



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Trammell Crow Company

File: B-311314.2

Date: June 20, 2008

Ronald A. Schechter, Esq., Gary E. Humes, Esq., Kara L. Daniels, Esq., Stuart W. Turner, Esq., and Patricia L. Stasco, Esq., Arnold & Porter, for the protester. Fernand A. Lavallee, Esq., Jeffrey R. Keitelman, Esq., J. Phillip Ludvigson, Esq., and Kim K.S. Pagotto, Esq., DLA Piper, for the intervenor. Elizabeth A. Hall, Esq., General Services Administration, for the agency. Peter D. Verchinski, Esq., David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where agency improperly credited awardee's proposed building with availability of certain future amenities; while solicitation required third party evidence that amenities "will exist" by date of occupancy, awardee only provided in its proposal its own commitment that it would provide the amenities in its building by occupancy date.
 2. Protest that agency failed to engage in meaningful discussions with the protester is sustained where agency failed to raise significant weaknesses associated with protester's key personnel during discussions.
-

DECISION

Trammell Crow Company (TCC) protests the General Services Administration's (GSA) award of a lease to CS Master V, LLC (Stonebridge), under solicitation for offers (SFO) No. 07-018, for office and related space to be occupied by the Department of Justice (DOJ) in Washington, D.C. TCC alleges several evaluation and other improprieties in the procurement.

We sustain the protest.

The solicitation, which anticipated the award of a 15-year lease, provided for a "best value" award based on four evaluation factors (with subfactors): location (access to DOJ facilities; access to Metrorail; and access to amenities); building characteristics (quality of building architecture, building systems, construction, and finishes;

planning efficiency and flexibility; and access to natural light); key personnel and past performance (key personnel and past performance); and price. Agency Report (AR) , Tab 5, SFO, at 20-21. The location factor was approximately equal in importance to the building characteristics factor, and each was significantly more important than key personnel/past performance; the technical factors combined were significantly more important than price. Id. In addition, the SFO stated that the phased occupancy of the building was to begin no earlier than January 1, 2010, and was to be completed no later than June 30, 2010. Id. at 8.

Following the submission and evaluation of initial offers, a round of discussions, and the submission and evaluation of final offers, Stonebridge’s offer was among the highest rated (overall rating of highly successful plus) and offered the lowest price (annual present value [DELETED] per square foot), while TCC’s offer was both lower rated (overall rating of successful plus) and higher priced ([DELETED] per square foot, for a total price premium of \$16.6 million on a net present value basis). AR, Tab 24, at 42, 43. The final evaluation ratings were as follows:¹

Factor	Subfactor	TCC	Stonebridge
Location (45%)	Access to DOJ (20%)	Superior Minus	Successful Plus
	Access to Metro (15%)	Highly Successful	Highly Successful
	Access to Amenities (10%)	Highly Successful Minus	Highly Successful
	FACTOR RATING	Highly Successful	Highly Successful Minus
Building Characteristics (45%)	Quality of Building/ Architecture (20%)	Successful	Superior
	Planning Efficiency/ Flexibility (20%)	Marginal	Highly Successful
	Access to Light (5%)	Highly Successful	Superior
	FACTOR RATING	Successful Minus	Superior Minus
Key Personnel/ Past Performance (10%)	Key Personnel (5%)	Successful	Superior
	Past Performance (5%)	Highly Successful	Successful
	FACTOR RATING	Successful/Highly Successful	Highly Successful
OVERALL RATING		SUCCESSFUL PLUS	HIGHLY SUCCESSFUL PLUS

¹ According to the source selection plan, offers could receive ratings of Superior, Highly Successful, Successful, Marginal, or Poor. AR, Tab 8, at 10. In actually evaluating offers, the agency used ratings with pluses and minuses, which are undefined in the record.

AR, Tab 23, at 1. Stonebridge's offer was selected as the best value to the government, and this protest followed.²

TCC raises numerous arguments concerning the propriety of the evaluation and other aspects of the procurement. In reviewing protests of alleged improper evaluations and source selection decisions, it is not our role to reevaluate submissions; rather, we will examine the record to determine whether the agency's judgment was reasonable and in accord with the stated evaluation criteria and applicable procurement laws and regulations. Panacea Consulting, Inc., B-299307.4, B-299308.4, July 27, 2007, 2007 CPD ¶ 141 at 3. Based on our review of the record here, we find that the evaluation was unreasonable in several respects, and we therefore sustain the protest. We discuss TCC's meritorious arguments below.

AMENITIES

TCC challenges the evaluation under the access to amenities subfactor. With regard to evaluating amenities, the SFO provided as follows:

Offers will be evaluated for amenities within the building or otherwise available within 2,000 walkable linear feet . . . Offers will be evaluated for both the quantity and variety of the following amenities: childcare centers, fitness facilities, postal facilities, restaurants, fast food establishments, dry cleaners, banks and ATM's, convenience shops, card/gift shops, and drug stores . . . The best rating will be given to offers that provide the greatest variety and quantity of amenities with the most extensive hours of operation existing at the time of occupancy within the building or adjacent to the building.

AR, Tab 5, SFO, at 21. In determining whether amenities that do not currently exist, but which would likely exist in the future, should be considered in the evaluation of an offer, the SFO stated as follows:

Amenities will be considered to be "existing" if they currently exist or if the offeror can demonstrate to the reasonable satisfaction of the

² The parties disagree as to whether Stonebridge's offer was rated successful or highly successful under the past performance subfactor. TCC, believing that Stonebridge's past performance rating was highly successful, asserts that the rating instead should be at best successful, but also could be lower. Protester's Comments on AR, Apr. 28, 2008, at 45 n.27. However, the record supports GSA's position that Stonebridge's final past performance rating in fact was only successful, AR, Tab 25, at 10, and TCC has made no showing that a lower rating was warranted. Accordingly, our decision is based on a rating for Stonebridge of successful under the past performance subfactor.

Government (i.e., though evidence of signed leases, construction contracts, etc.) that such amenities will exist by the Government's required occupancy date.

Id.

In support of Stonebridge's proposed future amenities, the awardee provided a letter with its final offer revision in which it committed to providing [DELETED] in the awardee's building. The agency ultimately credited Stonebridge's offer with these amenities, resulting in a rating of highly successful for the access to amenities subfactor.³ AR, Tab 19, Location Technical Advisory Report, attach. 2.

TCC asserts that the agency improperly relaxed the SFO requirements by accepting Stonebridge's letter of commitment as sufficient proof that the amenities will exist. The protester states that, had it known that a mere letter of commitment from the offeror to provide future amenities would suffice, it could have used this information to propose new amenities that would have increased its score under the amenities subfactor.

It is a fundamental principle of government procurement that competition must be conducted on an equal basis, that is, offerors must be treated equally and be provided with a common basis for the preparation of their proposals. Continental RPVs, B-292768.2, B-292768.3, Dec. 11, 2003, 2004 CPD ¶ 56 at 8; Systems Mgmt., Inc.; Qualimetrics, Inc., B-287032.3, B-287032.4, Apr. 16, 2001, 2001 CPD ¶ 85 at 8. Our Office will sustain a protest that an agency improperly relaxed its requirements for the awardee where the protester establishes a reasonable possibility that it was prejudiced by the agency's actions. Datastream Sys., Inc. B-291653, Jan. 24, 2003, 2003 CPD ¶ 30 at 6. We find that the agency's evaluation of Stonebridge's proposed amenities was inconsistent with the solicitation.

As stated above, the SFO provided that "the offeror must demonstrate to the reasonable satisfaction of the Government (i.e., through evidence of signed leases, construction contracts, etc.) that such amenities will exist by the Government's required occupancy date." AR, Tab 5, SFO, at 7. We think this language informed offerors that some level of evidence of a proposed amenity, beyond a mere promise of its existence by an offeror, had to be provided in order for the agency to give credit for the proposed amenity. While the agency asserts that Stonebridge's promise here is contractually enforceable, and thus the agency was reasonably satisfied that the awardee would provide the amenity, there is nothing in the solicitation that informs offerors that the agency would accept the mere promise of

³ With respect to the proposed [DELETED], the agency did not credit Stonebridge's offer with this amenity because the facilities were not official [DELETED]. AR, Tab 19, Location Technical Advisory Report, at 6.

the offeror instead of such evidence from third parties as represented by the signed leases or construction contracts cited in the SFO. Thus, in accepting something less than the required third party evidence for the proposed amenities, the agency relaxed the solicitation requirement for the benefit of Stonebridge without furnishing other offerors a similar opportunity to benefit from the lesser required proof of amenities.⁴

TCC also asserts that the agency improperly credited Stonebridge with amenities relating to a proposed Harris Teeter grocery store, since, according to the protester, the store will not be open by the June 30, 2010 occupancy date, as required by the SFO. In support of this allegation, the protester points to the Harris Teeter lease proposal, which states that Harris Teeter itself will build the grocery store inside the shell provided by the awardee, and that Harris Teeter is not required to accept the premises prior to April 1, 2010. TCC asserts that, “[e]ven if work begins at the earliest possible time, the amenity will simply not exist by the Government’s required occupancy date.” Protester’s Comments on AR, Apr. 28, 2008, at 16.

We find the agency’s evaluation of Stonebridge’s Harris Teeter amenities to be unreasonable. In this regard, neither the intervenor nor the agency have refuted the protester’s position that the Harris Teeter will not be open for business by the required June 30, 2010 occupancy date based on its anticipated occupation of the premises on or after April 1, 2010. While the intervenor maintains that the Harris Teeter will “exist” within the meaning of the SFO due to the fact that, as of April 1,

⁴ The agency asserts that offerors (including TCC) in fact were told during oral discussions that they could improve their offers by providing amenities in their building and that “the [g]overnment would accept a legally enforceable guarantee from a financially responsible offeror [as evidence] that the amenity would exist at the time of occupancy.” AR, Tab 2, Declaration of Neil I. Levy, at 2. The protester, however, denies that it was told that the agency would accept such a guarantee for amenities provided by third parties (such as banks, restaurants, etc.); rather, according to the protester, it understood that such a guarantee was acceptable only for amenities not involving third parties (such as a [DELETED]). Protester’s Comments on AR, exh. D, Declaration of Thomas E. Finan, at 2. Not only is the record unclear as to whether the agency in fact informed all offerors that it had relaxed the SFO requirements for establishing the existence of amenities provided by third parties, but, in any case, the Federal Acquisition Regulation (FAR) requires that the government amend the solicitation when it changes its requirements or terms and conditions, and there was no amendment issued here. FAR § 15.206(a). In this regard, when an agency orally amends a solicitation, the agency is then required to document the contract file and formalize the notice with an amendment. FAR § 15.206(d); *S³ Ltd.*, B-287019.2, *et al.*, Sept. 14, 2001, 2001 CPD ¶ 165 at 5. In short, there is no evidence that the agency advised TCC, let alone all offerors, of the relaxation of the amenities language.

the store will be present in the building, even though it will not necessarily be open for business until after June 30, we find this broad reading of the term “exists” to be unreasonable. The requirement that the amenity exist by the required occupancy date clearly was to insure that DOJ employees were able to use the amenity when they move into the building. Consequently, we conclude that, in specifying the occupancy date as the relevant date for purposes of determining whether an amenity would exist, the SFO clearly put offerors on notice that the amenity would have to be open for business by that date. As for the agency, it simply states that even if the Harris Teeter is not open by the occupancy date, it will be open for a substantial portion of the 15 year lease term. Agency Response, May 9, 2008, at 7 n.7. The SFO, however, did not allow the agency to give credit for amenities on such a basis. Since nothing in Stonebridge’s offer indicated that the Harris Teeter would be open for business by the required June 30, 2010 occupancy date, we conclude that the agency improperly waived this solicitation requirement by crediting Stonebridge’s offer with the Harris Teeter amenities.

KEY PERSONNEL

Discussions with TCC

TCC asserts that the agency improperly failed to conduct meaningful discussions with it regarding the qualifications of its proposed key personnel. In this regard, for purposes of evaluating offers under the key personnel subfactor, offerors were to provide resumes and other information for six key personnel. AR, Tab 5, SFO, at 22. The SFO provided that “[o]fferors whose Key Personnel provide the greatest qualifications, the most favorable past performance on similar projects, and a proven track record of working together as a team on past successful projects will be more highly rated.” *Id.* The evaluation team rated offers under this factor using six criteria: number of years experience, education/training, special skills, experience with similar projects (past performance), previous experience working with other key personnel, and references for past performance on similar projects. *Id.*; AR, Tab 20, Key Personnel/Past Performance Technical Advisory Report, at 1-2. The team then assigned various “preferences” to each criterion. For example, under “years experience,” the team determined that the property manager should have 10 years experience, while both the construction manager-base building and construction manager-interiors should have 15 years experience. The overall ratings under this factor were then assigned based on the number of personnel who met all six preferences—an offeror would receive a superior rating if all six personnel met all six preferences, a highly successful rating if five personnel met all six preferences, and so on, down to a poor rating where two or fewer personnel met all six preferences. *Id.* at 2.

Stonebridge’s offer received a superior rating and TCC’s a successful rating under the subfactor. While Stonebridge’s rating was based on the evaluation finding that all of its personnel met each of the six requirements, TCC’s lower rating reflected the

determination that TCC's [DELETED] had only 13 (rather than 15) years experience, and that its [DELETED] did not meet the past performance preference requiring previous successful experience with at least two other comparable federal interiors of at least 350,000 square feet in the Washington, D.C. area.

TCC asserts that the agency improperly failed to advise it during discussions that its offer had been downgraded based on the qualifications of its proposed key personnel. According to the protester, had it been advised of the evaluated shortcomings in personnel experience, it would have substituted other personnel that satisfied the agency's preferences.

When discussions are conducted, they must at a minimum identify deficiencies and significant weaknesses in each competitive-range offeror's proposal. FAR § 15.306(d)(3); Multimax, Inc., et al., B-298249.6 et al., Oct. 24, 2006, 2006 CPD ¶ 165 at 12; PAI Corp., B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 at 8. Discussions must be "meaningful," that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision. Smiths Detection, Inc., B-298838, B-298838.2, Dec. 22, 2006, 2007 CPD ¶ 5 at 12; Symplicity Corp., B-297060, Nov. 8, 2005, 2005 CPD ¶ 203 at 8.

We agree with TCC that the agency was required to advise the firm of its evaluation findings with regard to the firm's proposed key personnel. While the agency termed the failure of the TCC employees to meet the experience preferences only "weaknesses," AR, Tab 20, at 25, it is clear that, under the agency's evaluation methodology for this subfactor, the weaknesses in fact were significant. As described above, under the agency's approach, each proposed employee was evaluated as either meeting or not meeting the applicable undisclosed preferences. For each employee that did not meet all of the preferences, the offeror's rating was reduced by one rating--that is, if one employee did not meet all preferences, the offeror's rating was reduced from superior to highly acceptable, and so on. Because two of TCC's employees did not meet every applicable preference, its rating was reduced to successful. This was a significant scoring reduction, such that the weaknesses in these areas can only be considered significant, and the agency's failure to raise the matters during discussions was inconsistent with its obligation to conduct meaningful discussions.⁵

⁵ The agency asserts that it was not required to raise these matters during discussions because the solicitation clearly stated that the government would consider the number of years experience and past performance, and thus it was incumbent on the protester to offer the most qualified team possible, without further prompting from the government. Again, however, agencies are required to discuss with offerors "deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond." FAR § 15.306(d)(3). As noted above, under the agency's evaluation approach, the failure

(continued...)

Evaluation of Stonebridge's Offer

TCC challenges the evaluation of Stonebridge's offer as superior under the key personnel subfactor. The protester asserts that the agency improperly determined that all six of Stonebridge's proposed key personnel met all of the applicable preferences. According to TCC, two of Stonebridge's proposed key personnel do not satisfy the preference for previous experience working together; since only four of Stonebridge's key personnel met all six criteria, its offer should have received a rating of only successful.

Our review of Stonebridge's offer confirms that two of the proposed key personnel ([DELETED] and [DELETED]) had not previously worked together, and thus failed to satisfy the preference for these particular key personnel to have worked together. AR, Tab 30, Stonebridge's Clarification to Offer, July 23, 2007, Item 14. Accordingly, under the agency's approach to evaluating offers, Stonebridge's offer was improperly rated superior under the key personnel subfactor; its rating instead should have been only successful based on the agency's evaluation methodology.

PREJUDICE

Our Office will not sustain a protest absent a showing of prejudice to the protester; that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

We find that there is a sufficient showing of prejudice here. While the precise effect of the changes that could result from a correct evaluation is difficult to determine, we think it is sufficiently clear that a proper evaluation could have affected the award decision. In this regard, TCC asserts that it could have provided additional amenities in its building if it had known that the agency would accept a commitment

(...continued)

of TCC's employees to meet the agency's experience preferences represented significant evaluated weaknesses in its offer. Moreover, the SFO in fact did not disclose the preferences that resulted in TCC's lowered ratings; thus, for example, when TCC proposed [DELETED] with only 13 years of experience, it could not know that the agency had established a preference for a minimum of 15 years experience that had to be met in order to avoid a significantly reduced rating. Since it is not necessary for the resolution of this protest, we do not address whether the agency was required to disclose these preferences in the solicitation.

from the offeror without supporting third party evidence. Protester's Reply, May 14, 2008, at 27. Had TCC done so, its subfactor rating of highly successful minus could have increased, which likewise could have increased its highly successful rating under the location factor. Similarly, TCC's rating under the key personnel subfactor--and the key personnel/past performance factor as well--could have increased substantially had it been provided discussions in the area, while the reduction of Stonebridge's rating under the key personnel subfactor also could reduce its highly successful factor rating. Given the agency's reliance on adjectival ratings in its selection decision, there is nothing in the record that would permit us to conclude that the evaluation deficiencies would not have affected the outcome of the technical evaluation. Thus, even though Stonebridge's price was lower than TCC's, given the possibility that TCC's offer could be found technically superior to Stonebridge's, a proper evaluation could result in the need for the agency to conduct a price/technical tradeoff between the offers. We will not speculate as to the result of such a tradeoff, particularly in view of the fact that the technical evaluation factors were significantly more important than price under the SFO's evaluation scheme. AR, Tab 5, SFO, at 20. We thus conclude that TCC was competitively prejudiced by the evaluation deficiencies, and therefore sustain the protest.

RECOMMENDATION

The lease here has been awarded and signed by the agency and awardee, and the lease does not contain a termination for convenience clause. AR, Tab 33. In the absence of a termination for convenience clause, we ordinarily do not recommend termination of an awarded lease, even if we sustain the protest and find the award improper. Here, we do not think there is any basis to recommend termination. Peter N.G. Schwartz Co. Judiciary Square Ltd. P'ship, B-239007.3, Oct. 31, 1990, 90-2 CPD ¶ 353 at 11. Consequently, we recommend here that the protester be reimbursed its proposal preparation costs as well as the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2008). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly with the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Gary L. Kepplinger
General Counsel