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Burt Japikse

Proc. II

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON D. C. 20548**

FILE: B-186410

DATE: January 27, 1977

MATTER OF: Peace Surplus

DIGEST:

Even though solicitation for lease of Government real property permitted prior unauthorized occupant to compete for lease on basis of retaining fence installed during prior unauthorized use of property, no legal objection may be raised because Government will receive just compensation for prior unauthorized use and instant lease was entered into under broad statutory authority to lease to whomever and upon whatever terms the Secretary considers will promote national defense or be in the public interest. Abuse of such broad discretion is not indicated in record.

Peace Surplus protests any award to Kolar, Inc. (Kolar) under IFB DACA 09-76-B-0020, issued by the Corps of Engineers (Corps), for the leasing of approximately 7 acres of Government-owned property situated adjacent to Davis-Monthan AFB. The land in question is the same as was referred to in our decision in Peace Surplus, B-186381, August 18, 1976, 76-2 CPD 172.

It appears that Kolar fenced and used the subject land in connection with its aircraft scrap salvage business, and in that manner, has occupied the land for two to three years, without permission of the Government. Upon discovery of Kolar's occupancy, the Department of the Air Force (Air Force) determined that the land should be leased, pursuant to 10 U.S.C. § 2667 (1970), and has requested that the Corps lease the land competitively, at fair-market value, for a term of 5 years. Further the Air Force required, and the solicitation provides that:

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"The property is presently occupied and used for the storage of surplus aircraft and/or aircraft components in connection with a surplus aircraft salvage operation * * *. The fencing and personal property items now situate upon the premises will not be included in the lease. If the premises are leased to other than the present occupant, the present occupant shall be permitted to remove all fencing * * * situate on the premises."

As indicated in our prior decision, the Air Force also intends to seek recovery from Kolar for its past unauthorized use of the land.

Peace Surplus is also in the aircraft salvage business. It claims that the property is so situated that it affords an occupant the particular advantage that scrap aircraft may be directly removed from Davis-Monthan AFB, to the property, without first obtaining permits to move them upon public streets. Moreover, it argues that the land is much enhanced in value for its intended use if the fence is retained, and that, in its opinion, additional competition might have been obtained had the Air Force offered to lease the premises, as improved by the fence.

Specifically, Peace Surplus asserts:

1. That Kolar has illegally occupied the subject premises for more than two years, and should be prevented from participating in regard to the subject solicitation until it pays the Government compensation for its occupancy;
2. That certain fences now situated on the premises should be retained by the Government and should be made available to all bidders; and,
3. That the lease should contain provisions regarding ownership of existing or newly erected fences, at its expiration.

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We note that the protester had requested that the solicitation be amended to allow for monthly payment of rent rather than semi-annual payments and that the solicitation was amended to accommodate this request.

At the outset, we are met with the Corps' suggestion that we should not consider this case at all, since in its view, "this is a real estate matter as opposed to a procurement matter and no United States appropriated dollars are to be expended."

That funds are received, rather than spent, is not dispositive of our authority to settle the accounts of accountable officers, since that authority extends to the disposition of funds under their control, whether resulting from payment of the Government's obligations, or of obligations to the Government. 31 U.S.C. § 71 (1970).

As indicated above the substance of this protest concerns the terms and conditions for the lease as well as the propriety of leasing the property to Kolar, a prior unauthorized occupant of the land. We note, however, that the lease in question will be entered into under the broad statutory authority of 10 U.S.C. § 2667 (1970) for leasing "to such lessee and upon such terms as the Secretary considers will promote the national defense or be in the public interest." Although the protester, unlike Kolar, was not permitted to retain the fencing, this competitive inequality stems from Kolar's prior occupancy, albeit unauthorized, rather than from preferential treatment conferred by the Government. In our opinion it is not unreasonable for the Government to permit a prior occupant to retain the benefit of the occupant's improvements where, as here, the Government has or will be provided reasonable compensation for the prior occupancy. Kolar has incurred the expense for the improvement and, overall, is not in a better position to compete for the lease than the protester who has not incurred such expense. Accordingly, we find no abuse of the broad discretion permitted under the cited statute.

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We therefore find no legal basis for objecting
to this lease transaction and the protest is denied.

R. F. Kettle
Deputy Comptroller General
of the United States

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