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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Liberty Street East Associates

File: B-299486.3

Date: June 15, 2007

Robert P. Yoder for the protester.

Elin M. Dugan, Esq., Department of Agriculture, 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 agency report rebuts protester's allegations with regard to price evaluation, and protester fails to respond to agency's rebuttal in its comments on the agency's report, issues are considered abandoned and will not be considered; abandoned issues also will not be considered when reasserted in supplemental comments, as Bid Protest Regulations do not contemplate piecemeal development of protest issues.

2. Protest allegations challenging agency's evaluation of protester's proposal are denied where alleged evaluation errors did not result in competitive prejudice to protester; even if protester's evaluation score were increased to level asserted by protester, awardee's score would remain higher and, when combined with its lower price, would still reasonably support award.

DECISION

Liberty Street East Associates protests the award of a lease to Ashford/Warren Associates, LP under solicitation for offers (SFO) No. R9-6-1, issued by the Department of Agriculture (USDA) for office and related space in Warren, Pennsylvania. Liberty asserts that the agency's technical evaluation of its proposal was flawed.

We deny the protest.

The SFO sought a minimum of 20,300 usable square feet for USDA, for use by the Allegheny National Forest Supervisor's Office. All offers were evaluated under five factors—site; building image and physical characteristics; efficient layout and interior

space; high performance features; and price. The technical factors combined were equal in weight to price. Award was to be made to the firm whose offer was considered most advantageous to the government.¹

Four firms, including Liberty and Ashford, submitted offers. The evaluation panel members individually reviewed the offers and made site visits, and the panel then reached consensus scores for each offer.² All four offers were placed in the competitive range and the agency conducted written discussions with the offerors before requesting final proposal revisions. Out of a possible 660 points, Ashford's proposal received a final consensus score of 340 points, with a rental rate of \$17.50 per square foot, and Liberty's received a score of 190 points, with an evaluated rental rate of \$18.91.³ Based on the respective offers' technical scores and prices, the contracting officer, as source selection authority (SSA), determined that Ashford's offer was most advantageous to the government and awarded it the lease. After a debriefing and unsuccessful agency-level protest, Liberty filed this protest with our Office.

Liberty first asserts that its offer would have been evaluated as most advantageous to the government if the agency had properly considered the offerors' respective heating and cooling costs in the price evaluation. Based on its proposal of a geothermal system, Liberty maintains, its heating and cooling cost would be only \$1.02 per square foot throughout the lease period, while, it infers, Ashford's would start at \$3.50 to \$4.50 per square foot and would increase each year. Had these costs been added onto the square foot rental prices of each offer, Liberty asserts, its price would be lower than Ashford's.

In its report, the agency responded that low price alone would not make an offer the most advantageous, since price and technical factors were equal under the SFO's evaluation scheme; that Liberty did not propose the lowest-price lease; and that Liberty's argument was based on speculation as to Ashford's heating and cooling costs. Agency Report (AR) at vi.

Liberty's initial comments on the agency's report focused on its technical evaluation and provided no rebuttal to the agency's position. Where, as here, an agency

¹ The SFO also provided that award was to be made to the firm submitting the lowest priced, technically acceptable offer, but Liberty did not protest this inconsistency, and the agency disregarded this language in evaluating proposals.

² Under the evaluation plan, offers generally received additive points for exceeding the SFO requirements, no points for meeting the requirements, and deductive points for deficiencies and weaknesses.

³ In accordance with the SFO evaluation scheme, Liberty's proposed rate of \$19.40 was evaluated with a 2.5 percent reduction based on its location in an historic area.

specifically addresses an issue raised by the protester in its initial protest, and the protester fails to rebut the agency response in its comments, we consider the issue abandoned by the protester and will not consider it.⁴ Analex Space Sys., Inc.; PAI Corp., B-259024, B-259024.2, Feb. 21, 1995, 95-1 CPD ¶ 106 at 8. In any event, it appears from the agency's source selection documentation that the SSA took into account the protester's stated advantage in this area. In this regard, in determining that Ashford's offer was most advantageous, the SSA considered the apparent superiority of Liberty's geothermal unit in comparison to other offers and the SFO's requirements, but noted that the projected savings were not established and that there were uncertainties as to whether it would provide significant savings. AR, Tab D, at 16.

Liberty asserts that the technical evaluation was flawed in that it was overly subjective, was biased against urban locations, and failed to provide its proposal with appropriate credit for its offered building's features under each of the technical factors.⁵ For example, Liberty asserts that the agency improperly downgraded its building under the image and physical characteristics factor because its "overstated timbered entrance" and other interior features were "too opulent an image" to present to the public; under the efficient layout factor, due to an interior design that wasted space and limited the ability to modify the floor plan; and under the high performance features factor, for failing to provide high quality HVAC and high efficiency light fixtures. Liberty asserts that, if the agency had properly evaluated its proposal as technically acceptable under the building image and efficient layout factors, and had added appropriate credit under the site and high performance factors, its proposal would have received a score of 375 points—higher than the

⁴ Liberty reasserted this argument in its supplemental comments, and also argued for the first time that official travel between the Allegheny National Forest and the Ashford site would be more expensive than travel to Liberty's site. However, by failing to raise these arguments in its initial comments on the agency report, Liberty deprived the agency of the opportunity to provide a timely, appropriate response in its supplemental report, and additional submissions now would be required to resolve them. Where a protester has abandoned an issue and then reasserts it along with new arguments in a supplemental filing, those issues must independently satisfy our timeliness rules. 4 C.F.R. § 21.2(a)(2) (2007). Our Regulations do not envision a piecemeal presentation of evidence, information, or analysis. RC 27th Ave. Corp.—Recon., B-246727.2, May 20, 1992, 92-1 CPD ¶ 455 at 3.

⁵ Liberty also asserted that the agency did not properly credit its proposal for offering a building in an historic area. Again, however, the agency responded to this argument in its report—in part, noting that Liberty's proposal was given price evaluation credit for its location—and Liberty did not rebut the agency's response in its comments. We thus consider the issue abandoned. Analex Space Sys., Inc.; PAI Corp., supra.

awardee's. The agency concedes that it should have scored Liberty's offer 20 points higher for its proposal of high-efficiency light fixtures, but maintains that its evaluation was otherwise accurate and fair.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, 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). While Liberty asserts that various adjustments to the evaluation would increase its evaluation score to 375 points, our calculations show that, in fact, the requested adjustments would result in a total score of only 330 points.⁶ Thus, even if Liberty's proposal had received all points to which it now claims it was entitled, its technical score would remain 10 points lower than Ashford's score of 340. Since Ashford's rental rate also was lower than Liberty's--\$17.50 versus \$18.91 per square foot--Ashford's offer would remain in line for award. In other words, there is no reasonable possibility that the SSA would have determined that Liberty's offer was most advantageous to the government. It follows that Liberty was not competitively prejudiced by any errors in the technical evaluation of its proposal.

The protest is denied.

Gary L. Kepplinger
General Counsel

⁶ As observed by the agency, and conceded by Liberty in its supplemental comments, 30 of the incorrectly calculated points are attributable to an arithmetical error under the building image factor. The other 15 points already were assigned Liberty's proposal under the site location factor.