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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: JER 370 Third Street, LLC

File: B-402025.2; B-402541

Date: June 1, 2010

Richard J. Conway, Esq., and Pablo Nichols, Esq., Dickstein Shapiro LLP, for the protester.

Allan I. Aasmaa, Esq., General Services Administration, for the agency.

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DIGEST

Protest of agency decision to cancel solicitation and resolicit the requirement is sustained where record fails to demonstrate reasonable basis for contracting officer's conclusion that competition under the original solicitation was inadequate.

DECISION

JER 370 Third Street, LLC (JER) of Menlo Park, California, protests the decision by the General Services Administration (GSA) to cancel solicitation for offers (SFO) No. GS-09B-02312, for the lease of office space to be used by the Environmental Protection Agency (EPA) in San Francisco, California. JER also protests the agency decision to issue a new solicitation for the same requirement. The protester contends that the agency lacked a reasonable basis for canceling the first solicitation.

We sustain the protest.

BACKGROUND

SFO No. GS-09B-02312, which was issued in December 2008, sought proposals for the lease of approximately 290,950 square feet of office and related space in San Francisco's central business district for a term of 15 years. The SFO included sections defining both "location requirements" and "unique requirements," and the

solicitation advised offerors that a failure to meet the latter requirements would render an offer unacceptable.¹ SFO at 6.

In addition to the foregoing requirements, the SFO included over 20 pages of specifications pertaining to the building's general architecture; architectural finishes; mechanical, electrical, and plumbing systems; services, utilities, and maintenance; safety and environmental management; and security. In contrast to the guidance furnished regarding a failure to meet one of the SFO's "unique requirements," the solicitation did not state that a failure to demonstrate compliance with specifications would render an offer technically unacceptable. Of relevance to this protest, the specification describing the required ceilings provided as follows:

A. Ceilings shall be at least 8 feet, 6 inches (preferably 9 feet, 0 inches) and no more than 12 feet, 0 inches measured from floor to the lowest obstruction. Finished ceiling heights greater than 8 feet, 6 inches are required in certain special spaces (see the attached Program of Requirements) and in the entry lobby area. Areas with raised flooring shall maintain these ceiling height limitations above the finished raised flooring. Bulkheads and hanging or surface-mounted light fixtures which impede traffic ways shall be avoided. Ceilings shall be uniform in color and appearance throughout the leased space, with no obvious damage to tiles or grid.

B. Ceilings shall have a minimum noise reduction coefficient (NRC) of 0.80 for open office areas, 0.75-0.85 for conference rooms, and 0.60 for all other Government-demised areas.

* * * * *

D. Space within the ceiling cavity should be sufficient (in no case less than 18") to provide ample room for the necessary services without the need for bulkheads and beam breaks.

SFO at 41.

The SFO also included a "Program of Requirements" (POR) describing EPA's requirements for the new space--that is, the types of space required (e.g.,

¹ "Location requirements" included, for example, proximity to restaurants and public transportation. "Unique requirements" included a loading dock area accessible from street level; Leadership in Energy and Environmental Design (LEED) certification, Silver level, at a minimum; ENERGY STAR certification; Level IV security; an onsite childcare facility; efficient layout, as demonstrated through a test fit layout; and a minimum daylight factor of 2 percent. SFO at 6-7.

offices, conference rooms) and the particular requirements pertaining to each (e.g., size of the space, ceiling height). Of relevance to this protest, section 3.5 of the POR provided that office and office support space should be arranged to maximize daylight penetration into the building interior; in furtherance of this goal, the POR required that “no occupiable floor space be located more than 50 feet from the perimeter windows.” POR at 10.

The solicitation provided for award to the offeror whose proposal represented the best value to the government, technical factors and price considered, with the former of significantly greater importance than the latter. The technical evaluation factors were, in descending order of importance, sustainability, building design/systems, and team qualifications/past performance. Under the building design/systems factor, the evaluators were to consider the extent to which the site layout and design plan addressed the site-related, building design, and program fit factors set out in the solicitation. The SFO provided that the minimum standard for the factor was met when “the proposed building [met] the program fit requirements and minimum building codes and standards as required throughout the SFO and POR.” SFO at 17.²

The Source Selection Plan (SSP) provided for the evaluation of proposals on a [deleted] under each of the three technical evaluation factors, with a score of [deleted] corresponding to an adjectival rating of [deleted], a score of [deleted] corresponding to a rating of [deleted], and scores of [deleted] corresponding to ratings of [deleted], respectively. A rating of [deleted] was to be assigned under the building design/systems factor where the proposed “[d]esign meets and at times exceeds the standards; no deficiencies or significant weaknesses; low risk of unsuccessful contract performance.” SSP at 16. The SSP also assigned weights to the three technical evaluation factors, as follows: sustainability--[deleted]; building and systems design--[deleted]; and team qualifications/past performance--[deleted].

Four offerors submitted proposals by the February 6, 2009 closing date. The evaluators performed an initial evaluation, determined that three of the four

² Under the sustainability factor, which is not at issue in this protest, the evaluators were to assess “the building’s approach in meeting a minimum LEED Silver level certification” and whether the offeror had outlined “a clear, comprehensive, and sustainable approach” to operating the building. *Id.* at 15-16. Under the team qualifications/past performance factor, which likewise is not at issue in this protest, the evaluators were to consider whether the offeror had successful experience and past performance with the design, construction, management, and operation of a similar building within the past 5 years.

proposals should be included in the competitive range, and conducted discussions with the competitive range offerors. After discussions had been concluded, the source selection evaluation board (SSEB) drafted a final technical report.

In responding to this protest, GSA furnished us with several versions of the SSEB's final technical evaluation report; the agency was not able to identify which, if any, of the versions represented the consensus views of the evaluators, however.³ In this connection, the agency stated that it could not produce a final technical report that was endorsed by the evaluation board members. GSA Letter to GAO, Apr. 16, 2010 at 1. In all of the versions of the report furnished to us, JER's offer received a score of [deleted] under the sustainability factor, [deleted] under the building design/systems factor, and [deleted] under the team qualifications/past performance factor, corresponding to a rating of [deleted]. One of the other offerors, Lincoln Property Company, received scores of [deleted] under the first and third factors and a score of [deleted] under the second, while the third offeror received scores of [deleted] under the first factor and [deleted] under the second and third. When the agency multiplied the point scores by the factor weights provided for in the SSP, Lincoln received a total score of [deleted]; the protester, a score of [deleted]; and the third offeror, a score of [deleted]. Offerors' evaluated prices (per square foot) were as follows: JER--[deleted]; Lincoln--[deleted]; and the third offeror--[deleted].⁴ Agency Report (AR), Exh. 11, Negotiations Memorandum, Dec. 8, 2009, at 4, 5, 7.

By decision dated November 23, 2009, the SSA determined that Lincoln's offer represented the best value to the government. The SSA noted that neither JER nor the third offeror had proposed a building of the "highest quality"; in this connection, the SSA observed that neither proposal complied with the solicitation requirement pertaining to the ceiling cavity, which, in his view, posed a significant risk to the government since noncompliance could affect the installation of necessary equipment and the quality of the building's air

³ Only one of the three versions of the report furnished to us included signatures in the blanks for SSEB member signatures, and the dates that the evaluators signed varied, with the earliest signature dated November 6, 2009 and the last three dated November 20. The differing dates of signature, along with the different versions of the report, suggest that the report was revised as it was circulated among the various board members for signature. Troublingly, there is no evidence that the version that included the final edits was re-circulated for approval to the SSEB members who had signed off on an earlier version.

⁴ Lincoln's price was originally evaluated as [deleted]. AR, Exh. 10, SSA Decision, Addendum No. 1, Dec. 8, 2009.

supply. The SSA concluded that the technical superiority of Lincoln's proposal outweighed its higher price and justified its selection for award.

GSA sent Lincoln a lease for signature on December 4, 2009. As of February 2010, Lincoln still had not returned a signed lease, and on February 12, the SSA decided to cancel the solicitation. As "background" for his decision, the SSA noted the following:

- Lincoln's building had been selected for award as representing the best value to the government,
- he had originally determined [deleted],
- an updated market survey indicated that there was substantial new vacant inventory available on the market, and
- two of the three offers received by the agency "did not meet critical parts of the agency requirements."

AR, Exh. 12, Findings and Determination: Cancellation of Procurement, Feb. 12, 2010, at 1-2. Based on the foregoing, the SSA concluded that competition under the solicitation had not been adequate; that [deleted], that is, comparable quality space was available at significantly lower rates [deleted]; and that modification of the SFO's requirements might increase competition. Accordingly, he determined that it would be in the best interest of the government to reject all offers and to recompete the requirement. *Id.* at 2. The agency notified JER of the decision to cancel, and 6 days later, issued a presolicitation notice for SFO No. 0CA2196, seeking the same office space for EPA. On February 22, JER protested to our Office.

DISCUSSION

JER recognizes that in a negotiated procurement, an agency may cancel an existing solicitation where it has a reasonable basis for doing so, *see, e.g., Blue Rock Structures, Inc.*, B-400811, Jan. 23, 2009, 2009 CPD ¶ 26 at 2, but argues that the agency lacked a reasonable basis for its decision to cancel here. The protester contends that the agency decided to cancel after it became apparent that Lincoln would be unable to perform and that award to the next-in-line offeror, *i.e.*, JER, would therefore be required. The protester maintains that GSA sought to avoid awarding it a lease because EPA did not want to move into its proposed building, despite the fact that its offered space meets all of the SFO's stated requirements.

In response, the agency maintains that JER's offer was ineligible for award because the protester's proposed building failed to meet critical solicitation requirements. Specifically, the agency asserts that the offer failed to demonstrate compliance with the guidance in the SFO that "space within the ceiling cavity should be sufficient (in no case less than 18") to provide ample room for the necessary services without the

need for bulkheads or beam breaks,” SFO at 41, and with the requirement in the POR that no occupiable floor space be more than 50 feet from perimeter windows.

As noted above, the agency failed to produce a technical evaluation report endorsed by the evaluation panel members in its response to the protest here; thus, the record lacks documentation as to the technical evaluation panel’s conclusions regarding strengths, weaknesses, deficiencies, or risks in the protester’s offer. Moreover, none of the versions of the technical evaluation report produced by the agency, or the SSA’s source selection decision, includes a finding that the protester’s offer had been determined technically unacceptable. That is, while all versions of the report include findings of noncompliance with the guidance pertaining to required space in the ceiling cavity, in none is it indicated that the noncompliance rendered the offer technically unacceptable; on the contrary, in all versions of the report, the protester’s offer was assigned a score of [deleted], corresponding to a rating of [deleted], under the building design/systems evaluation factor. Likewise, while the SSA found that the protester had failed to comply with the guidance pertaining to the ceiling cavity and that this posed a risk to the government, he did not find that JER’s offer was technically unacceptable as a result; his rationale for selecting Lincoln for award was that its proposal was superior to the proposals of the other offerors, not that Lincoln had offered the only acceptable proposal. AR, Exh. 10, SSA Decision, Nov. 23, 2009, at 15.⁵ In sum, the record here does not establish that either the technical evaluators or the SSA considered the protester’s proposal to be technically unacceptable and thus ineligible for award.⁶

We turn then to the agency’s second justification for canceling and resoliciting—*i.e.*, that there has been a recent increase in the inventory of buildings available for rental in San Francisco, and, as a result, the agency can expect to receive offers for space [deleted] at lower rates than the rate proposed by Lincoln. We have reviewed the “market research” relied on by the contracting officer in reaching the foregoing conclusion, and fail to see how it supports a finding that offers of space comparable

⁵ Similarly, there was no finding in the versions of the technical evaluation report that were furnished to us or in the SSA’s award decision that the presence of occupiable floor space more than 50 feet from perimeter windows resulted in the protester’s building being considered technically unacceptable.

⁶ To the extent that the agency’s position is that, even if the protester’s proposal is not technically unacceptable, the contracting officer was still justified in considering the protester’s proposal ineligible for award because its proposed building was not of high quality, this conclusion is not supported by the findings of the SSEB, which, as previously noted, assigned the protester’s proposal a rating of [deleted] under the building design/systems factors.

in quality to the Lincoln building at rates in the [deleted] may be anticipated. In addition, while we have recognized that the potential for cost savings provides a reasonable basis for cancellation, RN Expertise, Inc., B-401020, Mar. 27, 2009, 2009 CPD ¶ 63 at 4, GSA has not established—or even conjectured—that it will receive prices more favorable than the protester’s if it resolicits; its position is simply that it can expect to receive prices more favorable than Lincoln’s.

In our view, the record fails to demonstrate that the agency had a reasonable basis for canceling the SFO. We recommend that the agency reinstate the cancelled solicitation and proceed with the source selection process, which process, we recognize, may include further consideration of the technical acceptability of the offers, in light of the concerns expressed by the agency in response to the protest regarding, in particular, the protester’s compliance with the ceiling cavity and window distance specifications. We also recommend that JER be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(d)(1) (2010). The protester’s certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days after receipt of this decision.

The protest is sustained.

Lynn H. Gibson
Acting General Counsel