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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: The New Jersey & H Street Limited Partnership

File: B-288026; B-288026.2

Date: July 17, 2001

Robert K. Huffman, Esq., Cameron S. Hamrick, Esq., and David F. Dowd, Esq., Mayer, Brown & Platt, and Michael J. Farley, Esq., Miller & Chevalier, for the protester.
Philip M. Horowitz, Esq., Michael R. Goldstein, Esq., and Amy E. Suski, Esq., Arter & Hadden, for Louis Dreyfus Properties, LLC, an intervenor.
George C. Brown, Esq., John P. Sholar, Esq., Richard J. Ufford, Esq., and Angela E. Clark, Esq., Securities and Exchange Commission, 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

Where protester's proposal was eliminated from competitive range, agency was not required to provide protester opportunity to submit revised proposal based on amended requirement; since amendment was not substantial such that it would not have been reasonably anticipated by offerors, agency also was not required to provide all interested firms an opportunity to propose on the amended requirement.

DECISION

The New Jersey & H Street Limited Partnership (NJ&H) protests the award of a contract to The Louis Dreyfus Property Group of New York under solicitation for offers (SFO) No. SECHQ-00-R-0030, issued by the U.S. Securities and Exchange Commission (SEC) for construction and lease of office space.

We deny the protest.

The SFO, issued September 8, 2000, sought proposals to furnish 630,000 to 650,000 rentable square feet of office space to be available not later than December 31, 2003. Several offerors, including NJ&H and Dreyfus, submitted proposals, all of which were included in the initial competitive range. After the SEC conducted discussions and obtained best and final offers (BAFO), it determined that NJ&H's proposal fell outside the revised competitive range. On January 29, 2001 the SEC notified NJ&H

of this fact and stated that proposal revisions therefore would not be considered. The protester requested and, in the form of a letter dated February 22, received a debriefing in which the agency provided a detailed listing of the strengths and weaknesses of the firm's proposal, and specifically stated that NJ&H's BAFO was "eliminated from the competition because it does not provide the close proximity and dedicated, secure access to transportation links, metro, and amenities as is found in the revised competitive range." In response to a March 16 request for an oral debriefing, on May 7 the SEC provided additional information. On May 29, the contracting officer made award to Dreyfus. NJ&H filed this protest on June 8.

NJ&H asserts that the evaluation and negotiations were flawed. Specifically, the protester asserts that the agency improperly considered whether offered properties had "dedicated access" to transportation and amenities, since that was not specifically listed as an evaluation factor. NJ&H also asserts that the agency improperly identified two areas of its proposal (ratio of perimeter glass to usable square feet and the co-developer's role) as weaknesses, maintaining that its proposal fully addressed those matters. Further, NJ&H alleges that the agency improperly failed to discuss these matters during negotiations.

The agency has requested summary dismissal of the protest as untimely filed. Having considered the protester's response to the agency's dismissal request, as well as the supplemental protest (discussed below), we agree that the protest is largely untimely and that the remaining issue can be resolved without submission of a full agency report.

Our Bid Protest Regulations require that protests (other than those challenging solicitation terms) be filed not later than 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (2001). More specifically, a protest based upon information provided to the protester at a debriefing is untimely if filed more than 10 days after the debriefing. Clean Venture, Inc., B-284176, Mar. 6, 2000, 2000 CPD ¶ 47 at 4 n.5; TeleLink Research, Inc., B-247052, Apr. 28, 1992, 92-1 CPD ¶ 400 at 5. All of the information underlying NJ&H's protest grounds was specifically identified in the SEC's February 22 written debriefing, and reiterated in the May 7 letter. Since NJ&H failed to protest any of these matters until June 8, more than 3 months after learning of them, its protest is untimely and will not be considered on the merits.

NJ&H maintains that its protest is timely because it did not know it was eliminated from the competition until it learned the award had been made to Dreyfus, and it protested within 10 days after receiving that information. In this regard, NJ&H states that, after reading a February 8 official statement in which the SEC stated that it had not made an award decision and that the selection process continued, it telephoned Spaulding & Slye Services Limited Partnership, the SEC's designee and authorized representative (SFO § 1.14) which, according to the protester, served as the primary SEC contact throughout the procurement. Protester's Declaration at ¶ 3. NJ&H asked the broker for clarification "as to whether [its] original proposal could still be

accepted should negotiations with [Dreyfus] be unsuccessful." Protester's Declaration at ¶ 4. While the broker informed NJ&H "that the SEC would not accept any further revisions to its proposal," it allegedly further stated that "the SEC could nonetheless accept the [NJ&H] proposal as submitted." Id.[1]

Even accepting the protester's version of its February telephone conversation with the broker, it had no reasonable basis to believe that its proposal was still under consideration. When a proposal is eliminated from the competitive range, it is "eliminated from consideration for award." Federal Acquisition Regulation (FAR) § 15.306(c)(3). The January 29 letter, signed by the contracting officer, clearly stated that the protester's offer fell outside the revised competitive range and, as noted, the February 22 debriefing letter specifically advised the protester that its proposal was "eliminated from the competition." The protester was aware of this language, as it repeated it on the second page of its March 16 letter. The contracting officer reiterated this language in her May 7 response to the March 16 letter, stating that the "February 22 letter to [NJ&H] . . . fully and thoroughly summarized the rationale for eliminating [NJ&H] from the competition." NJ&H could not reasonably ignore this unequivocal notice that the contracting officer had eliminated its proposal from the competition and choose instead to assume, based solely on the alleged statement by the broker's representative, that it remained in the competition. At minimum, reason dictates that NJ&H should have clarified the status of its proposal with the contracting officer; in this regard, the agency states that, in the 4 months following the broker's statements, NJ&H never raised the issue of those statements with the contracting officer.

In a supplemental protest, NJ&H asserts that the SEC improperly permitted only Dreyfus to revise its proposal to respond to an amended requirement for a 14-year lease term (instead of the 15-year term it had offered). NJ&H, which submitted a 15-year offer, argues that it should have been allowed the opportunity to submit a revised proposal on the basis of the amended term.

This argument is without merit. Under FAR § 15.206(c), "[a]mendments issued after the established time and date for receipt of proposals shall be issued to all offerors that have not been eliminated from the competition." NJ&H was not permitted to submit a revised proposal in response to the amended lease term because, unlike Dreyfus, it had been eliminated from the competition. Under FAR § 15.206(e), where the contracting officer determines that an amendment to a requirement after offers

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[1] The broker's representative's recollection of this conversation is different. When asked what the SEC would do if it was unable to complete the current procurement, he responded that the SEC's options might include revisiting the market for purposes of negotiating for space beyond the expiration of the current lease, but that "the SEC would not accept further revisions from [NJ&H] because it had been removed from the competitive range." Broker's Declaration at ¶ 4.

have been received "is so substantial as to exceed what prospective offerors reasonably could have anticipated," the solicitation must be canceled and all interested firms given an opportunity to respond to the changed requirement. The change in the lease term falls outside of this provision. Not only does a 1-year change in the lease term not appear substantial on its face, but since the RFP expressly permitted offerors to propose lease terms of from 10 to 20 years, a 14-year term clearly was not beyond what offerors reasonably could have anticipated. Thus, the agency was not required to provide NJ&H an opportunity to respond to the changed requirement.

In any case, NJ&H has not established competitive prejudice. Rather, it merely asserts, generally, that revised proposals from all offerors would result in "steep cuts" in price and that offerors "would have engaged in aggressive cost-cutting efforts." Supplemental Comments at 5. NJ&H provides no specifics to establish that any price revisions it would make would be substantial, and has not explained why--and nothing in the record suggests that--a 1-year shorter lease term would have a disparate impact on different offerors' proposed rates. We will not sustain a protest absent a reasonable possibility of competitive prejudice--that is, a showing that, but for the agency's actions, the protester 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). NJ&H has not made this showing.

The protest is denied.

Anthony H. Gamboa
General Counsel