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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: Fedcar Company, Ltd.

File: B-310980; B-310980.2; B-310980.3

Date: March 25, 2008

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Fernand A. Lavalley, Esq., Jeffrey R. Keitelman, Esq., and J. Philip Ludvigson, Esq., DLA Piper US LLP, for the intervenor.

Carl E. Smith, Esq., General Services Administration, for the agency.

Nora K. Adkins, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where an agency bases its source selection decision for the award of a lease on incorrectly calculated costs, the source selection is not reasonably based.
2. Source selection document that only discusses strengths of awardee's higher-rated, higher-priced proposal but not its weaknesses, or the strengths and the weaknesses found in protester's slightly lower-rated, lower-priced proposal does not reasonably justify tradeoff decision.
3. A purported acceptance of a lease offer by the General Services Administration that is conditioned on the offeror's assent to terms additional to, or different from, those offered is not an acceptance, but a counteroffer, and does not create a binding lease contract.

DECISION

Fedcar Company, Ltd. protests the award of a lease contract to Duke Realty Limited Partnership by the General Services Administration (GSA) under solicitation for offers (SFO) No. GS-05B-18064, for the construction and lease of a dedicated campus facility in Indianapolis, Indiana, for use by the Federal Bureau of Investigation (FBI).

We sustain the protest.

On January 17, 2006, GSA issued an SFO for the lease of a site of approximately 6 to 9 acres to be developed into a fully-serviced FBI campus facility with 110,531 rentable square feet of office and related space for a 15-year term. Contracting Officer's Statement (COS) at 1. The procurement was to be conducted in two separate phases; Phase I required offerors to submit proposals that included information on the offeror's technical approach and qualifications, while Phase II addressed design concepts and cost proposals. After the evaluation of the Phase I proposals, the agency would select the qualified offerors that would advance to Phase II. SFO, as amended, at 31.

The original acquisition plan contemplated that GSA would obtain a no-cost, assignable option for a specified land site, which would be assigned to the successful offeror, who would then construct a building on the site that would be leased to GSA for occupancy by the FBI. However, GSA was unsuccessful in its efforts to acquire a no-cost assignable option for any of the land sites preferred by the FBI, and on March 16, GSA received a request from the FBI to move forward with prospective offerors submitting their own sites. GSA thus amended the Phase I SFO on June 19 to allow developers to offer their own sites with their Phase II proposals. COS at 1.

The Phase II SFO required offerors to provide land site, technical, and price proposals. The SFO specified that the offerors' proposed land sites were required to meet certain minimum requirements in order to be considered responsive to the solicitation, as follows:

1.7 UNIQUE LAND SITES REQUIREMENTS

A. As part of the Phase II offer, each invited team is required to submit one or more land sites that meet the criteria listed in Paragraph B. The Government will survey the offered sites after receipt of Phase II offers. Site elimination shall be based on Government Security personnel feedback and noncompliance with the minimum site requirements. GSA will not evaluate submitted proposals that do not meet the stated criteria.

B. Sites must comply with the following minimum requirements:¹

* * * * *

5. Site not located in industrial areas, near oil tanks, or adjacent to gas stations.

¹ Fourteen requirements are listed, but we list only those requirements at issue in this protest.

7. Traffic in/around the site should be limited and a low volume of street traffic should pass in front/around the proposed site.

12. Site should eliminate/minimize exposure or vulnerability to overlooking elevations, overlooking buildings, overpasses, elevated roadways, or railroad tracks.

SFO, as amended, at 10-11. The land site requirements were evaluated on a “go/no-go” basis. A proposal that did not receive a “go” determination would not be considered further for award.

The Phase II technical evaluation was based upon four evaluation factors listed in descending order of importance: appropriateness of facility design, appropriateness of building system, appropriateness of exterior/interior design, and management plan. *Id.* at 32. Price was to be evaluated based upon the “present value” ANSI/BOMA [American National Standards Institute/Building Owners and Managers]² office area per square foot cost of the offers.³ *Id.* at 50-51. Award was to be made to the offeror whose offer “conforms to the solicitation and is most advantageous to the Government” based upon both the technical and price evaluations. *Id.* at 52. The technical evaluation factors, when combined, were to be significantly more important than price; however, the SFO noted that price would become more important in the best value tradeoff decision as the technical proposals became more equal. *Id.* at 32.

On June 30, 13 offerors submitted Phase I proposals to GSA. Agency Report (AR), Tab 35, Price Negotiation Memorandum (Dec. 17, 2007), at 1. Five of these offerors, including Fedcar and Duke, were selected to submit proposals on the Phase II SFO.

² GSA recognizes the ANSI/BOMA international standard definition for office area, which means “the area where a tenant normally houses personnel and/or furniture, for which a measurement is to be computed.” SFO, as amended, at 57. ANSI/BOMA office area square feet and usable square feet are terms that can be used interchangeably. *Id.* at 7.

³ The present value ANSI/BOMA office area per square foot of the offers was calculated using a pre-formulated spreadsheet that required the contracting officer to enter in numbers from the offerors’ proposals to calculate the final ANSI/BOMA present value amount. Supplemental COS (Feb. 7, 2008), at 3.

Id. at 2. On November 13, four of the offerors submitted a response to the Phase II SFO. Id.⁴

GSA conducted a go/no-go analysis of each site proposed by the remaining offerors, and on January 5, 2007, notified the offerors of their proposed sites' status. While seven sites were submitted by the four Phase II offerors, only three sites were approved by GSA: a site proposed by Duke, a site proposed by both Fedcar and another offeror (offeror A), and a third site proposed by yet another offeror (offeror B).

After technical and price evaluations and discussions and negotiations with the four remaining offerors based on the three remaining sites, GSA made award to offeror A on March 23.⁵ As part of the lease contract, offeror A agreed to provide to the contracting officer within 120 days after award of the contract (July 21) evidence of the site purchase. Offeror A defaulted on its commitment to provide evidence of site purchase and the lease was terminated.

On September 7, the agency reopened negotiations with the remaining three offerors by issuing an amendment to the SFO that provided:

Offerors will have the opportunity to refresh proposed pricing, address the weaknesses of the facility design concept and enhance other areas of the offer deemed necessary. However, Offerors will not have an opportunity to submit an alternate site, an alternate design proposal, or significantly redesign the current proposal.

AR, Tab 1L, amends. 1 and 12, at 1.⁶ In response, the remaining three offerors submitted final revised proposals. Only the offerors' technical and price proposals

⁴ One offeror notified GSA that it declined to proceed with a Phase II proposal submission because it was not able to secure a site that met the criteria set forth in the Phase II SFO.

⁵ Duke protested this award to our Office alleging that offeror A did not have site control. This protest was withdrawn by Duke prior to our Office issuing a decision.

⁶ Amendment No. 1 and amendment No. 12 to the SFO were published as the same document. A new solicitation number was assigned to amendment No. 1 for the reopened negotiations. Amendment No. 1 corresponds with the new SFO number, GS-05B-18064; amendment No. 12 corresponds with the original SFO number, GS-05B-17376.

were evaluated.⁷ Offeror B's offer was excluded from consideration because its final revised proposal did not comply with key requirements of the amended SFO. COS at 4. The source selection evaluation board (SSEB) gave Duke's technical proposal a score of [DELETED] points on a 100-point scale, while Fedcar received [DELETED] points. AR, Tab 35, Price Negotiation Memorandum (Dec. 17, 2007), at 2-3. The contracting officer's price analysis resulted in a present value ANSI/BOMA for Duke's proposal of [DELETED] per square foot, whereas Fedcar's offer was [DELETED] per square foot. *Id.* In making her best value decision, the contracting officer found that Duke's technically superior proposal was worth the [DELETED] cents per square foot price difference, and notice of the award of the lease was made to Duke on December 17. *Id.*; AR, Tab 13, GSA Award Letter (Dec. 17, 2007). Fedcar was notified of the award and protested on December 20. Because of this protest, performance under the lease has been stayed.

In its protest, Fedcar asserts, among other issues, that Duke's site was unacceptable and should have been rejected because it failed to meet 3 of the 14 requirements, which were minimum requirements of the solicitation.⁸ Specifically, Fedcar contends that Duke's site did not meet the following unique land site requirements: site not located in industrial areas, near oil tanks, or adjacent to gas stations; traffic in/around the site should be limited and a low volume of street traffic should pass in front/around the proposed site; and site should eliminate/minimize exposure or vulnerability to overlooking elevations, overlooking buildings, overpasses, elevated roadways, or railroad tracks. Fedcar alleges that Duke's site is located within an

⁷ The three proposed land sites were not reevaluated because the amended SFO restricted offerors from proposing an alternate land site, and each offeror's previously submitted site was formerly determined to be a "go."

⁸ Initially, the agency and intervenor requested dismissal of Fedcar's protest arguing, among other things, that the protest was untimely because Fedcar had not diligently pursued information regarding the site proposed by Duke by intervening in Duke's earlier protest of the first award decision, in which it could have learned the facts on which it now bases its protest--that Duke's site was not in compliance with the solicitation requirements. However, Fedcar did not have standing to intervene in that protest. In this regard, our Bid Protest Regulations define an "intervenor" as "an awardee if the award has been made." 4 C.F.R. § 21.0(b)(1) (2007). Since the award had been made to Offeror A, Fedcar was not an awardee and, hence, did not have standing in Duke's initial protest to intervene. In any event, because Duke was not the awardee, Fedcar would have no reason to protest Duke's compliance with the site requirements. Given that Fedcar's protest was filed within 10 days of when it was apprised of the award to Duke, there is no basis to find that Fedcar did not diligently pursue the information on which it bases its protest here.

industrial park, named Park 100; has heavy traffic along West 79th street; and is in close proximity to both railroad tracks and a highway overpass. Protest at 11-13.⁹

In reviewing protests against allegedly improper evaluations, it is not our role to reevaluate proposals. Rather, our Office examines the record to determine whether the agency's judgment was reasonable and in accord with the evaluation factors set forth in the RFP. Abt Assocs., Inc., B-237060.2, Feb. 26, 1990, 90-1 CPD ¶ 223 at 4. A protester's mere disagreement with the agency's judgment does not establish that an evaluation was unreasonable. UNICCO Gov't Servs., Inc., B-277658, Nov. 7, 1997, 97-2 CPD ¶ 134 at 7.

As noted, the agency's "go/no-go" site analysis had been previously conducted by members of the SSEB on November 16, 2006. The analysis included a visit and inspection of the premises of each proposed site. Individual evaluators used site tour comment sheets to note each site's strengths, weaknesses, and security concerns. The SSEB members reviewed the sites as a group and upon conclusion of the visit had one member, the GSA Project Manager, collect, organize, and record SSEB members' comments, observations, and evaluations, and enter a "Meets" or "Does not meet" check on the consensus evaluation sheet. Supplemental AR (Feb. 25, 2008), at 4. The consensus evaluation sheet report scored Duke's site as "Meets" with regard to each of the three requirements protested by Fedcar. AR, Tab 36(10), Duke Site Evaluation Documents.

In response to the specific concerns noted in the protest, GSA asserts that Duke's site is located within a corporate park that is zoned special commercial, not industrial; the minimal traffic in the area does not travel through or in front of the site; and [DELETED] minimize exposure or vulnerability from any overlooking elevations and railroad tracks. COS at 3. These assertions are consistent with the contemporaneous record, including the individual evaluator records that serve as the basis for the SSEB's consensus "Meets" rating for Duke's site under the land site factor. For example, one evaluator noted that Duke's site was located in a "class A office park" and had [DELETED]. Id.¹⁰

⁹ To support its claim, Fedcar has presented various photos and information on the surrounding buildings, topography, and roadways with regard to Duke's proposed site.

¹⁰ Fedcar contends that the evaluation of its alternate site, which it alleges is similarly situated to, and is only a few blocks away from, Duke's site, evidences unequal treatment because the Duke site was determined to be acceptable, yet Fedcar's alternate site was not. However, the evaluation documentation reasonably explains why Fedcar's alternate site was rejected. Specifically, one evaluator noted, regarding Fedcar's alternate site, "industrial park setting," "on busy intersection," "traffic concerns," "water concern at south end of site," "lot appears narrow," and "heavy truck traffic." A second evaluator commented, "more of an industrial park,"

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Based on our review, we find that the agency's evaluation of Duke's site was reasonable, in compliance with the SFO's stated evaluation criteria, and supported by the record. While Fedcar disagrees, arguing that Duke's site is, in fact, in an industrial park and that the agency's evaluation documents are insufficient to support a determination that Duke's site met the requirements, we find that the record reasonably supports the agency's determination that Duke's site satisfied the land site requirements.¹¹ In this regard, the record confirms the agency's assertion that Duke's site is near, but not in, an industrial park. COS at 2; AR, Tab 26, Duke's Phase II Technical Proposal, at A-7, Official Zoning Status; AR, Tab 8, C-S Special Commercial District zoning regulations.¹² Fedcar's mere disagreement with the agency's judgment does not establish that the site evaluation was unreasonable.¹³

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possibly a Class 'B' or 'C' office park," "narrow site," "busy intersection adjacent to propose[d] property," and "amount of truck traffic." The consensus evaluation document rates the site as "Does not meet" under criterion number 5, "site not located in industrial areas, near oil tanks, or adjacent to gas stations," and under criterion number 7, "traffic in/around the site should be limited." AR, Tab 36(10), Fedcar Alternate Site Evaluation Documents. Thus, we find no evidence of unequal treatment, as asserted by Fedcar, in GSA's evaluation of these two sites.

¹¹ Implicit in the requirement that the agency's judgment be reasonable is the requirement that these judgments be documented in sufficient detail to show they are reasonable. Advanced Tech. Sys. Inc., B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151 at 9. While the agency's "go/no-go" evaluation record here is a compilation of notes and comments, it is sufficient to support the agency's determination.

¹² In contrast, Fedcar's rejected site located several blocks from Duke's site was, in fact, located within an industrial park. The two site's respective zoning classifications support the agency's evaluation judgments here. COS at 2; AR, Tab 5, I-2-S Light Industrial Suburban description.

¹³ Except for the price evaluation issue and the insufficiently documented source selection decision discussed below, we find Fedcar's numerous other arguments provide no basis to object to the evaluation and award. For example, Fedcar argues that the agency waived or relaxed the solicitation requirements as to Duke's proposal by accepting site plan drawings that did not identify access and exit ramps and roads by directional arrows, did not show restaurants or other amenities, and failed to identify structures as required by the solicitation. However, based on our review, the agency reasonably determined that the requested information was ascertainable from elsewhere in Duke's proposal. (Our review of the record indicates that Fedcar's proposal had similar minor omissions that did not affect the evaluation.) We find that Fedcar's arguments that the agency's discussions with Duke were improperly unequal also had no merit, based on our review of the

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Fedcar also asserts that the agency's price evaluation was unreasonable because the agency inserted incorrect numbers into the price evaluation spreadsheet, which resulted in an error in favor of Duke's present value ANSI/BOMA office area per square foot price.

In its report, the agency admits that it erred in calculating the present value of the rent being offered by Duke, and that, instead of a price difference of [DELETED] per ANSI/BOMA square foot, the actual price advantage of the rent offered by Fedcar was [DELETED] per ANSI/BOMA square foot. Supplemental AR (Feb. 25, 2008) at 5; AR, Tab 40, Net Present Value Recalculation. The agency further admits that this error results in a net present value difference of [DELETED] per year, or [DELETED] over the 15-year life of the lease. Supplemental AR (Feb. 25, 2008), at 6. However, the agency dismisses this mistake as inconsequential and asserts that Fedcar is not prejudiced by the error because the solicitation stated that "the technical evaluation factors, when combined, are significantly more important than price." *Id.*

We disagree. As indicated above, the record shows the technical evaluation of the two proposals was relatively close with Duke's technical proposal having only a [DELETED]-point advantage (out of 100 points) over Fedcar's proposal. AR, Tab 35, Price Negotiation Memorandum (Dec. 17, 2007), at 3. While it is true that the technical evaluation factors were said to be significantly more important than price, the SFO also stated, "[a]s proposals become more equal in their technical merit, the evaluation of price becomes more important." SFO, as amended, at 32. With an initial price differential of only [DELETED] per square foot, the source selection authority (SSA) could reasonably place greater emphasis on technical merit in selecting Duke. Now, however, since the actual price differential ([DELETED] per square foot) between the offers is significantly (more than [DELETED] times) greater, if the award decision were to be based on this revised price difference, price under the SFO's evaluation scheme could reasonably become more important and change the award decision.

While the agency argues that the outcome of the SSA's cost/technical tradeoff would be the same regardless of the re-calculated price, our Office affords little weight to an agency's post-protest arguments that are based on judgments the agency asserts it would have made because such judgments made in the heat of litigation and based on facts that were not previously considered that are materially different from those on which the agency relied in making the original decision may not represent the fair and considered judgment of the agency. Global, A 1st Flagship Co., B-297235.2, Dec. 27, 2005, 2006 CPD ¶ 14 at 8. Under the circumstances, we give little weight to

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agency's transcripts of the discussions, which showed both offerors received meaningful discussions.

the agency's assertion that the outcome would have been the same, given that Fedcar now has a significantly greater price advantage than found by the agency when it made its source selection decision. Where a source selection authority bases his or her source selection decision on figures that do not reasonably represent the differences in costs to be incurred under competing proposals, the source selection is not reasonably based. See Gemmo Impianti SpA, B-290427, Aug. 9, 2002, 2002 CPD ¶ 146 at 5-6. Thus, Fedcar was prejudiced by the agency's error in calculating the price difference between the offers.

Moreover, as noted by Fedcar, the source selection document selecting Duke for award set forth the strengths found in Duke's proposal, but did not discuss that proposal's weaknesses nor the strengths found in Fedcar's proposal. AR, Tab 35, Price Negotiation Memorandum, at 3-4. The result was that the source selection document did not reasonably address the differences between the offers. An agency which fails to adequately document its source selection decision bears the risk that our Office may be unable to determine whether the decision was proper. Johnson Controls World Servs., Inc., B-289942, B-289942.2, May 24, 2002, 2002 CPD ¶ 88 at 6. Where, as here, the source selection decision is devoid of any substantive consideration of the relative merits of the proposals that would justify whether a higher rated, higher priced proposal was a better value to the government than a lower rated, lower priced proposal, the cost/technical tradeoff decision is not reasonably justified. Id. at 6-7.

We sustain the protest.

Since the lease does not contain a termination for convenience clause, we would customarily find that remedial action that may disturb the award is not feasible; in the absence of a termination for convenience clause, we would ordinarily not recommend termination of an awarded lease, even if we sustained the protest and found the award improper. Peter N.G. Schwartz Co. Judiciary Square Ltd. P'ship, B-239007.3, Oct. 31, 1990, 90-2 CPD ¶ 353 at 11.

Here, however, Fedcar argues that remedial action is appropriate because no legally binding lease contract between GSA and Duke was formed.¹⁴ Based on our review of the record, we agree with Fedcar that GSA did not form a legally binding lease

¹⁴ GSA argues that its award notice to Duke constitutes the acceptance necessary to form a binding contract, and points to the language of the SFO for support. The SFO, as amended, states, "The acceptance of the offer and award of the lease by the Government occurs upon notification of unconditional acceptance of the offer (i.e. award letter). This acceptance establishes a binding contract." AR, Tab 1L, ¶ 3.8(D). Here, however, Fedcar asserts that GSA never unconditionally accepted Duke's proposal, but instead unilaterally modified various material terms of the SFO in making the award, which cannot result in a binding contract.

contract with Duke because it did not unconditionally accept Duke's offer. In this regard, the record shows that on December 17, 2007, when GSA accepted Duke's offer and notified Duke of the award, GSA forwarded to Duke a draft lease containing various changes from the terms of the SFO and Duke's offer, and requested that Duke execute and return the lease. AR, Tab 13, GSA's Award Letter (Dec. 17, 2007). Fedcar has identified various changes in this draft lease that it regards as material deviations from the terms of the SFO and Duke's offer. For example, the agency changed a section of the SFO regarding the installation of roof antennas by making the agency's right to mount an antenna conditional on Duke's consent and added new provisions addressing the removal of the antennas. The draft lease also limited the lessor's right to negotiate price and imposed a mandatory procedure involving the use of appraisals to determine the purchase price. Neither GSA nor Duke has asserted that these are not changes from the SFO or Duke's offer, or explained why these changes are not material. Based on our review of the record, we find these changes are material. Moreover, the record does not include the modified draft lease executed by both GSA and Duke, even though this document (if it is in existence) was requested to be produced.¹⁵

A purported acceptance of an offer that is conditioned on the offeror's assent to terms additional to or different from than those offered is not an acceptance but a counteroffer, and does not create a binding contract. 1st Home Liquidating Trust, et al. v. United States, 76 Fed. Cl. 731, 739 (2007) (citing Restatement (Second) of Contracts § 59); Romala Corp. v. United States, 20 Cl.Ct. 435, 443 (1990); Climax Molybdenum Co., B-193828, July 3, 1979, 79-2 CPD ¶ 2 at 4. On this record, we find that GSA's conditional acceptance of Duke's offer did not form a legally binding lease contract.

Because GSA has made material changes to the lease agreement from those contained in the SFO, we recommend that GSA amend the SFO and obtain revised proposals. We also recommend that GSA make a new source selection decision taking into account the correct present value ANSI/BOMA office area per square foot price of the offers. In so doing, the agency should fully document its cost/technical tradeoff, including a comparison of the proposals' strengths and weaknesses as well as the evaluated price difference. In the event that Fedcar's proposal is found to be the best value, award should be made to that firm. We also recommend that Fedcar be reimbursed the reasonable costs of filing and pursuing the protests, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Fedcar should submit its certified

¹⁵ We also note that contract performance was stayed shortly after the award was purportedly made because of the filing of Fedcar's protest.

claim for costs, detailing the time expended and costs incurred, directly to the agency within 60 days after the receipt of this decision.

Gary L. Kepplinger
General Counsel