

***Office of Dispute Resolution for Acquisition***  
**Federal Aviation Administration**  
**Washington, D.C.**

**FINDINGS AND RECOMMENDATIONS**

**Matter:**        **Protests of 36<sup>th</sup> Avenue Co-Tenancy, International Office Building, JL Office Tower, and SL/JL Calais Office (Consolidated)**  
                     **Under Solicitation No. RETS AL 10860-A**

**Docket No.:**   **17-ODRA-00798, -00799, -00800, and -00801**

*Appearances:*

For 36th Avenue Co-Tenancy,  
International Office Building,  
JL Office Tower, and SL/JL Calais Office:

S. Lane Tucker, Esq.  
of Stoel Rives LLP

For the FAA Product Team:

Peter Putzier, Esq.

**I.        INTRODUCTION**

This matter arises from Pre-Award Protests (“Protests”) filed with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”) pursuant to Solicitation for Offerors No. RETS AL 10860-A (“SFO”). The Protests were filed individually by four offerors: 36<sup>th</sup> Avenue Co-Tenancy,<sup>1</sup> International Office Building, JL Office Tower, and SL/JL Calais Office. Because the facts and issues alleged in the Protests are nearly identical, they are being consolidated for decision, and the Protesters will be referred to hereinafter as “36<sup>th</sup> Avenue,” along with citations to 36<sup>th</sup> Avenue’s protest filing.

The SFO seeks office space in Anchorage, Alaska for Flight Standards in the FAA Alaskan

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<sup>1</sup> 36<sup>th</sup> Avenue is the incumbent lessor. *Protest* at 10, FN 5.

Region (“Region”). *SFO* at 1; *see also Declaration of Real Estate Contracting Officer*, dated September 8, 2017 at ¶¶ 3-4 and *Declaration of Deputy Director, Air Carrier Safety Assurance*, dated September 8, 2017 at ¶ 2. 36<sup>th</sup> Avenue challenges provisions of the SFO related to the evaluation of its proposal, specifically, Sections 2.0 and 3.0 of the SFO concerning the evaluation of Quality of Space, Tenant Improvement (“TI”) Allowance, and the resulting best value tradeoff. *Protest* at 2-8. 36<sup>th</sup> Avenue asserts that the lack of specificity in the SFO to evaluate these requirements is contrary to the rules for evaluation criteria established under the Acquisition Management System (“AMS”).

For the reasons discussed below, the ODRA recommends that these Pre-Award Protests be denied, inasmuch as the Protesters have not demonstrated by substantial evidence that the challenged SFO provisions fail to comply with the policy requirements of AMS 4.2, which specifically governs the FAA’s acquisition of real property interests.

## II. TIMELINESS

The Region asserts that the Protest is untimely because it was not “filed prior to the *date* set for receipt of proposals.” *Agency Response* at 14 (emphasis added). The ODRA Procedural Regulation provides that “Protests based upon alleged [apparent] SIR or solicitation improprieties . . . shall be filed prior to bid opening or the *time* set for receipt of initial proposals.” 14 C.F.R. §17.15(a)(1) (emphasis added). The SFO provides that “Offers are due by August 21, 2017 and shall remain open until lease award.” *SFO* at 2. The Protest was docketed by the ODRA as filed on August 21, 2017.

The SFO not only does not specify a time for receipt of proposals on August 21, 2017, it actually establishes that the period for submittal is “open until lease award.” *SFO* at 2. Even assuming *arguendo* that the deadline was August 21<sup>st</sup>, the general rule for filing a timely pre-award protest is the close of business when a specific time for submission is not specified in the solicitation. *See Protest of Water & Energy Systems Technology, Inc.*, 06-ODRA-00373 (“Protests seeking to challenge the terms of a solicitation must be filed prior to the date set for the receipt of proposals or the *closing date* for receipt of proposals after

the incorporation of the terms being objected to in the Protest.”); *see also NCI Information Systems, Inc.*, B-405745 (2011) (Applying the default time established under Federal Acquisition Regulations § 52.215-1(c)(3)(i)); *Guam Shipyard*, B-294287 (2004); and *Protest of Federal Systems Group, Inc.*, 88-1 B.C.A. (CCH) P20,334 at 7-8 (1987) (“‘[C]lose of business’ as the time for receipt of proposals plainly means that proposals would be received on the specified date at any time prior to when the office closed for the day.”). While not binding on the ODRA, this Office sees no reason not to adopt the common sense approach of these other forums.<sup>2</sup> Accordingly, under either interpretation of the SFO, the Protest is timely.

### III. DISCUSSION

#### A. Standard of Review

The Protester bears the burden of proof, and must demonstrate by substantial evidence that the challenged decision lacked a rational basis, was arbitrary, capricious or an abuse of discretion, or otherwise failed in a prejudicial manner to comply with the Acquisition Management System (“AMS”). *Protest of Alutiiq Pacific LLC*, 12-ODRA-00627. Consistent with the Administrative Procedure Act, 5 U.S.C. §§ 554 and 556, which applies to ODRA adjudications, the phrase “substantial evidence” means that the ODRA considers whether the preponderance of the evidence supports the challenged Agency action. Where the record demonstrates that the challenged decision has a rational basis and is not arbitrary, capricious or an abuse of discretion, and is consistent with the AMS and the underlying solicitation, the ODRA will not substitute its judgment for that of the designated evaluation and source selection officials. 14 C.F.R. § 17.19(m) (2016); *Protest of Potter Electric Co.*, 13-ODRA-00657.

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<sup>2</sup> While the FAA is not bound by the decisions of the GAO, the ODRA has held that such decisions may be viewed as persuasive authority insofar as the principles and rules announced in such cases are consistent with the AMS. *See Protest of International Services, Inc.*, 02-ODRA-00224.

## **B. Pre-Award Challenges to SFO Provisions**

The Protesters allege that ambiguous provisions in the SFO invite “disparate and unequal treatment through its unconstrained favoritism for offers incorporating high TI costs and potential consideration of unstated, unrelated quality of space criteria.” *Protesters’ Reply* at 7. Citing to AMS fundamental principles set forth in AMS 3.1.3, Protesters argue that the SFO “does not provide concrete criteria to evaluate quality of space or compare offers that include tenant improvement (“TI”) costs in the rent price versus those that do not.” *Protest* at 8. Protesters further argue that the SFO’s best value method of award does not provide for an “apples to apples comparison of offers based on overall costs;” nor does it promote fairness and integrity, or encourage competition. *Id.*

Specifically, Protesters challenge two sections of the SFO: “Section 3.0, which describes how the award will be made based on best value, and Section 2.0, which concerns the quality of the lease space.” *Protest* at 9. Protesters postulate that under Section 3.0, “an offeror could propose a higher square foot rental rate to overcompensate for TI costs which would end up costing the FAA significantly more money in the long run” but under the language of the SFO, could be evaluated more favorably than an overall lower cost offer. Protesters contend that an award made under such a scenario would violate the SFO’s provision for an award based on a determination of best value. *Protest* at 9. Protesters also challenge Section 2.0 as vague with respect to the evaluation of the quality of the lease space. *Protest* at 10. Protesters contend that the vague evaluation factors under these sections will permit disparate and irrational evaluations of offers. *Protest* at 12.

The Region counters that the SFO complied with all requirements of the AMS and Real Estate Guidance in 2.2.6. *Agency Response* at 2. The Region points to the unique nature of real estate and AMS Policy, which recognizes that the “FAA’s needs for a specific site, location, or other mission-driven requirement, may limit the alternatives available for consideration in the real property acquisition process. FAA’s primary goal is to acquire necessary real property interests to meet mission requirements.” *Agency Response* at 2, FN 4, citing AMS 4.2.2. The Region further asserts that the AMS does not require an SFO

for real property to set forth a detailed evaluation scheme, and that in fact “[t]he model AMS template used for space acquisition provides *no* definitions or descriptions of the discrete evaluation factors.” *Agency Response* at 7.<sup>3</sup>

### C. AMS and Applicable Law

Inasmuch as ODRA has not had the opportunity to adjudicate a pre-award protest of a lease SFO, this case is one of first impression and this Office will consider decisions of other forums as persuasive guidance, if they do not conflict with the AMS. *Protest of International Services, Inc., supra*. In reviewing a protest of a request for lease proposals, the GAO has found that “[w]hile it is up to the agency to decide upon an appropriate and reasonable method for proposal evaluation, the agency must use an evaluation methodology that provides a reasonable basis for comparing the relative costs of proposals.” *SK Hart Properties, LLC*, B-414338 (2017). Offerors must be advised of the material evaluation factors that will be considered in awarding a lease and the relative importance of those factors and significant subfactors. *S/A-Baltimore-I limited Partnership v. United States*, 37 Cont. Cas. Fed. (CCH) 76,047, 1991 WL 94282. The agency, however, does not need to specifically identify all aspects of evaluation sub-criteria that are reasonably related to the stated evaluation factors. *Id.* While the evaluation of lease proposals is primarily within the discretion of the procuring agency, it still must be consistent with the stated evaluation factors and documented in sufficient detail to show it was not arbitrary. *Adelaide Blomfield Management Company*, B-253128, B-253128.2 (1993).

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<sup>3</sup> AMS Real Estate Template 2.6.12 (Solicitation of Offers), Part III, Section 1.7 provides:

The lease will be awarded to the Offeror whose offer will be most advantageous to the Government, including but not limited to the following factors: rental price, tenant improvement allowance cost, specific location green building factors [], quality of space and services, and other factors to be decided upon by the Real Estate Contracting Officer.

The SFO at issue in these Protests is subject to the policy set forth in AMS 4.2, which specifically pertains to FAA “acquisitions, management and disposal of real property interests by lease, purchase, condemnation, or otherwise,” as well as other related services. AMS 4.2.1. Moreover, while AMS 4.2 is to be “read in conjunction with Procurement Policy 3.0” which pertains to acquisitions of products and services, with respect to real property acquisitions, AMS 4.2 is controlling in the event of any conflict. AMS 3.2.2.1; AMS 4.2.1.

Under the AMS the Real Estate Contracting Officer (“RECO”) is afforded considerable discretion and flexibility in acquiring property interests to meet mission requirements. AMS 4.2.2. Towards that end, AMS Real Estate Guidance provides for an acquisition process which starts by gathering market information to identify potential sources and determine the procurement method, with competition being the preferred but not required method. AMS 4.2.2; AMS 4.2.3 (“Real property interests . . . will be acquired by the competitive method whenever practical and reasonable.”); AMS 4.2.3.4; *Real Estate Guidance* 2.2.6.

The AMS provides that when real property is competed, selection “may be based upon that proposed offer that best meets the FAA’s requirements as defined in the SFO or proposed lease document.” AMS 4.2.3.6. In those cases, the SFO is required to provide a clear and “detailed statement of FAA’s space requirements, including any tenant improvement requirements” as well as “pertinent evaluation criteria and the basis for award” to ensure that the acquisition of space is in the best interests of the FAA. *Real Estate Guidance* 2.2.6.

Moreover, for offers in the competitive range, the receipt of offers marks the beginning of negotiations with the RECO. During these negotiations, “[i]f the evaluations indicate that the offerors have different interpretations of the FAA’s requirements, the RECO is encouraged to implement a process to clarify the ambiguities and allow offerors to revise their proposals in accordance with the clarifications provided.” AMS 4.2.3.6.1. Such negotiations, among other things would include attempts to reach a satisfactory agreement on a proposed rent structure, and other priced items, taking into account relevant

information in the market survey, i.e., “to obtain the necessary land/space interests at a fair and reasonable cost.” *AMS 4.2.3.6.1. Real Estate Guidance 2.2.7 and 2.2.7.1.*<sup>4</sup> Significantly, once offers are determined to be within the competitive range, the RECO may exercise her discretion to consider property features that the SFO did not explicitly identify under the stated evaluation criteria. The Real Estate Guidance expressly provides that:

[S]election for final award may be made *without further consideration of the selection criteria* [and] ... may be made based upon that proposed offer that is best suited to the FAA’s needs, *in the RECO’s opinion. This includes benefits offered that have not previously been addressed in the FAA’s requirements provided. Any new benefits identified do not change the evaluation criteria used to develop the competitive range group.*

*Real Estate Guidance 2.2.8* (emphasis added).

#### **D. The SFO Complies with AMS 4.2 and Real Estate Guidance 2.2**

In accordance with the AMS preference for competition, the current SFO contemplates a competitive acquisition of office space for the purpose of consolidating the Alaska Flight Standards Division with the Certificate Management Office (“CMO”) and Flight Standards District Office (“FSDO”). *SFO* at 1-3; *Declaration of Deputy Director, Air Carrier Safety Assurance*, dated September 8, 2017 at ¶¶ 5, 11. The record shows the Region’s acquisition efforts with respect to the current requirement began with procurement planning and market research commencing in 2014, which was followed by the issuance of a solicitation in 2016, and then the cancellation of that solicitation in 2017 after protests were filed by 36<sup>th</sup> Avenue Co-Tenancy, SJ/JL Calais Office II, and International Office Building LLC,<sup>5</sup> and the Region decided to take the corrective action of revising and reissuing the solicitation. *Agency Response, Declarations of the Real Estate Contracting Officer*, dated August 24, 2017 at ¶¶ 6-7, and September 8<sup>th</sup>, 2017, at ¶ 3.

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<sup>4</sup> Presumably, it is for this reason that the SFO states that offers “shall remain open until lease award” notwithstanding the stated due date of August 21, 2017. *SFO* at 2.

<sup>5</sup> The protests against the earlier solicitation filed by 36<sup>th</sup> Avenue Co-Tenancy, SJ/JL Calais Office II, and International Office Building LLC were docketed as 16-ODRA-00777, -00778 and -00779, respectively.

Here, Protesters challenge, as insufficiently specific and contrary to the AMS, the language of Section 3.0 of the SFO, which provides that award will be made to the offeror providing the “best value to the Government, cost/tenant improvement allowance and non-cost factors considered.” *SFO* at 6. The SFO identifies for evaluation the cost factors which include the rental price and tenant improvement allowance, and a preference for requiring less Government contribution towards tenant improvements. *SFO* at 7.<sup>6</sup> The SFO also identifies the non-cost evaluation factors, in descending order of importance, as: quality of space, sole occupancy and co-location, hazmat shower space, parking adjacency, security of facility, security of location, desirability of location, green building factors and ease of transition. *SFO* at 7-8. SFO Section 2.0 further defines the first, most important non-cost factor, quality of space, as follows:

As to quality of space, the Government reserves the right to identify and to give more favorable consideration to any issue of importance depending on the particular space and features including but not limited to ceiling height, cleanliness, age, paint, ceiling tile condition, flooring, bathroom access, heating and ventilation system quality, windows, view, hardware and finishes, architectural design, and elevator system, and such further preferences, if any, all in the sole discretion of the Government.

*SFO* at 5.

Protesters also challenge as improper SFO Section 3.0, entitled “Award Based on Best Value,” which states that award will be made to the offeror providing the “best value to the Government, cost/tenant improvement allowance and non-cost factors considered.” *SFO* at 8; *Protest* at 9. Protesters likewise question SFO language that pertains to the cost evaluation of tenant improvements specifically, e.g., that “[t]hose proposals requiring less Government contribution towards tenant improvements will be favored.” *SFO* at 7; *Protest* at 9-10. In this regard, the SFO Section 3.2 expressly describes the method to be used for the best value tradeoff analysis:

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<sup>6</sup> Section 2.3 also defines tenant improvements as “the components, finishes, and fixtures that typically take space from the ‘shell’ condition to a finished, usable condition.” *SFO* at 6. The SFO states: “All improvement shall meet the quality standards and requirements of this solicitation and its attachments.” *Id.*

The best value approach is a method of selecting the proposal that represents the greatest value to the Government, based on the evaluation of price, tenant improvement allowance and other factors specified in this solicitation considering their relative importance . . . This approach provides the Government an opportunity for a trade-off between price/cost factors and non-cost factors, and does not require the lease award be made to the Offeror submitting a highest evaluated proposal based on non-cost factors (“highest evaluated” will be per group general consensus and will not necessarily take a numeric form) or to an Offeror submitting the lowest price and/or highest tenant improvement allowance, although the ultimate lease award decision may be to any of these Offerors.

The Government will consider not only objective factors like cost, but also more subjective elements such as the look, feel and overall desirability of the space. Tradeoffs between price/costs and non-cost factors will not be quantified.

Price factors will be relatively more important in situations where the non-price evaluation factors are deemed roughly equivalent. Cumulatively, the non-price factors are more important than either rental cost or Tenant Contribution Allowance analyzed individually.

*SFO* at 8-9.


A review of the above evaluation factors and method of award described in the SFO demonstrates that they are consistent with the applicable AMS requirements and guidance. On the whole, these provisions rationally allow for flexibility in assessing unique aspects of each proposal, as well as the exercise of the RECO’s discretion in evaluating both cost and non-cost factors. The record shows that the SFO language in Section 2.0, clearly identifies the most pertinent issues of importance relative to the evaluation of the quality of space, i.e., the most important non-cost factor. *SFO* at 5; *Real Estate Guidance* 2.2.6. Moreover, the evaluation scheme of the SFO recognizes that it is impossible to predict in advance of receiving offers the features of a proposed property that will be evaluated. This point is underscored by the RECO’s answer to an offeror’s question regarding the evaluation of the Quality of Space non-cost factor, wherein she clarified that the evaluation “will necessarily be, to some extent, space dependent (each space having different features), and an element of flexibility is intended.” *Protest*, Attachment 3.

The SFO's selection methodology described in Section 3.0 also complies with AMS policy to the extent that it recognizes that the exercise of discretion may be subjective, taking into account the unique nature of real property acquisition on a "space by space basis" and "without application of a formula." *Protest*, Attachment 3; *AMS* 4.2.2. The fact that the SFO that provides for the subjective evaluation of certain factors does not invalidate its overall evaluation scheme; nor does it portend an arbitrary or irrational result, as long as the ultimate conclusion is based the application of sound business judgment, the criteria are applied consistently, and the selection decision best serves the interests of the FAA. *AMS* 4.2.2; *Real Estate Guidance* 2.2.8.

In sum, Protesters fail to present substantial evidence in support of their allegations, but rather offer only unsupported speculation and conjecture as to possible scenarios in which the evaluation of offers could fail to produce a best value award. Arguments of counsel are not evidence. *Protest of Systems Atlanta, Inc.* 10-ODRA-00530. The ODRA finds that the Protesters assertions have no merit and the challenged SFO provisions comply with the AMS, and in particular, the AMS Guidance concerning real property lease acquisition.<sup>7</sup>

### III. CONCLUSION

Based on the foregoing, the ODRA recommends that the protests be denied in their entirety.

  
Marie A. Collins  
Dispute Resolution Officer and  
Administrative Judge  
FAA Office of Dispute Resolution for Acquisition

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<sup>7</sup> The Protests also allege that 36<sup>th</sup> Avenue, the incumbent lessor, is disadvantaged by Section 2.0 and that "the FAA reissued the SFO with an intent to abandon the incumbent and not give the incumbent a fair chance to compete." *Protest* at 10, FN 5. To the extent that this allegation suggests bias on the part of the Region against 36<sup>th</sup> Avenue, this charge is unsupported by substantial evidence in the record. It is well established that bad faith will not be attributed to contracting officials solely on the basis of inference or supposition. *Protest of Delta Marketing Group, Inc.* 07-ODRA-00406.