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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: Paramount Group, Inc.

File: B-298082

Date: June 15, 2006

Kevin P. Mullen, Esq., and David E. Fletcher, Esq., DLA Piper Rudnick Gray Cary LLP, for the protester.

Robert C. MacKichan, Jr., Esq., Stuart W. Turner, Esq., and Kristen E. Ittig, Esq., Holland & Knight LLP, for Bristol Group, an intervenor.

Edith Toms, Esq., and Elizabeth A. Hall, Esq., General Services Administration, for the agency.

Jonathan L. Kang, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging solicitation's terms as unduly restrictive of competition is denied where agency demonstrates a reasonable basis for required approach to lease of office space and information provided in the solicitation is adequate to allow for submission of offers.

DECISION

Paramount Group, Inc. protests the terms of solicitation for offers (SFO) No. 06-011, issued by the General Services Administration (GSA) for the lease of office space to be occupied by the Department of Homeland Security (DHS), Immigration and Customs Enforcement Agency (ICE). The protester contends that the solicitation is unduly restrictive of competition.

We deny the protest.

BACKGROUND

The SFO seeks offers for the lease by GSA of up to 403,847 square feet of office space in Washington, DC on behalf of ICE. GSA currently leases office space for ICE

in the Chester A. Arthur Building (CAB), 425 I Street, N.W., Washington, DC.¹ Paramount is the current owner of the CAB and the incumbent lessor to GSA.

The SFO states that offers will be evaluated on the basis of three non-price technical factors, in descending order of importance: building characteristics, location, and key personnel and past performance. SFO § 2.3. The SFO states that the award will be made to the offeror “whose offer will be most advantageous to the Government and provides the best value to the Government.” Id. In selecting the successful offer, “price is of significantly less importance than the combined weight of the technical factors.” Id. The SFO anticipates a lease of 10 years, with an option for lease extension by the government after the eighth year. SFO at 7.

The SFO requires offerors to propose office space located within specified boundary areas in Washington, DC, that provides parking and access to metrorail and other amenities. SFO §§ 1.2, 1.3. The competition will take place in two phases. In the first phase of the competition, offerors must submit offers for office space provided as a building shell with basic construction elements, but without tenant improvements such as completed interior office space. SFO § 1.9. The parties refer to this standard by the common commercial term “warm lit shell.” Offerors are required to propose the office space with the following features:

Base structure and building enclosure components shall be complete. All common areas accessible by the Government, such as lobbies, fire egress corridors and stairwells, elevators, garages, and service areas, shall be complete. Restrooms shall be complete and operational. All newly installed building shell components, including but not limited to heating, ventilation, and air conditioning (HVAC), electrical, ceilings, sprinklers, etc., shall be furnished, installed, and coordinated with Tenant Improvements.

SFO § 1.9.A.1.

In their offers for the warm lit shell, offerors must propose a basic price per square foot for space, with an allowance for tenant improvements. This allowance is an established rate of \$38.30 per square foot set by the SFO for all offerors, and will be used by the lessor to build the tenant improvements, as directed by the agency, prior to occupancy. SFO §§ 1.10, 1.15; Supplemental Agency Memorandum of Law

¹ ICE is the DHS agency with responsibility for investigating threats to border security, and for enforcing economic, transportation, and infrastructure security laws and regulations. Prior to the creation of DHS, the CAB was occupied by one of ICE’s predecessor agencies, the Immigration and Naturalization Service (INS). In 2003, INS and other agencies were reorganized and consolidated into ICE, which assumed INS’s office space at the CAB.

at 6-7. Based on the initial offers for the warm lit shell, GSA will select offerors for a competitive range. SFO § 1.8(B)(2).

In the second phase of the competition, offerors selected for the competitive range will be provided additional information, including the program of requirements (POR), and will be required to conduct “test fits” of their space to determine which offeror provides the most efficient utilization of space for the government’s needs. Id.; Contracting Officer’s Statement ¶ 15.

The SFO also contains provisions that apply only to Paramount, as the lessor of ICE’s current office space in the CAB. The “Renovation of Current Location Alternative” provisions state that the CAB may be proposed as office space, provided that the building meets the requirements of the SFO. SFO § 1.21. These provisions require Paramount to renovate the CAB by demolishing existing tenant improvements, thereby providing the CAB as a warm lit shell in accordance with the SFO. Id. As part of the renovation process, Paramount must provide “swing space” for ICE, that is, provide temporary space for ICE during the renovation of the CAB, and conduct the required office moves for ICE personnel to and from the swing space during that time. Id.

Paramount submitted an agency-level protest on January 18, 2006, prior to the solicitation closing date, alleging that various SFO requirements and the lack of the POR placed it at a competitive disadvantage. The agency denied that protest on February 28, 2006, and Paramount then filed a timely protest with our Office.

WARM LIT SHELL REQUIREMENT

The protester contends that the warm lit shell requirement and the “Renovation of Current Location Alternative” provisions place it at a competitive disadvantage. The protester argues that the agency has not reasonably justified its requirement for a warm lit shell in a way that should require Paramount to demolish the existing tenant improvements in the CAB. In this regard, Paramount argues that the SFO unreasonably prevents it from offering the CAB with its existing tenant improvements and from reconfiguring the CAB to satisfy ICE’s needs, thereby saving time and costs; as a result, the protester contends that the SFO is unduly restrictive of competition.

While a contracting agency has the discretion to determine its needs and the best method to accommodate them, those needs must be specified in a manner designed to achieve full and open competition. Mark Dunning Indus., Inc., B-289378, Feb. 27, 2002, 2002 CPD ¶ 46 at 3-4. Solicitations may include restrictive requirements only to the extent they are necessary to satisfy the agency’s legitimate needs. 41 U.S.C. §§ 253a(a)(1)(A), (2)(B) (2000). Where a protester challenges a specification as unduly restrictive of competition, the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet the agency’s needs. Chadwick-Helmuth Co., 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. USA Fabrics, Inc., B-295737, B-295737.2, Apr. 19, 2005, 2005 CPD ¶ 82 at 5.

The agency cites two primary rationales for its requirement for a warm lit shell: flexibility for GSA client agencies and facilitation of evaluation of competing offers. With regard to the first rationale, the agency explains that a warm lit shell standard provides relatively uniform office space that allows GSA client agencies, such as ICE, to "focus their design efforts on their individual adjacency requirements and on other interior layout requirements," rather than "redesign, from scratch, the MEP [mechanical, electrical, plumbing] systems, the common areas, standard finishes, any fire and life safety related systems, etc." Supplemental Agency Memorandum of Law at 4. The warm lit shell also provides a standard level of quality that allows agencies to "know[] generally what to expect in the way of minimum quality standards in a Government leased location." Declaration of GSA Senior Realty Specialist ¶ 6. The agency states that the warm lit shell approach "is the only method of obtaining space that will permit ICE to actually design its interiors around its own operational needs so that it functions in accordance with its own mission, as opposed to functioning around the incumbent's constraints." Supplemental Agency Memorandum of Law at 5. In this regard, the agency explains that because ICE is comprised of portions of numerous predecessor agencies, it now requires the flexibility to reorganize the agency in new office space configurations. Contracting Officer's Statement ¶¶ 4, 8-9.

With regard to the second rationale, the agency explains that GSA's adoption of the warm lit shell standard stems from the agency's efforts in the early 1990s to bring the government's leasing practices in line with commercial practices, with the goal of attracting increased competition from potential commercial offerors. Declaration of GSA Senior Realty Specialist ¶ 5. The agency contends that requiring all offerors to offer a basic warm lit shell, without tenant improvements such as completed interior office space construction, allows the agency to more easily compare offers: "By requiring a uniform 'warm, lit shell' and a uniform Tenant Improvement allowance (set based on individual tenant needs for a given procurement), it is very easy to price compare between offers in a procurement." Id. ¶ 6. The agency contends that allowing Paramount to propose its current space without demolition, instead of the warm lit shell, would require the agency to provide for a much more detailed and complicated competition that specifically evaluates and compares the design of each offeror's proposed building and tenant improvements. Id. ¶ 7.

We believe that the agency has reasonably explained the basis for requiring offerors to provide a warm lit shell. Although the protester contends that it may be able to provide a more efficient or less costly alternative to the warm lit shell requirement, the agency need only provide a reasonable basis for its procurement approach, and

the protester's mere disagreement with the agency's solicitation approach does not render the agency's judgment unreasonable.² USA Fabrics, supra, at 5.

In any event, the government is not required to perpetuate a competitive advantage that an offeror may enjoy as the result of its performance of the current, or a prior, government contract. Inventory Accounting Serv., B-286814, Feb. 7, 2001, 2001 CPD ¶ 37 at 4. Conversely, an agency is not required to neutralize a competitive advantage that a potential offeror may have by virtue of its own particular circumstances where the advantage does not result from unfair action on the part of the government. Military Waste Mgmt., Inc., B-294645.2, Jan. 13, 2005, 2005 CPD ¶ 13 at 4. As long as an agency reasonably identifies its needs and allows offerors the opportunity to meet those needs, the fact that an offeror may have an advantage based on its ability to more readily meet the government's needs, as compared to the protester, does not mean that the solicitation is unduly restrictive of competition. See HG Props. A, L.P., B-280652, Nov. 2, 1998, 98-2 CPD ¶ 104.³

In sum, because the agency has demonstrated a reasonable basis for requiring offerors to propose a warm lit shell, and because the protester does not demonstrate that any competitive disadvantage it might incur is based on unfair government action, we deny this ground of protest.⁴

² Paramount also contends that the SFO provisions affect it more than other offerors, because the existing tenant improvements of the CAB could have been offered by the protester without incurring the costs of demolition. The agency notes, however, that any offeror who has office space with current tenant improvements will also be required to demolish them to provide a warm lit shell. Thus, Paramount is not uniquely disadvantaged by the requirement.

³ In HG Properties, our Office concluded that an SFO for leased property did not unduly restrict competition merely because it had some provisions favoring award to offerors who proposed new construction where the agency justified its preference for new construction, and the SFO did not preclude the protester, the incumbent lessor, from offering its existing property; the fact that the property owned by the incumbent lessor would require additional work to meet the agency's requirements did not mean that the SFO was unduly restrictive of competition. HG Props. A, L.P., supra, at 4-5.

⁴ Although Paramount challenged in its agency-level protest other SFO provisions that apply only to the CAB, such as the swing-space requirement, it does not do so in its protest to our Office. Rather, Paramount generally refers to these provisions as examples of the additional burdens it will bear because of the warm lit shell and demolition requirements.

POR DISCLOSURE

The protester next argues that the agency unreasonably withheld the POR from offerors, and that Paramount is disadvantaged because the absence of this information will make it more difficult for the protester to develop its offer for a warm lit shell and also to meet the unique requirements of the CAB renovation provisions of the SFO.

The agency contends that offerors do not need the POR to be able to submit their offers, stating that the SFO “contain[s] detailed construction specifications for the base building and certain generic aspects of the tenant improvements, as well as detailed criteria for the evaluation of the quality of the building architecture, systems, and construction.” Contracting Officer’s Statement at 6. The POR, in contrast, provides some, although not all, of the specifications for the actual tenant improvements, such as office space layout and configuration. Contracting Officer’s Statement at 6-7. With regard to the SFO provisions that apply to the renovation of the CAB, the agency also states that there is sufficient information for the protester to submit an offer:

The SFO contains all of the information needed for Paramount to develop a plan for the renovation and re-positioning of the base building to meet the minimum requirements of the SFO and to improve the competitive standing of the building in the procurement, as well as to develop a plan for the relocation of a portion of the building occupants into temporary swing space and for the phasing of tenant improvement construction.

Contracting Officer’s Statement at 6-7.

Thus, the agency argues, because offerors will be evaluated in the first stage of the procurement based on their offers for the warm lit shell in accordance with the information contained in the SFO, there is no need for offerors to have access to the POR. Furthermore, the agency notes that offerors do not need access to the POR to determine their proposed prices because the lease rate must be based solely on the warm lit shell, and all offerors are required to include the same tenant improvement allowance. SFO §§ 1.10, 1.15; Supplemental Agency Memorandum of Law at 6-7.

Although offerors are required to describe their general approach to providing the completed office space, and the CAB renovation requirements impose additional requirements for Paramount, we believe that it is speculative at this point to conclude that Paramount might be evaluated based on information that could not have been known without the POR (e.g., downgraded for insufficiently detailing the completed office space or phasing of swing space and tenant improvements). The agency has not conducted its evaluation of offers or indicated that the protester’s offer will not be included in the competitive range or otherwise excluded from award consideration; thus its protest merely anticipates prejudicial agency action

and is, therefore, speculative and premature. See Computer Assoc. Int'l, Inc., B-292077.2, Sept. 4, 2003, 2003 CPD ¶ 157. We assume that agencies, such as GSA, will conduct procurements in a fair and reasonable manner in accordance with the terms of the solicitation, and our Office will not consider a protest allegation which speculates that an agency will not evaluate proposals in the manner set forth in the solicitation. Walmac, Inc., B-244741, Oct. 22, 1991, 91-2 CPD ¶ 358.

The protest is denied.

Anthony H. Gamboa
General Counsel