



Decision

Matter of: Exec Plaza, LLC--Costs

File: B-400107.3

Date: October 24, 2008

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DIGEST

Request for a determination of entitlement to costs is denied because, although the agency issued a clarifying amendment in response to a protest allegation, the protester's argument was not clearly meritorious and therefore the agency's amendment cannot be considered as corrective action in the face of a clearly meritorious protest.

DECISION

Exec Plaza, LLC (Exec) requests that our Office recommend that the General Services Administration (GSA) reimburse its costs of filing and pursuing its protest of the terms of solicitation for offers (SFO) No. 08-008. Specifically, Exec requests that we recommend reimbursement of the protester's costs associated with its challenge to terms of the SFO that were amended by the agency during the course of the protest.

We deny the request.

The SFO was issued on February 29, 2008, and sought offers for the lease by GSA of approximately 574,164 square feet of office space in Rockville, MD, on behalf of the National Cancer Institute (NCI). At the time of the protest, GSA leased office space for NCI under multiple leases in Rockville from Exec and another lessor.

Exec filed a protest challenging the terms of the SFO on April 25, arguing that the SFO was unduly restrictive of competition because it placed numerous requirements

on incumbent lessors, such as Exec, that did not apply to other offerors. As relevant here the protester argued that the SFO required incumbent lessors, but not other offerors, to demolish existing tenant improvements in their proposed properties. Exec argued that this requirement placed it at a competitive disadvantage as compared to other offerors who would not be required to demolish their existing improvements.

In its report on the protest, GSA argued that the SFO required all offerors to demolish existing tenant improvements. Agency Report (AR) at 9. The agency further argued that the requirement, as applied to all offerors, was reasonable and was not unduly restrictive of competition. In a supplemental protest, Exec argued that the agency's position regarding the applicability of the demolition requirement to all offerors was not reflected in the SFO. In its supplemental agency report, GSA reiterated its view that the demolition requirement applied equally to all offerors. Supp. AR at 3.

Nonetheless, GSA's supplemental report also announced that it was issuing amendment No. 2 to the SFO, which would more clearly state that the demolition requirement applied to all offerors. GSA argued that SFO amendment No. 2 rendered the protest concerning the demolition requirement academic because it made clear that the requirement did not apply uniquely to Exec. In its comments on the supplemental agency report, Exec argued that the amended SFO still did not resolve its argument that the demolition requirement unduly restricted the protester's ability to compete for the contract. The protester also argued, however, that the amendment of the solicitation constituted corrective action in response to the initial protest, and requested that our Office recommend that the protester be reimbursed its costs of pursuing this aspect of its protest.

On August 1, we denied the protest. We concluded that certain of the challenged SFO requirements applied equally to all offerors, and that they did not uniquely prejudice Exec's ability to compete for the contract. As relevant here, we concluded that the amended SFO made clear that the demolition requirement applied to all offerors. With regard to the balance of the challenged SFO requirements, we concluded that although several of them applied uniquely to the incumbent lessors, like Exec, the competitive disadvantage they imposed was not unreasonable.

DISCUSSION

Exec requests that we recommend that the agency reimburse its costs of pursuing its protest concerning the demolition requirement. GSA argues that reimbursement is not warranted here because the original solicitation required all offerors to demolish existing tenant improvements, and that, notwithstanding the agency's amendment of the SFO to make the matter more clear, the protester's argument was without merit. We agree with GSA.

Our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2008), provide that we may recommend that an agency reimburse a protester's costs of pursuing a protest where the agency decides to take corrective action in response to the protest. We will make such a recommendation, however, only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing a protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Information Ventures, Inc.-Costs, B-294567.2, Nov. 16, 2004, 2004 CPD ¶ 234 at 2. A protest is clearly meritorious where a reasonable agency inquiry into the protest allegations would have shown facts disclosing the absence of a defensible legal position. AVIATE LLC, B-275058.6, B-275058.7, Apr. 14, 1997, 97-1 CPD ¶ 162 at 16. As a general rule, so long as an agency takes corrective action by the due date of its protest report, we regard the action as prompt, and will not consider a request to recommend reimbursement of protest costs. CDIC, Inc.-Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52.

Here, we think the record shows that Exec's initial argument was not clearly meritorious. As discussed above, Exec's initial protest argued that the SFO required only the incumbent lessors to demolish existing tenant improvements. The SFO set forth specific provisions that applied only to incumbent lessors, including the following requirement for demolition of existing improvements:

The majority of this requirement is currently located at 6116, 6120 and 6130 Executive Boulevard, Rockville, MD (the "Executive Boulevard Properties"). Modernization of the Executive Boulevard Properties may be a potential solution for this procurement. A modernization of the Executive Boulevard Properties will be required to meet all of the requirements of this SFO, including the Occupancy Date requirements of Section 1.7. The SFO outlines a level of base building requirements and tenant improvements that will require all or portions of the building to be vacant from time to time during modernization. In addition, existing tenant improvements in Executive Boulevard Properties must be demolished and replaced with new tenant improvements in accordance with the Government's Program of Requirements and approved plans.

SFO § 1.20A.

While the original SFO did not specifically state that non-incumbent offerors were required to demolish existing tenant improvements, it stated that all offerors were required to propose their office space as a "building shell."¹ SFO § 1.9. The building

¹ As discussed in our decision resolving the underlying merits of the protest, "warm lit shell" is a common industry term, referring to basic building structure elements. Exec Plaza, LLC, B-400107, B-400107.2, Aug. 1, 2008, 2008 CDP ¶ 143 at 3. While the

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shell requirements applicable to all offerors stated that the proposed office space must have complete base structures, accessible common areas, and systems such as heating, ventilation, air conditioning, electrical, and sprinklers. Id. The SFO required offerors to propose a base price for the building shell, and provided separately for a fixed allowance for the construction of new tenant improvements to meet the government's requirements. GSA states that this approach allows the government to evaluate offerors on a common basis, without having to take existing tenant improvements into consideration.² AR at 9.

Amendment No. 2 added a new section to § 1.9, which applied to all offerors, as follows:

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

SFO amend. 2 § 1.9(A).

To conclude that the protester's original argument was clearly meritorious, we would need to agree with the protester that the solicitation, as originally issued by GSA and challenged by Exec, was defective. We do not agree.

As discussed above, all offerors were required to propose office space as a building shell, *i.e.*, empty space with only basic elements such as utilities and safety systems. GSA concedes that the SFO did not specifically state that non-incumbents would need to assume demolition of existing tenant improvements. However, GSA argues

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non-incumbent-specific SFO provisions refer to a "building shell," and the incumbent-specific provisions refer to a "warm lit shell," SFO §§ 1.9, 1.20, GSA states that for purposes of the SFO, the terms "building shell" and "warm lit shell" are interchangeable. Supp. AR at 5. We think the record supports this view, as SFO § 1.20 states that the incumbent offeror must provide a "warm lit shell" consistent with the definition of such in Section 1.9 of this SFO." SFO § 1.20(C).

² In a decision addressing a similar argument, we concluded that a requirement to propose leased office space as a building shell was reasonable because it allowed GSA to evaluate offerors on a common basis. See Paramount Group, Inc., B-298082, June 15, 2006, 2006 CPD ¶ 98 at 3. In Paramount, the protester argued that the requirement to propose space as a building shell was unreasonable because it required the protester, the incumbent lessor, to demolish its existing tenant improvements.

that the solicitation clearly and necessarily implied that the SFO required demolition of existing tenant improvements, to the extent that all existing improvements must be removed so that the office space is reduced to the status of the required building shell. AR at 9.

We agree with the agency that proposing office space as a building shell means that an offeror must assume demolition of all existing improvements. Additionally, although the initial SFO more explicitly stated this requirement for incumbent offerors, we do not think the elsewhere-stated, but essentially duplicative provisions requiring a building shell, excused non-incumbents from demolishing existing tenant improvements.

Finally, we do not think that GSA's decision to amend the solicitation demonstrates that the protester's initial argument was correct, even though we agree that amendment No. 2 more clearly stated the requirement. As discussed above, we think that the initial solicitation advised all offerors that existing tenant improvements required demolition. Therefore, we conclude that agency's corrective action was not taken in response to a clearly meritorious protest, and we do not recommend that Exec be reimbursed its protest costs.

The request is denied.

Gary L. Kepplinger
General Counsel