



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Dorris, Helen, and William McMurtry

File: B-275803; B-275803.2

Date: March 31, 1997

Mark S. Sifferman, Esq., Norling, Kolsrud, Sifferman, Svejda & Davis, for the protester.

Thomas A. McCarville, Esq., for McCarville, Cooper & Vasquez, an intervenor.

Emily C. Hewitt, Esq., Donald R. Jayne, Esq., and Marilyn M. Paik, Esq., General Services Administration, for the agency.

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DIGEST

1. The issuance of an unsigned lease document by a contracting officer to an offeror does not constitute an award of a contract to that offeror where the letter accompanying the lease clearly indicates that no contract will arise unless the government signs the lease and the government never signed the lease.
2. An agency properly reopened discussions to address existing proposal deficiencies with, and obtain proposal revisions from, all offerors in the competition where no proposal is acceptable under the solicitation and eligible for award, and the solicitation has been amended in a material manner; under such circumstances, there is no improper technical leveling in reopening discussions.
3. Where a solicitation for leased space defines a late proposal as one received after the due date for submission of best and final offers (BAFO), a protest alleging that a proposal is late if received after the date for submission of initial proposals, but before the BAFO date, constitutes a protest based upon an alleged impropriety in a solicitation apparent prior to the time set for receipt of initial proposals, which is untimely if not filed prior to the time set for receipt of initial proposals.

4. An ambiguity concerning the identity of an offeror or the possible improper transfer of the offeror's proposal during the course of an ongoing procurement may properly be resolved during discussions prior to award.

DECISION

Dorris, Helen, and William McMurtry protest solicitation for offers (SFO) No. RAZ-95816, issued by the General Services Administration (GSA), for leased space for use by the Social Security Administration (SSA). The McMurtrys protest the reopening of discussions and award to any offeror other than the McMurtrys.

We deny the protest.

The SFO, issued September 6, 1995, contemplated the award of a firm, fixed-price lease for 15 years to the lowest-priced, technically acceptable offeror.¹ The date established for submission of initial proposals was November 9.

The SFO stated that negotiations would be conducted, proposal revisions would be permitted, and award would be based on best and final offers (BAFO). The SFO incorporated by reference GSA Form 3516, which included selected solicitation provisions from the Federal Acquisition Regulation (FAR) and the GSA Acquisition Regulations (GSAAR), including GSAAR § 552.270-3, "Late Submissions, Modifications, and Withdrawals of Offers (AUG 1992)" which stated in pertinent part:

(a) Any offer received at the office designated in the solicitation after the exact time specified for receipt of [BAFOs] will not be considered unless it is received before award is made and it [satisfies one of four possible exceptions.]

GSA received initial proposals by November 9 from the McMurtrys and from McCarville, Cooper & Vasquez. GSA also received requests for clarification of the solicitation from Mr. William O'Connor, the incumbent lessor. The contracting officer opened negotiations with the McMurtrys and McCarville, and corresponded with Mr. O'Connor concerning the requested clarification. On March 1, 1996, the contracting officer requested submission of BAFOs by March 29; however, after learning that neither the McMurtrys nor McCarville was prepared to submit BAFOs, she canceled the BAFO request.

On May 5, Mr. O'Connor submitted his initial proposal. By letter of May 23, the contracting officer requested submission of BAFOs by June 10. The McMurtrys and McCarville submitted BAFOs. By letter of July 29, the contracting officer reopened

¹The SFO also contained preferences for space in historic buildings and handicapped access buildings.

negotiations and requested receipt of revised BAFOs by August 9, in response to which all three offerors submitted BAFOs.

The McMurtrys proposed constructing a new building; the other two offerors proposed modifying existing buildings. The McMurtrys's BAFO was the highest-priced offer.

By letter of August 22, the McMurtrys filed a protest with GSA, alleging that "the competing offeror" did not comply with certain SFO requirements and that the successive rounds of negotiations may have constituted technical leveling in favor of "the competing offeror."

By letter of September 10, the contracting officer sent an unsigned lease agreement to the McMurtrys. The letter stated:

Execution of this contract by you constitutes your offer to the Government. The offer shall be interpreted as remaining open until either accepted by the Government or withdrawn by you. Execution of this contract by the Government shall constitute acceptance of the offer. No contract is established until this agreement is executed by the Government. . . .

This letter also included new "special space requirements" applicable to the lease.² The revisions included the addition of certain lump-sum reimbursable items, such as push-button automatic doors, peepholes, chair rail, bracing cabinets, a barrier wall between the reception and work areas, and a folding wall in the multi-purpose room, as well as certain changes to the space to accommodate a different computer system. By letter of October 4, the McMurtrys returned the lease with a few corrections and their signatures as the lessors under the lease agreement. The lease was never executed by the government.

Meanwhile, by letter of September 24 to McCarville, the contracting officer advised McCarville that it would not receive the award because the offered space:

would not lend to an efficient layout for systems furniture, which SSA plans to install at their new lease location. The [SFO] - Space Efficiency, Paragraph 4.4 states, "The design of the space offered must be conducive to efficient layout and good utilization."

²The SSA had instructed GSA to make sure that the new special space requirements were included in the new lease and replaced the old requirements.

By letter of September 25, McCarville filed a protest with GSA challenging the rejection of its BAFO.³ In pertinent part, the protest alleged that although the agency had raised concerns about a center wall in the existing structure and floors having more than one level, McCarville had addressed the concerns, prior to the last BAFO, by offering to remove the wall and explaining that its renovation plans always included bringing all of the floors to a single level.

By letter of October 17 to McCarville, the contracting officer referenced a July 24 letter from that firm stating that a central wall in the existing structure is not load bearing and can be easily removed. The contracting officer requested a certification from a structural engineer regarding the structural integrity of the building with the removal of the entire wall, including certification that the building conforms to applicable seismic requirements.

The record also indicates that Mr. O'Connor's proposal was not considered acceptable because it appeared that he did not propose sufficient available space, and that certain discussions had been held with Mr. O'Connor on the matter.

In November, the contracting officer's supervisor reviewed the entire procurement and determined that the procurement should be reassigned to another contracting officer. On November 19, a replacement contracting officer was assigned to the procurement.

The replacement contracting officer reviewed the proposals, and determined that areas of concern and deficiencies still existed in each proposal and that the record did not document that these matters had been sufficiently brought to each offeror's attention for resolution. By letter of November 29, the replacement contracting officer reopened negotiations with all offerors, identified areas of concern and proposal deficiencies for each offeror, and scheduled a site inspection with each offeror. The replacement contracting officer also issued amendment No. 1 revising the terms of the SFO, which included changing the required occupancy date from "June 1996" stated in the initial SFO to "120 days after receipt of the GSA-approved layout," and replacing the SSA special space requirements with the latest revised

³The McMurrys protest not receiving notification of McCarville's agency-level protest. However, the failure of an agency to notify an interested party of a protest concerns a procedural defect which has no substantive remedy; the only remedy would be a rehearing of the protest, which essentially has occurred via the present protest. BDM Management Servs. Co., B-211036.2, Apr. 9, 1984, 84-1 CPD ¶ 392 at 3; Commonwealth Communications, Inc., B-209322.2, June 6, 1983, 83-1 CPD ¶ 606 at 5.

version (which had been previously provided to the McMurtys).⁴ Another round of BAFOs was contemplated.

By letter of December 4, the replacement contracting officer denied the McMurtys's protest, stating, among other things, that the McMurtys's proposal was not technically acceptable, and thus an award could not be made to that firm. Among the reasons that the McMurtys's proposal was not considered acceptable were that its price was considered too high, its proposed space had windows only on one of the four exterior walls,⁵ and it proposed an occupancy date of 210 days after award and receipt of the GSA-approved layout.

The McMurtys's protest to our Office followed. The agency has not obtained revised BAFOs.

The McMurtys first allege that the lease document sent to it on September 10 is a legally binding contract and further competition is therefore improper. We disagree.

It is a fundamental rule that in order for the government to enter into a contract with an offeror, the government must clearly, unequivocally, and unconditionally accept the offer. American Management Co., B-228279; B-228280, Jan. 15, 1988, 88-1 CPD ¶ 38 at 3. The facts here clearly establish that GSA never entered into a lease contract with the McMurtys. The letter accompanying the lease stated that the offeror was to execute the lease, which would constitute the offer, and return it for execution by the government. The letter explicitly stated that acceptance of the offer by the government would not occur until the government executed the lease. Indeed, the McMurtys's October 4 letter returning the lease, stating that the McMurtys were awaiting commencement of the contract "upon receiving the final lease approval from [the contracting officer]," recognizes this. Since the lease remains unsigned by the government, there has been no acceptance of the McMurtys's offer. Thus, a lease contract between the McMurtys and GSA does not exist. Id.; TSCO, Inc., 65 Comp. Gen. 347, 349 (1986), 86-1 CPD ¶ 198 at 4.

Alternatively, the McMurtys object to the reopening of discussions with any offeror other than themselves, arguing that to do so would result in improper technical

⁴The amendment also replaced GSA Form 3516 with the revised version (4/96). The revised form included a revision to GSAAR § 552.270-3, which changed the time for determining whether a proposal is late from the date for receipt of BAFOs to the date for receipt of initial proposals.

⁵Paragraph 4.9 of the SFO stated, "Office space must have windows in each exterior bay unless waived by the Contracting Officer."

leveling in view of the repeated rounds of discussions previously held with the other offerors.⁶

In response, GSA states that none of the proposals is technically acceptable and thus an award cannot be made without further discussions. We agree. In negotiated procurements, any proposal that fails to conform to the material terms and conditions of the solicitation is unacceptable and may not form the basis for award. Team One USA, Inc., B-272382, Oct. 2, 1996, 96-2 CPD ¶ 129 at 8.

Here, the McMurtrys do not dispute that their proposal was inconsistent with the delivery date and window requirements stated in the SFO. The McMurtrys also have not shown that the replacement contracting officer's determination that the McMurtrys's proposed price is too high was unreasonable.

Nevertheless, the McMurtrys allege that the initial contracting officer waived these terms and conditions of the SFO in prior discussions with the McMurtrys (e.g., she acceded to the McMurtrys's proposed deviation to the window requirement), and determined that the protester's proposed price was reasonable, so that GSA cannot now conclude that the McMurtrys's proposal is unacceptable for failing to meet these requirements or for offering an unreasonably high price. In essence, the McMurtrys assert that GSA should be estopped from now applying these requirements against the McMurtrys's proposal or determining that their price is unreasonable.

An equitable estoppel will be found only where, among other things, the party asserting the estoppel has relied to its detriment upon the conduct of the party to be estopped.⁷ Koch Corp.--Recon., B-212304.4, July 31, 1984, 84-2 CPD ¶ 132 at 2. Here, since the McMurtrys's proposal remains in the competition and they will have the opportunity to correct the deficiencies identified for them by the replacement

⁶Technical leveling arises when, as the result of successive rounds of discussions, the agency helps to bring one proposal up to the level of other proposals, such as by pointing out inherent weaknesses that remain in an offeror's proposal because of the offeror's own lack of diligence, competence, or inventiveness after having been given the opportunity to correct those deficiencies. FAR § 15.610(d) (FAC 90-31); Department of the Navy--Recon., 72 Comp. Gen. 221, 225 (1993), 93-1 CPD ¶ 422 at 3.

⁷The other elements required under the doctrine of estoppel are (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that its conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; and (3) the party asserting the estoppel must be ignorant of the true facts. Planning Research Corp. Pub. Management Servs., Inc., 55 Comp. Gen. 911, 931 (1976), 76-1 CPD ¶ 202 at 28.

contracting officer, the McMurtys have not suffered any injury from relying on the alleged waiver of SFO requirements. Furthermore, there exists no basis under the legal doctrine of estoppel for requiring the government to consider for award a proposal which does not meet the government's minimum needs. Eastern Marine, Inc., B-213945, Mar. 23, 1984, 84-1 CPD ¶ 343 at 9. Thus, there is no basis to find the GSA estopped from determining the McMurtys's proposal to be unacceptable.

Additionally, the SSA's revisions to its special space requirements, which are clearly material, were not provided to GSA until after the last round of BAFOs were submitted and were not incorporated into the SFO until the November 1996 amendment. In such cases, the government generally must issue an amendment and provide offerors an opportunity to revise their proposals, as GSA is in the process of doing here. See FAR § 15.606; Media Funding, Inc. d/b/a Media Visions, Inc., B-265642, B-265642.2, Oct. 20, 1995, 95-2 CPD ¶ 185 at 5; United Tel. Co. of the N.W., B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374, aff'd, Department of Energy--Request for Recon. et al., B-246977.2 et al., July 14, 1992, 92-2 CPD ¶ 20. Where, as here, the need for revised proposals was due to the issuance of a material amendment, it cannot be said that improper technical leveling has occurred. Media Funding, Inc. d/b/a Media Visions, Inc., supra, at 5.

Thus, notwithstanding the previous rounds of discussions, the agency is properly requesting revised BAFOs.⁸

The McMurtys allege that Mr. O'Connor's proposal should not be considered in the competition because Mr. O'Connor submitted a "late" proposal after the due date for initial proposals. We disagree.

Under the terms of the solicitation applicable here, an initial proposal is late if received after the time set for receipt of BAFOs. GSAAR § 552.270-3 (AUG 1992). Mr. O'Connor submitted his initial proposal on May 5, 1 month before the June 10 due date for submission of the first BAFOs. Since GSA received O'Connor's initial proposal prior to the due date for BAFOs, it is not a late proposal and may be considered by GSA under the terms of the SFO applicable at the time of its

⁸In any case, while discussions were evidently conducted with all of the offerors, the record contains little documentation that the deficiencies in the various proposals were reasonably brought to the offerors' attention and their responses properly considered. Under the circumstances, the record does not establish that improper technical leveling occurred. In addition, we note that since the McMurtys's proposal is unacceptable, it is to that offeror's benefit to reopen discussions.

submission.⁹ LSS Leasing Corp., B-259551, Apr. 3, 1995, 95-1 CPD ¶ 179 at 4. To the extent the protest challenges the terms of GSAAR § 552.270-3 more than 1 year after the time for receipt of initial proposals, it is an untimely protest of the terms of the solicitation apparent prior to the time set for receipt of initial proposals. Bid Protest Regulations, § 21.2(a)(1), 61 Fed. Reg. 39039, 39043 (1996) (to be codified at 4 C.F.R. § 21.2(a)(1)); LSS Leasing Corp., *supra*, at 4.¹⁰

The McMurtys finally allege that McCarville should be excluded from the competition since during the course of the procurement it changed the name of the corporate entity identified as the offeror in its initial proposal, thus either improperly transferring the proposal or rendering the identity of the offeror ambiguous such that award could not be made to it.

The record shows that after the replacement contracting officer reopened discussions, McCarville submitted a form identifying a different corporate entity (albeit with the same ownership as McCarville). In response to the protest, McCarville resubmitted the form with the initial offering entity, McCarville, identified as the offeror, and stated for the record that McCarville was and is the offeror, and that there was no transfer of the proposal. Since the identity of the offeror is no longer ambiguous and no transfer of the proposal has occurred, there

⁹The fact that the initial proposal submitted by Mr. O'Connor was unacceptable did not require its rejection; rather, its inclusion in the competitive range for purposes of discussions was permissible. See ERA Indus., Inc., B-187406, May 3, 1977, 77-1 CPD ¶ 300 at 4; Procurement Consultants Inc., B-181779, Dec. 10, 1974, 74-2 CPD ¶ 321 at 3-4.

¹⁰The McMurtys base their objection to the terms of GSAAR § 552.270-3 on Aerolease Long Beach v. United States, 31 Fed. Cl. 342, 366-368 (1994), *aff'd on other grounds*, 39 F.3d 1198 (Fed. Cir. 1994) (GSAAR § 552.270-3 inconsistent with the requirement in 41 U.S.C. § 253a(b)(B)(ii) and the requirements of FAR § 15.412; GSAAR § 552.270-3 unfair to offerors who submitted initial proposals at an earlier date). We follow 60 Key Centre, Inc. v. Administrator of Gen. Servs., 47 F.3d 55, 58-60 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 50 (1995), which rejected the rationale of Aerolease and upheld acceptance of an offer submitted after the closing date for receipt of initial proposals but prior to the closing date for receipt of BAFOs pursuant to GSAAR § 552.270-3. LSS Leasing Corp., *supra*, at 4 n.3.

is no basis to exclude McCarville from the competition. See Dick Enters., Inc.-- Protest and Recon., B-259686.3, Nov. 16, 1995, 95-2 CPD ¶ 223 (information on offeror identity was properly provided after award to address concerns about ambiguity of offeror or improper transfer of proposals).

The protest is denied.

Comptroller General
of the United States