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Decision

Matter of: Exec Plaza, LLC
File: B-400107; B-400107.2
Date: August 1, 2008

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Edith Toms, Esq., and Elizabeth Johnson, Esq., General Services Administration, for the agency.
Jonathan L. Kang, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging terms of a solicitation for lease of office space that apply only to the incumbent lessor is denied where the agency demonstrates that the requirements are reasonable, despite imposing unequal burdens on the protester.

DECISION

Exec Plaza, LLC (Exec) protests the terms of solicitation for offers (SFO) 08-008, issued by the General Services Administration (GSA) for the lease of office space for the National Cancer Institute (NCI), a division of the National Institutes of Health (NIH). The protester contends that the solicitation is unduly restrictive of competition because it contains burdensome requirements that apply only to the incumbent lessors.

We deny the protest.

BACKGROUND

The SFO seeks offers for the lease by GSA of approximately 574,164 square feet of office space in Rockville, MD, on behalf of NCI. GSA currently leases office space for NCI under multiple leases in four buildings in Rockville at 6120 and 6130 Executive Boulevard (these two buildings are owned by the protester and are collectively known as "Executive Plaza"), 6116 Executive Boulevard, and 2115 East Jefferson Street. The office space for NCI is provided under [deleted] separate leases: [deleted] leases for Executive Plaza, [deleted] lease for 6116 Executive

Boulevard, and [deleted] leases for 2115 East Jefferson Street. Contracting Officer (CO) Statement at 1. The current leases at Executive Plaza were entered into in April 1986 for a 10-year term, and were subsequently extended through non-competitive lease extensions. The leases are due to expire in September 2009.

The SFO was issued on February 29, 2008. The SFO states that offers will be evaluated on the basis of four non-price technical factors, in descending order of importance: building characteristics, location, site parameters, and key personnel and past performance.¹ 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, the “technical evaluation factors, when combined, are significantly more important than price.” *Id.* The SFO anticipates the award of a lease for a 10-year term beginning “anytime between August 2011 and February 2012.” SFO §§ 1.5, 1.7. The solicitation requires the proposed office space to have a single owner, and be managed by a single management group. SFO § 1.4.

Exec filed this protest on April 25. The agency subsequently received [deleted] offers by the April 28 closing date, including Exec. In its protest, Exec argued that the SFO was unduly restrictive of competition because it placed numerous requirements on Exec as an incumbent lessor that did not apply to other offerors. On May 28, the agency submitted its report on the protest. On June 6, Exec submitted its comments on the agency report, arguing that the agency’s report did not provide a reasonable basis for the restrictive SFO provisions. On June 19, GSA submitted a supplemental agency report addressing the protester’s initial arguments, as well as its comments on the initial agency report. As part of this supplemental report, GSA stated that it had issued amendment No. 2 to the SFO, which revised the solicitation regarding certain of the requirements challenged in Exec’s protest. GSA’s June 19 supplemental report also contained a justification and approval (J&A) for extension of the Executive Plaza leases on a non-competitive basis. The J&A states that extension of the Executive Plaza leases is required to establish a common termination date with the other lessors of NCI office space, and to avoid costs that would be incurred by a short-term relocation of NCI prior to the new lease. Supp. Agency Report (AR), attach. 1, J&A for Lease Extension, at 2-3.

Based on the revisions to the SFO, GSA argued that certain of Exec’s arguments were rendered moot. In its comments on the agency’s June 19 supplemental report, as well as in other briefings to our Office, Exec argues that the changes in SFO

¹ Each of these evaluation factors contains several subfactors which are not relevant to this protest.

Amendment No. 2 do not resolve its protest grounds, and that the solicitation remains unduly restrictive of competition.²

The solicitation, as amended, contains general requirements that apply to all offerors, as well as specific provisions in SFO amendment No. 2 § 1.20 that apply only to the incumbent lessors. The SFO requires offerors to propose office space as a “warm lit shell,” meaning that the space must provide basic construction elements such that the base structure, common areas such as lobbies, stairwells and elevators, power, heating, cooling, and ventilation systems, garages, and restrooms.³ SFO amend. 2 § 1.9, 1.20. The warm lit shell does not include “tenant improvements,” *i.e.*, completed interior office space required to meet the tenant agency’s program of requirements (POR). SFO § 1.10. After award, the SFO anticipates that GSA and the lessor will negotiate construction of new tenant improvements to meet the POR, utilizing a tenant improvement allowance of \$42.08 per square foot. SFO § 1.10. The tenant improvement allowance is an amount per square foot that a lessor must provide for construction of improvements for the tenant agency. Although the lessor must perform the work at the outset of the lease, the government pays the lessor the allowance amortized over a period set forth in the lease. SFO § 1.8(E); see also, 41 C.F.R. § 102-85.90-.100 (2008).

With respect to non-incumbent offerors who propose buildings with existing tenant improvements, the SFO states that these offerors must assume that the existing improvements will be demolished, as follows:

² Exec also contends that GSA’s amendment to the SFO, announced in the agency’s June 19, 2008 supplemental report on the protest, constituted corrective action which entitled the protester to a reimbursement of the costs of pursuing its initial protest. GSA does not agree that Exec is entitled to protest costs, arguing that the record does not show that the initial protest grounds were clearly meritorious. In this regard, our Office will recommend that a protester be reimbursed its protest costs only where, under the facts and circumstances of a given case, the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Advanced Envtl. Solutions, Inc.-Costs, B-296136.2, June 20, 2005, 2005 CPD ¶ 121 at 2-3. We have docketed this request as a separate matter, and will address it separately.

³ “Warm lit shell” is a common industry term, referring to basic building structure elements. While the non-incumbent-specific SFO provisions refer to a “building shell,” and the incumbent-specific provisions refer to a “warm lit shell,” SFO §§ 1.9, 1.20, GSA states that for purposes of the SFO, the terms “building shell” and “warm lit shell” are interchangeable. Supp. AR at 5. We think the record supports this view, as SFO § 1.20 states that the incumbent offeror must provide a “warm lit shell” consistent with the definition of such in Section 1.9 of this SFO.” SFO § 1.20(C).

Demolition. All required demolition is at the Lessor's expense and offers should be priced accordingly. Notwithstanding § 1.11(A)(4) [concerning credits towards the tenant improvement allowance], any offeror proposing an existing building with existing tenant improvements must assume that all existing improvements must be demolished in order to provide for the Government's new POR.

SFO amend. 2 § 1.9(A)(15).

With respect to incumbent offerors, the initial SFO explained that the "majority of this requirement is currently located at 6116, 6120 and 6130 Executive Boulevard, Rockville, MD (the 'Executive Boulevard Properties')," and that the incumbent lessors' buildings will require "modernization" to meet the requirements of the solicitation. SFO § 1.20(A). Despite renovations over the course of approximately 23 years of tenancy, GSA states that the Executive Plaza buildings do not meet all of the current warm lit shell requirements, and that the interior space requires new tenant improvements to meet the anticipated POR for office configurations. CO Statement at 1-2. In particular, GSA states that renovation of Executive Plaza will be required to address the consolidation of the NCI office space from the numerous current locations to the consolidated requirements of the new lease. *Id.* at 2.

The SFO also advised the incumbent offerors to "assume that all existing tenant improvements must be demolished in order to provide the Government's new POR." SFO amend. 2 § 1.20(A). Because the modernization of the incumbent offerors' properties will require all or portions of the building to be vacant from time to time during modernization, the incumbent offerors must also propose, at their own expense, swing space for the NCI staff, as follows:

During modernization, the Lessor(s) of the Executive Boulevard Properties will be responsible for providing and paying for swing space (temporary alternate space) equal in size to the amount of space vacated from time to time in the Executive Boulevard Properties ("Swing Space").

SFO § 1.20(B).

Additionally, the incumbent-specific solicitation provisions state that "the Executive Boulevard Properties must meet all of the requirements of the SFO, including all security requirements outlined in Section 9.0 of this SFO." SFO amend. 2 § 1.20(G).

DISCUSSION

The protester argues that the SFO is unduly restrictive of competition because it contains numerous requirements which unreasonably place Exec at a competitive disadvantage.⁴ As discussed in detail below, we address the protester's arguments that the terms of the SFO unreasonably: (1) require Exec to demolish its existing tenant improvements, (2) apply materially different and unequal security requirements to Exec, (3) require Exec to provide swing space during the renovation of Executive Plaza, and (4) require offerors to have single ownership of the proposed properties. We find no merit to any of the protester's arguments.⁵

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. 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

⁴ As discussed above, NCI currently occupies four different buildings: the two buildings comprising Executive Plaza, owned by the protester, and the two owned by other offerors, 6116 Executive Plaza and 2115 East Jefferson Street. The SFO refers to the incumbent lessors collectively as the "Executive Boulevard Properties." The protester argues that the incumbent-specific provisions of the solicitation are unduly restrictive of competition; thus our discussion addresses these provisions as they apply to Exec.

⁵ The protester raises numerous collateral arguments in its protest that we do not address here. For example, the protester argues that the solicitation unreasonably requires incumbent offerors to submit a written modernization plan to demonstrate how the incumbent lessor "proposes to modernize the Executive Boulevard Properties in accordance with all of the requirements of this SFO, including the requirements set forth in this Section 1.20, with minimum disruption and interference with the ongoing operations of the NIH." SFO § 1.20(F). As discussed below, we conclude that the SFO requirements are reasonable regarding demolition of existing tenant improvements and renovation and swing space. In light of these requirements, we do not think that it is unreasonable for the incumbent to provide a written overview of its plans to achieve the required work—which other offerors will not need to perform. We have reviewed all of the protest grounds raised by the protester and find that none has merit.

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.

As a general matter, we have previously addressed arguments by incumbent lessors that requirements in a solicitation that apply only to the lessor are unduly restrictive of competition. While we recognize that, in certain instances, incumbent lessors may face unique and unequal burdens as compared to non-incumbent offerors when solicitations require demolition and renovations, such disadvantages are not necessarily unreasonable or unduly restrictive of competition. See Paramount Group, Inc., B-298082, June 15, 2006, 2006 CPD ¶ 98 at 5.

The government is also 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 another offeror, 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 at 4-5.

Demolition of Existing Tenant Improvements

Exec argues that the requirement to demolish existing tenant improvements is unreasonable. The protester contends that (1) the SFO requires Exec, but not non-incumbent offerors, to demolish its existing tenant improvements, and (2) the demolition requirement is prejudicial to the protester's ability to compete for the lease because it imposes additional costs and does not allow Exec to take advantage of existing, high-value tenant improvements in Executive Plaza. The agency argues that the SFO demolition requirements apply equally to all offerors, and that the requirements are a reasonable way to meet the agency's requirements. For the reasons below, we conclude that the record does not support Exec's arguments, and that the demolition requirement is reasonable.

The SFO, as amended, requires offerors to propose office space as a warm lit shell, without tenant improvements. The SFO states that offerors must assume that existing tenant improvements will need to be demolished. The demolition requirements are set forth in two provisions, one that applies generally to all offerors, and one that applies to Exec:

Demolition. All required demolition is at the Lessor's expense and offers should be priced accordingly. Notwithstanding § 1.11(A)(4), any

offeror proposing an existing building with existing tenant improvements must assume that all existing improvements must be demolished in order to provide for the Government's new POR.

SFO amend. 2 § 1.9(A) (generally applicable requirements).

In addition, all required demolition will be at the Executive Boulevard Properties expense and its offer should be priced accordingly. Notwithstanding § 1.11(A)(4), since the Executive Boulevard Properties will be proposing to offer an existing building with existing tenant improvements, the Executive Boulevard Properties must assume that all existing tenant improvements must be demolished in order to provide the Government's new POR.

SFO amend. 2 § 1.20(A) (incumbent-specific requirements).

First, the protester contends that because SFO § 1.20(A) specifically states that "the Executive Boulevard Properties must assume that all existing tenant improvements must be demolished," the incumbent offeror is being treated unequally from other offerors. As the agency notes, however, the demolition requirement clearly applies to all offerors with existing tenant improvements. Both the general and incumbent-specific requirements use identical language, stating that offerors must "assume that all existing improvements must be demolished in order to provide for the Government's new POR." SFO § 1.9(15), 1.20(A). Although the requirement regarding the incumbent lessors is duplicative, we find no basis to conclude that the requirements are unequal or impose different obligations on incumbent and non-incumbent offerors.

Next, the protester argues that it is specifically disadvantaged by the requirement to demolish existing improvements. Exec states that it has recently made improvements at Executive Plaza which would need to be demolished under the terms of the SFO. Thus, the protester argues, the demolition requirements are prejudicial to its ability to compete for the lease because the existing improvements will be "wasted," and "therefore add an additional time and cost burden" on the protester. Protester's Comments, June 9, 2008, at 10.

GSA argues that demolition of existing improvements is required to meet the warm lit shell requirements. The agency states that the warm lit shell approach "allows the tenant agency to design the interior spaces to its own unique needs and to increase its flexibility by not being constrained to existing space configurations." Supp. AR, July 9, 2008, at 6. GSA also states that the warm lit shell approach allows offerors to offer leased space on an equal basis, thereby enabling the agency to make a better comparison between offerors who are proposing based on uniform requirements. Id.

In a similar protest, our Office determined that GSA's rationale for requiring a warm lit shell was reasonable in light of the agency's requirement to have flexibility in

configuring its office space requirements and the need to have a common basis for comparison of offerors' proposed properties. Paramount Group, *supra*, at 4-5. We think the rationale in Paramount Group applies here as well, and therefore conclude that the agency's requirement for demolition of existing improvements is reasonable. Further, the record does not support the protester's argument that its existing improvements will be "wasted," as the SFO does not require offerors to demolish all improvements, but instead requires offerors to assume for purposes of their offers that demolition will be required.⁶

Applicability of Security Requirements to Exec

Next, the protester argues that the SFO imposes certain security requirements on Exec that do not apply to other offerors. GSA argues that SFO amendment No. 2 removed any potentially unique or prejudicial requirements that applied solely to Exec, and that all offerors must meet the same security requirements. We agree with the agency.

The initial SFO stated that Executive Plaza would require modernization as follows:

The Executive Boulevard Properties must undergo a complete modernization to meet the requirements of the SFO. This must include a new building façade, new windows, and new mechanical and electrical systems. All security requirements outlined in Section 9.0 of this SFO must also be met.

SFO § 1.20(G).

⁶ We also find no merit to the protester's argument that the solicitation treats Exec differently from other offerors with regard to the ability to receive a "credit" for existing tenant improvements that the government may choose to accept, rather than require the lessor to demolish, during negotiations concerning the tenant improvement allowance. See SFO §§ 1.9(A), 1.20(A), 1.11(A)(4). SFO amendment No. 2 imposes identical requirements on all offerors to assume, for purposes of pricing and structuring their offers, that demolition will be required. The SFO provisions for incumbent and non-incumbent offerors also use identical language to explain the process by which the lessor and the government may agree, after award, that certain existing improvements would be counted as a "credit" against the tenant improvement allowance. In this regard, the term "notwithstanding" clearly distinguishes the assumptions offerors must make in their proposals under SFO §§ 1.9(A) and 1.20(A), from negotiations that will take place after award regarding the government's use of the tenant improvement allowance.

This requirement was revised in SFO amendment No. 2 as follows:

Requirements of Modernization: the Executive Boulevard Properties must meet all of the requirements of the SFO, including all security requirements outlined in Section 9.0 of this SFO.

SFO amend. 2 at 1.

The agency argues that the revised provision merely states that Executive Plaza must meet the requirements of SFO § 9.0, which apply equally to all other offerors. The agency states that Exec must meet the security requirements of SFO § 9, but is free to propose any manner of doing so, and is not necessarily required to follow the modernization requirements set forth in the initial SFO. Exec disagrees with this interpretation, arguing that the agency should have deleted the provision in its entirety. The protester argues that by specifically singling out Exec, the SFO “confirms that there are a different set of requirements for [Exec] than there are for all other offerors.” Protester’s Supp. Comments, June 30, 2008, at 16.

We think that the protester’s interpretation of the revised SFO provision is unreasonable. While we agree that amended SFO § 1.20(G) is duplicative in stating that Exec must meet the requirements of SFO § 9.0, there is no basis to conclude that the protester is being treated any differently from other offerors. Specifically, there is no basis to conclude that SFO § 1.20(G) relieves other offerors from the requirements of SFO § 9.0, nor is there any basis to conclude that additional requirements apply to Exec. On this basis, we find no merit to the protester’s argument.

Swing Space Requirement

Next, Exec argues that the swing space requirements are unduly restrictive of competition because they apply only to incumbent lessors, and create significant costs and burdens. The protester also argues that the requirement for swing space is unreasonable because, it argues, Exec may not be an incumbent lessor when the lease commences. The agency contends that the swing space requirements are reasonable in light of the unique status of the incumbent offeror, and that the agency expects to continue occupying Executive Plaza until the new lease begins. As discussed below, we find no merit to the protester’s arguments.

The SFO requires the incumbent lessors to propose swing space, *i.e.*, alternative office space, for NCI during the renovation of Executive Plaza—which the SFO assumes will be required to meet the solicitation requirements. SFO § 1.20(B). As relevant here, the swing space must be provided at Exec’s expense, while the government will continue to pay rent on Executive Plaza during the relocation to the swing space. *Id.* ¶ (D). In a move unique to incumbent lessors, the government will pay for one move during the relocation of the office space—either to or from the

swing space; other moves, including reorganization of office space within Executive Plaza during the renovation of those buildings, will be at Exec's expense. Id. ¶ (E).

GSA acknowledges that the solicitation, by design, imposes a swing space requirement solely on incumbent offerors. The agency argues that this requirement is reasonable because the solicitation requires offerors to propose the office space as a warm lit shell, and because Executive Plaza will require renovation and demolition of existing tenant improvements. CO Statement at 5. As a consequence of the demolition and renovation, NCI employees must be moved during these events—to physically remove them from the space as it is being renovated, and also to minimize disruption to employees during the work. In essence, the agency argues that there is no way to conduct the necessary renovation work with the employees occupying the workplace. GSA further argues that the requirement for Exec to pay for the swing space and certain moving costs is reasonable because it allows the government to equalize the costs of incumbent and non-incumbent offerors. The agency states that if an incumbent lessor were not required to pay for swing space, the government would be subsidizing the lessor's costs by paying for both the current space and the swing space.

We think that a swing space requirement is an example of a legitimate disadvantage faced by an incumbent lessor due to its circumstances, and is not a disadvantage caused by unfair action by the agency. See Paramount Group, supra. In this regard, requirements for swing space are the logical consequences an incumbent lessor, such as Exec, must face when its building must be renovated to meet new lease requirements. While we recognize that potential non-incumbent lessors may receive a competitive advantage by not having to address the need for swing space in their offers, we think an agency is not required to remove the advantage unless it results from preferential treatment or other improper actions by the government. See, e.g., id. at 5; Norvar Health Servs.—Protest and Recon., B-286253.2 et al., Dec. 8, 2000, 2000 CPD ¶ 204 at 4-5.

Next, Exec argues that the requirement for swing space is unreasonable because it is not clear that NCI will occupy the building after September 2009, when the current leases for Executive Plaza are due to expire. In this regard, the SFO anticipates occupancy under the new lease between August 2011 and February 2012, after the expiration of the current lease. Thus, the protester argues, if NCI is not occupying Executive Plaza after 2009, Exec will not need to propose swing space. The protester also argues that GSA has not clearly demonstrated that it will in fact use its authority to extend the leases.

This argument raises two issues: (1) whether the agency has a reasonable basis for extending the Executive Plaza leases, and (2) whether the agency has the authority to extend the leases and will actually do so. First, GSA states that it intends to extend the Executive Plaza leases, as it would not be in the government's interest to move the NCI tenants from Executive Plaza and the other buildings into a new building, and then move the tenants again after the award of the new lease. Supp.

AR, June 19, 2008, at 11. The agency states that the costs and efforts of such a new procurement, along with the tenant improvement and moving expenses cannot be justified for such a short period of time. Supp. AR, attach. 1, J&A for Lease Extension, at 3. On this record, we think that the agency's rationale for continuing its occupancy of Executive Plaza for this period is reasonable.

Second, GSA states that it has the legal authority to extend its leases at Executive Plaza, either through negotiations with Exec, or condemnation proceedings. In this regard, the GSA supplement to the Federal Acquisition Regulation (GSAR) permits GSA to use other than competitive procedures to extend the terms of a lease on a short-term basis for various reasons, including the establishment of a common expiration date for multiple leases. See GSAR § 570.405(c). GSA also argues that, in the event it is unable to successfully negotiate lease extensions with Exec, the agency has the legal authority to obtain a leasehold interest in Executive Plaza through condemnation proceedings. See 40 U.S.C. § 581(c)(1) (stating that the Administrator of GSA may "acquire, by purchase, condemnation, or otherwise, real estate and interests in real estate."); 40 U.S.C. § 3113 ("An officer of the Federal Government authorized to acquire real estate for the erection of a public building or for other public uses may acquire the real estate for the Government by condemnation, under judicial process, when the officer believes that it is necessary or advantageous to the Government to do so."). Exec does not dispute that GSA has the authority to negotiate an extension of the existing lease, award a new short-term lease, or to condemn the property. Instead, the protester argues that the agency has not taken the steps necessary in this process; for example, the protester notes that GSA has not yet sought to engage in negotiations regarding the extension of the leases.

Our review of the record shows that GSA's requirement for swing space is based on its assumption that the Executive Plaza leases will be extended beyond September 2009. We think the record here also shows that GSA has the authority to extend the occupancy of NCI at Executive Plaza, either through negotiation or unilateral condemnation actions. Furthermore, the record shows that GSA has begun the process of extending the occupancy of Executive Plaza by executing a J&A for other than full and open competition. To the extent that the agency has not entered into negotiations with Exec or taken all of the necessary actions needed to extend NCI's occupancy at Executive Plaza, we accept GSA's representations that it will do so between now and the September 2009 expiration of the current leases. Thus, the record supports the agency's expectation that it will occupy Executive Plaza through the new lease occupancy date, and that the swing space will therefore be required if Executive is awarded the lease. In sum, we find no basis to conclude that the swing space requirement is unreasonable.⁷

⁷ Additionally, the agency argues that a GSAR provision, which was incorporated into the SFO, permits offerors to submit alternative proposals to the swing space requirement. See 48 C.F.R. § 552.270-1(c)(7). The protester argues that the ability to
(continued...)

Single Ownership Requirement

Finally, the protester argues that the requirement that the offered office space be owned by a single entity is unreasonable.⁸ The agency contends that the requirement is a reasonable restriction that addresses concerns regarding the current lease arrangements for NCI office space, which involve [deleted] separate leases, and concerns regarding the future administration of the lease.

As discussed above, the SFO states that “[t]he campus and/or buildings offered must be one ownership and one single management group.” SFO § 1.4. [Deleted]. The protester contends that because the office space will be under a single manager, the fact that there are two separate leases with the different owners will not affect the offerors’ ability to meet the solicitation requirements or affect the government’s interests.

GSA argues that the requirement for single ownership is reasonable based on two concerns. First, the agency notes that the current lease situation for NCI involves [deleted] leases which results in “different rent rates, in multiple buildings, owned by multiple landlords and operated by multiple management companies.” AR at 7. The agency states that it seeks to avoid similar problems with the anticipated lease here by ensuring that there will be a single owner and a single lease.

Second, the agency argues that the negotiation and administration of multiple leases with multiple owners would be needlessly complicated because of the fact that the

(...continued)

propose an alternative to the swing space requirement is not a valid justification for its restrictive effects, as submission of an alternative approach places an offeror at risk of being rejected as unacceptable. Exec also argues that this provision does not clearly allow it to propose alternatives to the swing space requirement. Because, as discussed above, we conclude the swing space requirement is reasonable, we need not address whether the ability to propose alternative solutions to the swing space requirement renders that requirement reasonable. Nonetheless, we agree with the agency that the solicitation permits incumbent offerors to propose alternatives to the swing space requirement. We note, however, that a recent decision by the Court of Federal Claims expressed the following view regarding the alternative proposal clause: “While GSAR 552.270-1(c)(7) allows offerors to submit proposals that depart materially from solicitation requirements, the government has no obligation to consider them, or explain why it did not do so.” Tim Mills Props., Inc. v. United States, Fed. Cl. No. 08-375C, July 15, 2008, at 14-15.

⁸ The protester initially argued that the requirement for single management was unduly restrictive of competition, but now concedes that the agency’s requirement is reasonable. Protest at 11; Protester’s Comments, June 9, 2008, at 5.

government would need to reach separate agreements with each lessor.⁹ The agency also contends that the lease schedule may be put at risk by disputes between multiple owners, and that there is an increased risk of a delayed schedule because there will be multiple entities responsible for obtaining financing and permitting. Finally, the agency notes that the government's rights and remedies in the event of nonperformance or breach become more difficult to enforce when there are multiple lessors. For example, having multiple lessors could require additional litigation by the government to determine how to allocate responsibilities for delays or non-performance.

We think that the agency's concerns regarding multiple owners for the proposed lease are reasonable. The agency explains that the numerous problems posed by multiple leases stem from entering into leases with multiple parties, each of whom would have separate legal rights and obligations. For this reason, we think that the agency's concern that single management will not address the problems posed by multiple owners is reasonable. In sum, we think that GSA's requirement for single ownership is reasonable.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁹ Exec notes that GSA's concerns are expressed with regard to multiple leases, rather than the SFO's requirement for a single owner. The protester does not explain, however, the relevance of this distinction to its protest. In this regard, the record shows that the protester's approach does not or will not involve either single ownership or a single lease.