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Decision

Matter of: CESC Skyline, LLC

File: B-402520; B-402520.2

Date: May 3, 2010

Mary Beth Bosco, Esq., Elizabeth Gill, Esq., and John Sharp, Esq., Patton Boggs LLP, for the protester.

Michael A. Hordell, Esq., and Stanley R. Soya, Esq., Pepper Hamilton LLP, for EREH Phase I LLC; Marcia G. Madsen, Esq., David F. Dowd, Esq., Roger D. Waldron, Esq., and Polly Myers, Esq., Mayer Brown LLP, for GBA Associates Limited Partnership, the intervenors.

Jeffrey H. Dunn, Esq., General Services Administration, for the agency.

Edward Goldstein, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging accelerated occupancy deadlines established in solicitation for acquisition of lease space in connection with the 2005 round of Department of Defense base realignments and closures is denied; protester's contention that the occupancy deadlines do not constitute legitimate requirements is without merit where the record shows that they are necessary to meet statutorily-imposed deadlines.

DECISION

CESC Skyline, LLC of Arlington, Virginia, protests the terms of solicitation for offers (SFO) No. 9VA2175, issued by the General Services Administration (GSA), seeking office and related space in Northern Virginia to house the Department of Defense (DOD) Medical Command Headquarters. The procurement is related to the 2005 round of DOD base realignments and closures authorized by the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, Title XXX (2001), in connection with the Defense Base Realignment and Closure (BRAC) Act of 1990, Pub. L. No. 101-510, Title XXIX (1990) (as amended). CESC argues that the SFO is unduly restrictive of competition in violation of the Competition in Contracting Act (CICA) of 1984, and that it is defective because it fails to provide prospective offerors certain information necessary to prepare a proposal.

We deny the protest.

By way of background, the term “BRAC” refers to the process enacted by Congress which authorizes DOD to reorganize its base structure to more efficiently and effectively support forces, increase operational readiness, and facilitate new ways of doing business. The first round of reorganization was authorized in 1988 by the Defense Authorization Amendments and BRAC Act, Pub. L. No. 100-526, Title II (1988) (as amended). Subsequently, additional BRAC rounds were completed in 1991, 1993, and 1995 as authorized by the Defense BRAC Act of 1990, Pub. L. No. 101-510, Title XXIX (1990) (as amended). The latest round—BRAC 2005—was authorized by the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, Title XXX (2001).¹ Pursuant to BRAC 2005, DOD is required to complete all recommended base realignments and closures no later than September 15, 2011.²

As it relates to this protest, under the 2005 BRAC reorganization, DOD is required to locate the components of the DOD Medical Command (MedCom) Headquarters on “a single, contiguous site.”³ DOD began its analysis of the options for housing MedCom

¹ Generally, under the BRAC process, the Secretary of Defense prepares a list of bases that DOD recommends for realignment or closure, which the Secretary then submits to a special BRAC Commission established by Congress. The BRAC Commission prepares a report for the President with its findings and conclusions regarding the recommendations of the Secretary of Defense. The President submits the BRAC Commission Report to Congress with the President’s approval or disapproval of the report. If the President approves the recommendations, they are binding 45 legislative days after Presidential transmission or Congressional adjournment, unless Congress enacts a joint resolution of disapproval. If the President disapproves the Commission’s initial recommendations, the Commission must submit revised recommendations to the President.

² The September 15, 2011 date derives from section 2904 of the BRAC Act, which requires DOD to complete all recommended base closures and realignments within 6 years of September 15, 2005, the date on which the President transmitted the BRAC Commission’s Report, with his approval, to Congress.

³ Specifically, in the 2005 BRAC round DOD is required to:

Realign the Potomac Annex, DC. Realign Bolling Air Force Base, DC. Realign Skyline, leased space in Falls Church, VA. Collocate the Navy Bureau of Medicine, Office of the Surgeon General of the Air Force, the Air Force Medical Operating Activity, and the Air Force Medical Support Activity, Office of the Secretary of Defense (Health Affairs), Tricare Management Activity, Office of the Army Surgeon General and US Army Medical Command to a single, contiguous site that meets the current Department of Defense AntiTerrorism Force Protection standards for new construction at either the National Naval Medical

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in 2006. DOD completed the analysis in 2008 with a recommendation to pursue leased space in the National Capital Region. The Under Secretary of Defense for Acquisition, Technology and Logistics approved this recommendation in March 2008 and, on June 12, 2008, DOD forwarded a request for space to GSA.

Based on DOD's request, GSA prepared a housing plan and prospectus, which were transmitted to Congress on September 16, 2009 for approval.⁴ Contracting Officer's (CO) Statement at 2. According to the prospectus, the MedCom Headquarters currently occupies approximately 600,000 rentable square feet (rsf) of space across 14 different locations in the Washington Metropolitan Area, which includes government-owned locations and leased space. Agency Report (AR), Tab 5, Prospectus No. PVA-04-WA10, at 5. The housing plan indicates that the leases have different expiration dates and that the current leased locations do not comply with the DOD Minimum Anti-Terrorism Standards for Buildings which must be met for all leases that expire in fiscal year 2009 and beyond.

In the housing plan and prospectus submitted to Congress, GSA proposed to lease up to 751,000 rsf in order to house the components of the MedCom Headquarters at a single site. The 751,000 rsf consists of approximately 600,000 rsf for BRAC covered functions and approximately 150,000 rsf for personnel not covered by BRAC and space not essential for BRAC covered operations (e.g., conference rooms, break areas, training areas). CO Statement at 2.

On January 20, 2010, before receiving Congressional approval of the prospectus, GSA issued the SFO, which provides for leasing 750,791 rsf in two phases. Phase I provides for moving all BRAC covered personnel by the September 15, 2011 BRAC deadline. Accordingly, the SFO requires that 600,000 rsf be ready for the government's move no later than June 1, 2011. In this regard, the SFO states that "[i]n order to meet the . . . BRAC statutory deadline of September 15, 2011, full

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Center, Bethesda, MD, Bolling Air Force Base, DC, or federally owned or leased space in the National Capital Region and consolidate common support activity.

2005 Defense BRAC Commission Final Approved Recommendations, Vol. 2, Appendix Q-99.

⁴ GSA prepared a lease prospectus for the MedCom Headquarters project, which provides, among other things, a project summary, a justification for the project, and a project description with an estimated total cost. See Agency Report (AR), Tab 5, Prospectus No. PVA-04-WA10. As provided by the Public Buildings Act, 40 U.S.C. §§ 3307 *et seq.*, GSA is required to obtain Congressional approval of the lease prospectus before it can execute the lease at issue in this protest since the lease is for a project in excess of \$2.66 million.

occupancy for the first phase is required no later than September 1, 2011.” SFO at 7. Phase II provides for moving non-BRAC related personnel and space not essential for BRAC operations. The remainder of the 750,791 rsf must be ready for commencement of the government move no later than June 1, 2012, so full occupancy can occur no later than September 1, 2012. Id.

On February 22, 2010, the SFO closing date, GSA received [DELETED] timely offers, including an offer from CESC. CESC filed its protest with our Office the same day.

In its protest, CESC principally argues that the occupancy dates set forth in the SFO are “extremely accelerated,” unduly restrictive of competition, and therefore in violation of CICA. Protest at 3. In this regard, CESC alleges that based on the required occupancy dates, there is currently only one viable location and offeror, thus rendering the SFO a de facto sole-source procurement. CESC further argues that, pursuant to CICA, the sole-source procurement cannot be justified because it was the result of GSA’s lack of advance planning. As a final matter, CESC argues that the SFO fails to contain sufficient information to enable offerors to prepare a Security Unit Price List mandated by the SFO.

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)(1) (2006); Innovative Refrigeration Concepts, B-272370, Sept. 30, 1996, 96-2 CPD ¶ 127 at 3. Where a protester challenges a specification as unduly restrictive, the procuring agency has the responsibility of establishing that the specification 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.

GSA recognizes that the occupancy deadlines established by the SFO have the practical effect of limiting the number of viable offerors to those with an existing building, and eliminates offerors such as CESC that would need to engage in new construction and are unable to immediately commence renovations of their building upon award (for example, due to occupants with outstanding leases). AR, at 2, 6. GSA asserts, however, that the occupancy schedule is necessary so that DOD is able to relocate all BRAC-affected MedCom personnel by the statutorily-mandated deadline of September 15, 2011.

CECSC argues that GSA's purported reliance on the September 15, 2011 BRAC deadline as justification for the occupancy dates is unreasonable because, according to CESC, the deadline is not immutable. Specifically, citing a September 18, 2009 DOD policy memorandum, CESC maintains that DOD has approved extending the BRAC move schedule beyond the September 15, 2011 deadline. In addition, CESC contends that GSA's own conduct demonstrates that it has the option of extending the BRAC deadline. In this regard, CESC notes that by dividing the move into two phases, GSA has effectively waived the BRAC deadline "to permit some amount of admittedly BRAC rentable square feet to be delivered after the September 15, 2011 deadline." Protester's Supp. Comments at 6. CESC also argues that GSA has implicitly recognized the possibility of waiving the BRAC deadline where the contracting officer, in response to CESC's protest, has acknowledged the potential to extend the occupancy period beyond the BRAC deadline, and GSA has advised Congress in a separate prospectus that it may not meet the September 15, 2011 deadline. CESC's arguments are without merit.

As a preliminary matter, the premise of CESC's arguments here is fatally flawed. The BRAC deadline is statutory, thereby requiring Congressional action, as opposed to a DOD policy memorandum or some action by GSA, to change the requirement. In any event, the memorandum cited by CESC, by its terms, and as subsequently clarified by DOD, does not purport to extend the statutorily-imposed BRAC deadline. Specifically, the memorandum addresses a requested delay by the Washington Headquarters Service "of the requirement that all lease renewals executed after September 30, 2009, must comply with the enhanced Antiterrorism (AT) criteria for buildings that house DOD employees." AR, Tab 12, Policy Memorandum from Ashton B. Carter, Under Secretary of Defense, Subject: Expiration of Leases Impacted by Base Realignment and Closure (BRAC) 2005, Sept. 18, 2009. In granting the waiver for the National Capital Region, the memorandum specifically directed that the Washington Headquarters Services

[b]e granted the authority to execute lease renewals until September 30, 2011, to accommodate continued occupancy by organizations in the [National Capital Region] affected by BRAC, even if the existing leased facility is not in compliance with [minimum antiterrorism standards] for buildings that house DOD employees. Such lease renewals may be for a term sufficient to allow occupancy by those organizations until their movement to the installations directed by the BRAC recommendation, including any time necessary to complete the disposal process, but in no event beyond September 30, 2014.

Id.

As subsequently explained in detail by DOD, it granted the waiver because enforcing the deadline for meeting the enhanced antiterrorism standards for the BRAC-affected organizations potentially could have required these organizations to move

twice, once when they had to renew their leases to meet the enhanced antiterrorism criteria, and then again to comport with the BRAC-mandated realignments. DOD thus sought “to avoid the mission disruption and waste of resources that could come with any double move.” AR, Tab 13, DOD Statement Clarifying its September 18, 2009 Memorandum, Sept. 23, 2009.

CESC asserts that when DOD granted the waiver it also extended the BRAC move deadline, given that the memorandum provides that lease renewals may be for a term through September 30, 2014. This provision, however, merely allows for extending the affected leases up through September 30, 2014—it does not address the BRAC move date. In fact, the memorandum implicitly recognizes compliance with the BRAC requirements by providing that lease renewals for BRAC-affected organizations “may be for a term sufficient to allow occupancy . . . until their movement to the installations directed by the BRAC recommendation.” AR, Tab 12, supra.⁵

CESC’s arguments suggesting that GSA has recognized that it may extend the BRAC deadline are equally baseless. As noted above, CESC argues that the two-phase occupancy process provided under the SFO deviates from the BRAC deadline since some BRAC space will not be delivered until after September 15, 2011. GSA explains that by dividing the requirement into two phases, it has prioritized delivery of the space necessary for DOD to meet the immediate BRAC move requirements. As noted above, the space to be delivered under Phase I will allow MedCom to perform its mission and thereby allow DOD to meet the BRAC relocation requirement by the September 15, 2011 deadline. Phase II encompasses space that is not mission-essential for the BRAC components, notwithstanding the fact some of the space

⁵ To the extent the memorandum may have contained any ambiguity regarding DOD’s policy in connection with lease term renewals and the BRAC deadline, DOD clarified the matter shortly thereafter through a public statement advising that

[t]he memorandum does not extend the BRAC relocation deadline and has no effect on BRAC relocation requirements. The Department has a legal obligation and a plan in place to close and realign all installations as recommended by the BRAC Commission by September 15, 2011. . . . The extension does not change the statutory BRAC deadline of Sept. 15, 2011, nor does it authorize any organization affected by BRAC to exceed the deadline.

AR, Tab 13, Lease Memorandum Clarification and Public Statement, Sept. 23, 2009. As DOD explained, allowing leases to run until September 2014 was intended to allow “time for orderly lease termination activities.” Id.

delivered under Phase II will be used by MedCom.⁶ See CO Statement at 5. This two-phase approach is consistent with and reasonably supports GSA's efforts to ensure that DOD will be capable of meeting the BRAC-mandated requirements, and does not suggest, as the CESC argues, an attempt to waive the BRAC deadline.⁷

CESC's additional arguments that GSA has suggested that the BRAC deadline is not firm and ultimately may be waived are based on mischaracterizations of a statement by the contracting officer in connection with this protest, and language contained in a prospectus submitted to Congress in connection with a different BRAC move. In both cases, GSA in fact affirms DOD's need to meet the September 2011 BRAC deadline, while also addressing potential contingencies if, for example, there is a significant delay in Congressional action on the prospectus which could affect the timing of the procurement. These statements do not suggest, as CESC argues, that GSA believes it has the authority to waive the BRAC statutory deadline or that GSA will not be able to meet the BRAC deadline. GSA's consideration of alternative courses of action in the event it became impossible to meet the BRAC deadline in no way alters GSA's duty to strive to meet the statutory deadline, and the contracting officer has consistently affirmed GSA's commitment to making an award that meets the current statutory deadline.

CESC further asserts that, to the extent the BRAC deadline is a legitimate requirement, it results in a de facto sole-source procurement, which cannot be justified because it is a consequence of GSA's lack of advance planning. The record reflects, however, that the SFO is not a de facto sole-source procurement. A survey of the rental market performed by GSA identified [DELETED] viable properties. See AR, Tab 6, Market Analysis, Nov. 20, 2008. Moreover, based on expressions of interest received by GSA and the contracting officer's understanding of market conditions, the contracting officer expected to receive at least [DELETED] viable offers in response to the SFO, [DELETED]. Owners of [DELETED] buildings have in fact submitted offers and both offerors have affirmed that they will be able to meet

⁶ GSA also explains that some of the space to be delivered in Phase II will house non-BRAC-related personnel. CO Statement at 2.

⁷ CESC argues that 600,000 rsf will not in fact meet the needs associated with the BRAC requirements since the prospectus identifies 535,169 usable square feet (usf) as BRAC space. According to CESC, 535,169 usf equates to approximately 642,202 rsf based on an industry standard factor of 1.2 to convert usf to rsf. CESC, however, fails to recognize that the 535,169 usf figure identified in the prospectus includes approximately 60,000 usf for non-BRAC personnel. See AR, Tab 5, Prospectus No. PVA-04-WA10, at 5. When this space is removed, the space specifically required for the BRAC move equates to 475,127 usf, which, after applying the 1.2 conversion factor, amounts to approximately 570,000 rsf, somewhat less than the 600,000 rsf provided for in the SFO.

the required occupancy dates. See CO Supp. Statement. Thus, CESC's contention that the BRAC occupancy requirements have resulted in a de facto sole-source procurement are without a factual basis.

Moreover, CESC's arguments chastising GSA for its alleged lack of advance planning are misplaced. First, the record reflects that GSA engaged in an orderly and deliberate process for identifying the requirements and evaluating potential options for meeting its requirements. While a more expeditious process might have been to the protester's benefit, there is no indication that GSA's acquisition planning was defective or otherwise unreasonable. Second, the statutory and regulatory provisions cited by the protester as support for its arguments concern the prohibition against using the agency's lack of advance planning as a justification for the agency's use of noncompetitive procedures, e.g., sole-source awards. See 10 U.S.C. § 2304(f)(4); 41 U.S.C. § 253(f)(4); Federal Acquisition Regulation § 6.301(c)(1). These provisions are inapposite, however, since the SFO here uses full and open competitive procedures.

As a final matter, CESC argues that the SFO does not provide offerors with sufficient information to prepare their offers. CESC complains that the SFO requires offerors to complete a Security Unit Price List but does not provide any specifications or quantities for any of the items listed. CESC also maintains that the Security Unit Price List is confusing because it is unclear as to whether the lessor must provide certain items as part of the rent, or if GSA will pay for them separately.

CESC is not an interested party to challenge these aspects of the SFO. 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) (2009).

Here, as discussed above, we conclude that the SFO's accelerated occupancy schedule represents a legitimate agency requirement. While CESC has not expressly asserted that it is unable to meet the SFO requirement in this regard, and the record reflects that CESC has in fact submitted an offer in response to the SFO, CESC tacitly admits its inability to meet the SFO occupancy requirements throughout its protest by repeatedly arguing that the accelerated occupancy schedule provided in the SFO results in a sole-source award to another offeror. E.g., Protest at 7 (stating that the SFO "violates the requirements of [CICA] by restricting bidding to a single prospective bidder"). CESC's inability to meet the SFO requirements (specifically, the accelerated occupancy schedule) is a logical predicate of its sole-source

argument.⁸ Since CESC's protest is premised on its inability to meet a legitimate agency requirement, it is apparent that CESC could not be eligible for an award under the SFO, and therefore does not have the direct economic interest required to challenge the other aspects of the SFO.⁹

The protest is denied.

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Acting General Counsel

⁸ This conclusion is also consistent with statements by the contracting officer throughout this protest that CESC's offer does not meet the government's minimum requirements since its proposed location currently only provides up to 431,235 rsf and there is not a reasonable likelihood that CESC would be able to add the additional space in time to meet the move-in dates mandated by the SFO. CO Statement at 3; CO Supp. Statement. CESC has not rebutted GSA's representations or conclusions in this regard.

⁹ After CESC filed its protest challenging the terms of the SFO, GSA rejected CESC's offer in response to the SFO because CESC's proposed occupancy schedule did not meet the schedule required by the terms of the SFO. CESC filed a separate protest challenging the agency's decision in this regard raising the same issues as CESC raised in its initial protest challenging the terms of the SFO. Having concluded, as discussed above, that CESC's protest of the SFO is without merit, CESC's protest of its elimination from the competition is denied as well.