



The Comptroller General
of the United States

Washington, D.C. 20548

Lieberman

Decision

Matter of: Stephen Sloan Marine Corp.
File: B-234219
Date: May 9, 1989

DIGEST

1. Concession contract renewal award properly was made on the basis of initial proposals to satisfactorily performing incumbent which submitted the best proposal, where the solicitation advised that award could, and probably would, be based on initial proposals, and the procurement was conducted under specific statutory authority which provides preference for satisfactorily performing concessionaires.
2. Allegation that incumbent had not performed satisfactorily under existing contract is untimely filed after award where the solicitation provided notice of the incumbent's satisfactory performance rating and resulting statutory preference entitlement.
3. Protester's speculation that awardee intends to sell its business, which is denied by awardee and of which the agency indicates it has no knowledge, does not provide a basis for protest.
4. Protest against issuance of solicitation prior to the expiration of an incumbent's concession contract is untimely filed after award of contract and, in any event, early resolicitation is in accordance with statute authorizing the procurement.
5. Agency properly did not credit protester for offering additional features which were discouraged under the solicitation, and which the solicitation provided would not be considered as enhancing a proposal.

DECISION

Stephen Sloan Marine Corp. protests the award of a concession contract for the operation of a passenger ferry service for Liberty and Ellis Islands Statue of Liberty

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National Monument, to the incumbent, Circle Line-Statue of Liberty, Inc., under a statement of requirements (SOR), issued by the National Park Service, Department of the Interior. Sloan asserts that the Park Service failed to conduct discussions, erroneously determined that Circle Line's current contract performance was satisfactory, and failed to consider certain unique features offered by Sloan. In addition, Sloan contends that Circle Line plans to sell its operations, and that the Park Service should not have conducted the competition 4 years before the scheduled expiration of the Circle Line's extant contract. We find the protest without merit.

Circle Line is the incumbent under a 15-year concession contract scheduled to expire in 1992, which was awarded pursuant to the Concessions Policy Act of 1965, 16 U.S.C. §§ 20 et seq. (1982), under which the Secretary of the Interior is authorized to award concession contracts to provide and operate facilities and services incident to the enjoyment of areas administered by the National Park Service. Section 5 of the Act directs the Secretary to encourage continuity of operation in the renewal of contracts by giving a renewal preference to concessionaires who have performed their obligations under prior contracts to the satisfaction of the Secretary. To this same end, the section also authorizes the Secretary to extend or renew the concession contracts before the expiration of the prior contract with reasonable public notice and after consideration and evaluation of all proposals received as a result. This preference provision grants the Secretary broad discretion to award concession renewal contracts without utilizing the normal competitive rules applicable to the award of federal contracts. 49 Comp. Gen. 88 (1969).

The current SOR was issued on June 24, 1988, and called for the submission of proposals within 90 days. The SOR included a copy of the Concessions Policy Act, and contained specific notice that Circle Line had been evaluated as having provided satisfactory performance, and that this earned Circle Line the statutory renewal preference. The SOR further stated that this preference entitled Circle Line to offer to equal the conditions of the best offer made, if it was not Circle Line's offer, and that by doing so Circle Line would be entitled to award of the new contract. We note that our Office has explicitly approved this manner of implementing the statutory preference, 49 Comp. Gen. 88, supra, and that this procedure is provided for in the applicable Park Service regulations governing the letting of concession contracts. 36 C.F.R. § 51.5(d) (1988).

The SOR contained five evaluation factors: 1. Identifying Information (to establish the ownership and legal structure of the offering entity); 2. Experience and Related Background (to assess the offeror's competency to manage a business activity and to operate a passenger ferry service); 3. Plans for Operation; 4. Insurance; and 5. Financing. The SOR provided that proposals would be evaluated on the basis of these criteria, and also stated that the services described in the SOR were sufficient and that offers of expansion which were not in accordance with National Park Service's planning documents or of extensive facilities of a type not requested would not be considered better offers. Further, the SOR warned that proposed franchise fees would be closely reviewed against projections of the operating costs, and that franchise fees which appeared inconsistent with the Park Service's public service objectives or which did not appear to allow the concessioner a reasonable opportunity for a profit from the operations were unacceptable. In addition, the SOR provided notice that award could and was expected to be made on the basis of initial proposals, without discussions; therefore, offerors were warned that their initial proposal should reflect their entire offer.

Three proposals were received by the closing date, Sloan's, Circle Line's, and a proposal by Brian A. McAllister. A Park Service evaluation panel reviewed the proposals and determined that Circle Line's was the best offer. In particular, the panel determined that while Sloan had the competency to manage a business, its proposal did not demonstrate the ability to operate a ferry service of the size and complexity required under the SOR. Also, Sloan did not include plans which showed the ability to have the required six ferry vessels in place in a timely manner, and did not demonstrate that Sloan had a sufficient commitment to finance the proposed business. Overall, Sloan's proposal was considered satisfactory in two evaluation areas (Identifying Information and Insurance), marginal in two (Plans for Operation and Experience), and unsatisfactory in one (Financing). The Park Service considered that a proposal by Sloan to establish a not-for-profit corporation which would contribute net profits to the Park Service constituted an offer of an enhanced franchise fee. Sloan also offered to provide an educational, multi-lingual audio presentation on its ferry service, for which it did not receive additional credit because the presentation was beyond the scope of facilities called for under the SOR. McAllister's proposal was found to lack much of the required material and was considered severely deficient under virtually every factor.

Circle Line's proposal was rated satisfactory under all five factors. Circle Line was considered to have submitted the best offer and, since it was a satisfactorily performing incumbent which was entitled to statutory preference, on November 28, Circle Line was awarded a renewal contract. By letter dated December 2, Sloan protested to the Park Service and, after agency denial of its protest, Sloan protested to our Office.

First, regarding Sloan's allegation that the Park Service failed to conduct discussions prior to making award, there is no legal requirement for the Park Service to do so. Since the solicitation provided notice that award could and, in fact, was expected to be made on the basis of initial proposals, the Park Service had the discretion to make an award without conducting discussions. Kitco, Inc., B-232363, Dec. 5, 1988, 88-2 CPD ¶ 559. Having determined that Circle Line, the incumbent with a statutory preference right to match any better offers in any instance, had submitted the best offer, the Park Service could reasonably decide to award the contract to Circle on the basis of initial proposals, without conducting discussions.^{1/}

Second, we think Sloan's assertion that the Park Service wrongly determined that Circle had performed satisfactorily under the existing contract is untimely. The solicitation explicitly stated that Circle Line was evaluated to have performed satisfactorily and that this entitled Circle Line to the statutory preference. Therefore, Sloan was on notice of this basis of protest from the June 24 issuance date. Since the protest was not filed until months later, the matter is untimely raised since our Regulations require that a protest be filed within 10 working days of when the basis of protest is known. See 4 C.F.R. §§ 21.2(a)(2) and (3) (1988). In any event, the Concessions Policy Act and the applicable regulations explicitly provide that the determination of satisfactory performance is within the

^{1/} We note that since the procurement was conducted under the specific procurement authority of the Public Concessions Act, it is not subject to the requirement under the Competition in Contracting Act that award on the basis of initial proposals may be made only when there is no other lower-priced technically acceptable proposal. In any event, that requirement would be inapposite since this procurement is for a concessions contract under which the government receives a franchise fee and does not pay for the services in question. Further, the evaluation, as summarized above, indicates that Sloan's offer was considered technically unacceptable, as was the third offer received.

discretion of the Secretary of the Interior; further, the determination is a matter of contract administration which is not subject to review by our Office under our bid protest function. 4 C.F.R. § 21.3(m)(1).

Third, concerning Sloan's allegation that Circle Line intends to sell its business, the Park Service states that it has no information to this effect, and Circle Line states that it has no intention of selling and that it fully intends to operate the concession for its full term. Further, there is nothing in the record which suggests that Circle Line is contemplating or in the process of selling its business.

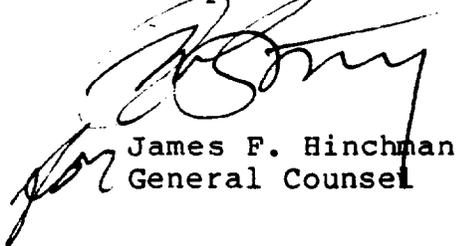
We also find no merit to Sloan's allegation that the Park Service improperly solicited the requirement 4 years prior to the expiration of Circle Line's existing contract. First, this protest basis is untimely filed since it concerns an alleged solicitation impropriety but was not raised until after the closing date for receipt of initial proposals. See 4 C.F.R. §§ 21.2(a)(1) and (3). Moreover, section 5 of the Concessions Policy Act expressly permits the renewal of a concession contract prior to the expiration date. The legislative history of the Act shows that Congress was particularly concerned with the desirability of maintaining continuity of operation and operators. To this end, section 5 of the Act was intended to give the Secretary of the Interior the discretion to renew existing contracts "before expiration [if] necessary to enable a concessionaire to raise capital for expanded improvements or, in the case of contracts due to expire within a year or two, to permit both the government and the concessionaire to know where they will stand in the future and thus assure continuity of park operations." H. R. Rep. No. 591, 89th Cong., 1st Sess. 5 (1965). Here, Circle Line's existing concession operation was providing only four boats. The SOR called for expansion to five boat service and also required the concessionaire to have a sixth boat readily available in case of problems with one of the five. Circle Line will require multi-million dollar capitalization to enable it to increase its fleet capacity to meet this expanded requirement. Accordingly, the Park Service acted properly within the discretion provided under the Act when it issued the SOR prior to the expiration of Circle Line's existing contract.

Finally, Sloan alleges that the Park Service failed to properly consider the unique features of its proposal, specifically its proposed audio presentation and its not-for-profit structure. However, the solicitation did not call for any audio presentation, and did not provide for its consideration. On the contrary, the SOR specifically

discouraged the offer of any extra features or facilities beyond the stated scope and provided that such features would not be considered as enhancing a proposal. Accordingly, the Park Service reasonably did not credit Sloan for this unrequested feature. See Loral Terracom; Marconi Italiana, 66 Comp. Gen. 272 (1987), 87-1 CPD ¶ 182. To the extent that Sloan is arguing that such enhancements should have been considered, Sloan is untimely protesting an alleged solicitation impropriety since the protest was not initially filed with the agency prior to the closing date for receipt of initial proposals. 4 C.F.R. §§ 21.2(a)(1), (3).

As for Sloan's not-for-profit feature, the Park Service reasonably considered this to constitute an enhanced franchise fee proposal. The Concessions Policy Act provides that considerations of the revenue to the government generated by franchise fees, however stated, shall be subordinate to the objective of protecting and preserving the areas and of providing adequate and appropriate services for visitors at reasonable rates. 16 U.S.C. § 20b(d). Accordingly, the SOR did not include franchise fees as an evaluation factor and, pursuant to the implementing regulations, the Park Service did not plan to consider the proposed franchise fees unless offers were considered otherwise equal. Since the offers were not considered otherwise equal, the Park Service properly did not give Sloan's proposal additional credit for this feature.

The protest is denied in part and dismissed in part.



James F. Hinchman
General Counsel