

AUDIT-LEGAL COMMITTEE

PROTEST RELATING TO CONCESSIONS MANAGEMENT CONTRACTS FOR RONALD REAGAN WASHINGTON NATIONAL AND WASHINGTON DULLES INTERNATIONAL AIRPORTS

DECISION

Westfield Concession Management, LLC ("Westfield") of Los Angeles, California, appeals the denial of its protest of the selection of MarketPlace Development, Inc. ("MarketPlace") of Newton, Massachusetts, for the award of the concessions fee manager contract under Metropolitan Washington Airports Authority ("MWAA" or the "Authority") Request for Proposals No. 4-12-C002 (the "RFP" or "Solicitation"). Westfield, the incumbent contractor, challenges MWAA's evaluation in numerous respects, objects to the Authority's decision not to conduct oral discussions with offerors, and alleges that at least one member of the Evaluation Committee ("EC") was biased against Westfield.

The Audit-Legal Committee, on behalf of the Authority pursuant to a delegation by the Authority Board of Directors ("Board"), denies the appeal on all counts.

I. Background

The procurement at issue in this protest sought a contractor for the Marketing, Leasing, and Management of the Food Service and Retail Concessions at Ronald Reagan Washington National Airport and Washington Dulles International Airport. RFP at 1.

The RFP was issued on April 12, 2012. It sets forth three evaluation factors, which are, in descending order of importance: (i) Financial Offer, (ii) Development and Implementation Plan; and (iii) Property Management, Marketing, Advertising, and Promotion. RFP at 35-36 (§ VII.A). The Authority received proposals from three offerors: MarketPlace Development, Inc., Westfield Concession Management, LLC, and AirMall USA, Inc.

The evaluator scoring of the respective proposals was conducted by an Evaluation Committee ("EC") consisting of five voting members. The members of the EC included the manager of the Authority's Concessions and Property Development Office, who also chaired the EC, three managers from Authority offices associated with the Authority's airline relations, customer service, and airport operations responsibilities, and one person from another airport whose food and retail concessions program is managed by the airport itself and has no relationship with any of the offerors. The EC's scores were as follows:

	Financial Offer	Development and Implementation Plan	Property Management, Marketing, Advertising and Promotion	Total
Max Score	250	150	100	500
AirMall				
Evaluator 1	243	70	50	363
Evaluator 2	243.8	85	55	383.8
Evaluator 3	243.8	90	60	393.8
Evaluator 4	243.8	90	60	393.8
Evaluator 5	243.8	90	60	393.8
Average	243.64	85	57	385.64
MarketPlace				
Evaluator 1	250	120	65	435
Evaluator 2	250	120	85	455
Evaluator 3	250	120	90	460
Evaluator 4	250	124	90	464
Evaluator 5	250	110	80	440
Average	250	118.8	82	450.8
Westfield				
Evaluator 1	232.1	95	70	397.1
Evaluator 2	232.1	100	80	412.1
Evaluator 3	232.1	100	80	412.1
Evaluator 4	232.1	95	95	422.1
Evaluator 5	232.1	91	80	403.1
Average	232.1	96.2	81	409.3

The Financial Offers were scored mathematically, with the lowest priced offer receiving the maximum available points. The other two evaluation criteria were scored by the individual evaluators. Notably, there was not a wide variance in the relative points awarded by the individual evaluators to the respective contractors. MarketPlace provided the lowest priced proposal, and every evaluator favored MarketPlace over Westfield under the combined non-price evaluation factors by between 19 and 30 points. In total, Marketplace was favored by between 36.9 and 47.9 points, with an average advantage of 41.5 points.

The final summary evaluation as reported to the Business Committee was as follows:

MarketPlace Development, Inc. submitted the best overall proposal. It presented strong plans to improve merchandising mix, to leverage post-security locations by pairing them with premium

pre-security locations, to increase the number of units, and provided the most advantageous financial offer in terms of its fee and increased Airports Authority revenues. In addition, MarketPlace Development, Inc. proposed significant local outreach to increase the number of local business owners represented at the Airports. Finally, MarketPlace Development, Inc. proposed several unique concepts to update the Retail Merchandising Units (carts) program at both Airports.

Protest Appeal Ex. G at 4 (Recommendation Memo to Business Committee).

Based on the dual finding that MarketPlace was lowest priced proposal and that it was highest-rated in the non-price evaluation, the Business Committee recommended approval and the Board subsequently approved the award to MarketPlace.

Westfield filed its initial protest on September 19, 2012. That protest was denied by the Manager of the Authority's Procurement and Contracts Department, Fred Seitz, on September 26. Westfield timely appealed the denial to MWAA CEO Jack Potter on October 3. Mr. Potter rejected Westfield's appeal on October 10. On October 17, Westfield timely filed this second appeal with the MWAA Board of Directors. By resolution on November 14, 2012, the Board assigned adjudication of the protest to its Audit-Legal Committee ("the Committee"). This decision represents the consensus opinion of that Committee.

II. Responses to Allegations Presented by Westfield

Westfield's October 17 protest appeal letter (hereafter "the Protest Appeal") raises six categories of protest allegations relating to the procurement and post-procurement process. The Committee has reviewed these allegations, and the documentation comprising the administrative record in this procurement, and has determined that none of Westfield's challenges withstand scrutiny. Each category of allegation is addressed in detail below.

A. Westfield's Allegation that MarketPlace Improperly Proposed to Expand the Gross Leasable Area of the Concessions Program Has No Factual Basis

Westfield's lead protest allegation is that the Authority improperly gave positive credit to MarketPlace for proposing to increase the "gross leasable area" of the concessions program, and favorably weighed this aspect of MarketPlace's proposal in validating the selection decision. Westfield argues that MarketPlace's alleged plan to increase the gross leasable area is contrary to the terms of the Solicitation and therefore should have rendered the entire proposal ineligible for award consideration. *See* Protest Appeal at 10-18.

At the outset, the Committee notes that Westfield has not seen MarketPlace's proprietary proposal documentation, and thus has no direct knowledge of what MarketPlace actually proposed to do. Similarly, Westfield has not examined the details of the evaluation record, which constitutes confidential source selection information, and therefore has no direct knowledge of what aspects of MarketPlace's proposal were and were not assigned positive "strength" credit and/or negative "weakness" credit. Instead, Westfield bases its allegation primarily on a written memorandum by the EC Chairperson to the Contracting Officer ("CO") in

which EC Chairperson supports the conclusion that MarketPlace presented “the best overall proposal” by citing to a list of positive attributes of the MarketPlace proposal which included “strong plans . . . to increase gross leasable area.” Protest Appeal Ex. F at 3-4 (July 19, 2012 Memo to CO). Because the RFP, as clarified by a subsequent formal Question and Answer document, stated that offerors may not propose to expand the gross leasable area set forth in the RFP, Westfield has concluded that MarketPlace must have violated this mandatory term of the solicitation and should be been disqualified rather than praised for doing so.

Westfield’s allegation is without merit. MarketPlace did not propose to expand the gross leasable area of the concessions program at either airport, and was not given evaluation credit for having done so. Unfortunately, there have been some missteps by Authority personnel after the scoring of proposals that have apparently misled Westfield into reaching the conclusion that it has reached. However, as will be explained in this section, the record reflects that these missteps neither prejudiced the evaluation process nor tainted the award approval process. In fact, with respect to the issue of “gross leasable area,” MarketPlace’s proposal complied with the RFP, was evaluated accordingly, and was properly approved by the Board.

1. MarketPlace’s Proposal Does Not Call for an Expansion of Gross Leasable Area for the Concessions Program

A review of the MarketPlace proposal discloses that MarketPlace did not propose to expand the “gross leasable area” or otherwise propose to lease space to tenants beyond the “gross leasable area” space identified in the Authority’s floorplans. There is nothing in MarketPlace’s proposal which expands the footprint of leasable space as called for in the Solicitation floorplans. Not only does MarketPlace not indicate its intent to expand the gross leasable area in its proposal narrative, but the floorplan drawings submitted with its proposal fully correspond to the floor plans in the RFP. *Compare* RFP Ex. C with MarketPlace Proposal, Vol. III, Ex. C. Accordingly, MarketPlace’s proposal fully complies with the RFP.

While there is nothing in MarketPlace’s proposal which seeks to expand the gross leasable area, the Committee has identified two concepts in the “Development and Implementation” volume of MarketPlace’s proposal which could, at a glance, lead one to suspect that MarketPlace was altering the gross leasable area. However, a closer examination reveals beyond a doubt that neither concept actually does so.

First, MarketPlace identified a number of innovations which support its “increased sales and rent projections” over the status quo. One of these innovations is “Increased number of units.”¹ MarketPlace Proposal, Vol. III at p. 3-20. Although one way to “increase” the total “number of units” being leased would be to add new lease space to the existing gross leasable area, this is not what MarketPlace proposed. Rather, MarketPlace adopted a subdivision plan

¹ A “unit,” as the term is used in the RFP, is a distinct retail space. Each shop, store, restaurant, and/or concessionaire equals one unit, regardless of size.

within the existing space.² For example, MarketPlace proposed to utilize the space occupied by a single existing restaurant and transform that space into a food court, housing multiple different “units” or vendors. *Id.* In this way, MarketPlace proposed to increase the number of units and/or vendors but did so without expanding the gross leasable area. To the extent Westfield believes that the reference in the summary rationale for award to MarketPlace’s plan to “increase the number of units” establishes that MarketPlace was expanding the gross leasable area, that belief is incorrect.

Second, MarketPlace suggested that the Authority consider changes to the composition of hold room seating which might lead to more passengers utilizing the concessions services. Specifically, the MarketPlace proposal states:

Introduce a New Option for Hold Room Furniture (when possible)

As an option to more effectively support the terminal food and beverage program and to better match passenger needs at both Reagan National and Dulles International, we believe a new approach to hold room design is worthy of the Airport Authority's consideration.

A small number of airports are testing new approaches to hold room design that blur the distinctions between food and hold room seating and thereby create more of a working-lounge environment. For example, we have installed tables and chairs as part of the seating mix in the new pod at the end of the E Concourse (serving primarily Southwest Airlines) at Philadelphia International Airport with good success. The results have been well received and -- when done correctly -- the seating capacity of these hold room spaces can be maintained or improved and higher food and beverage sales from surrounding units can also result.

MarketPlace Proposal, Vol. III at p. 3-9.

This “new option,” to be implemented only “when possible,” is the source of significant confusion for Westfield in the Protest Appeal. Airport “hold rooms” are the seating areas around the aircraft gates where passengers congregate while waiting for their flights. In its proposal, MarketPlace suggested re-designing portions of these “hold rooms” to add tables and chairs. *Id.* While these hold room areas are leased to airlines and are not part of the current “gross leasable area” under the concessions program or the RFP, MarketPlace never stated or implied in its proposal that it would lease hold room space to or from anyone. Rather, MarketPlace merely suggested that changes might be made by the Authority to these hold room areas to include more

² The RFP explicitly authorizes subdividing as a concept that offerors may propose. *See* RFP § at 25 (V.M.3.b.iii).

table and chair seating near concessions areas, for use by customers of the concessions, and that this could improve the success of the concessions program. Said another way, MarketPlace suggested an alteration to non-leasable space that would have the effect of making the current “gross leasable area” space more profitable *without expansion*.

Nothing in the MarketPlace’s suggestion to alter hold room seating layouts stated or implied that MarketPlace was proposing or intending to take possession of hold room space and/or lease hold room space to concession tenants. Moreover, MarketPlace’s idea to alter hold room seating was clearly postured as an “option” for “consideration” by the Authority that might be introduced “when possible” specifically because MarketPlace knew that, in general, the Authority did not control the hold room seating areas – the airlines did – and therefore MarketPlace would need to work with the airlines and/or with the Authority to get permission to make any changes to those spaces. See MarketPlace Proposal, Vol. III at pp. 3-5, 3-9. Furthermore, MarketPlace’s schematic drawings in which it lays out the leasable areas of the airport, as required by the RFP, do not include concessions in any of the hold room areas. Accordingly MarketPlace’s proposal cannot reasonably be interpreted as improperly expanding the “gross leasable area” of the concessions program. Thus, Westfield’s attempt to link MarketPlace’s hold room innovation to expansion of the “gross leasable area” is fundamentally mistaken.

2. The Evaluation Committee Did Not Assign Strengths (or Weaknesses) Related to MarketPlace’s Supposed Plan to Expand the Gross Leasable Area of the Concessions Program

A review of the score sheets of the EC members demonstrates that there is not a single comment – positive or negative – that suggests that any of the evaluators believed that MarketPlace planned to increase the “gross leasable area” of the concessions program or otherwise expand the floor plan provided by the Authority. That is because there was no such plan in the MarketPlace proposal.

On the other hand, MarketPlace received multiple strengths from multiple evaluators regarding its plan to increase the total number of concessions vendors through the subdivision of certain larger locations space to create a food court, as discussed above. Furthermore, four of the five evaluators assigned strengths under the Development and Implementation Plan evaluation factor for MarketPlace’s suggestion that the Authority alter the hold room seating to add more tables and chairs. Importantly, the evaluators applauded the creativity of this novel idea “even if opportunities to implement at DCA and/or IAD are limited.” Thus, it is clear that the EC understood that this “option” was offered as a suggestion, and not as a definitive aspect of the MarketPlace proposal.

None of these strengths in any way suggests that the evaluators believed MarketPlace would be expanding the leasable footprint and/or leasing or taking over space in the hold room areas. Rather, the evaluators assigned strength credit to aspects of MarketPlace’s proposal that complied with the RFP and did not assign any strengths or weaknesses related to a MarketPlace proposed expansion of the “gross leasable area.” This is because MarketPlace never proposed to expand the “gross leasable area.” As a result, the point scores assigned by the EC reflect an evaluation of a MarketPlace proposal that complied with the RFP, and those point scores are

untainted by any consideration of a part of that proposal that proposed to expand the gross leasable area of the program.

3. While an Erroneous Reference to an Increase in Gross Leasable Area Was Included in a Memorandum to the Contracting Officer, that Error Was Immediately Recognized and the Erroneous Reference Was Not Included the Award Recommendation to the Business Committee

After the EC determined that MarketPlace was the clear winner on both price and non-price factors over Westfield, the EC Chairperson prepared a memorandum to the Contracting Officer summarizing the findings of the EC.

The EC Chairperson submitted this memorandum to Contracting Officer on July 19, 2012. Protest Appeal Ex. F. After accurately summarizing the background of the procurement and the point scores of the offerors, the EC Chairperson stated the following as a summary rational for the selection of MarketPlace as winning offeror:

MarketPlace Development, Inc. submitted the best overall proposal. It presented strong plans to improve merchandising mix, to leverage post-security locations by pairing them with premium pre-security locations, to increase the number of units, and to increase gross leasable area. In addition, MarketPlace Development, Inc. proposed significant local outreach to increase the number of local business owners represented at the Airports. Finally, MarketPlace Development, Inc. proposed several unique concepts to update the Retail Merchandising Units program at both Airports.

Protest Appeal Ex. F at 3-4 (emphases added).

In total, this paragraph identified six positive aspects of the MarketPlace proposal that helped garner MarketPlace the leading evaluation score. A review of the strengths assigned to MarketPlace's proposal confirms that five of these six features, including the plan to "increase the number of units," are consistent with strengths assigned by the EC during the evaluation, and consistent with the terms of the RFP. On the other hand, this quote represents the first and only reference to an "increase gross leasable area" by *anyone* during the current round of the fee manager procurement and the "increase gross leasable area" comment does not correlate with any of the findings made by the EC.

As explained in the September 26, 2012, protest decision by the Manager of the Contracts and Procurement Division "the Contracting Officer (Richard Myrah) determined that the statement [regarding an increase in gross leasable space] was incorrect and that the EC had not construed the MarketPlace proposal as containing any such increase." See Seitz 9/26/12 Protest Response at 1. Thus, the recipient of the EC Chairperson's memorandum was not misled or

confused by the EC Chairperson's misstatement. Instead, the Contracting Officer effectively carried out his duties and identified and corrected the mistake.³

As a result of the Contracting Officer's actions, the rationale for the EC recommendation as disclosed in the formal recommendation memorandum prepared by Contracting Officer and EC Chairperson for the Business Committee did not include the erroneous reference to "gross leasable area" and reflected only the EC-found strengths of the MarketPlace proposal outlined in the EC Chairperson's memorandum to Contracting Officer, plus a reference to MarketPlace's superior financial offer:

MarketPlace Development, Inc. submitted the best overall proposal. It presented strong plans to improve merchandising mix, to leverage post-security locations by pairing them with premium pre-security locations, to increase the number of units, and provided the most advantageous financial offer in terms of its fee and increased Airports Authority revenues. In addition, MarketPlace Development, Inc. proposed significant local outreach to increase the number of local business owners represented at the Airports. Finally, MarketPlace Development, Inc. proposed several unique concepts to update the Retail Merchandising Units (carts) program at both Airports.

Protest Appeal Ex. G at 4 (Recommendation Memo to Business Committee) (emphases added).

Because the memorandum that the Business Committee received did not include the erroneous reference to "increase gross leasable area," the Business Committee was provided with an accurate account of the evaluation that had in fact had taken place. Because the Business Committee never received or reviewed the memorandum from the EC Chairperson to the Contracting Officer, it never had the opportunity to be confused or misled by that document. Therefore, because the only person who received that memorandum immediately recognized the erroneous inclusion of the reference to "increase gross leasable area" error, corrected the mistake and ensured that it was not repeated in the memorandum to the Business Committee, that committee's review of the EC evaluation and the recommendation from management could not have been, and was not, affected by that mistake.

³ Notably, the evaluation of the MarketPlace proposal by the EC Chairperson was not based on any misunderstanding that MarketPlace proposed to "increase gross leasable area" since the EC Chairperson's evaluation included no reference to "increase gross leasable area." The EC Chairperson's inclusion of this phrase in the memorandum to the Contracting Officer was simply an inadvertent mistake.

4. **Oral Testimony by the EC Chairperson to the Business Committee Properly Referenced MarketPlace's Hold Room Seating Option as a Unique and Positive Innovation in MarketPlace's Proposal**

After presenting the Business Committee with the written memorandum correctly summarizing the EC rationale for the award recommendation to MarketPlace, EC Chairperson met with the Business Committee to provide answers to questions. One particular exchange has become a major focus of the Westfield protest appeal:

Mr. Carter: Now, this entity operates at LaGuardia, it also operates in Philadelphia?

MS. VERRET: Yes.

Mr. Carter: What are some of the *unique concepts* that they presented? Part of what you just told me. Is there anything else?

MS. VERRET: You mean specific concepts that they presented? Without having their proposal in front of me, I really can't address the specifics, but one of the things that they implemented at LaGuardia that *they've proposed to implement here is utilizing some of the airline hold room spaces to sort of expand where people -- it sort of doesn't have that line anymore between where customers just sit and wait for their aircraft and where they purchase and consume the concessions*. So, therefore, one of the things that they have promoted is expanding that out, which gives us which increases the concessions utilization, as well as increase revenue. So that was one of the 'things.

Protest Appeal Ex. H at 7-8 (emphases added); *see also* Protest Appeal at 10-11.

Westfield has argued that this quote represents a confirmation that MarketPlace proposed to expand the "gross leasable area" of the concessions program. But that is not what the EC Chairperson said. Though perhaps not the most artfully worded statement, it is clear that EC Chairperson was referring to the portion of MarketPlace's proposal in which it presented the option to revise the hold room table and chair seating to encourage use of the concessions. As discussed above, this option has no bearing on "gross leasable area." Indeed, the EC Chairperson's statement makes no mention of "gross leasable area."

Because Westfield has not had the benefit of reviewing MarketPlace's proposal or the EC's evaluation of that proposal, its confusion on this point is understandable. But the fact remains that MarketPlace did not propose to expand the "gross leasable area" when it suggested changes to hold room seating layout, and thus the EC Chairperson's oral testimony has no connection whatsoever to the prior error in her memorandum to the Contracting Officer. Moreover, after the mistake she made in her memorandum to the Contracting Officer, the EC Chairperson was no doubt acutely aware of the important distinction between the hold room issue, which was permissible under the RFP, and the expansion of gross leasable area, which was not. The EC Chairperson's description of the MarketPlace hold room seating proposal to the

Business Committee was accurate,⁴ as was her identification that aspect of the Marketplace proposal in response to a question asking about the “unique concepts” proposed by MarketPlace. Accordingly, the Business Committee was not misled by the EC Chairperson’s testimony, nor was it induced by that testimony to approve a noncompliant bid.⁵

In sum, the “gross leasable area” allegation by hinges entirely on the erroneous quote in the EC Chairperson’s 2012 memorandum. Viewed through the prism of this error, Westfield mistakenly infers an incorrect meaning to the EC Chairperson’s oral testimony to the Business Committee, which is inconsistent with what was actually said. In turn, Westfield concludes that the EC Chairperson’s testimony proves that the Business Committee approved the selection of MarketPlace notwithstanding that it had submitted a noncompliant proposal. However, this chain of logic is inconsistent with the facts. The erroneous reference to the expansion of gross leasable space in the EC Chairperson’s memorandum was an isolated error occurring after proposal scoring, an error that was immediately caught by the Contracting Officer, and never presented to the Business Committee. Moreover, the EC Chairperson’s reference to the suggested changes to hold room seating layout related to an option in MarketPlace’s proposal entirely unrelated to leasable space. The error related to “gross leasable area” had no impact whatsoever on the evaluation and award process. Accordingly, Westfield’s numerous appeal arguments related to this issue are all denied.

B. Contrary to Westfield’s Allegation, the Evaluation of the Offerors’ ACDBE and LDBE Proposals Was Not Done on a Pass/Fail Basis

Westfield next alleges that the EC misevaluated the portions of offerors’ proposals relating to their Airport Concessions Disadvantaged Business Enterprises (“ACDBEs”) and Local Disadvantaged Business Enterprises (“LDBEs”) participation plans. Based entirely on statements allegedly made at the post-selection debriefing, Westfield contends that ACDBE and LDBE considerations were only looked at on a pass/fail basis in violation of the RFP, which required that they be reviewed on a qualitative basis. Protest Appeal at 18-20. However, a review of the evaluation record confirms that the offerors’ ACDBE and LDBE participation plans were qualitatively evaluated in accordance with the RFP.

⁴ The only misstatement is that, as noted above, MarketPlace implemented this concept at Philadelphia International Airport, not LaGuardia. Given that the EC Chairperson was responding to questioning on the fly without the benefit of having the proposal documents in front of her, this mistake was understandable. In any event, it was immaterial.

⁵ Regrettably, the protest appeal decision issued by MWAA CEO Jack Potter mistakenly states that Ms. Verret’s oral testimony related to gross leasable area: “Ms. Verret indicated, in response to a Board member’s question, that MarketPlace proposed to expand the leasable area by using airline holdroom spaces.” Potter 10/10/12 Protest Appeal Decision at 2. As explained above, the hold room space issue does not relate to the gross leasable area of the concessions program and Mr. Potter’s connection of those two concepts was in error.

1. Background on ACDBEs and LDBEs

The RFP defines the term “Airport Concessions Disadvantaged Business Enterprise” as follows:

Airport Concessions Disadvantaged Business Enterprise (ACDBE): This term refers to a Concession Operator that is a for-profit small business concern that has been certified by the Virginia Unified Certification Program as an airport concession disadvantaged business enterprise as defined in 49 CFR Part 23.

RFP at 1.

Within the “General Information” section of the RFP, the Authority provides the following summary of the requirements for ACDBEs:

ACDBE

The Contractor will be required to make good faith efforts to achieve an Airport Concessions Disadvantaged Business Enterprise (ACDBE) goal of thirty-five percent (35%) of the projected total gross receipts from the food service premises and twenty-five percent (25%) of the projected total gross receipts from the retail premises available for lease by the Contractor under the Management Contract. The Contractor will be responsible for ensuring that each ACDBE firm is certified prior to the execution of a lease by the Contractor with that firm. The Contractor shall be responsible for ensuring that the Airports Authority receives all information needed to determine whether a firm qualifies as an ACDBE. During the term of the Management Contract the Airports Authority reserves the right to revise ACDBE participation percentages to comply with U.S. Department of Transportation (DOT) requirements.

Id. at 10-11.

These ACDBE requirements are explained in greater detail in the “Proposal Contents Requirements” section of the RFP. *See, generally, id* at 27-29 (§V.M.3.f).

The RFP defines the term “Local Disadvantaged Business Enterprise” as follows:

Local Disadvantaged Business Enterprise (“LDBE”): For the purposes of this Proposal, this is a business concern which is organized for profit and located within a 100-mile radius of Washington, DC's zero mile marker, which has been certified by the Airports Authority as a Local Disadvantaged Business Enterprise.

Id. at 2.

Within the “General Information” section of the RFP, the Authority provides the following summary of the requirements for LDBEs:

LDBE

A LDBE participation requirement of 10% has been established for this Management Contract. The Airports Authority requires active LDBE participation in the management of the concession program, through subcontracts, joint ventures, partnerships, or other legal arrangement between the Contractor and firms that have been certified by the Airports Authority as LDBE. The Contractor shall demonstrate each year that at least 10% of its Management Fee is paid to LDBE firm(s) for its services under the Management Contract.

Id. at 9-10.

These LDBE requirements are expanded upon in greater detail in the “Proposal Contents Requirements” section of the RFP. *See, generally, id.* at 32-33 (RFP §V.M.4.c).

The RFP identifies two evaluation factors to be used in assessing the technical/non-price portion of offerors’ proposals – “Development and Implementation Plan” and “Property Management, Marketing, Advertising, and Promotion.” The definitional criterion for the “Development and Implementation Plan” evaluation factor states, in its entirety:

The evaluation of the development and implementation plan will be based on the quality, variety, innovative and leasing strategy of the Contractor’s concession program development plan, **including ACDBE participation plans**. The feasibility of the transition and implementation plan and its impact on the overall concession program will be evaluated. Finally, the validity and reasonableness of the Contractor’s sales and rental income projections and how they correlate to the proposed development plan will also be evaluated. Section V.M.3 of this RFP fully describes what will be evaluated for this criterion.

Id. at 35 (RFP § VII.A.2) (emphasis added).

The definitional criterion for the “Property Management, Marketing, Advertising, and Promotion” evaluation factor states in its entirety:

The evaluation of the property management, marketing, advertising, and promotion plan will be based on the thoroughness of the information described in Section V.M.4 of this RFP. Additionally, the Contractor’s plan for managing tenant relations, performance monitoring methods, concession operations monitoring, customer service initiatives and employee training, common area maintenance plan, **LDBE participation plans**, and reporting of tenant operating performance the Airports Authority

will be evaluated. Also evaluated will be the proposed marketing efforts as well as the proposed advertising and promotion plans for the concession program at the Airports.

Id. at 36 (RFP § VII.A.3) (emphasis added).

Under these two factors, it is clear that ACDBE and LDBE plans were to be qualitatively evaluated, like the other criteria set out in those factors. Therefore, a pass/fail evaluation of such plans would simply not comply with the stated evaluation factors in the RFP.

2. The EC Did Not Evaluate ACDBE and/or LDBE Plans on a Pass/Fail Basis

Proposal evaluations were performed using a pre-prepared scoring sheet. This scoring sheet included the above-quoted evaluation factors and relevant RFP requirements for each factor. Rather than score the entire factor at once, the score sheets broke down each of the factors into multiple subfactors, and invited the evaluators to provide strength and weakness comments on a subfactor-by-subfactor basis. After the last subfactor for each of the evaluation factors, the evaluators were instructed to assign an overall point score for the evaluation factor, considering the strengths and weaknesses assigned to the listed subfactors. The following instructions were provided on page 1 of each scoring sheet:

Directions to Evaluation Committee: For each of the following evaluation criteria, please read the evaluation criterion as well as the specific information relating to that criterion that was requested in the RFP. The text for each criterion as well as the information requested in the RFP, exactly as they appeared in the RFP are provided below. Please read each proposal carefully and evaluate the information provided against the appropriate evaluation criterion.

As you conduct your evaluation, please make detailed notes regarding the specific strengths and weaknesses of each Offeror's response that support your scoring. Please also note any missing information from the proposal along with any questions you may have on the appropriate pages of this evaluation form. Use additional pages if needed. Provide a numerical score for each criterion. This document includes adjectival descriptions for each score range for each criterion to assist with scoring.

E.g., Protest Appeal Ex. M at 1 (emphasis added).

Subfactor J under the "Development and Implementation Plan" factor on the evaluation scoring sheet was titled "ACDBEs." *E.g.*, *id.* at 17-18. The full set of requirements from RFP § V.M.3.f were reproduced under the Subfactor J heading, followed by blank fields to provide strengths, weaknesses, and other comments. Under Subfactor J on their respective scoring sheets, every single evaluator provided substantive strengths and/or weakness comments regarding the offerors' ACDBE plans submitted by both Westfield and MarketPlace.

Cumulatively, the evaluators assigned over 45 different strength and weakness comments regarding the ACDBE plans of Westfield and MarketPlace, thus making it abundantly clear that the evaluators did not merely look to see if the offerors proposed an ACDBE plan and then "checked a box" to indicate whether the plan passed or failed.

It is also readily apparent from the evaluation forms that the ACDBE plan subfactor, along with the other seven subfactors on the scoring sheets, combined to contribute to the bottom-line point score assigned to both offerors under the Development and Implementation Plan evaluation factor. Moreover, there is no indication that this one subfactor was somehow scored pass/fail while other subfactors contributed to the factor-level point scoring.

For LDBEs, the same pattern occurred. Subfactor C under the "Property Management, Marketing, Advertising, and Promotion" factor was titled "LDBEs." *See, e.g.,* Protest Appeal Ex. M at 31. The full set of requirements from RFP §V.M.4.c were reproduced under the Subfactor C heading, followed by blank fields to provide strengths, weaknesses, and other comments. Under Subfactor C on their respective scoring sheets, every single evaluator provided substantive strengths and/or weakness comments regarding the offerors LDBEs plans for both Westfield and MarketPlace. In total, another two dozen qualitative comments were provided by the evaluators regarding the offerors LDBE plans. It is clear that the evaluators did not merely evaluate the LDBE plans on a pass/fail or check-the-box basis. The quality of the offerors' LDBE plans was one of three subfactors that contributed to the scoring of the "Property Management, Marketing, Advertising, and Promotion" factor, as it should have been.

3. The Alleged Debriefing Statements Regarding the Evaluation of the ACDBE and LDBE Plans Have No Bearing on the Validity of the Proposal Evaluation Process

Based on the above evidence, combined with the lack of any evidence that the evaluators applied a pass/fail methodology to the evaluation of either ACDBE or LDBE plan, the Committee concludes that Westfield's ACDBE/LDBE allegation is meritless. In reaching that conclusion, the Committee has determined that, contrary to Westfield's argument, what was or was not said by Authority contracting staff during the Westfield post-award has no bearing on the analysis. It is possible Westfield misunderstood what was being communicated. It is also possible that the Contracting Officer and/or EC Chairperson accidentally provided an imprecise answer to Westfield's question. Ultimately, however, what was or might have been said in the debriefing is irrelevant to Westfield's ACDBE and LDBE allegation. It is well-established in procurement law that the post-award debriefing is not a part of the procurement, and is thus not subject to normal protest jurisdiction.

As the Government Accountability Office recently explained in denying a bid protest of federal contract award by the Department of the Navy, Military Sealift Command:

The evaluation record, not the agency's alleged statements during a debriefing, is the basis for our review. We are concerned with the manner in which the evaluation was conducted, notwithstanding the protester's understanding of the agency's subsequent explanation of how it conducted the evaluation. In this regard, a

debriefing is only an explanation of the agency's evaluation and source selection decision, not the evaluation or decision itself.

Keystone Sealift Services, Inc., B-401526.3, April 13, 2010, 2010 CPD ¶ 95; *see also Global Automotive, Inc.*, B-406828, Aug. 3, 2012, 2012 CPD ¶ 228 (“Debriefings are procedural matters that do not affect the validity of the award.”).⁶

Thus, an inadvertent debriefing misstatement does not serve to undermine the integrity of an otherwise proper and thorough previously-concluded evaluation process and selection decision that fully adhered to the RFP's guidelines. Given that the alleged debriefing statements constitute the entirety of Westfield's evidence to support its argument about the evaluation of ACDBE and LDBE plans, even if one were to presume that Westfield has properly characterized what was said, those comments do not negate an evaluation record which conclusively demonstrates that Westfield's and MarketPlace's ACDBE and LDBE plans were evaluated by the EC on a qualitative basis and included in the point-scoring of the EC's technical evaluation. Accordingly, Westfield's appeal on this ground of its protest is denied.

C. Westfield's Disagreements with the Subjective Findings of the Evaluation Committee Do Not Afford a Basis for Sustaining the Protest

While a procurement protest process allows an offeror to dispute the reasonableness of the evaluation decision, the process does not require the procuring entity to defend its discretionary evaluation scoring by providing further elaboration on the substance of the proposals. Nor does the process require the deciding authority such as this Committee to engage in a *post hoc* re-evaluation of those proposals.

Throughout its protest, but particularly at pages 24-27, Westfield objects to the way its own proposal was scored. Protest Appeal at 24-27. The basis for these objections is Westfield's belief that its proposal was excellent, as well as its view that the EC overstated the importance of the weaknesses that had been identified. *Id.* at 26-27 (“In light of the identified strengths, and the lack of any omissions, it begs the question that the Airports Authority is unable to answer: Why was Westfield's Development and Implementation Plan not scored higher?”). But the question is not Westfield's view of its proposal, but the view – *i.e.*, the evaluation – of the EC. That Westfield disagrees with the judgments and ultimate evaluation decisions made by the EC does not provide a basis for protest. In reaching this conclusion, the Committee is guided by the oft-repeated words of the GAO:

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

⁶ The Authority, at its discretion, often looks to the decisional law of the United States Government Accountability Office's Procurement Law Group (“GAO”) for non-binding guidance on general procurement principles, as well as how on its protest process.

criteria, and adequately documented. . . . A protester's mere disagreement with the agency's evaluation judgments, or with the agency's determination as to the relative merits of competing proposals, does not establish that the evaluation or the source selection decision was unreasonable.

General Dynamics Information Technology, Inc., B-407057, October 12, 2012, 2012 WL 4955422 (internal citations omitted).⁷

Thus, while Westfield appears determined to engage in a debate about the substantive merits of its proposal, and apparently hopes for this Committee to perform a *de novo* review of its proposal, the Committee views such a debate to be well beyond the scope of its review. Importantly, in making these arguments, Westfield has not identified a single portion of the RFP from which it claims the EC deviated during the evaluation of the Westfield proposal. Nor has Westfield cited any aspect of its proposal that the EC failed to consider before assigning an evaluation weakness. As such, its arguments amount to a "mere disagreement with the [Authority's] evaluation judgments" that cannot form the basis of a winning protest.⁸ Therefore, Westfield's appeal on this protest allegation is denied.

D. The Authority Had No Obligation to Conduct Discussions or an Oral Interview with Westfield

Westfield argues that the Authority unreasonably "failed to conduct interviews to resolve any outstanding questions it had" regarding the weaknesses assigned in the technical evaluation. Protest Appeal at 28. This argument has no merit because the decision to conduct, or not conduct, discussions is entirely discretionary. Moreover, Westfield was treated no differently than any other offeror; no offerors were invited for an oral interview.

Section § 2.4.1 of the Authority's Contracting Manual states that, in negotiated procurements such as this, "[a] contractor may be selected and award made with or without discussions, depending on the circumstances of the procurement" (Emphasis added.) This discretion is consistent with the rules applicable to any federal procurement:

⁷ As discussed above, to the extent Westfield claims that the explanation by Authority staff at the debriefing was inadequate, that is not a valid basis for protest either. See, e.g., *Healthcare Tech. Solutions Int'l*, B-299781, July 19, 2007, 2007 CPD ¶ 132 at 5 (GAO will not consider assertions regarding the adequacy and conduct of a debriefing, since that is a procedural matter that does not involve the validity of an award).

⁸ Westfield's various objections to the judgments and evaluations of its proposal reached by the EC are different than the allegations it has raised related to gross leasable area and the EC evaluation of ACDBEs and LDBEs discussed above. Those allegations, were they accurate, would show an objective failure by the Authority to comply with the stated terms of the RFP, which is not the case with these objections to the EC's discretionary evaluation decisions.

The contracting officer's discretion in deciding not to hold discussions is quite broad. There are no statutory or regulatory criteria specifying when an agency should or should not initiate discussions, and there is also no requirement that an agency document its decision not to initiate discussions. As a result, an agency's decision not to initiate discussion is a matter that we generally will not review.

L-3 Services, Inc., B-406292, April 2, 2012, 2012 CPD ¶ 170 (internal citations omitted).

Moreover, the RFP never stated that discussions or oral interviews would be conducted. Consistent with the Manual, it stated that "oral interviews or discussions" "may" be conducted at the discretion of the Authority. *See* RFP at 17 (§ V.G.5) ("The Airports Authority may also hold oral interviews or discussions with any Offeror or with any Offeror judged to be within a competitive range, concerning its Proposal.").

Westfield claims it may have been able to improve its score if it had been invited to an oral interview. That may be true, and it might be equally true for all other offerors. However, since each offeror received the same treatment when it came to an opportunity for an oral interview, Westfield has no basis to challenge the selection decision on the ground that it was not given that opportunity.

E. Westfield Has No Evidence to Support its Allegations of Bias on the Evaluation Committee

Westfield repeatedly argues that the Authority acted with bias and bad faith in this procurement, and that the EC Chairperson in particular was biased against it. *See, e.g.*, Protest Appeal at 30-34.⁹ Allegations of bias in a procurement are not to be taken lightly, but every protest forum places on protesters a high burden of proof to sustain such allegations.

For example, GAO decisional law states:

A protester's contention that contracting officials are motivated by bias or bad faith thus must be supported by convincing proof; we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition.

CE Support Services JV, B-406542.2, Sept. 28, 2012, 2012 CPD ¶ 265.

Similarly, the United State Court of Appeals for the Federal Circuit holds:

⁹ Westfield's allegation of a "conflict of interest" on the part of unnamed EC members and/or observers appears to be the functional equivalent of a bias argument, and is thus addressed in this section as well. *See* Protest Appeal at 34.

[W]hen a bidder alleges bad faith, in order to overcome the presumption of good faith on behalf of the [G]overnment, the proof must be almost irrefragable. Almost irrefragable proof amounts to clear and convincing evidence.

Galen Medical Assocs., Inc. v. United States, 369 F.3d 1324, 1330 (Fed. Cir. 2004).

Westfield has no hard evidence to support its claims of bias and bad faith. Instead, it relies on a pair of anecdotal innuendos and then argues that it is prevented from submitting real evidence because the Authority has not been forthcoming in providing information it wants. However, it is not the Authority's duty to make Westfield's "bias" case. As noted, the burden is on Westfield to support its allegations of bias and bad faith with evidence, not just conjecture, and it has not met this burden.¹⁰

Though no further treatment of this issue is required, it should be noted that, while Westfield believes the EC Chairperson, Ms. Verret, was predisposed against Westfield, her evaluations, when compared with those of the other four EC members, were actually the most comparatively favorable to Westfield. Every other evaluator believed the quality gap between the Westfield and MarketPlace's proposals was bigger, and all in MarketPlace's favor.

For these reasons, Westfield's appeal of its bias allegations is denied.

F. Westfield's Numerous Complaints about the Post-Award Actions and the Protest Process Generally Are Not Valid Bases of a Protest

The final area of the Westfield protest appeal presents assorted complaints that are focused on the Authority's conduct after the selection decision was made and announced. But complaints of this nature have no relevance to the earlier selection decision and, as such, have no place in a protest.

The purpose of the Authority's protest process, including appeals within the process, is to allow a disappointed offeror the opportunity to challenge the reasonableness of the proposal evaluation process and the selection decision. The protest process does not invite or allow protesting parties to present grievances arising from their interactions with the Authority after the selection decision. Thus, Westfield's complaints about the thoroughness of its debriefing, the

¹⁰ The Committee notes that Westfield's repeatedly suggests (*e.g.* Protest Appeal at 33) that its 2010 protest appeal to this Committee was sustained in part based on Westfield's allegations of bias. This suggestion is wholly inaccurate. As the recommendations of this Committee reflected, the 2010 protest was sustained because of insufficient documentation of the evaluation process, as well as a small number of specific evaluation concerns. At no time did this Committee state or imply that it believed that bias had tainted the initial evaluation. Had that been its belief, the Committee would have instructed that the biased individual(s) be removed from the evaluation effort. No such instruction was given. *See* Protest Appeal Ex. A at 4 (2010 Board Recommendations).

completeness of Authority memoranda, the sufficiency of document production, the degree of document retention, and the level of detail of prior denials of its protest will not be further considered. See Protest Appeal at 15-18, 22-24, 28-30, 34-35. None of these complaints bears on the validity of the decision to select MarketPlace for the fee manager contracts, and that is the only matter that is properly before the Committee in this protest appeal.

III. Conclusion

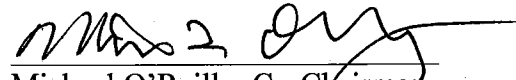
Westfield's protest appeal does not present a basis for the Committee to sustain its protest. Westfield's primary arguments – relating to the issues of “gross leasable area” and ACDBE/LDBE plans – lack factual merit. Its arguments about the findings and evaluation conclusions reached by the EC, about the lack of an oral interview, about the biased motives of the EC and the Authority, and about various acts and omissions of the Authority after the selection decision are either beyond the scope of a protest, lack the requisite evidence and proof, or simply cannot serve as the basis for a protest.

Overall, the Westfield protest appeal fails to demonstrate that the EC's subjective findings and evaluation conclusions, and the ultimate decision to select MarketPlace for award, were unreasonable or improper.

Accordingly, the protest appeal is denied on all counts.


Shirley Robinson Hall, Co-Chairman

11/19/12
DATE


Michael O'Reilly, Co-Chairman

11/19/12
DATE