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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Park Tower Management Ltd.

File: B-295589; B-295589.2

Date: March 22, 2005

J. Randolph MacPherson, Esq., Michael J. Noonan, Esq., and James S. DelSordo, Esq., Halloran & Sage LLP, for the protester.
Benjamin N. Thompson, Esq., and Jennifer M. Miller, Esq., Wyrick Robbins Yates & Ponton LLP, for LB&B Associates, Inc., an intervenor.
Ruth Kowarski, Esq., GSA-Public Buildings Service, for the agency.
Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation for building maintenance services provided for evaluation of comparability of buildings under prior maintenance contracts to building under solicited requirement, including equipment maintained, agency reasonably determined that awardee's building was comparable, despite fact that equipment awardee maintained was located in adjacent building, not in building submitted for consideration.

2. Evaluation of offerors' preventative maintenance plans was unobjectionable where neither offeror's plan included all required information, and agency scored protester's plan more favorably because it contained more information than awardee's.

3. Where offeror proposed to hire specific individuals employed by incumbent contractor, but failed to include required qualification and other information, agency reasonably considered information from outside proposal to fill in gaps.

4. Protester's allegation that agency improperly held discussions only with awardee after submission of final revised proposals is denied where record shows that contracting officer communicated with awardee only to clarify status of its commitments from proposed personnel.

DECISION

Park Tower Management Ltd. protests the award of a contract to LB&B Associates, Inc. under request for proposals (RFP) No. GS-02P-00-PLC-0191, issued by the General Services Administration (GSA) for mechanical and elevator maintenance services at the Daniel Patrick Moynihan U.S. Courthouse in New York City. Park Tower challenges the technical evaluation, discussions, and award.

We deny the protest.

The solicitation, which contemplated the award of a fixed-price contract for a base period (3 years) with two 3-year options, sought proposals for all management, supervision, labor, material, repair parts, tools, and equipment for mechanical and elevator maintenance services at the Moynihan Courthouse. The solicitation was issued in two phases, the first being a request for qualifications (RFQ), and the second an RFP for all those found qualified under the RFQ. Under the RFQ, prospective offerors were required to submit evidence of their experience in performing full mechanical maintenance services in at least three buildings considered comparable to the Moynihan Courthouse.[1] Under the RFP, successful RFQ offerors were required to submit proposals, which were to be evaluated under a price factor and the following five technical factors, listed in descending order of importance--past performance (weighted at 55 of a possible 95 percent), preventive maintenance (PM) plan (10 percent), staffing and authority plan (10 percent), quality control (QC) plan (10 percent), and customer service plan (10 percent). The technical factors, when combined, were approximately equal in weight to price. Award was to be made to the offeror whose proposal was found to be the "best value" to the government.

Eight offerors, including Park Tower and LB&B, submitted successful qualification statements in response to the RFQ, and both therefore were among the five firms that submitted proposals under the RFP phase of the solicitation. After the initial evaluation of proposals, the agency conducted two rounds of discussions and obtained two proposal revisions. Proposals were scored on a 10-point scale for each technical factor. The source selection evaluation board (SSEB) then convened to reach a consensus score for each proposal under each factor, which scores were then multiplied by the applicable factor weights. The results of the final consensus evaluation, showing raw and (weighted) scores, are as follows:

[1] The RFQ defined "comparable" as an office building, courthouse, or hospital of at least 500,000 gross square feet, 14 stories tall, and meeting at least 8 of 12 minimum standards, including the number of permanent tenants, chillers, boilers, pumps, air handlers, main motors, emergency generators, plumbing fixtures, and service calls.

	Park Tower	LB&B
Past Performance (55 percent)	9 (4.95)	8 (4.4)
PM Plan (10)	8 (0.8)	7 (0.7)
Staffing & Authority Plan (10)	8 (0.8)	8 (0.8)
QC Plan (10)	8 (0.8)	9 (0.9)
Customer Service Plan (10)	7 (0.7)	9 (0.9)
Total (95)	8.05	7.70
Price	$31,422,970	$29,531,152

Two of the three SSEB members recommended award to Park Tower based on its overall higher technical score. The remaining SSEB member recommended award to LB&B based on his view that, despite Park Tower's higher score, LB&B's proposal was comparable and lower-priced. The source selection authority (SSA) agreed with this latter view, and thus determined that LB&B's proposal represented the best value to the government and made award to that firm. After receiving a debriefing, Park Tower filed this protest.

Park Tower challenges the award decision on numerous grounds. In reviewing a protest of an agency's proposal evaluation, our review is confined to a determination of whether the agency acted reasonably and consistent with the terms of the solicitation and applicable statutes and regulations. United Def. LP, B-286925.3 et al., Apr. 9, 2001, 2001 CPD ¶ 75 at 10-11. We have considered all of Park Tower's arguments, and find that none has merit. This decision addresses Park Tower's most significant arguments.

TECHNICAL EVALUATION

LB&B's Phase I Qualification

Park Tower asserts that the evaluation of LB&B's phase I qualification submission was flawed because one of LB&B's listed buildings only met 4 of the 12 comparability features required by the RFQ. In the protester's view, the agency's evaluation of the building as meeting 8 of the 12 features was improperly based on its consideration of certain equipment--boilers, chillers, pumps, and generators--that supported the listed building, but actually was located in an adjacent building managed and maintained by LB&B.

We find nothing unreasonable in this aspect of the evaluation. The RFQ required offerors to submit information on at least three buildings with characteristics comparable to the Moynihan Courthouse. In response to the RFQ, LB&B listed three buildings, including the **[deleted]**, which is part of the **[deleted]**. Agency Report (AR) Tab 6. As explained in the cover letter accompanying LB&B's submission, the two buildings are joined by a common utilities plant with some utilities shared by both. Id. In conducting its evaluation of the complex, the agency considered the **[deleted]** for its evaluation and found that it met or exceeded 8 of the 12

comparability characteristics. The **[deleted]** itself met 4 of the 12--number of main air handlers, building management system/energy management system points, plumbing fixtures, and service calls. The boilers, chillers, pumps, and emergency generators, although located in the **[deleted]**, also served the **[deleted]**, and were maintained by LB&B. AR, Tab 7, at 14-15; Tab 8, at 31. We find that, since the equipment served both buildings and LB&B was responsible for managing and maintaining the equipment, the agency reasonably considered the equipment in concluding that the **[deleted]** met the comparability requirements.

Park Tower asserts that the RFQ prohibited considering shared equipment in determining comparability. In this regard, Park Tower observes that the RFQ states that "[m]ultiple buildings in the same complex are not considered as separate buildings, in meeting the 3-building requirement." RFQ, note 1. This argument is without merit. While the quoted language would preclude an offeror from, for example, submitting a single three-building complex to satisfy the RFQ requirement, it neither explicitly nor implicitly prohibits the agency from considering shared equipment in determining the comparability of one building within a multi-building complex.[2]

PM Evaluation

Park Tower asserts that the agency improperly failed to consider in the PM factor evaluation LB&B's failure to submit complete information concerning its PM program. In this regard, offerors were required to indicate the maintenance tasks and the frequency of performing PM "for each piece of equipment listed in the Building Inventory."[3] RFP at 247 (emphasis supplied). The inventory included in the RFP listed 42 pieces of kitchen equipment, but erroneously identified each with the same guide card designation of "K-100," which actually concerns only the dish/tray

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[2] There also is no evidence that the agency treated Park Tower unequally. Although GSA required it to delete equipment located in a connected building and covered by the same maintenance contract, there was nothing stating or suggesting that the equipment in question (a generator) supplied the evaluated building and Park Tower itself acknowledged that the generator "belong[ed] to the [other] building." Supplemental Contracting Officer's Statement (Supp. COS) at 15; AR Tab 40 at 6. In any event, the building otherwise met more than the minimum number of comparability requirements including a generator meeting the criteria. Supp. COS at 15. Thus, there is no basis to conclude that Park Tower was treated unequally or otherwise prejudiced by the evaluation.

[3] Offerors could meet this requirement by submitting the appropriate PM guide card for each piece of equipment found in GSA's Preventative Maintenance Guide (PM Guide). Supp. COS at 10. These cards included a description of the required maintenance tasks and the schedule for performing them.

conveyor. LB&B included in its proposal **[deleted]** to cover all kitchen equipment, while Park Tower, in its revised proposal, included **[deleted]** to cover the **[deleted]** kitchen equipment.[4] In evaluating the proposals, GSA considered the K-100 guide card sufficient to meet the requirement--it decided that the failure to include any other cards should not be deemed a significant weakness because of the RFP's error--and assigned LB&B's proposal a score of 7 (out of the 10 available) points. AR, Tab 20, at 27. Park Tower maintains that LB&B's proposal should have been downgraded based on its inadequate response to the requirement, noting that it did not include **[deleted]**.

This argument is without merit. Park Tower is correct that LB&B's proposal did not include all information required under the RFP--it did not address **[deleted]** equipment. However, Park Tower's proposal, though more complete than LB&B's, was also incomplete, since it did not include **[deleted]** equipment listed on the inventory. GSA gave Park Tower's proposal a score of 8 points, in recognition of its greater thoroughness and completeness in furnishing the additional **[deleted]**. AR, Tab 20, at 65. We find nothing unreasonable in the relative scoring of the two proposals; since neither offeror specifically addressed all 42 items, and the agency specifically took into account Park Tower's more detailed PM proposal, there is no basis to conclude that the evaluation was erroneous.[5]

Staffing and Authority Evaluation

Park Tower asserts that the agency misevaluated LB&B's proposal under the staffing and authority factor by failing to take into account the awardee's failure to submit all required information for its proposed **[deleted]**. In this regard, the RFP instructed offerors to submit an organizational chart showing the names and titles of proposed key managerial and supervisory personnel and describing their respective authorities and responsibilities, as well as their qualifications and experience. RFP at 247, § 2.B.1. In addition, offerors were to submit resumes for the on-site project manager and all other on-site supervisors, as well as indicate if those persons were in the offeror's employ or "if not, what commitments have been made to hire them." RFP at 248-250. Offerors were required to furnish a dedicated **[deleted]**, who were

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[4] GSA pointed out in discussions that Park Tower's initial proposal did not include **[deleted]**. AR, Tab 38, at 2. In consulting the PM Guide, the firm found 19 PM cards covering 11 types of kitchen equipment and **[deleted]** in its revised proposal. Supplemental Protest at 6.

[5] Park Tower asserts that it did account for each piece of equipment by including **[deleted]**. AR, Tab 14, at last page. However, this blanket statement does not constitute a PM plan, and is essentially a reiteration of information on **[deleted]** provided elsewhere in Park Tower's proposal. See AR, Tab 11, at PM-2, PM-125-PM126. It certainly did not **[deleted]** than LB&B's proposal.

considered "supervisory employees," Statement of Work, §§ 12.1.A.1, 12.1.B.4.A. LB&B's revised proposal did not name its proposed **[deleted]**, and did not identify their authorities or responsibilities, describe their qualifications, resumes, or include employment commitment information. However, LB&B proposed to hire the **[deleted]** under the current contract, and GSA was acquainted with these individuals and their job performance, and possessed their resumes from the protester's and another offeror's proposals. GSA found LB&B's proposal acceptable based on this information. The protester maintains that this was improper.

An agency is not bound by the "four corners" of an offeror's proposal in the evaluation of proposals and may use other information of which it is aware. Forest Regeneration Servs. LLC, B-290998, Oct. 30, 2002, 2002 CPD ¶ 187 at 6. Since the agency here was aware of the resumes and qualifications and experience information omitted from LB&B's proposal, those omissions were of no import.

While LB&B's proposal also did not include a description of the **[deleted]** responsibilities, LB&B's organizational chart did show **[deleted]**. AR, Tab 15, at B-2. Park Tower's proposal went further than LB&B's, specifically stating **[deleted]** (AR, Tab 11 at SP 7; Tab 14, ¶ 3.B), and that **[deleted]** (AR, Tab 11 at SP 9; Tab 14, ¶ 3.B). In our view, the listed responsibilities are fairly self-evident from the nature of the contract and the titles of the positions, and reasonably could be viewed by the agency as adding little substantive value relative to LB&B's proposal, particularly given that LB&B was proposing the individuals who were currently performing the **[deleted]** responsibilities. This being the case, even had the evaluators downgraded LB&B's proposal for omitting this information, there is no reason to believe it would have had any significant impact on LB&B's score or the source selection.

With regard to the absence of a statement of commitment, the RFP did not require letters of commitment; rather, offerors were to indicate "what commitments have been made to hire" personnel not currently employed by the offeror. RFP at 248-250. Here, LB&B's silence on the matter indicated that there was no commitment, a fact that was later clarified by the agency (see below).[6] The evaluators considered the absence of any commitments in preparing the SSEB report. AR, Tab 20 at 35, 83, 85.

[6] Park Tower asserts that a commitment was required because the source selection plan indicated that proposals were to be evaluated on the basis of whether some form of commitment had been provided. This assertion is without merit. Alleged deficiencies in the application of an agency's evaluation plan do not alone provide a basis for questioning the validity of an evaluation; such plans are internal agency instruction and do not give outside parties any rights. Mandex, Inc.; Tero Tek Int'l, Inc., B-241759 et al., Mar. 5, 1991, 91-1 CPD ¶ 244 at 7.

DISCUSSIONS

Park Tower asserts that GSA improperly conducted discussions only with LB&B after negotiations were closed, and after the offerors had submitted their FPRs. Specifically, Park Tower contends that in October and November, GSA improperly provided LB&B with an opportunity to modify its proposal without providing Park Tower the same opportunity. The agency responds that its communications with LB&B did not constitute negotiations but were requests for clarification.

Clarifications are "limited exchanges" between the government and offerors that may allow offerors to clarify certain aspects of proposals or to resolve minor or clerical errors. Federal Acquisition Regulation (FAR) § 15.306(a)(2). Discussions, on the other hand, occur when a contracting officer indicates to an offeror significant weaknesses, deficiencies, and other aspects of its proposal that could be altered or explained to enhance materially the proposal's potential for award. FAR § 15.306(d)(3); Wellco Enters., Inc., B-282150, June 4, 1999, 99-1 CPD ¶ 107 at 7. The acid test for deciding whether discussions have been held is whether it can be said that an offeror was provided the opportunity to revise or modify its proposal. Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79 at 5.

Here, the contracting officer's contacts with LB&B after receipt of FPRs were clarifications and not an invitation to modify or revise its proposal. As discussed above, LB&B proposed to hire the incumbent **[deleted]**, but its proposal was silent with regard to any commitments by these individuals to work for the firm. On or about October 14, GSA contacted LB&B and asked whether the firm had been able to obtain any commitment from the **[deleted]** to accept employment with LB&B. Supp. COS at 6. LB&B then contacted the **[deleted]** and unsuccessfully attempted to obtain a signed commitment. In an October 18 e-mail, LB&B responded to the agency's inquiry, explained that it still felt it could hire these employees, but was unable to obtain commitments, and stated that **[deleted].** AR, Tab 35. On November 8, the contracting officer again contacted LB&B to ask if it was still their intent to hire the incumbent **[deleted]**, to which LB&B replied "yes." AR, Tab 36. In our view, these contacts merely sought to clarify LB&B's existing proposal, not obtain any substantive information to modify it; obtaining clarification of the status of the employees' commitment to LB&B did not revise or otherwise modify LB&B's proposal.[7]

[7] Park Tower notes that the SSEB subsequently included this information in its evaluation report and the SSA considered it, indicating it was "essential" to the evaluation. Supplemental Protest at 3-4. While the evaluators included the information and considered it, this alone does not transform clarifications into discussions. Similarly, the SSA's consideration of the circumstances surrounding LB&B's failure to obtain commitments did not change the nature of the communications or the information obtained. The fact remains that the information

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SOURCE SELECTION DECISION

Park Tower asserts that the SSA's award decision was flawed because it was based on an incorrect finding that the technical proposals were effectively equivalent and on LB&B's alleged misrepresentations of the circumstances surrounding the lack of commitments. In Park Tower's view, it should have received the award based on its superior technical proposal, even at its higher price.

Price/technical tradeoffs may be made in deciding between competing proposals; the propriety of such a tradeoff turns, not on the difference in technical scores or ratings per se, but on whether the agency's judgment concerning the significance of the difference was reasonable and adequately justified in light of the evaluation scheme. SEEMA, Inc., B-277988, Dec. 16, 1997, 98-1 CPD ¶ 12 at 6. In this regard, evaluation scores are merely guides for the selection official, who must use his or her judgment to determine what the technical difference between competing proposals might mean to contract performance. Id.

The source selection decision was reasonable. Park Tower's assertion that the agency incorrectly found that the proposals were equivalent is based largely on its view that the agency misevaluated LB&B's proposal. As discussed above, however, we find that the evaluation of LB&B's proposal was unobjectionable. The SSA's evaluation conclusions were reached after he performed a detailed review of the SSEB's evaluation conclusions, as well as his own comparative assessment of the proposals against the technical evaluation criteria. This review provided the basis for his conclusion that Park Tower's proposal's higher score did not represent any significant technical superiority under any of the evaluation factors. AR, Tab 21, at 2, 6; SSA Declaration, ¶ 3. The protester has not demonstrated that this finding was unreasonable. Further, there is no basis for finding that the agency's conclusions were based on any misrepresentations by LB&B. Park Tower's assertion in this regard is based on its comparison of LB&B's October 18 e-mail to GSA (concerning employment commitments) with declarations from the incumbent's **[deleted]**, which, according to Park Tower, reveals inconsistencies. However, while the declarations and e-mail are not identical, overall they are consistent and simply reflect slightly different versions of what happened when LB&B contacted the incumbent's personnel.[8] The only exception concerns whether

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was not necessary to find the proposal acceptable and did not serve to modify it. We express no view on whether the exchange would still properly be viewed as a clarification, if LB&B had succeeded in obtaining (and then submitting to GSA) a signed commitment from the individual.

[8] For example, the email states that the **[deleted]** "felt very uncomfortable about the possibility of jeopardizing his current employment with the incumbent contractor," (continued...)

the **[deleted]** initially agreed to sign a letter of commitment, and later refused. The **[deleted]** denies that he agreed to sign any letter of commitment (**[deleted]** Declaration, ¶ 4), while LB&B's recruiter states that he did agree (LB&B Recruiter Declaration, ¶ 3). While the declarants dispute one another on this point, it does not appear that there was any intentional misrepresentation. In this regard, the **[deleted]** admits that, when asked about signing a commitment, he stated he "would have to think about whether or not to sign any papers." **[deleted]** Declaration ¶ 4. The incumbent **[deleted]** also advised the recruiter that he wanted to continue working at the Moynihan Courthouse if the contract were awarded to someone else and, in fact, has accepted employment with LB&B. Id., ¶¶ 4, 6; Contracting Officer's Statement at 9. Our review provides no basis for finding that the differing versions resulted from other than a misunderstanding or faulty memory on the part of one or both of the individuals.

The protest is denied.

Anthony H. Gamboa
General Counsel

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but the **[deleted]** states that he "further indicated . . . that I did not want to do anything to jeopardize my employment." AR, Tab 35; **[deleted]** Declaration, ¶ 4. The e-mail also included LB&B's assessment that the **[deleted]** feared reprisal. While the **[deleted]**'s declaration does not indicate that he feared reprisal, he did state that he did not want to jeopardize his position through signing a commitment letter. **[deleted]** Declaration, ¶ 4. We see nothing unreasonable in LB&B's or the agency's drawing an inference of a fear of reprisal from this statement.