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DECISION

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

30767

FILE: B-214716.4 **DATE:** March 25, 1985

MATTER OF: Bullock Associates Architects, Planners, Inc.

DIGEST:

1. Even though solicitation evaluation criteria could have been better written, the contracting agency did not act improperly where it used an annual basis for evaluating cost, because the solicitation stated that offers would be so evaluated and the selection made meets government's needs.

2. Estimate of overtime usage developed for purpose of evaluating cost of competing offers could be revised without advising offerors of the change, and without allowing them to amend their proposals, because the estimate was not stated in the solicitation and offerors were neither aware of nor entitled to rely on the original, defective estimate.

3. Whether an awardee under a contract to lease real property will be able to deliver title and occupancy of the premises is a matter of responsibility that GAO will not consider absent evidence of possible fraud by contracting officials or the existence of definitive responsibility criteria in the solicitation.

Bullock Associates Architects, Planners, Inc. protests the award of a lease to Magnolia-Boyd Corporation under Veterans Administration (VA) solicitation for offers (SFO) VACO83-210 for outpatient clinic space in Pensacola, Florida. According to Bullock, VA's decision is the result of an improper application of the SFO

evaluation criteria. Bullock asserts that its proposal is both the least costly and most favorable to the government. Further, Bullock charges that Magnolia-Boyd's proposal is a nullity because, Bullock says, Magnolia-Boyd does not have title to the property offered. We deny the protest.

Subsequent to filing this protest, Bullock filed suit in the United States District Court for the District of Columbia. We consider the protest in light of the indication in a January 4, 1985 order, transmitted to our Office by the protester on February 15, that the court desires our opinion in this matter.[1/] See, e.g., Applicators, Inc., B-215035, June 21, 1984, 84-1 CPD ¶ 656.

This procurement was the subject of our decision, Magnolia-Boyd Corporation, et al., B-214716 et al., Oct. 5, 1984, 84-2 CPD ¶ 388, where we sustained a protest filed by Magnolia-Boyd of the proposed award of a lease to Bullock. Magnolia-Boyd contended that an initial VA selection of Bullock was improper because VA had not applied the SFO evaluation criteria properly and had incorrectly evaluated total rental price. We sustained that firm's protest because we concluded that VA had improperly considered certain overtime charges. Had these charges been considered correctly, we found, VA would have concluded that Magnolia-Boyd submitted the lowest cost offer and that Magnolia-Boyd was in line for award. We recommended that VA correct its evaluation of proposals and make an appropriate award.[2/]

[1/] In addition to a copy of the court's order, Bullock forwarded a list of 35 enumerated questions, the answers to which Bullock suggested would be of interest to the court. There is no indication in the court's order that this is the court's desire, or that the court is even aware of Bullock's list, and we, therefore, decline to respond to the questions Bullock posed.

[2/] Concerning Bullock's role in the prior case, we point out that Bullock was expressly invited by our Office to respond to the agency report and to attend the conference conducted in that case. Bullock elected not to participate. For that reason, Bullock is not a party entitled to request reconsideration of our decision under 4 C.F.R. § 21.9 (1984). We have considered Bullock's present protest insofar as it challenges VA's actions subsequent to our prior decision, but we stand on our prior decision to the extent Bullock may be indirectly seeking its reconsideration.

As indicated in our prior decision, VA evaluated offers by taking four cost factors into account:

1. Rent;

2. The cost of services included in rent but subject to an annual adjustment based on the consumer price index;

3. The cost of government provided services; and

4. The cost of any lump-sum payment for preparing the premises for occupancy.

VA calculated the present value of these costs on the basis of annual cost per square foot of usable space. The methodology for doing so was set out in the SFO and is explained in our prior decision.

In the current protest, Bullock contends its proposal would have been evaluated as low had VA applied the discount factors as discussed in our prior decision. Bullock charges that VA improperly favored Magnolia-Boyd by overstating the government's cost of providing services and utilities charged to Bullock and that VA improperly reduced the amount of overtime usage assumed in accounting for off-hours charges for heating and air conditioning of the building. Bullock also argues that its proposal should have been selected because it was otherwise more advantageous to the government than was Magnolia-Boyd's proposal.

We disagree.

Bullock's first line of argument, that VA disregarded our decision in reevaluating offers, focuses on footnote 2 of our decision. In the body of that decision, we stated that we calculated the present value of payments on an annual basis because, as the decision indicates, we construed the SFO as providing for such an evaluation. In footnote 2, we observed that the SFO price evaluation clause was inconsistent with the SFO provisions concerning the payment of rent because rent was due on a monthly basis.

Bullock maintains that VA should have reevaluated offers by using discount factors based on monthly payments. We think, however, that VA acted properly in

using the annual basis and that our reasons for rejecting the monthly basis approach in our original decision remain sound. It is well settled that offers must be evaluated on the basis stated in the solicitation. Everhart Appraisal, Inc., B-213369, May 1, 1984, 84-2 CPD ¶ 485. In this instance, the SFO clearly provided that rent would be discounted on an annual basis, Magnolia-Boyd's selection will meet VA's needs and, as we observed in our prior decision, the time for protesting the apparent discrepancy between the SFO evaluation and payment provision had long since passed.3/

Concerning Bullock's contention that VA overstated the government's cost of providing services and utilities for the property it proposed, we point out that VA evaluated those costs by using data Bullock submitted with its offer. Bullock cannot fault VA for its own errors if VA was unaware of them; moreover, if Bullock's cost data was overstated, Bullock has not explained where the error is.

Likewise, Bullock has not explained why it believes VA's action in reducing its estimate of overtime usage was improper. Bullock only says it was injured because, had it known of the reduced requirement, it might have reduced its prices on other items.

We agree with Bullock that, had the SFO indicated that VA would calculate overtime charges on the basis of 10 hours per week, VA could not have reduced the number of hours on which it based its calculation without advising offerors of the change. Everhart Appraisal Services, Inc., supra. However, the SFO did not indicate the number of hours VA would use and there is no indication in the record that offerors were aware of the original estimate.

In the circumstances, no offeror had any right to rely on the original 10-hour figure, and since the record indicates VA subsequently determined that 10 hours per week

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3/ We also noted in our prior decision that the difference between discounting on an annual or monthly basis appeared to have no significant impact on our decision, a fact which our examination of VA's revised pricing indicates is still true.

exceeded its need, we can see no basis for legal objection to its decision to correct its analysis so the final evaluation would accurately reflect its actual requirements.

We also reject Bullock's assertion that its offer should have been accepted because it was the most advantageous once technical considerations are taken into account. As our prior decision indicates, there appears to have been some confusion between offerors concerning the role that factors other than price would play in the selection of an awardee. However, this confusion was largely resolved by VA in the cover letter transmitted with SFO, which reads:

> "As stated in the solicitation, price per net square foot will be the primary determining factor in the award of this lease. The basic effect of the Award Factors will be that where offers are received that are substantially equal in price, those offers which satisfy all the award factors will be favored over those that do not."

In Bullock's protest submissions to our Office, the protester urges that this language removes all doubt concerning the evaluation of technical factors; Bullock urges that it should receive the contract based on factors other than price because, it says, the offers received were substantially equal in price. According to Bullock an in camera examination of the record by our Office should confirm this.

Our examination of the record, however, does not support Bullock's position. Our original decision was based on calculations that showed a relatively small difference in the evaluated price of the Magnolia-Boyd and Bullock proposals. Upon reexamining the data, VA determined that its allowance for overtime charges was excessive because it was based on an allocation of too many overtime hours. The effect of VA's reevaluation of overtime charges is an increase of approximately $4,400 per year in the evaluated price differential between the Bullock and Magnolia-Boyd proposals. In the circumstances, we see no basis for questioning VA's view, implicit in its award decision, that offers were not substantially equal in price.

Finally, Bullock contends that Magnolia-Boyd's proposal is null and void because Magnolia-Boyd lacks the legal right to possess and develop the parcel of land offered to VA. Bullock also contends that the contracting officer was required to reject the Magnolia-Boyd offer because that firm cannot meet the occupancy date established in the solicitation.

Bullock has offered no evidence to support these assertions, which in any event, do not state a basis for protest. Whether an offeror will be able to deliver title and occupancy are matters concerning its ability to fulfill the obligations it offered to assume, and thus, raises concerns that go to that firm's responsibility. VA's decision to proceed with award to Magnolia-Boyd imports an affirmative determination of responsibility, based largely on business judgment, which our Office will not question absent evidence of possible fraud on the part of contracting officials, or the existence of definitive responsibility criteria in the SFO. Alan Scott Industries, et al., B-212703, et al., Sept. 25, 1984, 84-2 CPD ¶ 349. No such circumstances are present here.

The protest is denied.

for Harry R. Van Cleve
Comptroller General
of the United States