

**May 20, 1993**

**P.S. Protest No. 93-02**

## **FEDERAL PROPERTIES OF R.I., INC.**

### **Advertisement for Space, Braintree, MA**

#### **DIGEST**

Protest is denied where protester failed to show that the evaluation of its proposal to lease space was arbitrary, unreasonable or in violation of procurement regulations; protester's other contentions dismissed for lack of subject matter jurisdiction.

#### **DECISION**

Federal Properties of R.I., Inc. ("Federal Properties") protests the award to Pearl Plaza Realty Trust ("Pearl") of a lease agreement for a new retail postal facility for the Braintree, MA, post office. Federal Properties, which currently leases to the Postal Service space on Washington Street for a facility that includes the retail function,<sup>1</sup> contends that the Postal Service improperly predetermined the site for the new Braintree facility, failed to follow its own regulations, and unfairly evaluated the protester's proposal to keep the facility at its present site.

The Facilities Service Center in Windsor, CT, issued Postal Service Form 7410, "Advertisement for Space," on December 11, 1991, and placed advertisements in local newspapers to solicit proposals for a site for a new Braintree retail facility using the "Store

<sup>1</sup> The Postal Service's lease with Federal Properties will expire December 31, 1994. The current facility combines a Detached Mails Unit (DMU) for the processing and distribution of mail and a retail facility. The DMU is to be moved to a different site pursuant to a separate solicitation under which award already has been made. The relocation of the DMU is not at issue in this protest.

of the Future" concept.<sup>2</sup> Initial proposals were due January 17, 1992.<sup>3</sup>

Form 7410 solicited offers for 6,000 square feet of net space "[i]n the business area of South Braintree" and asked offerors to specify an annual rental rate for a basic lease term of ten years and a minimum of two five-year renewal options. The advertisement stated that offerors "may offer either existing space [or] space to be modified," and that "[l]ocations must have excellent access, and ample customer parking." It went on to state at paragraph 7 that award would be made to:

that responsible offeror whose offer is most advantageous to the Postal Service, price and other factors considered. Important factors include, but are not limited to, location, good daylight and ventilation, accessibility for patrons, accessibility to mail loading areas for postal vehicles, service considerations, and overall operating costs.

Paragraph 7 reserved to the Postal Service "the right to negotiate with offerors for better terms, clarification of ambiguities, modification, or other changes; to secure offers on suitable properties in addition to those offered initially in response to this invitation; and/or to reject any and all offers." Finally, paragraph 7 stated:

This is not a sealed bid advertisement and offers will not be publicly opened. Information as to the number of offers received, the identity of offerors or the properties offered will not be made available to anyone whose official postal

<sup>2</sup> The "Store of the Future" approach contemplates a postal facility in which *inter alia*, postal products (stamps, postal stationery, etc.) are placed on display for customers, who select the products and take them to a counter for purchase.

<sup>3</sup> Procurement Manual (PM) Chapter 11 governs the acquisition of real property and lease interests in real property. Postal contracting officials also follow Handbook RE-1, Realty Acquisition and Management (RE-1), and Handbook 191, Investment Policies and Procedures (Handbook 191), which provides guidance on capital investments.

PM 11.4.1 b. states:

Only some of the statutory policies that govern Postal Service procurement in general apply to the leasing of facilities, while several additional statutory and internal policies are applicable. Consequently, many of the procedures required for other purchases do not apply to leases of facilities.

PM 11.4.1 d. states:

Awards made as a result of solicitations for space must be made to the responsible offeror whose proposal is most advantageous to the Postal Service, cost and other evaluation factors set out in the solicitation considered.

RE-1 363.2 lists "factors to consider" in evaluating proposals responding to solicitations for space, including the cost of improvements for existing space and costs of new construction projects; site size and expansion capabilities; and accessibility for customers, traffic patterns and congestion.

duties do not require such knowledge.

Three proposals were received. During the ensuing year, discussions and negotiations were held with town officials and offerors, and clearances were obtained from federal and state environmental agencies. Award was made to Pearl effective January 8, 1993. Under the terms of the lease the Postal Service is to pay Pearl \$375,000.00 for Pearl's completion of specified improvements on its site at the Pearl Street Plaza shopping center and \$121,315.00 per year in rentals for the initial ten year term.

Federal Properties' main contention is that the Postal Service's failure to follow pertinent policies and procedures led to the improper conclusion that a new facility was necessary and to the subsequent unfair evaluation of the protester's proposal. The protester also complains that it was not solicited for a proposal, finding out about the advertisement "by accident." Nevertheless, the protester says that it submitted a proposal which conformed to the requirements of the advertisement. The protester claims that the Postal Service showed no interest in discussing its proposal despite its stated willingness to modify its offer, and that the Postal Service failed to provide information so that it could improve its offer. According to the protester, these failures to hold discussions were contrary to regulations and made it "impossible for the USPS to determine fairly and properly whether our proposal was better suited or . . . a better facility at a lower price because we lacked the benefit of what space arrangement and facilities that would best serve its interest." Further, the protester claims that postal officials improperly predetermined the new site by holding discussions with Pearl before the advertisement for space was published.

The protester asserts that it negotiated its current lease price with the "understanding" that the Postal Service would not expand or move, "offsetting our leasehold." To the extent that objections to its proposal arise from the fact that the current facility provides only a single driveway and limited parking, Federal Properties contends that those facilities were provided as the Postal Service originally required, and that it should not be penalized for providing "what the USPS requested."<sup>4</sup>

<sup>4</sup> The contracting officer denies that the Postal Service has "offset" the protester's leasehold interest, noting that the lease will remain in effect until December 31, 1994, when it will expire by its own terms. The contracting officer states that the lease does not obligate the Postal Service to renew the lease after December 31, 1994, and does not prohibit the Postal Service from developing future relocation plans. Also, he states that the Postal Service has no obligation to give an incumbent lessor "special treatment" when soliciting offers for a replacement facility.

Insofar as the protester is alleging "tortious interference" by the Postal Service with the terms of its current lease, we lack jurisdiction to consider the claim. See the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* Likewise, we cannot decide the merits of the protester's claims that its leasehold interests were undermined or "offset" by postal officials' actions. Such allegations involving contractual disputes are beyond the jurisdiction of this office. See *generally*, *Stamp Venturers, Inc.*, P.S. Protest No. 93-06, April 22, 1993; *COR, Inc.*, P.S. Protest No. 90-16, June 22, 1990; *M.L. Halle Oil Service Inc.*, P.S. Protest No. 85-76, November 26, 1985 (contractor must look to Contracts Disputes Act for remedy for breach of contract).

The protest against the decision to issue a solicitation in order to relocate also is not within our jurisdiction. See *Canteen Corporation*, P.S. Protest No. 92-37, October 20, 1992; *COR, Inc.*, *supra* (decision to issue a solicitation rather than to contract with the incumbent not reviewable under the

Federal Properties maintains that there is no justification for the Postal Service to give up the advantages of the present facility in favor of Pearl's site. According to the protester, those advantages include more than 6,000 square feet of space at a location which is well-known in and accessible to the community.

The protester complains that parties "with interest in promoting the Pearl Street location" have justified the move to Pearl Street by stressing traffic problems at the present facility, while the Postal Service has not considered alterations offered or promoted by the protester.<sup>5</sup>

The protester claims that access and parking conditions will be worse at the Pearl Street location than at its site because gaining access to Pearl's site and parking there will be more difficult.<sup>6</sup> If the Postal Service desired a shopping center location, the protester suggests that the South Shore Shopping Center would have been a better choice than Pearl's site.<sup>7</sup>

Federal Properties contends that the reports and recommendations that led to the Postal Service's decision were "contrived to suit the special interest" of the Pearl Street developer. It notes that in the course of negotiations, an effort was undertaken to exchange surplus postal property adjacent to Pearl's site as part of the lease consideration, evidence which it cites as support for its allegation that the move to Pearl Street was "obviously predeter-

protest process). In addition, such a contention is a protest against the terms of a solicitation, which must be made before the date for submission of proposals. See *Dataware Systems Lease, Inc.*, P.S. Protest No. 91-41, October 10, 1991; *Listo International Corporation*, P.S. Protest No. 90-47, September 11, 1990. See Procurement Manual (PM) 4.5.4 b.

To the extent the protester alleges that it is being "penalized" for meeting its obligations under its lease with the Postal Service, whatever action Federal Properties took to conform with its current leasehold obligations is irrelevant to this protest. *Canteen Corporation, supra*; *COR, Inc., supra*.

<sup>5</sup> The contracting officer's file contains a letter from a state representative from Braintree who states, "[m]ost everyone in town would agree that the present site is [not] an adequate one and that a change in location would be for the betterment of the Town of Braintree." The file also contains a local newspaper story which quotes a city official as saying that "the current post office [is] an accident waiting to happen." In addition, an August 28, 1992, postal memorandum referred to data compiled by the Braintree Police Department as indicating that "the frequency with which accidents occur at this location is extraordinarily high."

<sup>6</sup> The protester believes that the traffic problems will be worse at Pearl's site because the "maneuvering area and parking space available for Postal Service personnel and vehicles at Pearl Street is actually less than at the existing facility. The area for ingress/egress at Pearl is limited to one point. . . , unlike the existing site where a second means of ingress/egress was offered. Both Washington Street and Pearl Street are two lane, two-way local through streets. Traffic volume on the two streets is comparable; sight lines for Pearl are shorter than those at Washington Street; and speed of traffic is generally higher on Pearl Street."

<sup>7</sup> There is no indication in the record that the owners or developers of the South Shore Shopping Center submitted a proposal or otherwise showed interest in the solicitation for space.

mined." The protester contends that the Postal Service will incur unnecessary costs in moving, and that the weight of all factors of convenience, traffic, and safety "rests strongly on the side of the existing facility."

The contracting officer has replied to the issues set out in the protest.<sup>8</sup> He refers to Procurement Manual (PM) sections which recognize "that leasing is a specialized procurement and not all PM requirements apply," see footnote 3, *supra*, and states that the applicable regulations allow the Postal Service to acquire leasehold interests by direct negotiation. As a result, the Postal Service properly could negotiate with the Pearl Street owner prior to the issuance of the advertisement for space. The contracting officer states that the Postal Service subsequently issued the public solicitation to "promote competition," in order to obtain the best possible value.<sup>9</sup>

The contracting officer asserts that the Pearl Street location was never "predetermined," rather, the Pearl Street site initially was identified as suitable for the new project since the Postal Service was familiar with it because it owns property excess to its needs abutting Pearl's land.<sup>10</sup>

Further, the contracting officer asserts that his evaluation of the proposals was made in accordance with the PM and the RE-1. The contracting officer disputes the protester's

<sup>8</sup> The contracting officer's response to the allegations that Postal Service procedures were not followed in this case indicates that the contracting officer believes that the protester confused the closing, or discontinuance, of a postal facility with the relocation of that facility. He states that the Postal Service followed a different set of procedures for the relocation of the Braintree Retail Annex and the DMU than it would have for the closing of a facility. While we agree with the contracting officer that post office closing procedures are not applicable here, we do not understand the protester to contend that they are.

<sup>9</sup> PM 11.4.1 c. states, in part:

Competition must be obtained whenever practicable. However, flexibility in procedures is necessary, since the needs of customers often dictate the location of postal facilities. . . . When a solicitation is issued, the contracting officer may (1) negotiate with any or all offerors as to rental rates or other terms and conditions of proposals; (2) obtain proposals in addition to those offered initially in response to solicitations, without waiving the right to accept any proposal as submitted; or (3) reject any or all proposals. The contracting officer must maintain in the file a detailed record of all negotiations and additional proposals, as well as a justification for all decisions made. . . .

PM 11.4.2 a. states that a contracting officer will normally publicize Postal Service requirements for new leases of space by placing ads in publications in the geographical area in which the space is required or posting ads in public spaces such as post offices. It also states: "The contracting officer may also publicize requirements for leased space by contacting local business and real estate organizations."

<sup>10</sup> According to the contracting officer, discussions were held with Pearl Plaza Realty Trust about exchanging the surplus property for concessions in the cost of improvements at the new site because the surplus postal property was thought to have limited marketability because it is almost landlocked. Subsequently, however, the idea of an exchange was abandoned because an appraisal indicated that the Postal Service's parcel had a greater value than the estimated value of the improvements that Pearl offered to provide in exchange.

allegation that its facility is more suitable for the Postal Service than the awardee's and emphasizes that traffic congestion and parking problems were "foremost among the reasons for relocating this facility."<sup>11</sup>

The contracting officer emphasizes that the protester's arguments are "speculative or matters of opinion," and states that neither he nor the postal analysts share the protester's opinion that its space "meets or exceeds the requirements of the solicited new space." The contracting officer states that "the protester has been unable to formulate an acceptable traffic safety improvement plan" and asserts that "[t]he argument that the protester is somehow penalized if the Postal Service does not continue to lease from the protester *ad infinitum*, despite the changing needs of the Postal Service[] and its customers. . . should be dismissed."

In response to the contracting officer's statement, the protester reiterates its various concerns. The protester claims that decisions were made to relocate the Braintree facility to Pearl's site long before the solicitation was issued, that the Postal Service conducted meaningful discussions only with Pearl, and that the contracting officer's conclusions were based on faulty analyses of the cost to bring the existing facility up to code requirements and to convert the existing space to a Store of the Future. Federal Properties alleges that postal personnel generally did superficial work that precluded accurate financial conclusions. The protester states that the Postal Service rejected one access/traffic improvement scheme it offered because of an erroneous belief that the protester did not own an abutting parcel of land necessary to the scheme. The protester asserts that because the exchange of surplus property fell through, the Postal Service ended up paying Pearl significantly more than would have been required to improve the existing facility.<sup>12</sup>

<sup>11</sup> The protest file contains a narrative report by the contracting officer's representative. The report stated in part:

The existing office was ruled out primarily due to the traffic safety issues pertaining to ingress/egress and site circulation. The lessor of this facility was willing to offer alternatives to mitigate some of these safety concerns. However, when analyzed it appeared that these mitigating efforts would prove too cost prohibitive.

<sup>12</sup> The protester's letters of January 15 and April 6, 1992, appear to contain its proposals. In the January 15 letter, Federal Properties offered its existing Washington street facility and an adjacent parcel to provide additional parking and an entrance and exit on Academy Street. The initial annual rental for the facility was proposed to be \$105,480.00 for the first three years of the ten year lease, "with each year thereafter escalating at six (6%) percent," plus an additional \$28,000 rent per year for the Academy Street parcel. A site plan dated January 16 also showed a "possible access road" to Brow Avenue at the rear of the facility, traversing "vacant land to be acquired."

The April 6 letter proposed an annual rental of \$75,000.00 "to lease 6,000 square feet of the existing Post Office on Washington Street" and went on to propose traffic alleviating ideas involving the abutting parcel on Academy Street; however, the letter stated, "The proposed [\$75,000.00 rent] does not include the cost of renovations or improvements that may be required by the Postal Service nor does it include provisions for the additional parking and roadway. . . ." A site plan dated April 5 showed no rear access to Brow Street.

In a memorandum dated April 13, the contracting officer's representative wrote that she understood that

the initial offer "may only work if the [Academy Street] parcel is used to provide additional parking and secondary access to Academy Street due to the traffic safety concerns . . . . The total rental under this scenario is considerably higher than the proposal submitted on the preferred site location in Pearl Plaza."

The memorandum of the contracting officer's representative stated that the April 6 letter was the result of her request that Federal Properties "resubmit a 'best and final offer'," and indicated that after receiving it, the representative spoke with the protester "so that I had an understanding of what this proposal submitted in attached letter dated 4/6/92 includes." That understanding, as stated in the memorandum, was that the \$75,000 rental would apply to an initial five year term, with a five year option at \$100,000/year.

The senior postal financial analyst assigned to this project, who was also the secretary of the Financial Investment Committee, kept a memorandum of the minutes of an April 10, 1992, meeting of the committee, which stated:

Because over a 50% rehab would be required on the present office to build a 'Store of the Future' it was estimated that construction costs would equate to \$137 ~~sq~~<sup>sq</sup>, \$138 elsewhere] per s.f. as just experienced at Harvard Square [a recently renovated Store of the Future]. The total construction cost of \$886,913 could not be offset by the decreased rent of \$75,000 if we retained our presence at the current office. Based on the estimated costs given it was more economical to move the retail unit to alternate quarters on Pearl Street. *This analysis did not consider additional costs which would be experienced to alleviate the access/egress problems at the present office and it was still not economically feasible.* The additional costs required to bring the old office up to code made the possibility too expensive. [Emphasis added.]

In a memorandum dated April 22, 1992, the senior analyst wrote:

Our financial review indicates that it would be most cost efficient to move the retail unit into alternate quarters based on the estimates we have received. To remain in the present facility and convert it to a 'Store of the Future' would cost \$2,506,968 over a 10 year period. To move the retail unit will cost us \$2,212,155 over the same period. Discounted @ 9.5% would yield a \$437,144 savings through moving the retail unit over a 10 year period. At any interest rate it would be more advantageous to move. . . .

The lower rent of staying at the present facility does not offset the \$886,913 in construction that would be necessary at the Washington St. site. The additional construction costs are due to the related construction expenditures required to bring the building up to code because over a 50% renovation would be taking place.

The latter analysis did not include projected costs for proposed traffic improvement schemes at the protester's site. The contracting officer's representative's April 13, 1992, memorandum stated: "When I discussed the feasibility of demising the interior to allow access to both the loading dock and front entrance, [the protester did] not foresee a problem. . . . [The protester] did state that the renovations including demising, parking, and roadway would be at postal expense." She went on to request that the facilities engineer comment on the feasibility of solving the traffic problems at the protester's site; the engineer indicated that he thought that to attempt it would be more costly to the Postal Service than relocating to Pearl's site.

According to the protester, the \$138.00/sq. ft. estimate to convert its site to a Store of the Future is excessive. In contrast, the contracting officer states that Federal Properties' \$70.00/sq. ft. figure is

Federal Properties claims that the Postal Service failed in its duty to take the protester's proposal seriously and exhibited bad faith by not conducting meaningful discussions with the protester; by eliminating the protester's proposal while refusing to consider its suggestions for improving the existing facility; and by not conducting a fair comparison of the traffic problems at the existing facility and at Pearl's site.

The protester also stresses that Handbook 191 procedures were not followed, stating, as an example, that once the exchange of surplus property idea was dropped the contracting officials should have "produced an Amendment to the [internal Decision Analysis Report] which, in turn, would have required revalidation. These important, prudent review steps were ignored." Finally, the protester reasserts that it provided the most cost-advantageous offer and asks that the award to Pearl be set aside.

In rebuttal, the contracting officer reiterates that location was the "primary determinant" for Pearl's selection and award. He states: "In the judgement of responsible [p]ostal officials, the traffic safety concerns at the present facility are most appropriately resolved by relocation."

In surrebuttal, the protester complains that the contracting officer did not address in his rebuttal the specific points raised in its protest and response to the contracting officer's statement. The protester stresses that the contracting officials acted in an arbitrary and capricious manner by not providing all offerors with the same information about the advertisement for space, the cancellation of the exchange of property, and the Store of the Future concept; ignoring the protester's efforts to accommodate the Postal Service and then stating that it failed to accommodate; blaming it for traffic problems when they were in fact caused by the Postal Service itself; ignoring its proposals to ameliorate the traffic problems;<sup>13</sup> neglecting to consider that the removal of the DMU facility from the protester's site would solve the traffic/parking problems;<sup>14</sup> awarding the new contract to Pearl even

"inaccurately low. . .as it ignores the fact that about one quarter of the facility is mezzanine and basement space, and it ignores costs for design and other associated work." (Quote is from a February 25, 1993, letter from the contracting officer to the protester in response to a Freedom of Information Act request.)

<sup>13</sup> The record shows that the Postal Service considered the protester's letter of April 6 about the traffic problems. A memorandum of the minutes of an April 10, 1992, meeting of the Funds Investment Committee, which was written at a later date and included information about subsequent events, indicates that the Postal Service also considered a plan to renovate Federal Properties' site which the protester submitted April 17--and that the committee postponed a previously scheduled meeting in order to do so.

<sup>14</sup> Although the Decision Analysis Report for the Retail/Financial Branch does state that with the departure of the DMU from the protester's site, there would be more room to operate at the protester's site than the Postal Service needs, the departure of the DMU was not thought to solve the access/parking problems for customers. The report's next paragraph states: "Many customer complaints/comments about parking and a very dangerous access situation [have] shown that relocation of the retail operations would be a significant improvement in conditions and service convenience." Postal analysts thus concluded that the relocation of the DMU would meet the Postal Service's operational needs but would not have an ameliorating effect on the Braintree retail customers' complaints about access, parking and safety.

though traffic problems at that site will be worse; not stating in the solicitation for space that a shopping center was desired; and by opting for a shopping center even though not all Stores of the Future are so located. The protester repeats its assertions that award to Pearl was predetermined, that postal officials were biased against its proposal and that renovation of its facility would be more economical than proceeding with the award to Pearl.

A protest conference was held March 26. The protester's representatives reemphasized their main contentions that Handbook 191 instructions were not followed due to a "preconceived" plan to relocate the facility to Pearl's site, which led to an arbitrary and capricious evaluation of its proposal. Federal Properties claims that the idea to renovate the current facility was eliminated as not cost-effective before the evaluators considered its proposal. The protester stresses that despite its efforts to cooperate with the Postal Service, Federal Properties was not furnished the same information about the Store of the Future concept as was Pearl; consequently, the protester asserts that the Postal Service capriciously prevented Federal Properties from submitting a technically acceptable proposal. The protester claims that bad faith pervaded the entire solicitation process in that the evaluators acted on false conclusions based on erroneous information (especially with respect to the traffic problems) to eliminate Federal Properties without giving it an opportunity to discuss its proposal. The protester's representatives concluded their presentation by stating that the Postal Service must have a "reasonable basis" for relocating the retail facility that is validated with supporting data in accordance with the instructions in Handbook 191.

The protester submitted post-conference comments which summarize its protest by characterizing the contracting officials' actions as "superficial and blatantly improper analysis to justify a predetermined end." The protester asks, in order to maintain the integrity of the process, that we find that the contracting officials acted in an arbitrary and capricious manner in violation of the PM and Handbook 191.

Following the protest conference, we asked the contracting officer to address further some of the protester's concerns having to do with aspects of the exchange of land, the consideration of Federal Properties' proposed parking solutions, and whether the advertisement for space had been posted in the lessor's facility. The contracting officer's responses on the first two issues have been incorporated in the discussion. As to the last issue, the contracting officer advises that to the best of his knowledge, the advertisement for space was posted in the current facility.

After receiving a copy of the contracting officer's response to our questions, the protester submitted additional comments, claiming that it was improper for the Postal Service to approach Pearl initially because of a possible surplus property exchange, then later to continue to negotiate only with Pearl after the exchange of surplus property was abandoned. The protester claims that information about the exchange of surplus property should have been given to the other offerors, and that once the idea was abandoned it was arbitrary and capricious for the contracting officer to negotiate a cash deal only with Pearl when other offerors also could have offered a suitable cash deal. The protester also alleges that once the exchange of surplus property fell through, Handbook 191 procedures required that an amendment to the Decision Analysis Report be issued and proper authorizations to continue obtained. Federal Properties alleges that postal personnel who

lacked the requisite authority made the approvals.<sup>15</sup> The protester states that such actions taken without authority "become arbitrary and capricious" and in this case "overcame the integrity of the competitive process."

Concerning its ownership of land abutting its facility, the protester states that the Postal Service should have asked it about the adjacent parcels<sup>16</sup> and reiterates its claim that the Postal Service never took its proposal seriously because it had decided against the protester before the proposal was submitted. The protester also complains that despite several requests, it was never given a copy of the solicitation for space.

<sup>15</sup> Federal Properties complains that a facilities engineer rather than a financial analyst made what it termed the erroneous conclusion that the \$375,000.00 payment for improvements instead of the land exchange did not "significantly change the recommended 10 year cash flow." The record shows that the quote about which the protester complains was contained in a cover memorandum (addressed to a real estate specialist in Windsor) to which an amendment to the Decision Analysis Report written by the contracting officer's representative was attached. The engineer actually stated: "[The contracting officer's representative] has the original April [Decision Analysis Report] and the changes reflected in this addendum do not negate that package[']s justifications nor does it significantly change the recommended 10 year cash flow," a reference to the attached addendum as well as the original Decision Analysis Report.

<sup>16</sup> The contracting officer asserts that the protester confuses the issue of the land abutting its Washington Street site by implying that land abutting only one side of the current post office was at issue and only one traffic improvement scheme was considered.

As discussed at footnote 12, *supra*, the protester submitted two proposals, the first of which included a possible access to Brow Avenue, and the second which did not. The financial analyst wrote about both schemes in his April 22, 1992, memorandum of which the protester complains, noting as to one approach: "One of the major purposes to relocating from the existing Washington Street site was to provide a safe and adequate access/egress for the customer. . . . Primarily, the Lessor does not have control of a certain parcel required to implement one [traffic control] scheme. The control of this parcel would most definitely be contingent upon our agreement to a new negotiated lease and at a cost most certainly passed to the Postal Service."

The traffic improvement scheme of which the financial analyst wrote in the quoted passage was the first one proposed, which depended on access to Brow Avenue across a parcel of which the Postal Service had no knowledge of ownership. The contracting officer asserts that if the protester is now claiming to own land abutting Brow Avenue, that ownership "was not made clear to the Postal Service" during the solicitation process.

Since the Postal Service knew about the protester's control of the Academy Street parcel, it appears correct that the analyst was referring to the Brow Avenue land. The plan which the protester attached to its January 15, 1992, proposal does not indicate that the protester owns land abutting Brow Avenue, describing the parcel as "Vacant Land to Be Acquired," and the protester's subsequent proposal of April 6 referred only to the Academy Street parcels with regard to the traffic problems.

In the absence of evidence to the contrary, which Federal Properties has failed to provide, the record fails to establish that the contracting officer acted unreasonably in concluding that Federal Properties did not control the Brow Avenue site.

## DISCUSSION

In claiming that its proposal should have been selected over Pearl's, the protester is contending that its proposal was improperly evaluated. The contracting officer rejected Federal Properties' proposal because its site was unsatisfactory and could not economically be renovated to accommodate the Postal Service's current needs. That is the equivalent of stating that for the purpose of the Postal Service's current needs, the protester's proposal was technically unacceptable.

"This office will not substitute its judgment for that of the contracting officer or disturb his evaluation of an offer's technical acceptability unless it is shown to be arbitrary or in violation of procurement regulations." *Doninger Metal Products Corporation*, P.S. Protest No. 90-50, October 10, 1990; *Lista International Corporation*, *supra*. The purpose of our review of a determination of technical unacceptability is only to ensure that it has a reasonable basis. *Doninger Metal Products*, *supra*; *TLT Construction Corp., Inc.*, P.S. Protest No. 89-75, January 18, 1990; *Cohlmlia Airline, Inc.*, P.S. Protest No. 87-41, October 30, 1987; *accord B&D Supply Company of Arizona, Inc.*, Comp. Gen. Dec. B-210023, 83-2 CPD 50, July 1, 1983. Further, "[t]he choice as to what is in the best interest of the Postal Service is a business decision within the discretion of the contracting officer and will not be overturned unless the contracting officer has clearly abused his discretion." *Georgia Power Company*, P.S. Protest No. 90-01, February 14, 1990. The record in this case does not support the protester's allegations either of arbitrariness or of abuse of discretion.

The selection and weighting of evaluation criteria are duties falling within the contracting officer's discretion. *Service America Corporation*, P.S. Protest No. 91-56, October 30, 1991; *Frederick Manufacturing Company*, P.S. Protest No. 87-13, April 8, 1987. Once the criteria are selected, they must be applied as stated in the solicitation. *Id.* In doing so, "[t]he contracting officer has discretion in reviewing the cost proposals of offerors and determining which proposal is evaluated as the lowest cost." See *Rickenbacker Port Authority and The Turner Corporation*, P.S. Protest No. 91-78, February 10, 1992 ("*Rickenbacker*"). Here, postal analysts concluded that it would not be cost-effective to convert the protester's facility to a Store of the Future.<sup>17</sup> Most of the financial conclusions were reached without taking into account the cost of traffic-improvement schemes. See Footnote 12, *supra*. When access and parking were mentioned, the analysts concluded that even if a feasible way to remedy the situation were found at the protester's site, the cost would be prohibitive. See footnotes 11 and 12.<sup>18</sup> While the record shows that the

<sup>17</sup> The record shows that the analysts believed that attempting to upgrade the current facility to a Store of the Future would not be cost-effective for reasons including the cost of renovating the facility to meet current building codes and federal environmental and energy conservation standards and to maintain space in excess of the Postal Service's needs once the new DMU operated to capacity. The analysts consistently stressed the Postal Service's need to modernize its Braintree retail facility, to find "an immediate opportunity to upgrade its retail services and programs in the Braintree community" and to "provide a much safer access for Postal customers and employees . . . ." (Quotes from the Decision Analysis Report Addendum.)

<sup>18</sup> The protester's best and final offer stated that any traffic improvement costs would be incurred by the

protester disagrees with the contracting officer and postal analysts over the relative costs of its proposal and Pearl's, the protester has not met its burden of proving that the cost analyses were incorrect or flawed. *Rickenbacker, supra*. Our review of this record indicates that the contracting officer acted within the scope of his discretion in his evaluation of the cost proposals, *Id.*, and we have no basis to overrule his judgment that Pearl's proposal met the evaluation criteria at a more cost-effective price. *Georgia Power, supra*.<sup>19</sup>

Federal Properties also claims that the Postal Service exhibited bad faith by not negotiating with it on an equal basis with Pearl. The record and the applicable regulations do not support this contention.

PM 11.4.2 a. authorized the contracting officer to contact Pearl, and it does not state that such contact must be initiated after a solicitation for space is publicized. The RE-1 also advises that the "search for properties is not limited to responses to the solicitation," and that after the solicitation period closes, the contracting officer should "canvass the preferred area to ensure the best available property has been identified, regardless of whether it is offered in response to the solicitation." RE-1 356. The goal was to solicit advantageous offers, and the PM and RE-1 indicate that there are many ways to do so (see footnote 9). The solicitation reserved the right of the Postal Service to negotiate with offerors for "better terms"--for example, to negotiate the cash price with Pearl instead of the exchange of surplus property, which the record shows was determined to be less advantageous for the Postal Service.

Moreover, no regulation required the contracting officer to negotiate with all potential offerors; rather, he was free to "negotiate with any or all offerors" or "reject any and all offers" (quoting PM 11.4.1 c., footnote 9, and the advertisement for space). The protester has complained that it did not receive equal information about the advertisement for space, the cancellation of the land exchange, and about the concept of the Store of the Future. The protester relies on RE-1 358, which states, "Use tact and good judgment to ensure equal treatment to all offerors and give no advantage to one offeror over another." Federal Properties also quotes PM 4.1.2 k.2.(b) for the general principle that any information about a solicitation must be furnished to all offerors as an amendment to the solicitation. The protester believes that the cancellation of the land exchange should have been the subject of an amendment.

However, the above RE-1 and PM sections apply to those offerors who are within the

Postal Service, in addition to rent. See footnote 12.

<sup>19</sup> Moreover, as RE-1 363.1 states: "Although location and the lowest total cost to the Postal Service are ordinarily important evaluation factors, select the proposal which is to the Postal Service's best overall advantage, considering all factors included [in 363.2]." See footnote 3. As previously discussed, the internal memoranda on this protest record indicate that in addition to cost-related concerns, the Postal Service's specific goals throughout this procurement were to obtain a centrally-located site that would ameliorate the customer access and traffic safety problems experienced at the protester's site while taking into account the current and future needs of customers.

competitive range. RE-1 363.7 states:

An award may be made without the contracting officer conducting discussions or negotiations if a reasonable and otherwise acceptable proposal is received initially in response to the solicitation. When no acceptable proposal is received initially, or when discussions might be advantageous, conduct discussions with each responsible offeror whose proposal, as evaluated[,] is within a competitive range . . . .

Further, PM 4.1.2 i.3.(c) states: "If the competitive range has been established, and the amendment would have no effect on the basis for establishing the competitive range, only those offerors within the competitive range must be sent the amendment."

The postal analysts consistently expressed serious doubts that a satisfactory solution to the customer access and parking problems could be reached at the protester's site, and the contracting officer's representative wrote that the protester's facility was ruled out primarily because of those problems. See footnote 11. The analysts' conclusion that renovating the facility and attempting to remedy its traffic safety problems would be cost-prohibitive led the contracting officer to the decision that Federal Properties' proposal was outside of the competitive range and technically unacceptable. Therefore, the discussions with Pearl were not improper, and any lack thereof with the protester also was not improper.<sup>20</sup>

The protester has made numerous requests to the contracting officer for information pursuant to the Freedom of Information Act. The protester also has repeatedly asserted that it did not receive sufficient information in response to its requests and that the documents which it did receive were replete with factual errors and erroneous assumptions. Requests for information are properly directed to the records custodian, in this case, the contracting officer or the manager of the Facilities Service Office. This office does not resolve conflicts between contracting officials and protesters about the release of information. *Service America Corporation, supra; Dataware Systems Lease, Inc., P.S. Protest No. 91-41, October 10, 1991.* Moreover, unlike a court, our protest forum does not provide a mechanism for formal discovery or other adversarial methods of resolving factual disputes. See *International Business Machines Corporation, On Reconsideration, P.S. Protest No. 90-66, February 22, 1991; Cohlma Airline, Inc., supra.* It is well settled that "[i]n resolving factual conflicts between the protester and the contracting officer, the statements of the contracting officer are given a 'presumption of correctness' which the protester bears the burden of overcoming." *T&S Products, P.S. Protest No. 90-06, March 9, 1990, quoting Fairfield Stamping Corporation, P.S. Protest No. 88-04, June 3, 1988.*

The protester complains that it could have brought its proposal to technical acceptability had the Postal Service not arbitrarily withheld information from it, specifically, about the

<sup>20</sup> Contrary to the protester's assertions, it is clear that the Postal Service undertook to consider the protester's proposal fully despite concerns about the feasibility of its proposed approach, requesting that Federal Properties clarify and resubmit its "best and final" offer. Such discussions are not required to be conducted with an offeror whose offer is technically unacceptable, and thus, perforce, outside the competitive range. We do not believe, however, that the fact that those discussions occurred is inconsistent with the determination that the protester's offer was, in fact, unacceptable.

Store of the Future concept. As discussed above, the protester's proposal was downrated primarily because of its location and traffic/access problems. On this record there is no reason to conclude that if the Postal Service had discussed the Store of the Future idea with Federal Properties, the protester could have adapted its proposal to overcome its location and traffic problems. Even though the Postal Service was under no obligation to negotiate with the protester, the record shows that it did, nevertheless, consider the idea of improving the existing facility. As discussed in footnotes 11, 12, and 16, the Postal Service based its conclusions about the protester's traffic improvement schemes on submissions provided by the protester, which had the burden of submitting a complete proposal. See generally, *Hill's Capitol Security, Inc.*, P.S. Protest No. 90-25, July 20, 1990. The protester cannot claim that it had no knowledge or information indicating that improved access was what the Postal Service wanted; the protester's own letters dated January 15, 1992, and April 6, 1992, demonstrate otherwise. Thus, the protester has not shown that the contracting officer acted capriciously in this regard.

The protester complains that in his rebuttal, the contracting officer indicated that a location in a shopping center was preferable, yet that location criterion was not published in the advertisement for space. Neither the regulations nor the solicitation stated that the new retail annex must be located in a shopping center or that it could not be. The published advertisement listed "location" as a factor to be considered along with many others in this particular solicitation. It was entirely proper for the contracting officials, during the negotiation process, to come to the conclusion that a shopping center would be the most advantageous location in this case.<sup>21</sup> Once again, it is an issue involving business judgment, which we will not disturb under these circumstances. *Georgia Power, supra*.

The protester relies extensively on alleged failures of contracting officials to adhere to procedures set out in Handbook 191. Federal Properties has committed great effort to provide a detailed analysis of the ways that it alleges that Handbook 191 was not followed. This office, however, reviews only the process from solicitation through award and, as previously discussed, can overturn an award only when it is determined that the contracting officer's actions were arbitrary, capricious or amounted to abuse of discretion--or if failure to follow PM regulations had a direct impact on the decision not to award the contract to the protester. We will not attempt to resolve the dispute between the contracting officer and the protester about the extent to which Handbook 191 procedures were followed because even if they were not properly executed in this case, the record provides no basis to conclude that absent those alleged internal procedural deficiencies, the Postal Service would have decided not to relocate its facility.

Moreover, it is well settled that failure of contracting officers to follow internal instructions such as those in Handbook 191 does not provide a basis to sustain any protest. As the Comptroller General has stated:

[A]n agency's internal instructions, such as the Forest Service Handbook, do not have the force and effect of law, so that the alleged failure to comply with

<sup>21</sup> The fact that the advertisement for space--without the term "shopping center"--was issued after negotiations had begun with Pearl supports the contracting officer's position that neither award to Pearl nor location in a shopping center were improperly "predetermined."

them in a particular instance involves a matter for consideration within the agency itself, rather than through the bid protest process.

*Doug Jones Sawmill*, Comp. Gen. Dec. B-239996, September 19, 1990, 90-2 CPD 233; *East West Research, Inc.*, Comp. Gen. Dec. B-238316, April 18, 1990, 90-1 CPD 400. See also *Mid Pacific Air Corporation*, P.S. Protest No. 92-62, November 13, 1992 (failure of Postal Service to follow the procedures of the Procurement Handbook cannot provide basis to sustain protest); and *Modern Systems Technology Corporation v. United States*, 24 Cl.Ct. 360 (1991), *aff'd*, 979 F.2d 200 (Fed. Cir. 1992) (Procurement Handbook does not have the force of law).<sup>22</sup>

The protester also claims that throughout this procurement process, postal officials were biased against the current facility and were in league with Braintree officials to promote the interests of Pearl. The protester evidently believes that we should infer that the contracting officer must have been biased against the protester because of the statements and reports referenced in footnote 5 or because the contracting officer included them in the protest file. To so infer would be to make unwarranted assumptions from this record. Assumptions and speculation are not enough to support allegations of impropriety or abuse of discretion. *EnPro Corporation*, P.S. Protest No. 91-48, October 9, 1991; *Five Star Catering*, P.S. Protest No. 88-68, January 31, 1989. Likewise, a protester must offer specific proof of allegations of bad faith, bias or unfairness; prejudicial motives will not be attributed to individuals on the basis of inference or supposition. *COR, Inc.*, *supra*; *Thermico, Inc.*, P.S. Protest No. 90-71, December 21, 1990.

The "evidence" which the protester cites to prove bad faith (other than the statements of public officials) consists mainly of allegations that the contracting officer and the other postal evaluators were incompetent and that they relied on what the protester claims were erroneous financial analyses to conclude in error that Pearl's proposal was more advantageous. While the protester has demonstrated that it held a different opinion than the Postal Service about each significant decision reached during this process, the existence of disagreement over contested facts and conclusions is not sufficient to overcome the presumption of correctness attributed to the factual findings of the contracting

<sup>22</sup> Even failure to follow the Procurement Manual, which does have the force and effect of law, 39 C.F.R. 601.100, does not necessarily lead to a sustained protest. See *C&L Construction Co. v. United States*, 6 Cl.Ct. 791 (1984), *aff'd without published decision* 790 F.2d 93 (Fed. Cir. 1986); *Lincoln Services, Ltd. v. United States*, 230 Ct. Cl. 416 (1982) (contracting officials' failure to comply with regulations promulgated for the benefit of the government does not provide government contractors or unsuccessful bidders with basis for legal complaints).

The protester also complains that award should not have been made to Pearl because of a freeze imposed on real estate acquisition during the Postal Service 1992 nationwide reorganization. The record indicates that the contracting officials obtained the proper authorization to proceed with this project despite the freeze, "so as to minimize safety and health risks for our employees and customers." (Quote from the September 8, 1992, memorandum from the Acting Assistant Postmaster General for facilities, whose approval was needed to proceed with this project.) In any event, this office lacks jurisdiction to question an internal decision to impose or to lift a contracting moratorium. See generally, *COR, Inc.*, *supra*.

officer. *Rickenbacker, supra; Service America Corp.*, P.S. Protest No. 89-27, August 22, 1989. Moreover, the preference of one site over another is not "bias," and mere disagreement over the comparative worth of proposals does not support a finding of bias or prejudicial motives. *Id.* It also does not support a finding that the evaluations were arbitrary or unreasonable. *Id.*

Federal Properties has not demonstrated evidence of bias that consists of more than its opinions, which are insufficient as evidence to overcome either the presumption of correctness which attaches to the contracting officer's statements or the presumption that a contracting officer has acted in good faith. See, e.g., *B&S Transport, Inc.*, P.S. Protest No. 92-69, October 30, 1992; *Ameriflight, Inc.*, P.S. Protest No. 92-42, September 3, 1992. In a protest involving a site acquisition, this office will not review each decision anew to conclude which opinions have merit; we "will not substitute [our] judgment for that of the contracting officer by making an independent determination of the relative merits of the sites offered." See *F.R. and Lee MacKercher, On Reconsideration, supra; Amdahl Corporation*, P.S. Protest No. 81-34, September 29, 1981.<sup>23</sup>

<sup>23</sup> *F.R. and Lee MacKercher*, P.S. Protest No. 85-45, September 17, 1985, involved an advertisement for space similar to the one in this case, which did not require negotiations, but reserved the right to negotiate. Like Federal Properties, the MacKerchers complained that the Postal Service did not conduct negotiations with them and negotiated for better terms only with the preferred offeror. Further, the MacKerchers complained that their site was better located, more accessible, and more cost-efficient than the awardee's. The contracting officer similarly had found the protester's offer unacceptable for many reasons other than price, including an expectation of parking problems and concerns about the safety of postal employees and customers. This office upheld the protester's disqualification based on evaluation factors other than price and found that the evaluation was not arbitrary or in violation of regulations. On reconsideration, we held that "[offerors] had been sufficiently apprised of the possibility that award could be made without negotiation" and affirmed our decision not to substitute our judgment for that of the postal analysts who concluded that the protester's site was unworkable because of parking problems and other safety concerns. *F.R. and Lee MacKercher, On Reconsideration*, P.S. Protest No. 85-45, October 7, 1985.

The protester has not shown that the evaluation of its proposal was arbitrary, unreasonable or in violation of procurement regulations.<sup>24</sup>

The protest is dismissed in part and denied in part.

For the General Counsel:

William J. Jones  
Senior Counsel  
Contract Protests and Policies

<sup>24</sup> As part of its allegation that the Postal Service was biased against it from the start, the protester has asserted repeatedly during this protest that the solicitation was defective because, contrary to R.F. 355 c., it was not sent "to the lessor of the existing postal facility." The protester's representatives also claim that despite several requests they were not furnished with a copy of the advertisement until this protest was filed. These allegations are untimely because they were not made within ten working days after "the information on which they are based is known or should have been known, whichever is earlier." PM 4.5.4 d. However, even if these allegation were timely, the protester has not demonstrated that it was harmed by the omissions. Since the protester learned of the solicitation and submitted a timely proposal, it suffered no prejudice. See, e.g., *Rickenbacker, supra* (no remedy for harmless error). Further, the protester's submissions indicate that its representatives were well aware of the Postal Service's need for a site that would meet the criteria for location, customer access and parking which were published in the advertisement for space.