

DECISION

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

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FILE#-208699

DATE: December 13, 1982

MATTER OF: Bowman Square Properties

DIGEST:

Discussions with only one offeror intended to remedy material deficiencies in technical proposal held after receipt of best and final offers is improper because discussions reopened with one offeror after receipt of best and final offers must be reopened with all offerors in the competitive range and an opportunity given to submit revised proposals.

Bowman Square Properties (Bowman) protests the award of a lease for space for the United States Forest Service (Forest Service) Office in Pendleton, Oregon, under negotiated solicitation for offers No. R6-82-86P.

Bowman alleges that the Forest Service improperly awarded the lease to G.H. Peterson (Peterson) whose offer was technically unacceptable. Bowman also contends that the Forest Service awarded the lease to Peterson because it offered the lowest rent, which was contrary to the selection criteria contained in the solicitation. In this regard, Bowman states that the Forest Service did not give sufficient weight to the technical superiority of Bowman's proposal. Finally, Bowman objects to the Forest Service's apparent consideration of the agency's costs of relocating to another building if award were made to any firm other than Peterson, which offered a lease in the building the Forest Service currently occupies because the costs of relocating were not stated in the solicitation as a factor for award.

We sustain the protest because the Forest Service accepted Peterson's technically unacceptable proposal and then sought to remedy this after receipt of best and final offers by continued negotiations only with Peterson.

Initially, we note that the Forest Service alleges Bowman's protest is untimely. The Forest Service states

that award to Peterson was made on July 30, 1982, and Bowman was verbally advised of the award on that date. According to the Forest Service, since Bowman filed its protest with GAO on August 20, 1982, the protest more than 10 days after Bowman was notified of the award on July 30, 1980, is untimely. We disagree.

The record indicates that by letter dated August 13, 1982, Bowman, after obtaining information on the rationale for award and reviewing the awardee's proposal, protested to the Forest Service. By letter dated August 24, 1982, the Forest Service advised Bowman it would not consider its protest and stated that Bowman could appeal to GAO.

Under our Bid Protest Procedures, where a protest has been filed initially with the contracting agency, any subsequent protest to the GAO will be considered if the protest is filed within 10 days of formal notification of or actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.1(a) (1982). Thus, Bowman had 10 days from receipt of the Forest Service's letter of August 24, 1982, to file a protest with GAO. Bowman filed a timely protest here on August 20, 1982, prior to receiving a formal response from the Forest Service, and the protest will be considered on the merits.

The solicitation clearly required offerors to furnish 20 parking spaces for official and visitor vehicles including two parking spaces of larger dimensions for recreational vehicles. The solicitation further required that a site plan showing landscaping work to be accomplished accompany the offer. During negotiations, the Forest Service requested substantial information on the proposed parking plan "so that we can determine whether your proposal meets the terms and requirements of the solicitation for offers." Peterson's best and final offer did not respond to this request.

In the contracting officer's letter to Peterson stating that Peterson's offer was accepted, the contracting officer states that:

"As previously discussed with you, we have some serious reservations concerning your proposed parking plan. Our review of

the plan and an on site review by local Forest Service representatives lead us to believe that recreational vehicles will be unable to safely access the site, and that they will be unable to maneuver into or out of the designated parking spaces (also see attached July 28 letter from City Engineer Lorenzen). [This letter questioned the feasibility of the expansion of the existing parking lot and stated that the costs of the renovations could be 6 to 8 times that anticipated.] It appears necessary for you to revise your parking plan to meet this requirement for recreational vehicle parking within 300 feet of the visitors entrance.

"It also appears that the amount of on site parking spaces shown in your plan cannot be achieved without considerable effort and expense. Even if the site is developed as is proposed we question whether the required number of vehicles can be accommodated. It appears that there is not enough room to safely maneuver these vehicles into and out of the planned parking spaces.

"We are also concerned about the appearance of the site. The existing landscaping is minimal and unattractive. With the further development of the site we expect the development may look even less attractive. You have agreed to provide whatever landscaping the Forest Service desires on the site. While the contractual responsibilities to provide a landscaping plan remains yours, we are agreeable to furnishing you with our recommendations.

"In summary there appears to be serious limitations of your proposed parking plan. You have given us your verbal assurance that you understand our requirements, and that you can meet them. If you cannot meet our requirements as planned, you have agreed to provide an acceptable alternative. Should you be unable to meet our requirements you understand that you would be placed in default. While it is unusual to discuss a potential default in an acceptance letter, it is important that you understand our deep concern with your proposed parking plan."

The contracting officer reports that although the parking plan "did leave something to be desired," the plan was not "infeasible," and since the landscaping plan was contingent on an approved parking plan, it was reasonable to defer this requirement. Therefore, according to the contracting officer, the offeror's verbal assurance to provide approved plans was acceptable to the Government, and the award was proper.

The letter and report clearly demonstrate that the Forest Service considered the solicitation parking and landscaping requirements material, that the Peterson best and final offer did not meet the Forest Service requirements, and that the Forest Service had further discussions with Peterson after best and final offers in an attempt to remedy the deficiencies which resulted in "verbal assurances" by Peterson that it would provide a satisfactory plan. The Forest Service's acceptance of Peterson's materially deficient proposal, based on Peterson's post-best and final offer verbal assurances that the deficiencies would be corrected after award constituted improper negotiations. Moreover, the Forest Service refused to consider a post-best and final submission from the protester.

It is not proper for the Government to continue discussions with only one of the offerors in the competitive range after best and final offers have been received. If negotiations are reopened with one offeror, they must be reopened with all of the other offerors in the competitive range, and a new round of best and final offers requested. See University of New Orleans, 56 Comp. Gen. 958 (1977), 77-2 CPD 201; PRC Information Sciences Company, 56 Comp. Gen. 768 (1977), 77-2 CPD 11.

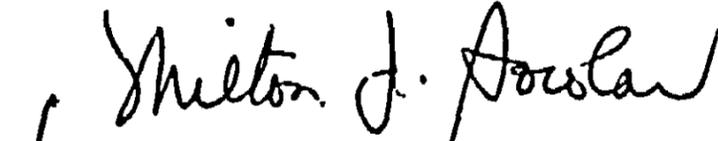
Accordingly, the protest is sustained.

Peterson is performing, at its own expense, renovations at its building to meet the contract requirements. The work has been partially completed--approximately 15-20 percent as of October 29, 1982--with a completion date of March 1983. The Forest Service should investigate the feasibility of terminating the contract for the convenience of the Government. If this is feasible, we recommend that the Forest Service immediately reopen negotiations to allow the offerors a reasonable opportunity to submit new best and final offers and that negotiations be properly terminated upon the receipt of these offers by a common cutoff date.

Since we have sustained the protest and recommend the reopening of negotiations, we need not consider the merits of Bowman's other allegations. However, with regard to these issues, we recommend that the Forest Service make clear its intention to award on the basis of lowest rent offered by a technically acceptable proposer and also state that the agency relocation costs, if a factor for award, will be considered.

By letter of today, we are advising the Secretary of Agriculture of our recommendation.

This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (formerly 31 U.S.C. § 1176 (1976)), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.


for Comptroller General
of the United States



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

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Golden

D-208699

December 13, 1982

The Honorable John R. Block
The Secretary of Agriculture

Dear Mr. Secretary:

Enclosed is a copy of our decision of today in the matter of Bowman Square Properties (Bowman) in which we have sustained Bowman's protest because the Forest Service awarded on the basis of a technically unacceptable proposal and then sought to remedy this after receipt of best and final offers. Please note our recommendation that the Forest Service investigate the feasibility of terminating the existing contract for the convenience of the Government. If termination is feasible, we recommend that the Forest Service immediately reopen negotiations to allow the offerors a reasonable opportunity to submit new best and final offers.

As the decision contains a recommendation for corrective action to be taken, it has been transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (formerly 31 U.S.C. § 1176 (1976)) which requires your agency to submit to the named committees within prescribed times written statements of the action taken on the recommendation.

We would appreciate advice of the action taken on the recommendation. Also, please furnish us copies of your written statements to the congressional committees.

Sincerely yours,

for Milton J. Rowland
Comptroller General
of the United States

Enclosure