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United States General Accounting Office
Washington, DC 20548

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Decision

Matter of: Parcel 47C LLC

File: B-286324; B-286324.2

Date: December 26, 2000

Richard J. Conway, Esq., and Charlotte Rothenberg Rosen, Esq., Dickstein Shapiro Morin & Oshinsky, for the protester.
Barry D. Segal, Esq., and Edith L. Toms, Esq., General Services Administration, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In a solicitation for the design, build, and lease of space, the contracting agency reasonably found that requiring post-award evidence that the awardee has site control represents an actual need of the government.

DECISION

Parcel 47C LLC protests the terms of solicitation for offers (SFO) No. 99-016, as amended, which was issued by the General Services Administration (GSA) for the design, build, and lease of space for a headquarters building for the Department of Transportation (DOT). Parcel objects to the SFO's site control and parking space provisions.

We deny the protest.

The SFO, issued on November 23, 1999, sought proposals for a new headquarters for DOT, consisting of approximately 1.35 million square feet of space and 145 parking spaces[1] to be provided under a fixed-price, 15-year lease with a 10-year extension option.[2] SFO § A.7. Besides the 145 official parking spaces to be included in the

[1] The prospectus, which Congress approved for this procurement, provides GSA with authority to obtain 145 official parking spaces. Prospectus No. PDC-97W15.

[2] The SFO also provided for a purchase option, exercisable by the government or its assignee or designee.

rental rate, the offeror was required to offer at least the number of parking spaces required under zoning laws of the District of Columbia (D.C.). Such additional parking was required to be made available to DOT employees and contractors on a daily or month-to-month basis at prevailing market rates. Offerors were informed that the government had the right to impose security restrictions on access to the garage during the lease term and that no parking of third-party vehicles would be allowed. SFO § A.8.

Offerors were also informed that after lease award the lessor would, with the government's participation, design a project to satisfy DOT's needs within the budget offered. SFO § D.5. Offerors were also informed that the lessor would be required to provide the total funding commensurate with its proposed budget. SFO, Executive Summary, at i.

The SFO provide for a two-phased evaluation process. SFO § C.1. Under phase I, offers would be evaluated for the quality of the proposed site, design team, and developer and for compliance with stated minimum requirements. Two of the stated requirements under phase I were the following:

> For privately owned sites, evidence by the Offeror, acceptable to the [contracting officer], of site ownership, access to ownership through held options, ground lease, or other evidence that ownership or access to ownership will be achievable by the due date for Phase II submissions[;]

and

> [a]bility to deliver 1.3 – 1.35 million rentable square feet fully in compliance with this SFO under current land use approval processes within six years of lease award either individually or in combination with an adjacent Offeror.

SFO § C.2.2. The SFO provided that a maximum of five offerors would be selected to proceed to phase II. SFO § C.1.

The following technical evaluation factors were identified for the evaluation of offers under phase II: financial considerations; massing design; site; schedule; environmental mitigation; and operations and maintenance plan. The relative importance of each of the factors was identified, as well as subfactors (and their weighting) for each of the evaluation factors. SFO §§ C.1, C.5. The SFO provided for award on the basis of a cost/technical tradeoff and informed offerors that price was significantly less important than the technical factors combined. SFO §§ A.19, C.1.

The SFO also stated a number of pre-award and post-award development requirements. SFO § D. Among other things, the SFO provided as follows:

> No less than 10 working days prior to Lease award, the Government shall notify the preferred Offeror of its intent to award the Lease to that Offeror. During the subsequent 10 days, the Offeror shall either deposit or post an irrevocable letter of credit in an amount equal to $20,000,000.

SFO § D.1.1. In addition, the lessor was required within 5 working days of the lease award to demonstrate, "[t]o the extent control of all or a portion of the site was evidenced by purchase contracts or other agreements" that "required closing(s) have occurred and that title is unconditionally and irrevocably vested in the Lessor." SFO § D.1.2.a. The SFO provided that failure to comply with section D.1 of the SFO would constitute default by the lessor, which would allow the government to terminate the lease. SFO § D.1.5.

Phase I proposals were received from a number of firms, including Parcel. Parcel proposed to develop its privately owned "Portals site" in Southwest Washington, D.C., on 14th Street across from the U.S. Bureau of Engraving and Printing (BEP) and GSA's central heating plant. Parcel obtained ownership of this site from D.C., subject to the pre-existing use of the property by GSA for a coal shaker[3] and by BEP for an ink storage building.[4] At the time the SFO was issued, GSA's contracting officer wrote Parcel with respect to the SFO to inform Parcel that:

> I am aware that the . . . Portals site is presently encumbered by [GSA's] coal shaker and associated facilities. . . [DELETED].
>
> The SFO provides detailed guidance to offerors regarding Phase I submittal requirements. For privately owned sites, offerors are to provide evidence, acceptable to the Contracting Officer, that ownership or access to ownership will be achievable by the due date for Phase II submissions.
>
> Should you desire to submit a Phase I proposal based on the Portals site, this letter will constitute acceptable evidence of compliance with the SFO's requirement in Section B.1.2.g with

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[3] A coal shaker is a device used to shake out and remove coal from railcars. Presently, GSA does not operate the coal shaker at this location. GSA currently has a welding shop and allows parking by GSA employees at the Portals site. [DELETED].

[4] [DELETED]. Protester's Comments at 6 n.4.

> respect to site control. Of course, should you desire to submit a Phase I proposal, you will be required to satisfy all minimum SFO requirements and you should not construe this letter as waiving any requirement in the SFO.

Agency Report, Tab 2, Letter from Contracting Officer to Parcel (Nov. 23, 1999), at 1-2.

Five offerors, including Parcel, were selected to proceed to phase II. When the contracting officer requested Parcel's phase II proposal, he noted:

> [A]s per my letter to you dated November 23, 1999, that while I am aware that an encumbrance exists on the site, we have accepted the site as meeting the requirements of site control under Section B.1.2.g. of the SFO pending [DELETED]. You will be required to meet all of the minimum SFO requirements in order to be considered for award.

Id., Tab 8, Letter from Contracting Officer to Parcel (Mar. 10, 2000), at 1.

Negotiations were conducted with the offerors, including Parcel. In face-to-face discussions, Parcel was informed that there was a portion of its site that it did not "own or control" and that "[a]rguably, you are non-compliant at this point. You own it but don't control it." In addition, Parcel was informed that the

> [b]ottom line is that you will have to tie up control by date of submission for Revised Proposals. If you don't have control by this date, you will be excluded from the competition. Evidence would be a legal document executed by all parties showing control and an ability to consummate the transaction.

Id., Tab 16, Transcript of Negotiations between GSA and Parcel (July 17, 2000), at 12.

On August 24, GSA issued amendment No. 7 to the SFO to require, among other things, that offerors provide, prior to the due date for receipt of revised phase II proposals, evidence of "site ownership or control so as to permit [the] development, construction and lease of the DOT Headquarters facility," or evidence of "access to such ownership or control through fully executed agreements that vest the Offeror with the ability to obtain such ownership or control in a timeframe consistent with the requirements of this SFO and its offer." SFO amend. 7, at 5.

Parcel protested to the agency the terms of SFO amendment No. 7, arguing that the site control requirements did not represent the agency's minimum needs, but were

[DELETED].[5] Agency Report, Tab 25, Parcel's Agency-Level Protest (Sept. 8, 2000). On September 18, GSA invited Parcel to submit a revised proposal; GSA also informed Parcel that if Parcel did not comply with the SFO (which the agency did not amend in response to Parcel's agency-level protest), the offer would be found technically unacceptable. Id.; Tab 29, GSA Request for Revised Proposal (Sept. 18, 2000). Parcel protested the terms of SFO amendment No. 7 to our Office on September 21. On that same date, GSA issued amendment No. 8 to the SFO, which deleted the site control requirements added by amendment No. 7 and added the following post-award site control requirement:

> Notwithstanding any other provisions of this Solicitation for Offers, Offerors of privately owned sites shall provide, not later than thirty (30) days after Lease award, evidence acceptable to the [contracting officer] that the Offeror has obtained (a) site ownership or control so as to permit its development, construction and lease of the DOT Headquarters facility as required by this SFO and as proposed in its offer, or (b) access to such ownership or control through fully executed agreements that vest the Offeror with the ability to obtain such ownership or control in a timeframe consistent with the requirements of this SFO and its offer.

SFO amend. No. 8. Parcel then protested the terms of SFO amendment No. 8 to our Office.

Parcel complains that the post-award requirement for site control does not reflect GSA's needs, as required by the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253b, Federal Acquisition Regulation (FAR) § 6.101, and General Services Acquisition Regulation (GSAR) § 570.302(c),[6] but was motivated, instead, by an alleged conflict of interest on the part of GSA. Parcel argues that the site control requirements are not necessary because the SFO, as issued, contained sufficient protection for GSA. Specifically, Parcel notes that the SFO already required evidence of site ownership and contained a number of performance requirements in

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[5] Parcel also challenged the agency's refusal to "guarantee" sale of a certain number of parking spaces and refusal to allow the lease of parking spaces to non-government employees.

[6] GSAR § 570.302(c) provides as follows:

> The description [of the requirements] must promote full and open competition. Include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs or as authorized by law.

section D of the SFO that, with the requirement for a $20 million irrevocable letter of credit, would require the lessor to make progress in the design and construction of the building. Underlying Parcel's conflict of interest argument is the fact that [DELETED].[7]

GSA disagrees with Parcel's characterization of GSA's actions and notes that since the issuance of the SFO and throughout its discussions with Parcel the agency has consistently expressed its concern to the protester that Parcel did not have site control. See, e.g., Agency Report, Tab 2, Letter from Contracting Officer to Parcel (Nov. 23, 1999), and Tab 16, Transcript of Negotiations between GSA and Parcel, at 12 (July 17, 2000). GSA states that it "has a legitimate interest in ensuring that its contractor is making satisfactory progress toward providing the promised performance in a timely fashion" and that an offeror's lack of site control could adversely affect the lessor's ability to satisfactorily perform its lease obligations. Agency Report at 11; Contracting Officer's Statement at 10-11.

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[7] Parcel also complains that it was improper to amend the SFO in amendment No. 7 after the phase I evaluation to provide for the evaluation of site control in phase II. However, this part of amendment No. 7 was effectively cancelled by amendment No. 8, which made evidence of site control a post-award requirement. Thus, this protest allegation is academic and will not be considered. Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132.

In its November 13 comments on the report, Parcel makes a number of contentions regarding some of the specific provisions contained in the protested site control requirement imposed by amendment No. 8, that is, questioning why it was only applied to privately owned sites, claiming that the meaning of site control was not clear, and questioning the timing (30 days after lease award) of when the evidence of site control had to be presented. These contentions are untimely raised, since they were not in any way referenced in Parcel's protest of the site control requirement imposed by amendment No. 8, but were only raised weeks after the September 25 closing date for receipt of revised proposals. Our Bid Protest Regulations provide that challenges to alleged apparent solicitation improprieties that were incorporated into the solicitation after the initial issuance of the solicitation, such as is alleged here, must be filed prior to the time set for the receipt of proposals following the date of incorporation, 4 C.F.R. § 21.2(a)(1) (2000), and do not contemplate the piecemeal development of protest issues. Since we see no reason why these specific contentions could not have been raised in Parcel's supplemental protest so that the agency would have had the opportunity to respond without unduly disrupting the process, we will not consider these new contentions. Braswell Servs. Group, Inc., B-276694, July 15, 1997, 97-2 CPD ¶ 18 at 6-7; A-1 Postage Meters and Shipping Sys., B-266219, Feb. 7, 1996, 96-1 CPD ¶ 47 at 3 n.1.

The determination of a contracting agency's needs and the best method for accommodating them are matters primarily within the agency's discretion, which we will question only if the agency's judgment is shown to be unreasonable. Tucson Mobilephone, Inc., B-250389, Jan. 29, 1993, 93-1 CPD ¶ 79 at 2, aff'd, B-250389.2, June 21, 1993, 93-1 CPD ¶ 472. Mere disagreement with the agency's judgment concerning the agency's needs and how to accommodate them does not show that the agency's judgment is unreasonable. AT&T Corp., B-270841 et al., May 1, 1996, 96-1 CPD ¶ 237 at 7-8. In reviewing an allegation that a requirement exceeds an agency's needs, we will not substitute our judgment for that of the agency. Id.

Here, we conclude that GSA reasonably found that the imposition of a post-award requirement for evidence of site control satisfies an actual need of the government.[8] The essential purpose of the lease is to obtain the design and construction of a building that can then be leased to provide DOT with a new headquarters facility. Unquestionably, one of the government's needs is to have this done in a timely fashion. It is also indisputable that a lessor's failure to have site control can affect the lessor's ability to timely construct the building. Although Parcel argues that other SFO provisions (e.g., section D of the SFO) protect the government's interest in timely performance of the lease, we think that GSA could reasonably conclude that these provisions do not suffice. That is, although the provisions of SFO section D provide the government with various progress protections and with financial protection (through the requirement for a $20 million letter of credit), these provisions do not alleviate the risk attendant upon continuing lease performance with a firm which does not have site control.[9] In our view, it is within the agency's reasonable exercise of discretion to determine how much risk the solicitation should place upon an agency (and how much risk will be placed upon an offeror) in entering a contract. See AT&T Corp., supra, at 8. Here, GSA has determined that, with

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[8] Parcel also contends that this post-award requirement was unnecessary because site control had been resolved in the Phase I evaluation. This argument is meritless. GSA clearly advised Parcel of its concerns about site control both before and after Phase I and indicated that they needed to be resolved later in the procurement process.

[9] Requiring evidence of site control within 30 days after lease award lowers the risk to the government that there will be construction delays arising from problems with site control. We disagree with Parcel's view that site ownership by itself guarantees that there will be no problems arising from a lessor's ability to obtain site control. Even accepting Parcel's argument that an owner can obtain site control by legal recourse, the likely delay while the site control dispute is litigated or otherwise settled could adversely affect lease performance. The government is not required to assume that risk, but may properly require resolution of site control shortly after award.

respect to the question of whether a lessor has site control, the government will bear little risk. We have no basis to question that exercise of discretion.

Parcel also argues that the decision to require the post-award submission of evidence of site control is tainted by an organizational conflict of interest (OCI). Specifically, Parcel argues that the contracting officer "[DELETED]." Protester's Comments at 31. Citing FAR §§ 3.101 and 9.505-2, Parcel contends that this OCI impugns the contracting officer's judgment to require site control because [DELETED].[10] Protester's Comments at 32.

The government is directed to strictly avoid any conflict of interest or even the appearance of a conflict of interest in government-contractor relationships. FAR § 3.101-1. An OCI occurs where, because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.[11] FAR § 9.501; Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397.15 et al., July 27, 1995, 95-2 CPD ¶ 129 at 12. Underlying the FAR rules governing OCI is that the contracting officer should avoid, neutralize or mitigate: (1) the existence of conflicting roles that might bias a contractor's or the government's judgment, and (2) unfair competitive advantage by competing contractors. See FAR §§ 9.504, 9.505.

GSA denies that its requirement for post-award evidence of site control derives from any improper purpose or was motivated by any improper conflict of interest. Agency Report at 17-19. Rather, the agency states that since the issuance of the SFO and consistently thereafter the agency has informed Parcel of the need for site control. The contracting officer also states that [DELETED]. Contracting Officer's Statement at 9, 11. The contracting officer states that his actions regarding the site control requirement have been motivated since the beginning by a desire to maximize competition; that is, by deferring the time by which the encumbrance must be resolved, GSA allowed Parcel to offer its Portals site. Id. at 11.

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[10] In its arguments, Parcel makes clear that it is asserting that a conflict of interest exists and not alleging that the contracting officer or others were motivated by bad faith or bias. Protester's Comments at 31-32.

[11] Although FAR subpart 9.5 does not specifically apply to government agencies or employees, we have found that this subpart provides guidance in determining whether an agency has met its obligation to avoid conflicts under FAR § 3.101-1. DZS/Baker LLC; Morrison Knudsen Corp., B-281224 et al., Jan. 12, 1999, 99-1 CPD ¶ 19 at 4.

The question here, in the context of the arguments of this case, is whether the requirement for post-award evidence of site control is reasonably related to the government's actual needs. If so, we fail to see how it can be said to be based on an improper conflict of interest. Although Parcel asks us to find that there is no actual need for site control and that the requirement of SFO amendment No. 8 is based only upon the GSA's alleged conflict of interest, we find, as noted above, that GSA reasonably concluded that site control serves an actual government need. Moreover, the record shows, as argued by the agency, that Parcel was consistently informed since the start of the procurement that site control was of importance to the agency. This belies Parcel's arguments that the site control requirements of amendment No. 8 were added only [DELETED]. Based upon our review of the record, we do not find that the post-award requirement for site control was based on an improper conflict of interest.

Parcel also objects to GSA's interpretation of the parking requirements of the SFO, as expressed in SFO amendment No. 7. Specifically, Parcel complains that GSA informed offerors that although the agency would be evaluating an offeror's site for availability of sufficient parking, the agency stated that it would not guarantee the sale of any parking spaces and would not allow the sale of parking spaces at the building to non-government employees. In Parcel's view, GSA is authorized by its Congressionally approved prospectus to obtain only 145 parking spaces and therefore may not restrict a lessor's sale of additional parking spaces to others at the building or evaluate the parking sufficiency of an offeror's site beyond the 145 official parking sites provided for in the prospectus. We find these objections to be untimely and/or meritless.

As originally issued, the SFO informed offerors that they would be required to offer more parking spaces (at least the number of parking spaces required under D.C. zoning law) than the 145 spaces provided for by the prospectus. The SFO, as originally issued, also stated that the government reserved the right to impose security restrictions and that "no parking of third party vehicles will be allowed."[12] SFO § A.8. To the extent that Parcel believes that these restrictions violate the authority granted GSA by the Congressional approval of the prospectus, its protest of these alleged apparent solicitation improprieties is untimely, since they were apparent from the SFO as issued but were not protested until September 21, after the submission of initial proposals. The Charles E. Smith Cos., B-277391, Sept. 25, 1997, 97-2 CPD ¶ 88 at 6.

With regard to the complaint that the amount of parking should not be evaluated, the SFO included an evaluation factor to evaluate an offeror's environmental impact and mitigation measures under the National Environmental Policy Act of 1969. As

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[12] We disagree with Parcel's suggestion that the restriction on third party parking did not clearly apply to non-government employees.

explained in the public information packet available for the environmental impact statement for this procurement, one of the environmental impacts to be considered was "[h]ow many new parking spaces will be needed and where they would be located?" Public Information Packet for the Environmental Impact Statement on the Proposed [DOT] Headquarters Consolidation Project (Apr. 11, 2000) at 2. This complaint, also first raised in Parcel's September 21 protest, is thus also untimely.[13] 4 C.F.R. § 21.2(a)(1).

Finally, we find meritless Parcel's complaint that GSA would not guarantee the sale of parking spaces at the DOT headquarters facility. We know of no authority, nor does Parcel direct us to any authority, that requires GSA to guarantee the sale of parking spaces.

The protest is denied.

Anthony H. Gamboa
General Counsel

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[13] Parcel also complains that GSA will unfairly evaluate the [DELETED] available at a proposed site, and other impacts, under the SFO environmental impact evaluation factor matrix. We dismiss this protest allegation because it merely anticipates improper action that has not yet taken place. GSA has completed only a preliminary evaluation of proposals and has not yet made an award decision. Protests that merely anticipate improper agency action are speculative and premature. See Saturn Indus.--Recon., B-261954.4, July 19, 1996, 96-2 CPD ¶ 25 at 5.