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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: HG Properties A, LP

File: B-290416; B-290416.2

Date: July 25, 2002

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Department of Veterans Affairs, for the agency.
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Counsel, GAO, participated in the preparation of the decision.

DIGEST

Lease modification changing location of site for construction of offered building space remains within the scope of the underlying lease, so that resolicitation of agency's space requirements is not necessary, where substituted site meets solicitation's geographical requirements and modification does not change lease price, performance period, basic responsibilities of parties to the lease, or the nature and purpose of the lease, so that overall effort under modified lease remains essentially the same as was contemplated under the original solicitation for offers.

DECISION

HG Properties A, LP protests the modification of lease No. V541R-62, awarded to Premier Office Complex, Inc. (POC) by the Department of Veterans Affairs (VA) for the provision of building space for a VA medical facility in Canton, Ohio. HG, the incumbent lessor of building space for the agency's current medical facility in the area, chose not to compete for the lease it is now challenging. HG contends, however, that a recompetition of the lease is now necessary due to an alleged out-of-scope modification to POC's lease. Specifically, HG contends that the lease was improperly modified to allow a change to the site of construction of the lessor's offered building space; HG argues that the change in location is a cardinal change outside the scope of the lease awarded to POC which, according to HG, should be viewed as an improper sole-source award. In its supplemental protest, HG also raises, among other contentions, numerous challenges to the agency's initial award of the underlying lease to POC.

We deny the protests.

On January 26, 2001, the agency issued solicitation for offers (SFO) No. 541-040-01 for approximately 15,000 net usable square feet of building space for medical/office space located within a delineated geographic area in Canton, Ohio. Five amendments were issued to that solicitation to extend its closing date in an effort to delay the procurement until HG could resolve an ongoing eminent domain action against a property it would have liked to offer in response to the SFO. That SFO, however, was ultimately cancelled.

Several months later, under a new solicitation, SFO No. 541-018-02, the agency again set forth its detailed needs for building space for its medical facility. Although HG was sent a copy of the new SFO, the firm did not submit a proposal in response to it; the eminent domain action against HG's property was not withdrawn until after the date offers were due under the SFO. The agency did receive offers in response to the SFO from two other firms, including POC; the offers were deemed acceptable and found to offer reasonable prices.

The SFO set out both general and highly specific space requirements to meet a variety of stated agency needs. As to the location of offered buildings, the SFO provided only general requirements that were to be met. No specific property location was identified; rather, offered properties had to be located within a designated area of consideration, defined in the SFO by reference to certain city boundaries. Such properties had to be located in a prime commercial office district with professional surroundings, be reasonably accessible to public transportation and highways, and include a minimum of 125 on-site parking spaces. SFO ¶¶ 1.1–1.3.

The SFO, however, did include detailed and numerous architectural requirements to be met by the offered building space, and the SFO also included specific requirements for the lessor to provide certain specialized services--security services and custodial services--utilities, maintenance, and environmental management. Particular design requirements were set out for waiting and examination rooms, as well as office space for personnel, and space for equipment storage. The SFO also set forth highly specialized specifications for specific medical treatment and laboratory areas required within the proposed facility. SFO ¶¶ 4.0–10.18. The leased space was to be free of hazardous materials. SFO ¶ 8.9. New construction or substantial renovation to a quality building of existing sound construction was generally considered by the agency to be necessary to meet the SFO's particular requirements.

A lease term of 5 years, with a 5-year renewal option period, was cited in the solicitation, but offerors were advised that the lease term was negotiable, as long as the proposed term did not exceed a maximum of 10 years. SFO ¶ 1.4. A lease was to be awarded to the offeror who submitted the offer found to be most advantageous to the government considering location, condition of offered building space, and price. The solicitation advised that price could become significantly more important than

the non-price factors combined; in this regard, the SFO indicated that the location of offered property was not the predominant factor of importance to the agency under the SFO evaluation scheme. SFO ¶ 2.0.

As stated above, the agency determined that the offers submitted by the two offerors that responded to the SFO were technically acceptable. POC's offer (which was based on construction of a new building on its proposed site) was considered to be most advantageous to the government in that it offered the lowest price. The agency subsequently awarded a lease to POC, dated February 27, 2001, to meet the stated medical facility space requirements.

Shortly thereafter, POC notified the agency that a post-award inspection of its offered site of construction of the building space revealed the presence of hazardous materials. During its conversation with the contracting officer on the matter, POC evidently learned of another acceptable site in the same area, which had been reviewed earlier by the agency. POC subsequently suggested a substitution of that site at no cost to the agency and no change to the performance requirements of the lease. Since the new site was only four blocks from the initial property, in the same commercial district, within the SFO's delineated geographic area of consideration, and otherwise acceptable under the SFO, the agency agreed to modify the lease to change only the address of the premises upon which the proposed building would be constructed. All other terms of the lease were to stay the same, including the lessor's responsibility to provide the offered building space at the same price as awarded, and within the same performance period. The supplemental lease agreement effectuating the site change, dated March 7, cites the SFO's Changes clause, which provides for changes in leased "facilities or space layout" where the changes are "within the general scope of the lease." SFO ¶ 33.

More than 2 months after this lease modification was executed, HG filed a protest against the propriety of the modification, stating that the firm had just learned of the site change from a newspaper article about the planned medical facility. HG argues that because location was a stated factor for consideration for award under the SFO, the change of site, even if the new site otherwise meets all of the SFO and lease requirements, is a cardinal change outside the scope of the lease. HG argues that this alleged out-of-scope modification resulted in a sole-source lease to POC that instead must be recompeted. HG, which now has a property it can offer to meet the agency's needs for space for the medical facility, seeks recompetition of the lease awarded to POC for that facility.

Our Office generally will not consider protests challenging contract modifications because modifying a contract involves the administration of the contract, which is outside our bid protest jurisdiction. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(1) (2002). Nonetheless, we will review a protest alleging that a contract modification represents a cardinal change beyond the scope of the contract and therefore should have been the subject of a new procurement. See New Beginnings Treatment Ctr., Inc.--Recon., B-252517.5, Apr. 11, 1994, 94-1 CPD ¶ 242 at 3. In assessing whether a

contract modification is outside the scope of the original agreement, we look to see whether the original nature or purpose of the contract is so substantially changed by the modification that the original and modified contracts are essentially and materially different. In assessing whether the modified work is essentially the same as the effort for which the competition was held and for which the parties contracted, we consider, for instance, factors such as the magnitude of the change in relation to the overall effort, including the extent of any changes in the type of work, performance period, and costs between the modification and the underlying contract. See Access Research Corp., B-281807, Apr. 5, 1999, 99-1 CPD ¶ 64 at 3-4; see also Caltech Serv. Corp., B-240726.6, Jan. 22, 1992, 92-1 CPD ¶ 94 at 4; Rolm Corp., B-218949, Aug. 22, 1985, 85-2 CPD ¶ 212 at 2-3.

Accordingly, the critical question is whether the change in the location of the site for the construction of the awarded building space is so material to the overall effort required under the SFO as to be outside of the scope of the lease awarded here. In answering this question, we look to the purpose and nature of the lease, which here required much more than an amount of space located at a particular address.

As noted above, the lease here incorporates numerous work performance requirements ranging from the provision of specific, architecturally defined areas of building space, highly specialized for the needs of a medical treatment facility, to the provision of specified management, custodial, and security services. In our view, the level of detail provided describing the required configuration and provision of the building space reflects the relative importance to the agency of obtaining space meeting specific design and functional requirements. In contrast, the SFO's property location requirements are only general in nature and scope--wide location boundaries were provided in the SFO and only general transportation accessibility was required, reasonably indicating that specific location within the cited area simply was not a critical factor to the agency, as long as the property was within the delineated area and reasonably accessible. In other words, we think it is apparent that the location of the specific site offered--as long as it was within the identified geographic boundaries and otherwise met all SFO requirements--was not of particular importance under the SFO.

Based on our reading of the SFO as a whole, we think that the change in site does not, standing alone, materially change the nature or purpose of the lease with POC. It is important here to recognize that the substituted site, only four blocks from the initial site for construction of the building, meets the SFO's location requirements. It is also important to point out that, despite the site change, the lessor remains responsible for construction of the building space bargained for to meet the agency's needs as detailed in the SFO. Moreover, both the lease price and the performance period similarly remain unchanged by the modification. In sum, given the totality of specific performance requirements to be met by the lessor, which remain virtually unchanged by the challenged modification, and the relatively limited emphasis afforded to specific location under the SFO's general location requirements, we cannot conclude that the challenged modification materially changed the nature or

purpose of the work to be provided under the lease awarded to POC. The record thus supports the reasonableness of the agency's determination that the challenged modification is within the scope of the lease.

In a supplemental protest filed by HG more than 3 months after the underlying lease was awarded to POC, raising issues which allegedly were based upon HG's review of a copy of that lease included in the agency's report on HG's initial protest, HG raised numerous challenges to, among other things, the evaluation and acceptance of the POC offer. Given the substantial passage of time since that lease was awarded, however, we conclude that the challenges are untimely. A protester is required to diligently pursue information forming the basis for a protest. Here, HG waited months before it requested and reviewed information about that award for possible bases of protest. This delay simply does not meet our requirements for the expeditious pursuit of information.¹ See Professional Rehab. Consultants, Inc., B-275871, Feb. 28, 1997, 97-1 CPD ¶ 94 at 2-3.

In any event, we also find that HG lacks the requisite interest to challenge the terms of the competition or the terms of the award. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (2000), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 31 U.S.C. § 3551(2); 4 C.F.R. § 21.0(a). A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. See Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57 at 2. Here, there is another offeror in line for award under the SFO whose offer was found to be acceptable and has not

¹We also find untimely HG's allegations based upon terms of the SFO indicating the negotiable nature of certain solicitation requirements, as well as its challenges based on the SFO's provisions regarding available funding for the award. Since these contentions essentially stem from terms in the SFO that were apparent prior to the closing date for the receipt of offers, they had to be raised before that time. 4 C.F.R. § 21.2(a)(1). HG's contention that the post-award site substitution is an improper late offer is also untimely--HG first raised this contention in its supplemental comments, more than 2 months after it filed its initial protest, yet it has not shown that it did not have or should not have had information about the substitution to raise the argument at that time. 4 C.F.R. § 21.2(a)(2).

been challenged by HG. Accordingly, HG, which did not submit an offer under the SFO, lacks sufficient interest to challenge the propriety of the evaluation or lease award under the SFO.²

The protests are denied.

Anthony H. Gamboa
General Counsel

² We also note that HG also has not shown that any alleged procurement irregularity kept it from submitting an offer for consideration for award; the protester thus has not shown that it has suffered any competitive harm from any action by the agency or from the terms of the lease awarded to POC after a competition among those offers submitted under the solicitation; prejudice is a required element of a viable basis of protest. See 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).