GSA National Capital Region

May 29, 2012

Via E-mail

Mr. Cary Euwer
Manager
BP-Metropolitan Investors, LLC
c/o Metropolitan Partnership, Ltd.
10740 Parkridge Boulevard
Suite 120
Reston, Virginia 20191

Re: Agency-Level Protest of BP-Metropolitan Investors, LLC
Redevelopment of the Old Post Office
Solicitation # NR-73002105

Dear Mr. Euwer,

On April 16, 2012, BP-Metropolitan Investors, LLC ("BPM") submitted an agency-level protest alleging that the U.S. General Services Administration ("GSA") unlawfully and unwisely awarded the rights to negotiate a lease for the redevelopment of the Old Post Office building and annex ("Old Post Office") to Trump Old Post Office LLC ("Trump") in response to solicitation number NR-73002105. Shortly thereafter, BPM requested permission to rescind its April 16 agency-level protest, and to file a new protest. Accordingly, on April 30, 2012, BPM submitted a revised agency-level protest.

In light of the clear definition of the word "protest" pursuant to Federal Acquisition Regulation ("FAR") Part 33, and that the lease of government-owned real property is not a procurement of property or services, the agency-level protest provisions are not available to BPM. Accordingly, the agency-level protest is denied solely on this basis. GSA recognizes that some of BPM's factual misstatements may have been unknown to BPM at the time it submitted its agency-level protest. Thus, this response endeavors to clarify many of the factual misunderstandings.

I. AGENCY-LEVEL PROTEST JURISDICTION AT GSA OVER LEASES OF GOVERNMENT-OWNED PROPERTY

The lease of government-owned real property is not a procurement of property or services. Pursuant to FAR 33.101, the term "protest" means:

(1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.
(2) The cancellation of the solicitation or other request.

(3) An award or proposed award of the contract.
(4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

Moreover, FAR Part 33.103 provides the procedures for protests to the agency. This section repeatedly relies of the word "protest" in describing the process for protests to the agency.

With regards to the agency-level protest filed by BPM, GSA did not terminate or cancel the solicitation. Thus, those grounds for protest are not available. With regards to the first part of the definition, the lease of government-owned real property is not a procurement of property or services. Therefore, BPM may not rely on this ground to file an agency-level protest. The last portion of the definition refers to (underlining added) "[a]n award or proposed award of the contract." The use of the word "the contract" refers back to the first part of the definition that requires "a contract for the procurement of property or services." Thus, since "the contract" to be awarded is not a procurement of property or services, this part of the definition does not apply either.

In light of the clear definition of the word "protest" and that the lease of government-owned real property is not a procurement of property or services the agency-level protest provisions are not available to BPM. Accordingly, the agency-level protest is denied solely on this basis.

II. THE REQUEST FOR PROPOSALS

On March 24, 2011, GSA posted a Request for Proposals ("RFP") for the redevelopment of the Old Post Office to Federal Business Opportunities ("FedBizOpps"). As noted in the RFP, the Old Post Office is a property listed in the National Register of Historic Places and located at 1100 Pennsylvania Avenue, NW, in the District of Columbia under the jurisdiction, custody and control of GSA. See RFP at 4. The RFP was issued pursuant to the Old Post Office Redevelopment Act of 2008 (the "OPO Act"), which directed the Administrator of General Services to provide for the redevelopment of the Old Post Office in accordance with existing authorities available to the Administrator. See RFP at 4. Section 111 of the National Historic Preservation Act of 1966 ("Section 111"), which allows GSA to enter into leases for assets listed on the National Register of Historic Places, represented one of those existing authorities. See RFP at 4; 16 U.S.C. § 470H-3.

The OPO Act noted that the, "Redevelopment of the Old Post Office Building will preserve the historic integrity of this unique and important asset, put it to the highest and best use, and provide a lucrative financial return to the Government." Thus, a major thrust of the legislation was to provide a lucrative financial return to the Government. The RFP specifically left open the possible uses for the Old Post Office. That is to say, the RFP did not mandate any particular use (*e.g.*, office, hotel, retail, etc.). To that end, the RFP noted that, "GSA will rely on market-analysis based responses to its solicitation to help determine the highest and best use." Id. at 5. In other words, GSA would rely on the market-based research, as submitted by the potential offerors, in determining the highest and best use for the Old Post Office.

In the RFP, GSA notified offerors that GSA was seeking "comprehensive and detailed proposals." Id. at 5. Similarly, under the heading "Selection Process, Schedule and Evaluation Criteria," GSA asked the developers to "submit detailed proposals that will include comprehensive approaches to redevelopment…." Id. at 11. GSA also notified offerors that, "The financial offer shall be based on the developer's best building and land price." Id. at 9 (underlining added). In order to evaluate the financial offers, GSA stated that it would rely on each developer's pro forma analysis. Id. at 9. Thus, the RFP clearly asked for developers to submit their best financial offer in a comprehensive and detailed proposal, including the pro forma analysis.

In order to ensure a lucrative financial return to the Government, GSA structured the evaluation factors such that the developer's financial offer and supporting financial information constituted 35% of the overall evaluation. The following are the evaluation factors and weighted percentages, as listed in the RFP:

1. Experience and Past Performance of the Developer and Developer's Key Personnel – 15%
2. Developer's Site Plan and Design Concept – 35%
3. Developer's Financial Capacity and Capability – 15%
4. Developer's Financial Offer and Supporting Financial Information – 35%

Id. at 13.

The RFP also contained a section entitled "Statement of Limitations," which set forth certain conditions that each developer agreed to by submitting a proposal. In particular, Statement 1 provided as follows:

> The GSA represents that this RFP, submissions from developers to this RFP, and any relationship between GSA and developers arising from or connected to this RFP, are subject to the specific limitations and representations expressed below, as well as the terms and conditions contained elsewhere in this RFP. By participating in the selection process, developers are deemed to accept and agree to this Statement of Limitations. By submitting a response to this RFP, the developer acknowledges and accepts GSA's rights as set forth in the RFP, including this Statement of Limitations and any Appendices.

Id. at 20 (underlining added).

With Statement 1 in mind, by submitting a proposal, each offeror accepted and agreed to the following:

> Statement 2: GSA reserves the right, in its sole discretion, without liability, to accept or reject any or all the RFP responses, and to develop and operate the OPO site, in whole or in part, outside this selection process.

> Statement 3: GSA reserves the right in its sole discretion to hold discussions with, to obtain information from, to request presentations from, and to conduct negotiations with, any or all developers that GSA deems appropriate in its sole discretion.[1] GSA reserves the right, as it deems its interests may require in its sole discretion, to accept or reject any and all submissions, to waive any informality, informalities, or nonconformity in the submissions received, and to accept or reject any or all items in a submission.
>
> Statement 6: ...GSA reserves the right to fully exercise its discretion in interpreting and applying the selection criteria in making its selection.

Id. at 20-21.

As part of the RFP process, GSA allowed potential offerors to submit written questions, and GSA posted the responses on FedBizOpps for the benefit of all offerors. Moreover, on April 28, 2011, GSA provided the opportunity for potential offerors to tour the Old Post Office. In addition to the group tour, and in response to a question from a potential offeror, GSA informed offerors that, "Arrangements can be made for developer's engineers to undertake due diligence site walkover assessments of the building with [Contracting Officer] Kevin Terry via email listed in the RFP." Many of the developers took advantage of the additional due diligence site assessments.

III. FACTUAL MISSTATEMENTS CONTAINED IN THE AGENCY-LEVEL PROTEST

A. BPM'S PROPOSAL REPRESENTED ONE OF THE LOWEST FINANCIAL RETURNS TO THE GOVERNMENT

In its summary of BPM, the technical evaluators noted that, "their financial offer to the government was significantly lower than others." Similarly, in its summary of Factor 4, the evaluators noted, "The primary weakness identified was the low lease payment. In reviewing the financial statements, the ADR's proposed by this team were also lower than other proposals, which may have contributed to the low lease payment offer." Of the ten (10) offers received, five (5) proposed a straight hotel use while three (3) others proposed a mixed use of hotel and office space. Of these offerors, BPM's reliance on lower ADR figures represented a strategic business decision, much like its decision to provide a low annual lease payment as part of its proposal.

BPM's annual lease payments were not only the lowest of any of the ten (10) offerors, but they were more than 50% lower than the next lowest offer. In addition, BPM's total investment of [redacted] ranked as the second lowest of any of the ten (10) offerors, and was significantly lower than the average $182M investment of the ten (10) offerors. Lastly, BPM's nonrefundable deposit at lease execution was the lowest of all the offers.

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[1] Under a different section, the RFP provided a similar notice that, "GSA, at its sole discretion, may discuss matters pertaining to the proposals with some or all developers." RFP at 12.

B. GSA WAS NOT LEGALLY REQUIRED TO EVALUATE BPM'S AMENDED FINANCIAL OFFER

BPM's argument seemingly relies on regulations that do not apply to the RFP. No offeror should have had an expectation that GSA would follow any provisions in the FAR because the FAR did not apply to the selection process used to choose the Preferred Selected Developer. To the contrary, Section 111, which provided the authority to conduct the selection, states as follows:

> Notwithstanding any other provision of law, any Federal agency...may lease an historic property owned by the agency to any person or organization...if the agency head determines that the lease or exchange will adequately insure the preservation of the historic property.

16 U.S.C. § 470H-3(a). There was no promise made by GSA to potential offerors that GSA would rely on the FAR during the selection process. BPM fails to point to any applicable regulation or law that GSA failed to follow.

Moreover, the terms of the RFP placed offerors on notice that, "GSA reserves the right, in its sole discretion, without liability, to accept or reject any or all the RFP responses...." RFP at 20. Similarly, the RFP noted that,

> GSA reserves the right in its sole discretion to hold discussions with, to obtain information from, to request presentations from, and to conduct negotiations with, any or all developers that GSA deems appropriate in its sole discretion. GSA reserves the right, as it deems its interests may require in its sole discretion, to accept or reject any and all submissions, to waive any informality, informalities, or nonconformity in the submissions received, and to accept or reject any or all items in a submission.

Id. at 21 (underlining added). Lastly, under a different section, the RFP provided a similar notice that, "GSA, at its sole discretion, may discuss matters pertaining to the proposals with some or all developers." Id. at 12.

BPM's position is essentially that GSA had a legal duty to enable BPM to make its significantly low financial offer better. BPM's misunderstanding of the selection process reflects an erroneous business strategy for responding to the RFP. BPM provided an initially low financial offer and apparently thought that it would incrementally increase that offer upon prompting from the GSA. However, other offerors, including Trump, recognized the importance of submitting their "best" financial offer on July 21, 2011. For reasons unknown to GSA, and despite the clear wording of the RFP, BPM chose to provide a significantly lower financial offer on July 21, 2011, than what it may have offered through subsequent negotiations that it mistakenly assumed would occur with GSA.

C. GSA CONDUCTED A PRICE REASONABLENESS ANALYSIS OF TRUMP'S PROPOSAL

With regards to Factor 4, the RFP noted that the overall objective of the factor "is to evaluate the developer's financial offer to GSA to ensure that it enhances present value revenues to the United States." Id. at 19. The RFP also notified offerors that, "The Financial Offer will be evaluated based on the developer's pro forma analyses and supporting documentation." Id. Lastly, the RFP also noted that, "GSA will rely on market-analysis based responses to its solicitation to help determine the highest and best use." Id. at 5.

The premise that Trump's ADR is unreasonable fails to reflect an understanding of the market-based responses submitted to the RFP. With regards to offerors that submitted responses premised in whole, or in part, with hotel use, the average ADR was $626 based upon an average of 231 rooms. When compared to the market-based responses, Trump's ADR is by no means unreasonable. To the contrary, when compared to the market, BPM's ADR reflects an extremely conservative approach for the asset as it is 13% lower than the next lowest ADR and [redacted] lower than the average ADRs submitted by the market in response to the RFP. While BPM chose to submit a proposal with low ADRs, the other offerors, which included top luxury hotels, believed that the Old Post Office property warranted significantly higher ADRs. GSA understands that, at the time it submitted its agency-level protest, BPM may not have been aware of this fact.

D. GSA PROPERLY EVALUATED TRUMP ON EVALUATION FACTOR 1

Evaluation Factor 1 (Experience and Past Performance of Developer's and Developer's Team) requested each offeror to provide "three, but no more than five projects completed over the past 10 years with (a) development cost of $30 million or more for development, preservation, and/or rehabilitation, and/or (b) a total development cost of at least $15 million for historic restoration and adaptive re-use projects." RFP at 16.

BPM avers that, "GSA's conclusion that the Trump proposal was equivalent in rating to Metropolitan's proposal was unreasonable in light of the three issues described above [the other protest grounds], as well as Trump's lack of direct development, hospitality or historic preservation expertise in Washington, especially when compared with Metropolitan's team of substantial expertise and experience in Washington."

BPM's allegation is incorrect on a number of grounds. The RFP did not indicate that the developer required any expertise in Washington, DC. Rather, the RFP is silent on the issue. In any event, Trump's team included numerous individuals and companies with significant experience and expertise, especially in Washington DC and even the Old Post Office itself. For instance, Trump identified Arthur Cotton Moore as the design architect. Mr. Moore's experience with the Old Post Office dates back to the early 1970s when he first proposed that the building become a hotel. Mr. Moore won a competition in 1976 to serve as the architect for the last redevelopment effort of the Old Post Office. Since 1965, Mr. Moore has practiced in 38 cities across the United States and has received over 70 Design Awards, including two National Architectural Record Residential Design Awards and three National AIA Honor Awards. His projects have been published in over 2,600 articles in magazines and newspapers throughout the

U.S., Europe, and Asia. His restoration of the Library of Congress won an AIA National Honor Award as well as a joint National AIA/American Library Association Honor Award.

As a general matter, BPM also asserts that GSA failed to "include on the Source Selection Board ("SEB") on the day of the presentations even a single person with destination retail, hospitality or historic preservation and architectural/design expertise is inexplicable given that the plans for redevelopment of the Old Post Office were considered by GSA for potential award were focused on these questions." Much like its mistaken understanding with regards to the market's ADR assumptions, BPM's understanding of the composition of the entire evaluation team reflects something less than a full knowledge of the complete facts. To that end, the non-voting evaluators included personnel from other government agencies with expertise in design and historic preservation; private sector practicing architects; deans of architecture from prominent universities; and, private sector financial experts. GSA understands that, at the time it submitted its agency-level protest, BPM may not have been aware of this fact.

IV. CONCLUSION

GSA values its relationships with the developers, contractors, and vendors with whom GSA transacts business. It appears that many of the allegations contained in the agency-level protest are based upon a simple misunderstanding of facts that may have been unknown to BPM at the time it submitted its agency-level protest. GSA believes that it followed the process as outlined in the RFP and in accordance with the authority granted under Section 111, and that GSA fairly and accurately evaluated the proposal submitted by BPM. GSA regrets that BPM does not feel the same way.

Sincerely,

(b) (6) [redacted]

Kevin Terry
Contracting Officer