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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: New Jersey & H Street, LLC

File: B-311314.3

Date: June 30, 2008

Alex D. Tomaszczuk, Esq., and Daniel S. Herzfeld, Esq., Pillsbury Winthrop Shaw Pittman LLP, for the protester.

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

Robert A. Hauser, 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 credited awardee's proposed building with availability of certain future amenities based solely on promise in offer, without requiring supporting evidence that amenities would exist, which was required by solicitation; agency essentially relaxed evidence requirement only for awardee, without providing protester with opportunity to propose amenities under relaxed standard.

2. Protest that agency failed to engage in meaningful discussions is sustained where agency failed to raise during discussions significant weaknesses associated with access to amenities in or near protester's proposed office building.

DECISION

New Jersey & H Street, LLC (Justice Plaza Development Team or JPDT) protests the General Service 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, DC. JPDT 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 2, SFO, at 20-21. The location factor was approximately equal in importance to the building characteristics factor, and each was significantly more important than the key personnel/past performance factor; the technical evaluation 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 revised offers, Stonebridge’s offer and JPDT’s offer were among the highest rated, both receiving an overall technical score of “highly successful plus.” JPDT’s price (annual present value [DELETED] per square foot) was higher than Stonebridge’s ([DELETED] per square foot), resulting in an overall difference of approximately \$38,000,000 in net present value terms. The ratings under the individual technical evaluation factors and subfactors were as follows (including specific weights of each factor and subfactor, which were not disclosed in the SFO):¹

Factor	Subfactor	<u>JPDT</u>	<u>Stonebridge</u>
Location (45%)	Access to DOJ (20%)	Highly Successful	Successful Plus
	Access to Metro (15%)	Poor	Highly Successful
	Access to Amenities (10%)	Successful	Highly Successful
	Factor Score	Successful	Highly Successful Minus
Building Characteristics (45%)	Quality of Building Architecture, etc. (20%)	Superior	Superior
	Planning Efficiency and Flexibility (20%)	Superior	Highly Successful
	Access to Light (5%)	Superior	Superior
	Factor Score	Superior	Superior Minus
Key Personnel/ Past Performance (10%)	Key Personnel (5%)	Superior	Superior
	Past Performance (5%)	Superior	Successful
	Factor Score	Superior	Highly Successful
OVERALL SCORE		Highly 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 4, at 10. In actually evaluating offers, the agency used ratings with pluses and minuses, which are undefined in the record.

AR, Tab 5, at 49. Because the two offers were considered equal overall technically, Stonebridge's offer was ultimately selected as the best value to the government based on its lower price.² This protest followed.

JPDT 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 two respects and, therefore, we sustain the protest. We discuss JPDT's meritorious arguments below.³

AMENITIES

JPDT challenges the evaluation of its offer 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 2, SFO, at 21. For purposes of determining whether an offer would be credited for amenities that were not currently existing but would likely exist in the future, the SFO stated as follows:

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

² There is confusion in the record as to whether Stonebridge's offer was rated successful or highly successful under the past performance subfactor. Since the agency now maintains that the awardee should have received the lower rating, we use that rating here.

³ By decision dated June 20, 2008, we sustained a protest filed by Trammell Crow Company challenging the same source selection in issue here. See Trammell Crow Co., B-311314.2, June 20, 2008, 2008 CPD ¶ ____.

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 proposed future amenities, the awardee provided a letter with its final offer revision in which it committed to providing in its proposed building [DELETED]. Stonebridge's Final Revised Proposal, Vol. II, Sept. 20, 2007, Commitment on Constitution Square Retail and Retail Plans. The agency ultimately credited Stonebridge's offer with these amenities, resulting in a rating of highly successful for the access to amenities subfactor.⁴ AR, Tab 9, Location Technical Advisory Report, attach. 2.

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

It is a fundamental principle of government procurement that a 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. We will sustain a protest that an agency improperly relaxed its requirements only 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 2, SFO at 7. We think this language informed offerors that some level of evidence of a proposed amenity to be furnished by a third party, beyond a mere promise of its existence, had to be provided in order for an offer to receive evaluation credit for the proposed amenity. The agency asserts that Stonebridge's promise is contractually

⁴ 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 9, Location Technical Advisory Report, at 6.

enforceable, and that it thus was reasonably satisfied that the awardee would provide the amenity. However, the key consideration here is not whether a promise could be viewed as providing some level of assurance that a third party amenity would be available, but whether the agency's reliance on the promise alone was consistent with the terms of the SFO. Again, we find that it was not. The SFO stated that offerors "must demonstrate" that the proposed amenities would exist, indicated in the parenthetical that this was to be "through evidence," and then gave examples of satisfactory evidence. We do not think a bare promise satisfied the SFO requirement that offerors "demonstrate" the existence of future amenities through "evidence." It follows that, in accepting Stonebridge's promise, the agency relaxed the evidence requirement only for the benefit of Stonebridge, without advising JPDT and the other offerors of the reduced evidence standard.

The agency asserts that "all offerors were informed" during oral discussions that they could improve their offers by providing amenities in their building, and that "the government would accept, in addition to letters of intent or other proof, the guarantee of a financially responsible offeror as proof that the amenity will be 'existing' at the time of occupancy." AR, Tab 1, Contracting Officer's Statement, at 3. The agency cites the protester's addition of a fitness center reserved to its building after discussions as evidence that JPDT was aware that future amenities could be supported merely by an offeror's contractual guarantee. Agency Response to Comments, May 16, 2008, at 7.

The record simply does not support the agency's position. JPDT denies that it was told that the agency would accept an offeror's guarantee as the sole evidence that the amenity would exist at the time of occupancy. In support of this denial, JPDT has furnished: (1) a declaration executed by the vice president of one of its teaming partners who attended the discussions, in which he reports the information conveyed by the agency and specifically denies that the agency advised that an offeror's guarantee would suffice to verify the existence of a future amenity; and (2) a contemporaneous e-mail reporting in detail the matters raised by the agency during discussions, which makes no mention of the agency's having relaxed or even discussed the evidence of future amenities requirements. Declaration of JPDT Partner Boston Properties Vice President; E-mail From Bennett Group DC to Boston Properties [JPDT partners], 9-12-07 Meeting Notes, Sept. 12, 2007.

In addition, the contemporaneous record of discussions provides no support for the agency's position. Specifically, GSA's statement of objectives for the negotiations makes no reference at all to the level of evidence required to establish future amenities, let alone any reference to permitting JPDT to rely on a promise or guarantee as evidence of third party amenities. AR, Tab 22, DOJ Negotiation Objectives. There is nothing else in the record that confirms that the agency advised JPDT of the relaxed evidence requirement. Further, we do not agree with the agency that JPDT's offer of a fitness center in its building indicates it understood the level of evidence required for third party amenities, since the fitness center was to be

furnished by JPDT, not a third party entity. We conclude that there is no evidence that the agency advised JPDT of the relaxed requirements.

DISCUSSIONS

JPDT's initial offer included a list of the various amenities surrounding its proposed office site, as well as a map showing their locations. Among the amenities proposed, the firm listed 5 restaurants and 13 fast food establishments (as well as convenience stores, daycare facilities, drug stores, banks/ATMs, a postal facility, a law library, gift shops and dry cleaners) within 2,000 walking linear feet (wlf) of the office building.⁵

The record indicates that, subsequently, during oral discussions on September 12, 2007, GSA informed the protester that it was unable to verify the existence of a postal facility or a fitness facility within 2,000 wlf, and that it was "unable to verify" two food establishments ("Andy's Carry Out," and "Domino's Pizza") identified in JPDT's initial offer, as well as the Sports Club/LA. AR, Tab 22, DOJ Negotiation Objectives, at 1; Declaration of JPDT Partner Vice-President; E-mail From Bennett Group DC to Boston Properties [JPDT partners], 9-12-07 Meeting Notes, Sept. 12, 2007. In addition to these inquiries specific to JPDT, the agency asserts that "all offerors were informed [during oral discussions] that they could improve their technical score by providing amenities within the offered building" Contracting Officer's Statement at 3. There is no indication in the record that the protester was given any further information during discussions regarding the agency's evaluation of its proposed amenities. AR, Tab 22, DOJ Negotiation Objectives.

The protester's final revised offer included a response to the agency's concerns. Specifically, the protester provided additional information about the four amenities identified by GSA, including a map showing where Andy's Carry Out and a United States Postal Service facility were located; the explanation that Domino's Pizza had relocated elsewhere in the city; and the explanation that, while the cited sports club no longer existed, JPDT would provide in its building a fitness center reserved exclusively for DOJ personnel, and that JPDT had also identified a separate, existing fitness center located at the Government Accountability Office Building, which DOJ personnel were eligible to use. JPDT's Technical Proposal, Building Data and Capability to Perform, Final Revised Proposal, Amenities Clarification.

After evaluating the protester's revised offer with regard to the access to amenities subfactor, the agency determined as follows:

⁵ JPDT's offer did not include the distance from the proposed building site to each specific amenity. JPDT's Technical Proposal, Building Data and Capability to Perform, Vol. I, May 31, 2007, Access to Amenities.

the Team found a relatively equal balance of significant and minor strengths and significant and minor weaknesses The proximity of amenities generally is a significant weakness, with only an on-site fitness center and three other amenities available within 1,000 wlf. The proximity of fast food establishments is a significant weakness, with only 3 fast food establishments within 1,500 wlf, the closest of which is 904 wlf away. In addition, the quantity, variety, and proximity of table service restaurants is a significant weakness, with only three restaurants available at distances ranging from 1,427 to 1,964 wlf.

AR, Tab 5, at 24. The agency ultimately assigned JPDT's offer a successful rating under the amenities subfactor. Id.

JPDT asserts that the discussions it received with regard to its amenities were inadequate, since GSA failed to bring to its attention the several "significant weaknesses" it had found regarding proposed amenities. Specifically, the protester points to the above language, noting that the agency determined that the proximity and limited number of amenities generally was a "significant weakness"; the proximity and limited number of fast food establishments was a "significant weakness"; and the quantity, variety, and proximity of table service restaurants was also a "significant weakness." JPDT asserts that, had GSA raised these "significant weaknesses" during discussions, it could have modified its building to include additional amenities within the building.

Discussions, when conducted, must be meaningful, that is, they may not be misleading and must identify proposal deficiencies and significant weaknesses that could reasonably be addressed in a manner to materially enhance the offeror's potential for receiving award. PAI Corp., B-298349, Aug. 18, 2006, 2006 CPD ¶ 124 at 8. While an agency generally need only lead an offeror into the general areas of concern about its proposal, the agency must impart during discussions sufficient information to afford the offeror a fair and reasonable opportunity to identify and correct deficiencies, excesses, or mistakes in its proposal. Advanced Sci., Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52; Aydin Computer and Monitor Div., Aydin Corp., B-249539, Dec. 2, 1992, 93-1 CPD ¶ 135.

The discussions here were not meaningful. While the record shows that the agency indeed advised JPDT that it could improve its technical score by providing amenities within its offered building, this information was conveyed, not to identify deficiencies in JPDT's offer, but as part of the agency's general advice that every offeror received. This general advice amounted to no more than a restatement of the SFO's evaluation criteria. It did not reasonably apprise JPDT that the agency had found its proposal to contain specific significant weaknesses regarding access to amenities, including the proximity and number of amenities generally, the proximity and number of fast food restaurants, and the variety, quantity, and proximity of table

service restaurants. See Integrity Int'l Sec. Sys., Inc., B-261226, Sept. 1, 1995, 95-2 CPD ¶ 98 at 8 (general boilerplate-type reminder that was provided to all offerors during discussions was insufficient to provide notice of protester's specific deficiency).

Further, while the record also supports the agency's claim that it informed JPDT that it was unable to verify the existence of two of the identified restaurants and the identified sports club, this very specific information likewise fell short of advising JPDT that its proposed amenities were a concern overall. Indeed, by providing its concerns regarding particular restaurants and a particular fitness facility without indicating that it considered JPDT's offer to have significant weaknesses regarding the proximity and number of amenities generally, the proximity and number of fast food restaurants, and the variety, quantity, and proximity of table service restaurants, we think GSA led JPDT reasonably to believe that GSA's concerns were limited to those particular establishments and were not broader in nature. See Spherix, Inc., B-294572, B-294572.2, Dec. 1, 2004, 2005 CPD ¶ 3 at 14 (agency failed to conduct meaningful discussions where it determined that offeror's entire quality control plan was a significant weakness, but identified only two specific aspects of the quality control plan in discussions). We conclude that the agency's discussions failed to provide JPDT with sufficient information to afford it a fair and reasonable opportunity to identify and correct the evaluated significant weaknesses in its offer.⁶

PREJUDICE

We 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 and from meaningful discussions with JPDT is difficult to determine, we think it is sufficiently clear that the award decision could have been different. In this regard, JPDT asserts that it

⁶ The agency asserts that it was not required to raise these matters during discussions because the solicitation clearly stated that the government would rate on-site amenities more highly. 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." Federal Acquisition Regulation (FAR) § 15.306(d)(3). As noted above, under the agency's evaluation approach, the failure of JPDT's proposal to provide amenities in close proximity to its offered building (including on-site) represented significant evaluated weaknesses in JPDT's offer.

could have provided additional amenities in its building if it had been advised of the evaluated significant weaknesses in its proposal with respect to amenities and/or if it had known that the agency would accept a commitment from the offeror without supporting third party evidence. Had JPDT done so, its subfactor rating of successful could have increased, which likewise could have increased its successful rating under the location factor. As a result, JPDT's offer, if evaluated in light of our above findings, could be found to be technically superior to Stonebridge's, in which case, the agency would have to conduct a price/technical tradeoff between Stonebridge's and JPDT's offers in order to determine the best value offer. While the agency viewed JPDT's offered price as significantly higher than Stonebridge's, 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 2, SFO, at 20. We conclude that JPDT was competitively prejudiced by the deficiencies in evaluation and discussions, 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. 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 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