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DECISION



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

FILE: B-221862 **DATE:** May 28, 1986
MATTER OF: Restorations Unlimited, Inc.; Wade
Associates; Furniture Craftsman, Inc.

DIGEST:

1. Reasonable basis exists to cancel an RFP for chairs for historic site where subsequent to the issuance of the RFP, a private organization offers to donate chairs to government.
2. The Federal Property and Administrative Services Act, as amended by the Competition in Contracting Act of 1984, does not apply to a procurement conducted by a nonprofit organization using private contributions even though the property which is the subject of the procurement is subsequently donated to the federal government.
3. Under the Historic Sites Act, 16 U.S.C. § 461, et seq. (1982), the Secretary of the Interior, through the National Park Service, has broad discretion to perform acts necessary to preserve for public use designated historic sites, including acquiring personal or real property by gift, purchase or otherwise from patriotic associations or individuals.
4. Claim for proposal preparation and protest filing costs is denied where protest against cancellation of solicitation is denied.

The joint venture of Restorations Unlimited, Inc., and Wade Associates, and Furniture Craftsman, Inc., protest the cancellation of request for proposals (RFP) No. 3-5-93 issued by the Department of the Interior, National Park Service (Interior), for the procurement of 760 theatre chairs for the Ford's Theatre National Historic Site (Theatre) in Washington, D.C. We deny the protest and claim for costs.

Interior issued the RFP on May 31, 1985, for the design and fabrication of 760 chairs for the Theatre, which would be replicas of the original chairs used in the Theatre.

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Offerors were to submit chair prototypes (of three different required types of chairs) with their proposals. By the closing date for proposals, July 29, prototypes and proposals were received from four contractors: the protesters, Joseph's Refinishing, and an additional vendor.

A four member technical evaluation committee (TEC) was established, which included as a member the Executive Producer of the Ford's Theatre Society (Society), a non-profit, tax-exempt group, set-up by agreement with Interior to assist in the management of the Theatre and its bookings. At the direction of the contracting officer, the TEC examined the prototypes of the chairs. According to Interior, for purposes of preserving the historical integrity of the chairs to be used in the Theatre, the Executive Producer of the Society "expressed interest in purchasing a particular chair," offered by Joseph's Refinishing, which, in the opinion of the contracting officer, did not conform to certain mandatory requirements of the RFP.

The Society developed a proposal to purchase and donate the Joseph's Refinishing chairs to the government, thereby eliminating the need for the expenditure of appropriated funds by Interior. The Society planned to raise money for the new chairs by selling to Theatre patrons for \$500 each the old chairs in the Theatre (valued at \$20 apiece). Because the Society was going to raise the funds and donate the new chairs to the government, Interior no longer needed to purchase the chairs under the RFP. Therefore, on October 31, 1985, by amendment No. 3, Interior canceled the RFP. Subsequently, the Society purchased the chairs from Joseph's Refinishing and donated them to the government.

The protesters contend that the cancellation of the RFP was improper because the stated reason for the cancellation, that "the supplies being contracted for are no longer required," was not true since the chairs were still needed and were purchased for Interior. The protesters argue that the cancellation of the RFP and the Society's plan to sell the old chairs were part of a complicated scheme to avoid the requirements of the Competition in Contracting Act of 1984 (CICA), 41 U.S.C.A. § 303(a)(1)(A) (West Supp. 1985). We do not agree with the protesters' contention.

The Federal Property and Administrative Services Act of 1949, 41 U.S.C. 253, as amended by CICA, essentially requires that an executive agency in conducting a procurement for property or services use competitive procedures, 41 U.S.C.A. § 303(a)(1)(A) (West Supp. 1985).

Here Interior initially intended to conduct a competitive procurement with government funds and issued an RFP for this purpose. This procurement was subject to CICA competition requirements. The record indicates that after the initial evaluation of sample chairs, the Society notified Interior of its proposed plan to donate the new chairs. Acceptance of the plan meant that Interior no longer needed to use appropriated funds or to continue with the RFP. We find nothing improper in Interior's decision to cancel the RFP and to accept the chairs as a gift from the Society. In this connection we have recognized that the potential for cost savings is a legitimate basis for canceling a solicitation. Business Communications Systems, Inc., B-218619, July 29, 1985, 85-2 C.P.D. ¶ 103.

The protesters contend, however, that it was only through Interior's RFP and the response by the four offerors that the Society was able to identify the chairs that the Society selected to donate to Interior. While this appears to be so, we do not find any reason to object. The RFP was canceled when the Society offered the chairs as a gift which made the RFP unnecessary. While the Society apparently identified the chair it subsequently purchased from the evaluation of samples under the RFP, there is no evidence that the RFP originally was issued for this purpose, or that the proposals were solicited competitively in bad faith.

The protesters also question the authority of Interior to make the agreement with the Society for the Society's purchase and donation of the new chairs which permitted Interior to obtain the chairs in lieu of conducting a competitive procurement. However, under the Historic Sites Act (Act), 16 U.S.C. § 461, et seq. (1982), the Secretary of the Interior, through the National Park Service, is given broad discretion to perform any acts necessary and proper to preserve for public use designated historic sites, including Ford's Theatre. The Act permits the Secretary, in his discretion, to acquire in the name of the United States by gift, purchase or otherwise any property, personal or real. 16 U.S.C. § 462(d); B-155950, Mar. 20, 1974. In administering the Act, the Secretary is authorized to cooperate with and may seek and accept the assistance of any patriotic association or any individual. 16 U.S.C. § 464(a). Given the Secretary's broad discretion in acquiring property under the Act we find nothing improper with Interior's arrangement with the Society and the acceptance of the new chairs funded by the Society.

Furthermore, the protesters argue that Interior may have violated the laws and regulations which govern the disposal of surplus government property when it transferred the old chairs to the Society for the Society's sale. However, Interior was authorized by the General Services Administration (GSA) pursuant to GSA's jurisdiction (under 40 U.S.C. § 484 (1984)) over the disposal of government surplus property to dispose of the old chairs in the stated manner in view of the circumstances involved.

Thus, while the protesters allege that Interior's agreement with the Society was established to circumvent CICA, we find no evidence that this was the case. The record indicates that Interior canceled the RFP only after the Society offered Interior a plan by which the Society would donate the chairs which obviated the need for an RFP. Interior had the authority to accept the gift. Under these circumstances, we find without merit the protesters' allegation.

Finally, the protesters have requested reimbursement of their proposal preparation and protest costs, including reasonable attorneys' fees. We will allow a protester to recover its proposal preparation costs only where (1) the protester had a substantial chance of receiving the award but was unreasonably excluded from the competition, and (2) the remedy recommended by this Office is not one delineated in our Bid Protest Regulations at 4 C.F.R. §§ 21.6(a)(2-5) (1985). EHE National Health Services, Inc., 65 Comp. Gen. 1 (1985), 85-2 C.P.D. ¶ 362. As provided by section 21.6(e) of our Regulations, the recovery of the costs of filing and pursuing the protest, including attorneys' fees, is limited to situations where the protester was unreasonably excluded from the procurement, except where this Office recommends that the contract be awarded to the protester and the protester receives the award. EHE National Health Services, Inc., 65 Comp. Gen. 1, supra.

A prerequisite to the entitlement of proposal preparation expenses where an agency cancels an RFP and the protester alleges that the agency solicited proposals with knowledge that an award would not be made under the RFP is a showing that the government acted in bad faith in issuing the RFP. Computer Resource Technology Corp., B-218292.2, July 2, 1985, 85-2 C.P.D. ¶ 14. A lack of due diligence or carelessness on an agency's part in allowing an RFP to be issued does not entitle an offeror to proposal preparation costs since mere negligence or lack of due diligence, standing alone, does not rise to the level of arbitrary or

capricious action which provides a basis for the recovery of proposal preparation expenses. Computer Resources Technology Corp., B-218292.2, supra.

As stated above, there is no evidence to indicate that Interior did not originally plan to make award under the RFP or that the proposals were solicited competitively in bad faith. Moreover, the protesters were not unreasonably excluded from the procurement because a reasonable basis existed to cancel the RFP, a risk always taken by those who choose to bid on government contracts. Asbestos Abatement of America, Inc., B-221891; B-221892, May 7, 1986, 86-1 C.P.D. ¶ ____. Because the protesters were not unreasonably excluded from the procurement, neither proposal preparation costs nor the costs of filing and pursuing the protest are recoverable. Asbestos Abatement of America, Inc., B-221891; B-221892, supra; Computer Resource Technology Corp., B-218292.2, supra.

The protest and request for costs are denied.

Harry R. Van Cleve

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