

# Decision

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**Matter of:** DCR Development, LLC

**File:** B-419608; B-419608.2

**Date:** May 28, 2021

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**DIGEST**

1. Protest that agency acted in bad faith by misleading protester as to the award of a lease contract is denied where there is no indication in the record that the government's actions constituted bad faith.
  2. Protest alleging that discussions with the protester were misleading with regard to price is denied where the discussions were consistent with applicable procurement law and regulation.
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**DECISION**

DCR Development, LLC, of Conroe, Texas, protests the award of a lease for office and hangar space to KH Aviation, LLC, also of Conroe, Texas, by the General Services Administration (GSA), under request for lease proposals (RLP) No. 8TX3328. The protester challenges the award decision, arguing that it was based on erroneous market research, which misled the protester and reflects bad faith. The protester also contends that the agency conducted misleading discussions and failed to adequately document whether the awardee's proposal met a checklist of minimum technical requirements.

We deny the protest.

**BACKGROUND**

GSA is conducting the procurement on behalf of the United States Marshals Service (USMS), which provides rapid response support for aerial surveillance missions and must house four new aircraft in the Houston, Texas, metropolitan area. Contracting

Officer's Statement (COS) at 1. GSA posted an advertisement on the Federal Business Opportunities (FedBizOpps) website on April 19, 2019.<sup>1</sup> The posting advised that the government was seeking to lease approximately 17,100 American National Standards Institute/Building Owners and Managers Association Office Area square feet (ABOA SF) of office and hangar space in Tomball, Texas. Agency Report (AR), exh. 1, Lease Ad. It also specified additional requirements for the leased space, such as, the space had to be located in a warehouse or hangar park within an airport that provided aircraft access to a minimum runway of at least 5,000 linear feet, and the building had to be capable of meeting the government's security requirements. *Id.*

GSA issued the initial RLP on December 18, 2019. COS at 2. The RLP provided for the award of a 15-year lease of office and hangar space in Conroe/Tomball, Texas.<sup>2</sup> The due date for proposals was January 20, 2020. AR, exh. 4, RLP. GSA received an offer from one firm, DCR, on January 15, 2020. AR, exh. 5, DCR Initial Offer. The agency conducted multiple rounds of discussions with DCR, resulting in DCR submitting a second revised offer on March 18, 2020, and final proposal revisions (FPR) on April 27, 2020, and June 26, 2020.<sup>3</sup> AR, exh. 6, Req. for Revised Offer; exh. 8, FRP Req.; exh. 10, DCR FPR.

After receipt and review of DCR's June 26 FPR, GSA conducted an internal review. Memorandum of Law (MOL) at 2. On October 1, as part of the standard procedure in GSA's Leasing Division for the Greater Southwest Region, the lease contracting officer (LCO) presented the negotiated lease file for review and approval prior to lease award. AR, exh. 16, GSA Emails; COS at 2. While the lease file was still being reviewed by GSA, the LCO mistakenly sent a copy of the proposed lease to DCR through DocuSign, GSA's electronic document management platform. AR, exh. 13, Lease DocuSign.

During the review, GSA recognized that the LCO had compared DCR's proposed rates with rates for office buildings, rather than for hangar space, when she conducted negotiations with DCR. COS at 2; AR, exh. 12, Initial Market Research. In order to obtain more accurate market data to determine whether the rental rate offered by DCR was fair and reasonable, GSA elected to conduct additional market research by calling representatives for hangar space at the Conroe-North Houston Regional Airport (CXO).

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<sup>1</sup> The FedBizOpps website has since been replaced by the System for Award Management (SAM) website as the "official [United States] government website" for contract opportunities. See <https://sam.gov/content/home> (last visited on May 26, 2021). Federal contracting opportunities that were previously posted on the FedBizOpps website are now posted on the SAM website. See *id.*

<sup>2</sup> The RLP provided that the term of the lease was 15 years, 10 years firm. RLP at 25.

<sup>3</sup> The solicitation was reopened on June 3, 2020, to include RLP amendment 0001, which incorporated a tenant improvement allowance. AR, exh. 9, RLP amend. 0001. DCR submitted a revised offer.

During this time period, DCR was notified via several emails that GSA was reviewing the offered rental rate. On October 15, 2020, GSA sent an email advising DCR that GSA was reviewing the fairness of DCR's rental rate. AR, exh. 14, GSA Broker Emails. On October 19, 2020, GSA contacted DCR to request further details on how its rental rates were developed. *Id.* On October 26, 2020, GSA advised DCR that GSA was conducting further market research regarding the negotiated rate. AR, exh. 15, Email to DCR.

Based on the additional market data, GSA decided to reopen the procurement to obtain additional competition. On November 5, 2020, GSA posted a new advertisement on beta.SAM.gov.<sup>4</sup> AR, exh. 20, 2nd Ad. As a result of the posting, KH was provided with a copy of the RLP. On November 12, the agency issued amendment 0002, which modified the solicitation to add COVID related cleaning and disinfecting services and to incorporate additional representations. AR, exh. 22, RLP amend. 0002.

After reopening the procurement, GSA received offers from DCR and KH. COS at 4. The agency found both offers technically acceptable, and evaluated prices. AR, exh. 32, Price Negotiation Memo (PNM) at 10. The agency calculated the present value of KH's offer as \$13.57 per ABOA SF and the present value of DCR's offer as \$19.55 per ABOA SF. *Id.* at 10; COS at 4.

On February 16, 2021, the agency notified DCR that the award had been made to KH. AR, exh. 33, Unsuccessful Offeror Letter. On February 17, 2021, GSA posted the notification of the lease award to KH on beta.SAM.gov. AR, exh. 34, Award Notice. The total value for the awarded lease is \$4,978,536. On February 22, 2021, DCR filed this protest.

## DISCUSSION

The protester challenges GSA's award decision, arguing that the agency acted in bad faith by misleading DCR throughout this procurement. The protester contends the agency misled it by awarding it the lease, and then rescinding the award, without explanation. The protester asserts that GSA then improperly decided its initial market research was flawed because it was based solely on the use of comparables for office space (instead of office/hanger space), and never advised DCR that the agency was conducting additional market research for office space and hangar space. The protester also challenges the adequacy of the updated market research. Additionally, the protester contends that GSA conducted misleading discussions because the agency failed to inform DCR that GSA had "mistakenly used comparables for office buildings, instead of office/hangar space" in conducting its initial negotiations with DCR. Comments & Supp. Protest at 8. Finally, the protester asserts that the agency failed to document adequately whether the awardee's proposal met the RLP's checklist of

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<sup>4</sup> The beta.SAM.gov website has merged with SAM.gov, and all content from both sites is now at SAM.gov. See <https://sam.gov/content/home> (last visited May 26, 2021).

minimum requirements. For the reasons discussed below, we find no basis to sustain the protest.<sup>5</sup>

#### Bad Faith/Market Research

The protester argues that GSA's actions in this procurement reflect bad faith because "DCR was misled as to the award." Protest at 1. The protester asserts that "GSA evaluated and approved DCR Developments offer per the RLP" and then sent the lease agreement to DCR, which "was executed by DCR Development, LLC on 10-2-2020." *Id.* The protester maintains that GSA rescinded the lease on October 15, 2020, due to the agency's "negligence and incompetence" in failing to use the appropriate "comparables" in its market research for the purpose of determining the fair and reasonable market rate.<sup>6</sup> *Id.* at 2. We find no merit to the protester's argument.

As an initial matter, government officials are presumed to act in good faith and a protester's claim that an agency official was motivated by bias or bad faith must be supported by convincing proof. *Brian X. Scott*, B-310970, B-310970.2, Mar. 26, 2008, 2008 CPD ¶ 59 at 4. Our Office will not attribute prejudicial motives to procurement officials on the basis of inference or supposition. *Id.*

Here, we find no indication in the record that the government acted in bad faith. First, the record does not support the protester's assertion that it was awarded the lease. As relevant here the RLP provides: "The Offeror's executed Lease shall constitute a firm offer. No Lease shall be formed until the LCO executes the Lease and delivers a signed copy to the Offeror." RLP at 4. Although DCR's signature on the lease constituted an offer to GSA, the facts here establish that the LCO never accepted the offer by executing the lease. AR, exh. 13, Lease DocuSign. Thus, a lease contract between DCR and GSA did not exist, and could not have been rescinded, as the protester asserts.

Second, we similarly find no indication in the record that the government's actions regarding its updated market research constituted bad faith. The protester argues that, due to GSA's "negligence and incompetence" in failing to use the appropriate "comparables" in its market research, GSA decided to conduct additional market research during the course of the procurement. The protester contends that the updated market research was unreasonable and insufficiently documented.<sup>7</sup> The

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<sup>5</sup> Although we do not address all of the protester's arguments in this decision, we have considered all of them, and find no basis to sustain the protest.

<sup>6</sup> Specifically, the protester asserts that GSA failed to use comparables for three current federal leases at CXO and David Wayne Hooks Memorial Airport. Protest at 1-2.

<sup>7</sup> To the extent DCR's argument can be construed as a challenge to the agency's decision to reopen the procurement or to reopen discussions, these allegations are untimely and will not be considered because they are based on information that the

protester also asserts that this new market data is “clearly erroneous” and does not support the agency’s conclusion as to whether the offered prices are fair and reasonable. As discussed below, we find no basis to conclude that the agency’s updated market research was unreasonable, inadequately documented, or “clearly erroneous.”

As noted above, DCR submitted a revised offer to GSA on June 26, 2020, and GSA then conducted internal reviews. MOL at 2. On October 1, 2020, the LCO sent the lease file for review, and this review raised concerns that the rental rate appeared very high for a hangar with office space. AR, exh. 16, GSA Emails; COS at 2. Specifically, the review of the market research showed that the agency had relied solely on comparables for office building space (rather than office space and hangar space) in estimating the fair and reasonable market price applicable to this lease. AR, exh. 16, GSA Emails. Accordingly, GSA elected to conduct additional market research. *Id.* In this regard, GSA explains that it contacted all 22 hangar owners at the Conroe-North Houston Regional Airport to request information on their rental rates for hangar space. As a result, GSA learned that 9 out of the 22 hangars contacted had available space and could provide a rental rate.<sup>8</sup> AR, exh. 46, Broker Statement at 2.

We find nothing unreasonable regarding GSA’s decision to conduct additional market research. Emails in the record clearly reflect GSA’s contemporaneous concerns regarding whether DCR’s offered rate was fair and reasonable. AR, exh. 16, GSA Emails. The record also shows that once GSA concluded that the initial market research relied upon comparables only for office space (and not the unique office/hangar space sought in the RLP), it then reasonably decided that the initial market research could not support a determination that DCR’s offered price was fair and reasonable. *Id.*

As the agency explains, it is a fundamental tenet of pricing policy that the contracting officer must determine that the prices offered to the government are fair and reasonable. Supp. MOL at 2; Federal Acquisition Regulation (FAR) 15.402; General Services Acquisition Manual (GSAM) 570.110. The agency’s regulations provide that “regardless of the process used, the contracting officer must determine whether the price is fair and reasonable.” GSAM 570.203(d). Accordingly, if an agency determines that pricing is not fair and reasonable prior to award, then an award cannot be made. In these circumstances, we find GSA’s decision to conduct additional market research to

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protester knew or should have known before it submitted its offer at the time the procurement was reopened. 4 C.F.R. § 21.2(a)(2) (protest must be filed no later than 10 calendar day after the protester knew, or should have known, of the basis of protest).

<sup>8</sup> During the additional market research, the hangar owned by KH Aviation, LLC was identified on October 22, 2020, as potentially being capable of meeting the RLP requirements. An expression of interest from KH was submitted to GSA on October 29, 2020. COS at 3.

be reasonable and that the record is adequately documented.<sup>9</sup> On this record, we find no basis to sustain the protest.

Similarly, we find no merit to the protester's argument that GSA's updated market research is based upon "clearly erroneous market data." Comments & Supp. Protest at 4. DCR's argument essentially is that it was unreasonable for the agency to use its market research to consider the rental rate for hangar space in addition to office space, unless the hangar space matched exactly all of the specifications in the solicitation. See, e.g., Supp. Comments at 4 (arguing the updated market research is unreasonable because "GSA required 17,100 square feet" and "[o]nly two out of the nine identified hangars" had "enough space to meet GSA requirements"). As GSA's broker explains and the record reflects, the "unique requirements" of the RLP provided that the agency requires 6,400 SF of office space and 10,700 of hangar space. RLP at 5. Accordingly, a "shell rental rate was determined" based on the updated market research, for the purpose of considering whether offered prices were fair and reasonable, by "blending rental rates for office space and hangar space pro rata based on 10,700 SF of hangar space and 6,400 SF of office space."<sup>10</sup> AR, exh. 46, Broker Statement at 4; exh. 39, GSA Emails re: Revised Market Research; exh. 40, Revised Market Research. The protester has failed to demonstrate that the agency's method for considering both hangar space and office space in its updated market research was erroneous or otherwise unreasonable.

#### Misleading Discussions

DCR argues that GSA conducted misleading discussions by improperly failing to inform DCR that GSA had "mistakenly used comparables for office buildings, instead of office/hangar space" in conducting negotiations with DCR prior to October 2. Comments & Supp. Protest at 8. The protester contends that the negotiations "misinformed DCR regarding its proposal" and "[s]imply nudging DCR to continue lowering its price" does not change that fact. *Id.* The agency responds that it clearly communicated to DCR its concerns that the protester's offered price was too high. For

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<sup>9</sup> We also disagree with the protester that the record is "devoid" of any documentation regarding the agency's decision to conduct additional market research. Comments & Supp. Protest at 2. See AR, exh. 16, GSA Emails (emails raising concern that the offered rental rate appeared high, discussing that comparables for office building space (rather than office/hangar space) had been used to estimate a fair and reasonable market price, and deciding to conduct additional market research that included hangar space).

<sup>10</sup> The broker states that the "market research was conducted to obtain asking rates for hangar space, regardless of square footage." AR, exh. 46, Broker Statement at 3. The broker explains that "[t]he quoted rates for hanger space suitable to store one aircraft could be translated on a per square foot basis to larger hangars capable of storing multiple planes similar to the USMS requirement." *Id.*

the reasons discussed below, we conclude that the agency's discussions were not misleading.

When an agency engages in discussions with an offeror, the discussions must be meaningful, that is, sufficiently detailed so as to lead an offeror into the areas of its proposal requiring amplification or revision. *Hanford Env'tl. Health Found.*, B-292858.2, B-292858.5, Apr. 7, 2004, 2004 CPD ¶ 164 at 8. An agency may not mislead an offeror through the framing of a discussion question into responding in a manner that does not address the agency's actual concerns, or otherwise misinform the offeror concerning a problem with its proposal. *Refinery Assocs. of Texas, Inc.*, B-410911.2, Mar. 18, 2015, 2015 CPD ¶ 116 at 6; *Per Aarsleff A/S, et al.*, B-410782 et al., Feb. 18, 2015, 2015 CPD ¶ 86 at 15. The requirement that discussions be meaningful, however, does not obligate an agency to spoon-feed an offeror or to discuss every area where the proposal could be improved. FAR 15.306(d)(3); *Insignia--Spectrum, LLC*, B-406963.2, Sept. 19, 2012, 2012 CPD ¶ 304 at 5. Where an agency elects to conduct discussions with an offeror concerning price, it is not required to advise the offeror of the specific areas where its price or cost is too high or to provide a specific price that the offeror must meet; simply advising the offeror that its price is too high is sufficient. *Northstate Heavy Equip. Rental*, B-416821, Dec. 19, 2018, 2018 CPD ¶ 430 at 6.

Here, we find that GSA's discussions were not misleading. The record reflects that once GSA discovered that DCR's offered price may not have been fair and reasonable, GSA advised DCR that it was reopening the procurement and negotiations because it was "in the Government's best interest to reopen negotiations in order to obtain rental rates within the market range." AR, exh. 18a, Reopen Letter. Specifically, the agency told DCR that its offered "shell rate" was "too high." *Id.* By advising DCR that its offered shell rate was "too high" and not considered within the market range, we conclude that the agency imparted sufficient information to the protester for it to know that its price was viewed as too high. See *Securiguard, Inc. et al.*, B-254392.8 et al., Feb. 9, 1994, 94-1 CPD ¶ 92 at 6 (denying allegation that discussions were misleading where agency advised firm that its proposed price exceeded the government estimate and was therefore "too high"); see *Northside, supra*.

Although the protester asserts that it was misled by the agency's failure specifically to inform DCR regarding GSA's change or update to its market research, we find this argument unavailing. As the agency explains in response to the protest, GSA conducts market research to use internally to determine if an offeror's price is fair and reasonable. This market research is not disclosed to offerors, but rather, GSA uses the information to formulate the agency's internal negotiation objectives.<sup>11</sup> AR, exh. 46, Broker Statement at 4; Supp. MOL at 4. Accordingly, the protester has failed to demonstrate how the agency's failure to inform DCR regarding the agency's change to its internal market research misled the protester during discussions. This protest ground is denied.

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<sup>11</sup> The protester also acknowledges that GSA did not disclose any of its market research to DCR or any of the offerors at any point during this procurement. Comments & Supp. Protest at 7-9.

## Technical Evaluation

The protester argues that GSA's technical evaluation "falls woefully short" because in evaluating whether the awardee's proposal was technically acceptable, the agency failed to document adequately whether the awardee's proposal met the RLP's checklist of minimum aviation & aviation asset requirements.<sup>12</sup> Comments & Supp. Protest at 2, 5. The agency contends that its award decision was adequately documented.

In reviewing an agency's evaluation of proposals and source selection decision, it is not our role to reevaluate submissions; rather, we examine the supporting record to determine whether the decision was reasonable, consistent with the stated evaluation criteria, and adequately documented. See *Federal Builders, LLC--The James R. Belk Trust*, B-409952, B-409952.2, Sept. 26, 2014, 2014, CPD ¶ 285 at 3. The agency's evaluation record is not required to document every instance where the evaluators conclude that an offeror met the RFP's requirement. See *Biswas Info. Tech. Sols., Inc.*, B-414760.3, B-414760.4, Oct. 5, 2018, 2018 CPD ¶ 332 at 7. While we will not substitute our judgment for that of the agency, we will question the agency's conclusions when they are inconsistent with the solicitation criteria and applicable procurement statutes and regulations, undocumented, or not reasonably based. See *Poplar Point RBBR, LLC*, B-417006.2, B-417006.3, Sept. 3, 2019, 2019 CPD ¶ 302 at 5-6. Our Office, however, will not limit its review of an agency's evaluation to contemporaneously documented evidence, but instead will consider all the information provided, including a party's arguments and explanations. See *Hoover Properties*, B-418844, B-418844.2, Sept. 28, 2020, 2020 CPD ¶ 372 at 7.

Based on our review of the record, we reject DCR's assertions that the agency's conclusion that the awardee's proposal was technically acceptable was inadequately documented. As relevant here, the RLP included the following seven minimum aviation and aviation asset requirements:

- A minimum runway of at least 5,000 linear feet
- Instrument Approach
- Control Tower
- 11,909 square feet of insulated hangar space

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<sup>12</sup> DCR's initial protest argued that the awardee's property fails to meet the requirements of the RLP because it "is over 8 years old" as opposed to DCR's newly constructed facility which is a "Class A" corporate office/hangar facility. Protest at 2. GSA provided a detailed response to the protester's argument, explaining that the RLP did not include a requirement for new construction or for "Class A" space, and that the agency found that the awardee's 7-year old facility met the requirement for a modern quality building. MOL at 4. DCR elected not to reply to the agency's response regarding this particular allegation in its comments. We therefore consider this argument abandoned. See *Citrus College; KEI Pearson, Inc.*, B-293543 *et al.*, Apr. 9, 2004, 2004 CPD ¶ 104 at 8 n.4.



- Certified Maintenance Facility that is locally convenient to the proposed facility
- 24 hr/day fuel service for Avgas & Jet A
- Secure Building to house aircraft and equipment

RLP at 69.

In response to the protest, GSA's broker explains that five out of the seven requirements are met by the CXO airport, where the awardee's property is located. AR, exh. 46, Broker Statement at 5. For the other two requirements--11,909 square feet of insulated hangar space, and a secure building to house aircraft and equipment--the record reflects that the awardee's building was determined to satisfy both requirements. AR, exh. 41, KH Property Inspection; exh. 32, PNM at 1-12.

GSA also provided our Office with an explanation of the agency's efforts to confirm that the awardee's property complied with the RLP's minimum aviation and aviation asset requirements. Specifically, GSA's broker explains that an inspection of the awardee's hangar was conducted on November 4, 2020, by a USMS representative, who is a chief inspector. AR, exh. 46, Broker Statement at 5. The broker explains that he also attended the inspection virtually, via Zoom video conference, and that notes summarizing the inspection and the building's ability to meet the minimum requirements were provided to GSA and USMS.<sup>13</sup> AR, exh. 41, KH Property Inspection. The broker states that a complete survey form, indicating building details sufficient to confirm the building currently met, or could be modified to meet, all GSA and USMS minimum requirements, was provided to USMS and signed by both USMS and the broker on November 9, 2020. AR, exh. 46, Broker Statement at 5-6. The broker also notes that this same process was used to determine that DCR's building and property could meet the RLP's minimum technical requirements. *Id.*, see also AR, exh. 44, DCR Property Inspection.

Ultimately, the record reflects that GSA verified that the final offer submitted by the awardee was technically acceptable, and decided to award the lease to KH because its offer was also the lowest priced. AR, exh 32, PNM, at 10-12. The agency documented its evaluation in the price negotiation memorandum, along with the market surveys and present value analysis (PVA) worksheets. AR, exh. 29, DCR PVA; exh. 30, KH PVA; exh. 32, PNM; exh. 41, KH Property Inspection and exh. 44, DCR Property Inspection. Both DCR and KH were found to be technically acceptable with some of the RLP requirements being met by CXO. Supp. MOL at 6. The agency's chosen method of verifying compliance, on its face, appears reasonable and unobjectionable. On this point, we note that the RLP did not specify in detail how the agency would evaluate whether a firm's property met the requirements. RLP at 68-72. Additionally, the agency used this same method in verifying the technical acceptability of DCR's proposal.

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<sup>13</sup> Zoom Video Communications, Inc. provides for live video and audio conferencing "on any device," such as a computer or phone. See <https://explore.zoom.us/meetings> (last visited May 28, 2021).

Further, the protester has not established, or even argued, that the agency's conclusion--regarding the technical acceptability of the awardee's proposal--is flawed.

Although the protester claims that we should give no weight to the broker's statements, post-protest explanations that provide a detailed rationale for an agency's contemporaneous conclusions and simply fill in previously unrecorded details will generally be considered in our review of the rationality of selection decisions, if those explanations are credible and consistent with the contemporaneous record. *McLaurin Gen. Maint., Inc.*, B-411443.2, B-411443.3, Jan. 14, 2016, 2016 CPD ¶ 41 at 6.

Here, we find the broker's explanation is credible and consistent with the contemporaneous record. While we agree with the protester that the contemporaneous record may be limited, based on our review of the record and the agency's explanation, we find the record sufficient to show that the agency's selection decision was reasonable. As a result, we find no basis to question the agency's evaluation of the awardee's quotation, and deny this protest ground. *McLaurin Gen. Maint., Inc., supra.*

The protest is denied.

Thomas H. Armstrong  
General Counsel