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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Eisenhower Real Estate Holdings, LLC

File: B-310941

Date: March 18, 2008

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DIGEST

Protest of reasonableness of agency's cost-benefit analysis that served as basis for agency determination that government cannot expect to recover through competition substantial relocation or duplication costs involved in award of lease to other than incumbent lessor is denied where record shows cost-benefit analysis was reasonably based, and protester provides no persuasive support for assertion that a lease for its property would provide cost savings exceeding agency's relocation or duplication costs.

DECISION

Eisenhower Real Estate Holdings, LLC protests the decision by the General Services Administration (GSA) to award a sole-source lease to the incumbent lessor of office space for the headquarters location of the Drug Enforcement Administration (DEA). The protester, which asserts that it can provide an acceptable alternative property offering cost savings to the agency, challenges the reasonableness of the cost-benefit analysis cited as the basis for GSA's justification for the use of noncompetitive procedures and its determination that there is only one responsible source that can satisfy the needs of the agency.[1]

[1] Eisenhower also generally asserts that GSA lacks statutory authority to use noncompetitive procedures here; as discussed below, this allegation is untimely in light of the fact that the specific arguments in support of the protester's initial general challenge were not raised until the firm filed comments 6 weeks after the protest was filed.

We deny the protest.

GSA's existing lease for office space for DEA's headquarters location (in two buildings constructed 20 years ago for DEA's use) is expiring. The current protest involves the agency's plan to award a 10-year lease to the incumbent lessor for continued use of the property based on a cost-benefit analysis that demonstrated that substantial relocation expenses would not be recovered through competition for the award of the lease.[2]

On June 29, 2006, the agency issued a presolicitation notice seeking expressions of interest from potential lessors for a 10-year lease of approximately 593,100 rentable square feet (RSF) of office and related space in northern Virginia. The notice, which provided general requirements for a secured site meeting government safety standards and setback distances with proximity to a Metrorail station, was reissued on April 2, 2007; both notices specifically advised potential offerors that the agency would evaluate expressions of interest in terms of availability of alternative properties and the relocation costs involved in moving DEA to determine whether the agency would remain at the existing property or relocate. Expressions of interest were to describe the potential lessor's property and identify the amount of space available, date the property will be available, expected rental rate per RSF (capped by the lease prospectus at $35 per RSF), cost and amount of available on-site parking, tenant improvement allowance, and available services and amenities. Six responses were received after the first notice, and two firms, the protester and the incumbent, revised their responses after the second notice.[3] Both the protester's and incumbent's properties were considered acceptable in terms of meeting the minimum requirements set out in the notices, and both were found to meet the applicable $35 per RSF rental rate maximum.[4]

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[2] GSA reports that the existing property has been updated and customized for DEA at substantial government expense, that the useful life of the upgrades will exceed the expiration of the current lease, and that the substantial costs for the upgrades would be duplicated in a relocation to the protester's property; noted upgrades include the construction of command, communication and conference centers, chambers and courtrooms, secured work areas, a museum, cafeteria, fitness center and health unit, and an auditorium.

[3] The other responses received were evaluated but ultimately were not considered for award.

[4] In this regard, the incumbent's rate of [deleted] was found compliant with the $35 per RSF cap (and was evaluated at $35 per RSF) due to the anticipated application of lease and broker contract terms providing for the government to receive the additional [deleted] as commission in the form of free rent. [deleted].

The agency, through its broker for the lease acquisition, then performed a comparative review of the properties in a cost-benefit analysis evaluating the estimated costs of remaining at the present location versus relocating. The analysis revealed that relocation costs associated with a move to the protester's property (including required security upgrades, telecommunications cabling, design fees and build-out costs, fixtures, furniture and equipment, and the physical move[5]) would be substantial, totaling more than $86 million over the 10-year lease term. The agency considered the incumbent's and the protester's comparable rental rates (both were evaluated at [deleted] per RSF), as well as the lower parking costs at the protester's property (which presented more than [deleted] million in savings compared to the cost of parking at the incumbent's location over the 10-year lease period), and minor restoration costs for required repairs upon departure of the incumbent's site, and concluded that the government would save $77 million over the 10-year lease term by remaining at the existing location.[6] Based on the cost-benefit analysis of the expressions of interest, the agency concluded that it cannot expect to recover the substantial relocation costs through competition and thus intends to negotiate a sole-source "succeeding" (follow-on) lease with the incumbent lessor.

On October 18, 2007 (later amended on November 9), Eisenhower filed an agency-level protest of the proposed sole-source award to the incumbent claiming that, since Eisenhower has an acceptable alternative property, it was unreasonable for the agency to conclude that only one source exists that will satisfy the agency's requirements. In responding to that protest, the agency explained to the protester that it decided to award a sole-source lease to the incumbent based on the results of the cost-benefit analysis which was performed pursuant to the GSA regulations (GSAR) regarding succeeding leases, 48 C.F.R. subpart 570.4. Specifically, under

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[5] Physical move expenses [deleted] were considered relatively minor overall (constituting approximately $1.6 million of the estimated $86 million relocation costs).

[6] While the protester suggests that its expression of interest should have been evaluated at a rental rate lower than $35 per RSF, Eisenhower has not shown that, but for the agency's evaluation on this basis, its property would have been found to offer overall cost savings to the government compared to the costs of remaining at the incumbent's location. In light of the substantial relocation costs for security upgrades and customization of the property, as well as telecommunication cabling, equipment and services, it is clear that even if Eisenhower's rental rate had been calculated as low as [deleted] per RSF (reflecting the protester's initial rate of [deleted] with an additional [deleted] credit per RSF for commission as free rent), the amount of its evaluated rental rate over the 10-year lease period would be reduced by only slightly more than [deleted] million, representing a comparatively minor reduction in the overall cost savings of $77 million associated with remaining at the incumbent's property.

GSAR § 570.402-5(b), "if the cost-benefit analysis indicates that the Government cannot expect to recover relocation costs and duplication of costs through competition, [the agency is to] prepare a justification for approval in accordance with FAR 6.3 and 506.3.[7]" The agency further explained that a justification for the proposed sole-source award was prepared pursuant to the exception to full and open competition requirements at Federal Acquisition Regulation (FAR) § 6.302-1 (which provision references as statutory authority, the Competition in Contracting Act (CICA), 41 U.S.C. § 253(c)(1)), since the cost-benefit analysis showed that only one responsible source will meet the agency's needs. Agency Report in Response to Agency-Level Protest, Nov. 1, 2007, at 2, 4. The agency-level protest official dismissed the protest as an untimely challenge to the terms of the presolicitation notices, and, to the extent the protest questioned the proposed sole-source award of a succeeding lease to the incumbent, denied the protest on the basis that the agency had complied with the requirements of GSAR § 570.402-1(b)(2) for a cost-benefit analysis prior to making the sole-source determination for the lease.[8]

On December 13, Eisenhower filed its protest with our Office, stating that it

> protests as unreasonable and contrary to procurement law and regulations applicable to leasing the [a]gency's intent to make award to the incumbent without competition, the [c]ost-[b]enefit analysis . . . purportedly conducted by the [a]gency . . . and the [j]ustification for [o]ther than [f]ull and [o]pen [c]ompetition based upon the erroneous [cost-benefit] analysis and underlying market survey.

Protest at 2. In its protest, Eisenhower also only generally contends that no exception to full and open competition in the FAR and the GSAR applies here, and

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[7] The reference to "506.3" is to a provision in the GSA Manual (GSAM) setting out internal agency acquisition policy. That provision (specifically, GSAM § 506.303-1), sets out internal procedural steps relevant to situations where a justification for the use of other than full and open competition is proposed for a class, or is based on industrial mobilization issues, national emergency, or the public interest. The parties have not suggested that GSAM § 506.303-1 is relevant here.

[8] GSAR § 570.402-1(b) provides that "[i]f a succeeding lease will exceed the simplified lease acquisition threshold, [the agency] may enter into the lease [if] . . . (2) [the agency] identify[ies] potential acceptable locations, but a cost-benefit analysis indicates that award to an offeror other than the present lessor will result in substantial relocation costs or duplication of costs to the Government, and the Government cannot expect to recover such costs through competition."

that "no rational basis exists to justify the [a]gency's determination that there is only one responsible source."[9] Protest at 5, 10, and 11.

In its comments filed 6 weeks after the protest, Eisenhower, for the first time, provided specific challenges to the agency's use of the CICA exception at 41 U.S.C. §253(c)(1) and its implementing regulations at FAR § 6.302-1, and contended that the agency's reliance on the cost-benefit analysis required by the GSAR is not controlling here, since, according to Eisenhower, the GSAR does not authorize the use of the cited statutory exception.[10] The agency argues that Eisenhower's protest of the legal authority relied on in support of the agency's justification for the sole-source award, first advanced with any specificity in its comments, should be dismissed as untimely. We agree.

The record shows that, despite knowing the legal authority relied on by the agency for its justification for the sole-source award (information shared with the protester as early as in the agency's report in response to the firm's agency-level protest), the detailed comments purporting to support Eisenhower's earlier broad allegations were not filed until 6 weeks after the protest. A protester has an obligation to set

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[9] Shortly after the protest was filed, the agency requested dismissal of the protest on the ground that that it was an untimely challenge to the terms of the presolicitation notice that advised potential offerors of the analysis to be performed to determine whether the agency would compete the lease requirement; our Office denied the request, since the terms of the presolicitation notice did not convey a final determination regarding the agency's intention to conduct a sole-source procurement. A copy of the justification prepared by the agency in support of the use of noncompetitive procedures for the lease was submitted with the agency's dismissal request. The justification cited as its legal authority CICA's exception to full and open competition at 41 U.S.C. § 253(c)(1), regarding the availability of only one responsible source that will satisfy the agency's requirements. Shortly thereafter, our Office asked the parties to discuss the legal authority supporting the use of this exception where the determination appeared to be based on cost factors alone. As discussed further in this decision, the agency now requests dismissal, as untimely, of the protester's challenge to the agency's reliance on the exception to full and open competition in 41 U.S.C. § 253(c)(1). The fact that our Office raised the issue during the initial development of the protest has no bearing on the timeliness of the issue, which instead turns on whether, and if so, when, the protester raised the issue as part of its protest.

[10] For instance, Eisenhower specifically argues for the first time in its comments that the agency's determination that leasing space from the incumbent will be less costly does not provide a basis for the agency to conclude there is only one source that can meet the agency's needs, and that CICA's "only one responsible source" exception, as implemented by FAR § 6.302-1, does not apply to follow-on lease acquisitions.

forth its grounds of protest and the factual and legal basis for its complaint within the time constraints of our timeliness rules. 4 C.F.R. § 21.1(b) (2007). Our Bid Protest Regulations do not contemplate the piecemeal presentation or development of protest issues through later submissions citing examples or providing more specific legal arguments missing from earlier general allegations of impropriety. The later, more specific arguments cannot be considered unless they independently satisfy the timeliness requirements under our Bid Protest Regulations. See Foundation Eng'g Sciences, Inc., B-292834, B-292834.2, Dec. 12, 2003, 2003 CPD ¶ 229 at 6-7. Since Eisenhower did not raise its challenge to the legal authority of the sole-source determination with the requisite degree of specificity until it filed its comments weeks after learning the basis for the challenge, it is untimely and will not be considered.[11] 4 C.F.R. § 21.2(a)(2); see Advanced Communication Sys., Inc., B-283650 et al., Dec. 16, 1999, 2000 CPD ¶ 2 at 12.

We have reviewed each of Eisenhower's challenges to the cost-benefit analysis and find that none of them provides a basis to conclude the cost-benefit analysis lacks a reasonable basis. For instance, Eisenhower initially alleges that its rental rate is [deleted] per RSF lower than the rate paid by GSA under the incumbent's current lease; the protester estimates that this difference gives it an almost [deleted] million advantage in terms of cost savings to the government. The agency reports, however, that Eisenhower's initial rental rate of [deleted] is in fact higher than the rates paid under the incumbent's lease, and that the subsequent rate information provided by the two firms showed their properties are indeed comparable in terms of rent. The record supports the agency's position.

The protester next argues that since its expression of interest noted that the firm would like to discuss paying for the [deleted] costs, it should have received credit against the [deleted] costs amount in the cost-benefit analysis. The record supports the reasonableness of the evaluation, however, since, despite the firm's failure to quantify its claimed credit for such costs, or confirm that it would pay all such costs rather than just a portion, the agency applied an industry standard amount for such costs [deleted]; the protester has not shown that the standard amount is unreasonable. Moreover, Eisenhower has not shown in any way that, given the substantial relocation and duplication costs assessed against it in the cost-benefit analysis, even if the full amount of the [deleted] costs calculated here (approximately

[11] Accordingly, we express no view on the propriety as a general matter of GSA's reliance on the one responsible source exception to full and open competition where, as here, it concludes that award to other than the incumbent lessor would result in substantial costs which it cannot expect to recover through competition. Rather, our review is limited to the matter timely protested with sufficient specificity--the reasonableness of the agency's evaluation of the expressions of interest in conducting its cost-benefit analysis under GSAR § 570.402.

[deleted] million) had been credited to the firm in the analysis, it would have made any material change to the outcome of the analysis.

Eisenhower also claims that its lease location should be viewed as presenting additional benefits exceeding the agency's stated minimum requirements, thus warranting cost credits in the comparison of the expressions of interest; examples include the ability to provide [deleted]; providing space in a newly refurbished building capable of supporting state-of-the-art equipment the agency may choose to purchase for its new space; providing a convenient location, accessible by highways and Metrorail, with more generous setback distances; and the ability to design the layout of the space to consolidate office space or accommodate growth. As a preliminary matter, to the extent that the protester asserts that the value of the additional intangible benefits its location allegedly offers was not quantified by the agency, the protester itself has provided no support for the dollar value associated with the claimed benefits. Further, to the extent Eisenhower suggests that the alleged benefits were ignored by the agency, as the agency reports, these elements, while not quantified, were considered in the cost-benefit analysis.

For instance, while the agency noted that Eisenhower could provide additional [deleted], it considered the current amount [deleted] at the incumbent location acceptable as it met the agency's actual needs. While Eisenhower asserts that the incumbent's parking presents a greater security risk because of its below-building location, Eisenhower is essentially disagreeing with the agency's judgment that there is sufficient security at the incumbent site. Similarly, while the protester's location offers newly refurbished space, the record shows that the agency's space and equipment needs are met at its current upgraded location. Regarding the claimed convenience associated with the protester's location, the agency points out that the incumbent's location is also accessible by highways and Metrorail. As to the additional setback distance for the protester's property, since the incumbent's property has been government-approved for setbacks and apparently otherwise meets the agency's security requirements, we do not find persuasive the protester's general contention that the shorter setback distance at DEA's current location presents a security risk, or one that has not been resolved through other effective

security measures.[12] In short, there is no showing in the record that the cost-benefit analysis challenged by the protester was unreasonable.

The protest is denied.

Gary L. Kepplinger
General Counsel

[12] In its comments, the protester argued that its property appeared more advantageous in terms of potential expenses considered under an alternate cost-benefit analysis prepared by the agency. The agency explains, however, that those cost figures were inaccurate as they were prepared under the assumption that the agency would have to pay close to [deleted] for repairs to DEA's current leased buildings and move its employees between temporary office spaces during those repairs. This assumption is factually incorrect, as the lessor is expected to pay for most if not all of the repairs and, the agency reports, no additional space for employee moves will be necessary during the required repairs.