

Mr. Boyle 14758
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DECISION

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

[Protest of GSA Contract Award]

FILE: B-197842

DATE: August 27, 1980

MATTER OF: H. Frank Dominguez d.b.a. Vanir Research
Company

DIGEST:

1. Solicitation provided that award would be based on rental price per square foot (not overall annual price) and other disclosed award factors. Where agency reports that its evaluation of disclosed factors showed protester's and awardee's proposals were equal and protester's price per square foot was lower than awardee's, agency's award determination based on undisclosed award factors (including lowest overall life-cycle cost) was improper because principles of negotiated procurement require agency to advise offerors when disclosed basis of award is changed.
2. Firm submitting best proposal when properly evaluated in accord with solicitation's evaluation criteria is not entitled to award of lease when agency determines that firm is nonresponsible. Further, nonresponsibility determination is reasonably based where agency cites firm's recent prior unsatisfactory performance on similar lease contract even though firm disputes agency's prior default termination and matter is still pending.
3. Contention--that awardee was not eligible for award because it did not satisfy solicitation's zoning requirement--is without merit where awardee had proper zoning on adequate portion of property to perform on contract.

H. FRANK DOMINGUEZ dba VANIR RESEARCH
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4. No legal basis exists to preclude award of lease to firm merely because it might lose money in performing.
5. Whether awardee could deliver building for occupancy by scheduled date is matter of responsibility and GAO does not review affirmative determinations of responsibility except in circumstances not present here.

H. Frank Dominguez, doing business as Vanir Research Company (Vanir), protests the award of a lease to Shane Realty and Construction Company (Shane) by the General Services Administration (GSA) under solicitation for offers (SFO) GS-09B-08296 for office space and parking for the Social Security Administration in San Bernardino, California. Vanir contends that it should have received the award since it is the responsible firm which submitted the best proposal, and Shane should not have received the award for certain reasons. In response, GSA recognizes that some errors were made in the award determination but GSA contends that termination of the lease would not be in the best interest of the Government. We conclude that there was a valid basis not to award to Vanir, and that Shane was eligible for award. Thus, Vanir's protest is denied.

The SFO provided that GSA needed 16,361 square feet of contiguous general office space, plus or minus 5 percent, and 12 reserved off-street parking spaces, for a 5-year period commencing June 13, 1980. The SFO also provided that for purposes of determining the lowest price, an annual square foot rate for the amount of space offered and not an overall yearly rate would be used; in determining which offer will be the most advantageous to the Government, several listed award factors--in addition to the rental proposed and the conformity of the space offered to the SFO's specific requirements--would be considered. GSA reports that since its evaluation of the listed factors resulted in a determination that Vanir's offer and Shane's offer were equal, the only remaining disclosed evaluation factor was price per square foot. Vanir's price was \$9 for 16,725 square feet and Shane's was \$9.35 for 16,361 square feet. Therefore, based on disclosed

evaluation factors, it appears that Vanir submitted the best proposal.

In addition to the disclosed award factors, however, GSA considered "other factors": (1) life-cycle cost, (2) seismic safety, (3) Vanir's ability to perform, and (4) the comparable age of the two buildings. The life-cycle cost analysis showed that Vanir's price per square foot was still lower than Shane's (\$9.84 vs. \$9.79) but the estimated total cost to the Government was higher with Vanir than with Shane (\$818,859.65 vs. \$805,614.89). GSA was not satisfied with Vanir's certification regarding seismic safety but Shane's was acceptable. GSA was not confident in Vanir's ability to perform on this award because it was involved in a dispute with Vanir on another project, which ended in GSA terminating that contract for default shortly after the award here. Lastly, GSA believed that the new, energy efficient building offered by Shane was better than the older building that Vanir proposed.

First, GSA recognizes that offerors were not notified that life-cycle costs would be evaluated in the award determination but GSA states that (1) overall cost to the Government should be considered in making the award, and (2) on a prior lease procurement, Vanir was advised that overall costs had been considered. Vanir states that it disregarded the information on overall cost consideration relative to the prior procurement because of the specific language used in this SFO.

In our view, the use of life-cycle cost as the method of evaluating price (as compared with rental price) is an acceptable method either on an overall cost basis or on a per square foot basis, provided that offerors are notified in advance of the basis for evaluation. The best interest of the Government will be served when offerors can tailor their proposals to the precise needs of the Government as the relative importance of those needs are reflected in the disclosed evaluation scheme. The principles of negotiated procurement require an agency to advise offerors when the disclosed basis of award is changed. Eastman Kodak Company, B-194584, August 9, 1979, 79-2 CPD 105.

Here, the method of proposal evaluation was not only changed from rental price evaluation to life-cycle cost evaluation but also from a per square foot basis to an overall basis, the latter of which was directly opposed to the SFO's stated basis of evaluation.

In our view, it was not proper to switch to an overall cost basis without advising offerors. Further, since Vanir was still lower on a per square foot of life-cycle costs basis, we do not believe that this "other factor" would provide a basis to award to Shane.

Second, we can understand why GSA was dissatisfied with the carefully worded statement from Vanir's Registered Engineer regarding the seismic safety of the proposed building. Vanir appears to have recognized this since it sent in a letter offering to make any modifications necessary to the building to bring it in compliance with the applicable building code. If GSA was still dissatisfied with Vanir's certifications, then GSA could have used the negotiation process to give Vanir an opportunity to satisfy the certification requirement. Therefore, we do not believe that this "other factor" would provide a basis to award to Shane.

Third, the SFO required a modern office building with certain specific features; this represented the Government's minimum needs. Since it appears that Vanir's proposed building met these needs, it would be improper to award to Shane based on Shane's proposal to provide a new building. Thus, this "other factor" would not provide a basis to deny Vanir the award.

Fourth, GSA recognizes that the final "other factor"--Vanir's ability to perform--concerns responsibility and it should not have been considered as an award factor.

In sum, we must conclude that Vanir's proposal was better than Shane's when properly evaluated in accord with the SFO's evaluation criteria; however, we are not aware of any obligation on GSA's part to award a lease to a firm that it determines is nonresponsible, which is essentially what GSA did. As GSA points out, in our decision at 51 Comp. Gen. 565 (1972), we stated

that an offeror's past performance should be considered in determining responsibility and past unsatisfactory performance will ordinarily be sufficient to justify a finding of nonresponsibility. Here, relying on our decision in Howard Electric Company, 58 Comp. Gen. 303 (1979), 79-1 CPD 137, and other decisions, GSA has determined that Vanir's prior inadequate performance justifies a finding of nonresponsibility even though Vanir disputes GSA's view of its prior performance and the dispute is still pending. Since GSA's nonresponsibility determination is reasonably based on Vanir's alleged recent unsatisfactory prior performance on a similar contract, we have no basis to question GSA's determination not to award to Vanir. See United Office Machines, 56 Comp. Gen. 411 (1977), 77-1 CPD 195, aff'd, B-187193, May 2, 1977, 77-1 CPD 297.

Vanir further argues that GSA's nonresponsibility determination violates 15 U.S.C. § 637(b)(7) (Supp. I, 1977)--which empowers the Small Business Administration (SBA) to certify the responsibility of a small business--since GSA did not refer the matter to SBA prior to making award to Shane. This basis of protest was untimely raised as it was first made more than 10 days after Vanir received GSA's report on the protest, 4 C.F.R. § 20.2(b)(2) (1980), and after the record in this matter was closed in accordance with our Bid Protest Procedures, 4 C.F.R. § 20.3(d) (1980). There also is a question as to the applicability of the COC procedures to lease procurements, which we need not address in view of the foregoing, since such procurements are not listed in the applicable SBA regulations, 13 C.F.R. § 125.1 (1980).

We note, however, that GSA initially considered Vanir's responsibility as an award factor; therefore, GSA apparently believed that it had no obligation to consider referring a nonresponsibility determination to SBA. After award, in its report on Vanir's protest, GSA recognized that a nonresponsibility determination should have been made instead of considering responsibility as an undisclosed award factor but at that point preaward referral to SBA under the certificate of competency (COC) program was impossible.

Vanir contends that Shane was not eligible for award because it did not satisfy the SFO's zoning requirement and its schedule was unrealistic and the building costs were so high that Shane could not perform realistically. Vanir refers to the zoning provision of the SFO, which provides that the failure to provide satisfactory evidence that the property is zoned in conformance with the Government's intended use will automatically make the "bid nonresponsive." Vanir points out that one portion of Shane's proposed property was not properly zoned. GSA and Shane respond that Shane could have performed by building on the properly zoned portion of the property. They explain that the improperly zoned lot was for parking only and the parking requirement could have been satisfied with an underground area. In our view, Shane's proposal did not violate the SFO's zoning requirements and this aspect of Vanir's protest is without merit.

Vanir also contends that Shane's underground parking suggestion is "absurd" because of the additional cost that would be entailed. This contention is dismissed, however, because the fact that Shane may have lost money in performing is not a legal basis to deny Shane the award.

Finally, Vanir contends that Shane could not and cannot deliver the building for occupancy by the scheduled date. GSA notes that this aspect of Vanir's protest concerns Shane's responsibility. This aspect of Vanir's protest will not be considered because we do not review affirmative determinations of responsibility except in circumstances not present here. See Ira Gelber Food Services, Inc., B-196868, February 27, 1980, 80-1 CPD 161.

Vanir's protest is denied in part and dismissed in part.

Harvey R. Van Clave
For The Comptroller General
of the United States