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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Nevada Federal Centre

File: B-225954

Date: March 30, 1987

DIGEST

Where contracting agency did not provide protester/incumbent contractor with solicitation because of agency's unconfirmed and, apparently, incorrect belief that contractor was unable to provide enough space to meet increased space requirements, incumbent contractor was improperly excluded from the competition in violation of requirement in the Competition in Contracting Act of 1984 for full and open competitive procedures.

DECISION

Nevada Federal Centre (NFC), owner of the Nevada Federal Centre building in Las Vegas, protests the General Services Administration's (GSA) award of a lease for office space to Tropicana Investors, owner of the First Commerce Financial Center building. The lease was awarded under solicitation for offers (SFO) No. GS-09B-68167 issued by GSA for a 5-year lease of office space for the Department of Housing and Urban Development (HUD). NFC, the incumbent lessor, contends that GSA's deliberate decision not to advise NFC of the solicitation improperly denied NFC an opportunity to compete for the new lease.

We sustain the protest.

GSA reports that NFC's current 5-year GSA lease is for 21,179 square feet (sq. ft.) subdivided into three blocks of space occupied by three separate federal agencies (HUD, the Social Security Administation (SSA), and the National Labor Relations Board (NLRB)). The lease, which expires April 22, 1987, accounts for virtually all of the space in NFC's building. HUD currently occupies 7,729 sq. ft. of the building, and requires a minimum of 9,580 sq. ft. in the future. HUD advised GSA of the approximately 2,000 sq. ft. increase in its space requirements on August 22, 1986.

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GSA conducted a market survey, inspected nine different buildings, and issued six SFO's on August 25 and 26, pursuant to its small lease procedures, which provide accelerated procedures for leasing up to 10,000 sq. ft. of space. Offers were due August 28 and award was expected by October 31.

The SFO contemplated a maximum delay of 165 days between award and occupancy: GSA had up to 45 days after award in which to provide the lessor with layout drawings, and the lessor had 120 days after receipt of the drawings in which to build-out (perform space alterations) and provide occupancy. GSA awarded the lease to Tropicana, one of the four offerors, on November 26, so that pursuant to the SFO, occupancy was required no later than May 11, 1987. However, GSA reports that the actual occupancy date will be April 23, 1987, apparently because of GSA's prompt delivery of the drawings.

GSA admits that it intentionally did not solicit NFC because NFC's building was 100 percent occupied and, thus, contained insufficient space to meet HUD's requirement for additional space. GSA admits that its lease with NFC for all 21,179 sq. ft. expires on April 22, but contends that the GSA leasing specialist responsible for the HUD lease could not be charged with knowledge concerning the intentions of the other two federal tenants (i.e., whether they would vacate and, if so, when). GSA further contends there would be insufficient time for NFC to build-out the space to SFO specifications by April 23. GSA urges that it therefore would have been a futile act to proffer NFC a copy of the solicitation, and argues that it obtained both adequate competition and a reasonable price. To support the propriety of its actions, GSA cites our decision Rocky Mountain Trading Co., B-220718, Jan. 28, 1986, 86-1 C.P.D. ¶ 99, where we said:

> ". . . from the government's point of view, the propriety of a procurement is determined on the basis of whether adequate competition and reasonable prices were obtained, not on whether a particular bidder is afforded an opportunity to bid."

NFC responds that GSA's determination that the Nevada Federal Centre could not accommodate the additional space within the time required was pure hypothesis. NFC has furnished documents showing two additions to its building that NFC claims it can construct in less than 120 days (i.e., March 26 based on a November 26 award of the lease). NFC maintains that either addition could provide the additional 2,000 sq. ft. required by HUD. NFC states that its building is designed, constructed, approved and zoned for additional upper stories and that it already owns the adjoining

properties required for lateral expansion into the two additions. Moreover, NFC argues, GSA should have known the building's expansion capabilities since NFC's current GSA lease contains a 9,617 sq. ft. price-to-be negotiated expansion option effective on 180 days notice. Finally, NFC claims to have advised GSA when it first learned of the new lease, on December 11 (10 working days after the award to Tropicana), of its ability to meet HUD's increased space requirements.

This procurement is subject to the Competition in Contracting Act of 1984 (CICA), which requires the use of full and open competitive procedures. 41 U.S.C. § 253(a)(1)(A) (Supp. III 1985). Congress established "full and open" competition as the required standard for awarding contracts because of its strong belief "that the procurement process should be open to all capable contractors who want to do business with the Government." House Conference Rep. No. 98-861, 98th Cong., 2d Sess. 1422 (June 23, 1984). Moreover, long before CICA we held that an incumbent lessor is required to be given an equal opportunity to compete to provide space meeting the government's needs and should be furnished a copy of the solicitation regardless of previous information indicating that the incumbent would be unable to submit an acceptable offer. 48 Comp. Gen. 722 (1969). In this regard, GSA's regulations require a market survey for all proposed acquisitions of space specifically in order to promote full and open competition, 48 C.F.R. § 570.201 (1985); the survey must include the solicitation of information on the availability of space through consultations with owners, and others, as appropriate, 48 C.F.R. § 570.201(a); and the proper conduct of the market survey is deemed a "crucial aspect" of the small lease procedures. 48 C.F.R. § 570.304-2.

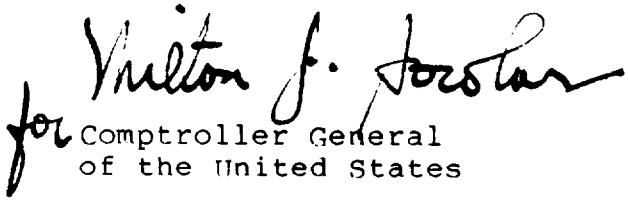
In our view, NFC was improperly denied a copy of the solicitation in violation of CICA's requirement for full and open competition. We find it significant that NFC was contractually bound by its current GSA lease to maintain the capability to expand the available space by up to 9,716 sq. ft. within a period of time (180 days) only 15 days longer than the maximum amount of time (165 days) contemplated by the SFO between award and occupancy. In other words, GSA could, at its option, have called upon NFC to provide more than four times HUD's required additional space within a timeframe similar to that provided by the SFO. We also note NFC's claim that had it received a copy of the solicitation and won the competition it could have provided occupancy even before April 23, when occupancy under the lease with Tropicana will begin.

Moreover, we cannot ignore the possibility that either SSA or NLRB, or both, may have been willing, or planning, to vacate their space in NFC's building, which would immediately open additional space for HUD, again within the required timeframe. There is nothing in the record showing that the market survey included inquiries regarding the moving plans of SSA or NLRB even though both were leasing under GSA auspices. While the individual GSA leasing specialist may not have known this information, we think that a proper market survey would include appropriate inquiries along these lines.

Finally, we find GSA's reliance on Rocky Mountain Trading Co. misplaced. That decision concerned a bidder's failure to acknowledge a material solicitation amendment, where there was no evidence that the contracting agency attempted to exclude the bidder from the competition deliberately, while the instant protest involves an agency's deliberate failure to solicit an incumbent contractor.

Accordingly, we conclude that GSA's failure to solicit an offer from NFC was improper. Since Tropicana's lease does not contain a termination for convenience clause, we cannot recommend the termination of Tropicana's present lease. See I.E. Levick and Associates, B-214648, Dec. 26, 1984, 84-2 C.P.D. ¶ 695. Nevertheless, because GSA's actions unreasonably excluded NFC from the procurement, and no other corrective action is appropriate, NFC is entitled to recover the costs of filing and pursuing its bid protest, and should submit a claim for those costs directly to GSA. 4 C.F.R. § 21.6 (1986). By separate letter, we are advising the Administrator of GSA of our determination.

The protest is sustained.



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