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**DECISION**

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

FILE: B-203306
B-203306.2

DATE: July 31, 1981

MATTER OF: Messrs. Albert Abramson and Theodore N. Lerner, trading as White Flint Place; Travenca Development Corporation

DIGEST:

Where each offeror's proposal deviated from mandatory, material, additional-rent requirement of grantee's prospectus, grantee should not have considered any proposal as acceptable. Since grantee is willing to accept proposals with such conditions, grantee should so revise prospectus and permit offerors to compete on common basis. In view of this conclusion, other bases of complaint need not be decided; however, several matters to be considered by grantee prior to reopening competition are pointed out.

Messrs. Albert Abramson and Theodore N. Lerner, trading as White Flint Place (White Flint), and Travenca Development Corporation (Travenca) complain against the proposed award to Paramount Development Corporation (Paramount) under a joint development prospectus for the White Flint Metro Station (parcel MA-364) issued by the Washington Metropolitan Area Transit Authority (WMATA).

WMATA acquired the real property involved in this matter pursuant to 80-percent funding from a grant under the Urban Mass Transportation Act of 1964, as amended. White Flint and Travenca request that we review WMATA's proposed award to Paramount in accord with our announcement, "Review of Complaints Concerning Contracts Under Federal Grants," 40 Federal Register 42406 (September 12, 1975). In addition, WMATA requests that our Office consider the matter and provide our views on the merits of the complaint. This decision is rendered in response to WMATA's request.

[Protest of Washington Metropolitan Area Transit Authority Proposed Award]

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We understand that WMATA has agreed to abide by our decision on whether WMATA's selection of Paramount was reasonable and consistent with competitive principles. We conclude that WMATA's actions were not reasonable and not consistent with competitive principles.

White Flint and Travenca principally complain that since WMATA's prospectus contemplated a long-term leasehold arrangement with the selected contractor for the whole site, WMATA could not accept Paramount's proposal based on the purchase of the residential portion of the site without inviting similar proposals from White Flint and Travenca. Further, White Flint and Travenca contend that WMATA would be violating the conditions of the Federal grant if it sold a portion of the real property without prior approval from the grantor, the Urban Mass Transportation Agency (UMTA).

White Flint also complains that WMATA's evaluation of its proposal was improper because it was not on a basis comparable to the evaluation of Paramount's proposal, and WMATA's selection of Paramount will not result in the best economic return to WMATA.

Travenca also complains that Paramount and White Flint took material exceptions to the mandatory requirements of the prospectus. In that regard, WMATA reports that Travenca also took exception to a mandatory, material requirement of the prospectus. Travenca further complains that WMATA did not realistically evaluate the financial aspects of the proposals.

We find that each one of the proposals was unacceptable because each one took exception to a material requirement of the prospectus. Consequently, we recommend reopening the competition based on a revised statement of WMATA's current requirements as related to the exceptions taken and other factors calling for corrective action outlined in this decision.

Pursuant to WMATA policy, WMATA formulated and issued the prospectus soliciting proposals for the

lease and joint development of real property excess to transit facility requirements at the White Flint Metro Station site. The mixed-use development potential of the site is set forth in the approved Montgomery County, Maryland, sector plan. It depicts 300 hotel units, 650,000 square feet of commercial office space, 73,000 square feet of retail space, and 650 residential units. The project is expected to yield improved ridership, revenue equal to the property's acquisition cost, greater accessibility to and enhanced esthetics of the station, and other benefits. This negotiated-type competition was the method that WMATA used to select the joint development contractor.

The prospectus stated in section IV, Requirements of Lease, that as one of the major lease provisions, "[a]ll lease proposals will contain a complete rental offer as follows:

> a. minimum guaranteed rent to be paid during the initial four (4) year development period of the lease. * * *
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> b. minimum guaranteed rent to be paid during the fifth (5th) through the fiftieth (50th) year of the lease.
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> c. additional rent payable to WMATA during the sixth (6th) through the fiftieth (50th) year of the lease. This additional rental, above the minimum guaranteed rent to be paid, shall be expressed as a fixed percentage of all gross income from the project." (Emphasis added.)

Section VII, Selection Procedure, stated that the first of the selection factors to be considered in the selection process is "[f]ull conformity to all requirements set forth in the [p]rospectus."

In response to the additional rent requirement for a fixed percentage of all gross income, Paramount proposed 10 percent of gross income exceeding $55 million per year, White Flint proposed 8 percent of gross income exceeding $30 million per year, and Travenca proposed 1.2 percent of all gross income "subordinate to debt service."

From past dealings with WMATA, White Flint explains that the exclusion of some gross income from the additional rent computation would be acceptable to WMATA. It appears that Paramount's past association with WMATA resulted in a similar understanding. Only Travenca was unaware of WMATA's relaxed interpretation of the unambiguous requirements of the additional rent provision. Travenca explains that the "subordinate to debt service" qualification in its proposal did not affect the magnitude of Travenca's rent payments, but established a priority in the event of default; the debtor would be paid before WMATA. WMATA did not reject any of the additional-rent proposals as unacceptable.

A fundamental competitive principle is that all competitors must be given the opportunity to submit offers on a common basis. Cohu, Inc., 57 Comp. Gen. 759 (1978), 78-2 CPD 175; International Business Machines Corp., B-194365, July 7, 1980, 80-2 CPD 12; Burroughs Corporation, B-194168, November 28, 1979, 79-2 CPD 376. While we need not decide, we note that this principle would be applicable even if it was determined that WMATA's procurement regulations governed this matter since those regulations provide that contracts shall be made on a competitive basis to the maximum practicable extent.

WMATA contends that its conduct in selecting contractors, like Paramount, for revenue-producing contracts, like this joint development project, is not restricted by the laws that established WMATA or WMATA's procurement regulations. WMATA contends, citing various court decisions and decisions of our Office, that its actions are not subject to objection because they were reasonable. Specifically regarding the prospectus,

WMATA argues that the prospectus did not mandate precise conformance to the detail specified at the risk of rejection for nonconformance. WMATA concludes that, in view of the substantial advantage of the Paramount proposal, it cannot be said that the failure to advise Travenca of the permissibility of sheltering some revenue from the application of the additional rent provision constitutes an abuse of discretion requiring that the selection be invalidated.

Where, as here, negotiated-type procedures are used and there is a change in the stated needs or requirements, or the agency decides that it is willing to accept a proposal that deviates from those stated requirements, all offerors must be informed of the revised needs and given the opportunity to submit a proposal on the basis of the revised requirements. Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 201 (1975), 75-2 CPD 144; Union Carbide Corporation, 55 Comp. Gen. 802 (1976), 76-1 CPD 134; Cohu, Inc., supra.

We conclude that the additional rent provision of section IV of the prospectus was a requirement of the prospectus and that, as such, section IV of the prospectus mandated full conformity with it.

In our view, each offeror's proposal deviated from the additional-rent requirement of the prospectus, the requirement was mandatory, and the additional-rent provision was material. Each offeror took an advantage that, under the prospectus, was not permissible. None of the proposals satisfied the terms of the prospectus; therefore, based on WMATA's statement of requirements, none should have been considered acceptable by WMATA. We believe that WMATA's failure to notify the offerors of its willingness to accept such proposals falls short of the standard that all offerors must be given an opportunity to submit a proposal based on the revised requirement. Further, we believe that WMATA established a mandatory requirement and then ignored its application to all three proposals. We may not speculate on how offerors may have revised the nonfinancial aspects

of their proposals had WMATA enforced the requirement as WMATA wrote it. Since WMATA is willing to accept proposals with conditions like those imposed by the offerors, we recommend that WMATA so revise the prospectus and permit the offerors to compete on a common basis.

Accordingly, the competition should be reopened based on a current statement of WMATA's additional-rent requirements. Our conclusion on this point makes it unnecessary for our Office to consider the merits of the other bases of complaint. However, since we have recommended reopening the competition, we point out certain matters which WMATA should consider prior to implementing our recommendation.

WMATA's revised statement of requirements should clearly provide the parameters on the acceptability of lease/purchase proposals. If the sale of a portion of the site is contemplated in the revised prospectus, then we suggest that WMATA obtain UMTA's concurrence prior to award of the contract.

We also suggest that, rather than merely accepting the proposers' financial information, WMATA should evaluate the revenue projections of each proposal from the standpoint of realism and the common elements of each proposal.

The record indicates that all offerors exceeded the limitations of the applicable sector plan distorting the actual financial return to WMATA. To cure this and to provide a common basis for evaluation, WMATA should include in the prospectus the salient aspects of the sector plan which offerors may not exceed for purposes of evaluation. For example, all of the development plans produced peak hour trips exceeding the sector plan guidelines.

Finally, we also suggest that the revised statement of requirements indicate the relative importance of evaluation criteria (such as, economic return, responsiveness with the sector plan, utilization of minority

business enterprise, financial qualifications and experience of the offeror, etc.) so that offerors can better tailor proposals to WMATA's requirements.

Since we recommend reopening the competition, claims for proposal preparation costs by Travenca and White Flint need not be considered.

Milton J. Socolar

Acting Comptroller General
of the United States