building specific amortized capital rate, and applicable operating and parking costs. RLP at 11. For the tenant improvement rate, offerors were to provide an annual rent that amortized the cost of tenant improvements. Id. at 12. The solicitation contemplated that the agency would provide a tenant improvement allowance of \$37.39 per ANSI/BOMA Office Area (ABOA)<sup>2</sup> square foot, to cover tenant improvements directed by the government. RLP, Exh. A, GSA Form L100, at 3.

The solicitation package included a document titled “Agency Special Requirements” that provided further detail on the agency’s general requirements for the office space. RLP, Exh. B, Agency Special Requirements. This document provided usage, internal space, and parking specifications that were, in some cases, inconsistent with the main RLP document. See Contracting Officer’s Statement at 3.

On May 29, 2018, after Flaherty filed its protest of these inconsistencies with our Office, the agency issued a solicitation amendment (amendment five), which clarified that the Agency Special Requirements were included in the RLP “for informational purposes only so the offeror can see generally what will be built inside the provided shell.” RLP, Amend. 5. The amendment provided that final space allocations would be determined after award and that, in the event there were any discrepancies between the Agency Special Requirements and the main RLP document, “the requirements outlined in the RLP document itself shall control.” Id.

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<sup>1</sup> Unless otherwise indicated, citations to the RLP refer to the main solicitation document that was provided in tab 04A of the agency report.

<sup>2</sup> ABOA is the GSA-recognized standard, as defined by the American National Standards Institute/Building Owners and Managers Association, for measuring the area where the tenant normally houses personnel, furniture, and/or equipment. See General Services Acquisition Regulation § 570.102.

On June 4, Flaherty filed a supplemental protest of the amended solicitation terms.<sup>3</sup>

## DISCUSSION

The protester argues that the solicitation does not contain critical information needed for offerors to accurately price their proposals. In this regard, Flaherty asserts that the agency has failed to inform offerors of its current needs for the leased space, as it is obligated to do. Flaherty argues that, instead of providing such information, the agency improperly relies on advisory internal space specifications that render it impossible for offerors to formulate realistic and meaningful pricing. In addition to these challenges, Flaherty contends that the solicitation's parking space requirements are burdensome and inconsistent with other solicitation provisions.<sup>4</sup>

### Internal Space Requirements

The protester challenges the absence of definite information in the solicitation regarding the agency's internal space requirements, which the protester contends is needed for offerors to propose accurate rental rates. Protester Resp. to GAO First Request for Supp. Info. at 2.

By way of background, the solicitation here does not provide offerors with definite information regarding the agency's internal space requirements or its intended use of the internal building space.<sup>5</sup> Instead, the solicitation provides offerors with certain

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<sup>3</sup> Flaherty's supplemental protest was styled as an objection to a dismissal request filed by the agency. Because Flaherty's response raised new arguments challenging the amended solicitation, our Office docketed the challenge as a supplemental protest.

<sup>4</sup> While we do not address every argument raised by Flaherty in its protest, we have reviewed each issue and do not find any basis to sustain the protest. For example, during the course of the protest, Flaherty argued that the agency failed to post the solicitation on the FedBizOpps website as required under Federal Acquisition Regulation subpart 5.102. We dismissed this argument because the protester's allegations do not reflect that it was prejudiced by this alleged error. Competitive prejudice 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. Lockheed Martin Integrated Sys., Inc., B-408134.3, B-408134.5, July 3, 2013, 2013 CPD ¶ 169 at 8. Here, the record does not demonstrate that the agency's failure to post the solicitation on FedBizOpps resulted in any harm to the protester relative to the other offerors. See Dismissal Request at 2. Indeed, the protester concedes that it obtained a copy of the solicitation a month prior to the proposal submission date. See Protest at 4.

<sup>5</sup> The agency explained that the solicitation, as drafted, provides the GSA with greater flexibility, which it can use to decide which tenant improvements to undertake once it

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“Agency Special Requirements,” which are included for “informational purposes only” so offerors can “see generally what will be built inside the provided shell.” RLP Amend. 5. Additionally, the RLP main document sets forth the agency’s shell building requirements and notes that offerors will be provided a tenant improvement allowance of \$37.39 per ABOA square foot to be used for the “build-out of the [s]pace in accordance with the [g]overnment approved design intent drawings” that will be provided after award. RLP at 14. Thus, the solicitation anticipates that final space allocations will be decided after award, and that the agency will pay for renovation to accommodate these internal space requirements via the tenant improvement allowance. See RLP, Amend. 5.

Flaherty challenges the omission of definite internal space requirements from the solicitation, arguing that it will prevent offerors from proposing accurate rental rates. In this regard, the protester notes that the solicitation requires offerors to price fully-serviced space, inclusive of utilities, in their proposed rental rate.<sup>6</sup> According to the protester, the cost of such utilities is impacted by the requirements for the space. The protester notes, for example, that highly specialized uses, such as added showers and baths, could create large swings in costs, including the costs to provide utilities, and that these costs would not be covered by the tenant improvement allowance. Comments at 6; see also Protester’s Resp. to GAO Second Request for Supp. Info at 3. The protester maintains that these costs, however, “must be included in any responsible offeror’s pricing models and the final rent rate offered to GSA **before** award.” Comments at 6 (emphasis in original).

In preparing a procurement, agencies must develop specifications in such a manner as is necessary to achieve full and open competition in accordance with the nature of the property or services to be acquired. Sunbelt Props., Inc., B-249469 et al., Nov. 17, 1992, 92-2 CPD ¶ 353 at 4. A solicitation must contain sufficient information to allow offerors to compete intelligently and on an equal basis. SEK Solutions, LLC, B-406939.2, Feb. 27, 2014, 2014 CPD ¶ 87 at 5. There is no legal requirement, however, 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. Harmonia Holdings, LLC, B-407186.2, B-407186.3, Mar. 5, 2013, 2013 CPD ¶ 66 at 6.

Based on our review of the record here, we find that the solicitation provides sufficient information for offerors to compete intelligently and on an equal basis. In this regard, while the RLP does not provide definite information regarding the agency’s internal

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has selected a building site. See Agency Resp. to GAO Second Request for Supp. Info at 2.

<sup>6</sup> The solicitation included an annual cost statement worksheet (GSA Form 1217) directing offerors to calculate their best estimate for utilities costs, along with various other annual costs. See RLP, Exh. G, Lessor’s Annual Cost Statement.

space requirements, we are not persuaded that this omission leaves offerors without a basis to formulate meaningful operating costs and compete intelligently for the overall requirement. Although the protester asserts that highly specialized uses could have a large impact on operating costs, there is no indication in the solicitation that the agency anticipates adoption of such highly specialized requirements for the internal space and expects offerors to account for this possibility in calculating their operating costs. We note, in addition, that in the event the agency does adopt such highly specialized usages, it appears that the contractor would be entitled to an equitable adjustment under the contract's changes clause, which entitles the lessor to an adjustment in its operating cost base where there are changes to the lessor's costs as a result of tenant improvements. See RLP, Exh. E, General Clauses, at 13.

Furthermore, while solicitation amendment five's description of the Agency Special Requirements being provided "for informational purposes only" is somewhat inconsistent with the position taken by the agency in this protest that such information should be used by offerors to formulate their operating costs,<sup>7</sup> the protester has not established that the uncertainty caused by this ambiguity deprives offerors of the ability to formulate a reasonable estimate of their applicable operating costs. In this regard, we note that the Agency Special Requirements is the only document in the solicitation package that provides such internal usage information. Thus, for offerors calculating operating costs, there is no other internal usage information available to use.

Moreover, to the extent an offeror might base its estimated operating costs on the shell building alone, the protester has not asserted that doing so would result in materially different operating costs relative to using the information found in the Agency Special Requirements. In this connection, the agency denies that the usage of the internal space will make a material difference in operating costs, which the agency asserts are "almost entirely a product of the square footage of the building and the prevailing market rates for such factors as HVAC, plumbing, gas, janitorial services, etc." Agency Resp. to GAO Second Request for Supp. Info at 2.

In sum, we find that the solicitation provides offerors with sufficient information to compete intelligently for the requirement. While the solicitation does not completely remove every uncertainty from the mind of every prospective offeror, we see no reason that offerors could not account for the risks created by these uncertainties within their proposed rental rates. See Harmonia Holdings, LLC, supra.

### Parking Requirements

The protester additionally raises several challenges to the solicitation's parking requirements. First, Flaherty argues that the RLP parking requirements are inconsistent with the Agency Special Requirements. In this regard, the solicitation requires the offered location to have 96 parking spaces "publicly available within ¼ walkable mile," in addition to "44 structured/inside parking spaces reserved for the exclusive use of the

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<sup>7</sup> See Agency Resp. to GAO Second Request for Supp. Info at 3.

[g]overnment.” RLP at 1-2. Flaherty contends that this requirement is inconsistent with the Agency Special Requirements, which contemplate 100 secured parking spots for government and employee vehicles and 40 public parking spaces.<sup>8</sup>

We find no merit to this argument. While the protester is correct that these provisions are inconsistent, we note that solicitation amendment five, which was issued in response to Flaherty’s protest, expressly clarifies that “[w]here discrepancies between the requirements outlined in [the RLP] and Exhibit B-Agency Special Requirements occur, the requirements outlined in the RLP document itself shall control.” RLP, Amend. 5. The agency confirmed this interpretation in its notice of corrective action, stating that the RLP parking requirements control over the Agency Special Requirements and that the 96 additional parking spaces could be satisfied either with onsite parking or with offsite parking. Notice of Corrective Action at 3.

The protester also argues that the total number of spaces required under the solicitation (140) is “highly prejudicial against any bidder in an office business park,” which runs contrary to the RLP’s “indicate[d] preference for an office park location.” Comments at 7. In this regard, the RLP required office space to be located either (1) “in an office, research, technology, or business park that is modern in design with a campus-like atmosphere,” or (2) “on an attractively landscaped site containing one or more modern office [b]uildings that are professional and prestigious in appearance with the surrounding development well maintained and in consonance with a professional image.” RLP at 2. Flaherty notes that the total number of required parking spaces exceeds the county’s local code by 37 percent, making it difficult for an office park location to provide the requisite parking without significantly increased costs. In the protester’s view, this would “relegate[] this requirement to [a] retail, strip shopping center space.” Protest at 13.

It is within a contracting agency’s discretion to determine its needs and the best method to accommodate them, and we will not question an agency’s determination of its needs unless that determination has no reasonable basis. Salient Fed. Solutions, Inc., B-410174, Nov. 6, 2014, 2014 CPD ¶ 350 at 2. 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. LexisNexis, B-413612, Nov. 29, 2016, 2016 CPD ¶ 356 at 4-5. Additionally, the fact that a solicitation’s requirements may be burdensome or even impossible for an offeror to meet does not make them objectionable, if the requirements properly reflect the agency’s needs. TransAtlantic Lines, LLC, B-411846.2, Dec. 16, 2015, 2015 CPD ¶ 396 at 9.

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<sup>8</sup> The protester additionally argues that the requirement to provide 140 parking spaces represents an expansion of the parking requirement from prior RLP versions that is a “new and never advertised requirement.” Supp. Protest at 6. Here again, we find that Flaherty’s allegations do not reflect any competitive prejudice. See supra note 4. In this regard, the record demonstrates that Flaherty received notification of the applicable requirement at the same time as other offerors. See Dismissal Request at 2.

Here, we find nothing inconsistent or unreasonable about the requirement at issue. In this regard, the agency represents that the number of parking spaces being sought represents its actual requirement, see Agency Resp. to GAO First Request for Supp. Info. at 4, and the protester has made no showing otherwise. The protester additionally does not argue that there is a less restrictive means that could be utilized to meet the applicable requirement.<sup>9</sup>

While the protester argues that the parking requirement would exceed local zoning requirements, this fact does not establish that an office park location or an “attractively landscaped” office building could not still meet the requirement. We therefore conclude that the solicitation is not inconsistent with the RLP’s expressed preference for such office sites. While the requirement may be more burdensome for some offerors to meet than for others, this fact, without more, does not provide a basis for us to sustain the protester’s challenge. See TransAtlantic Lines, LLC, supra.

The protest is denied.

Thomas H. Armstrong  
General Counsel

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<sup>9</sup> Indeed, we note that the requirement, as drafted, has already been structured to accommodate sites that only have minimal on-site parking. See Agency Resp. to GAO First Request for Supp. Info. at 4.