Stanks

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Heuga USA

File: B-234351

Date: June 9, 1989

DIGEST

Where low offer expires and offeror, having sold its business interests through which it could provide the solicitation requirements, purports to withdraw its offer, the contracting agency's acceptance of the offeror's "withdrawal" of its offer is not improper or unreasonable where prior to the expiration of the offer or the agency's acceptance of the "withdrawal" of the offer, the buyer of the business did not assert any possessory interests in the offer and the agency, otherwise, has no basis to conclude that the buyer is a successor in interest.

DECISION

Heuga USA protests the agency's action in excluding from consideration for award the offer submitted by the Bigelow Division of Fieldcrest Cannon, Inc. (FCI), in response to request for proposals (RFP) No. FCNH-88-F501-N, issued by the General Services Administration (GSA). The RFP, issued for various types of carpet, contemplated a requirements contract for 63 special item numbers (SINs). Heuga's protest concerns SINs 31-54 a and b for carpet tiles and corresponding (color coordinated) broadloom carpet, respectively. Heuga contends it is the successor in interest to the offers submitted by FCI for those items.

We deny the protest.

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FACTS

As we indicated above, FCI had submitted an offer under this RFP. On December 30, 1988,1/ FCI sold to Heuga International, B.V. (a Netherlands company which does business in the United States as Heuga USA) its fifty percent interest in the Bigelow/Heuga Company, which was a joint venture2/ between FCI and Heuga International, B.V., established for the purpose of manufacturing and selling carpet tiles such as those required by the RFP. Also on December 30, after several prior extensions of the period of acceptance in accordance with the agency's requests, FCI's offers on SINs 31-54 a and 31-54 b expired. Prior to the expiration of FCI's offer on December 30, GSA had failed to request that the firm again extend its acceptance period on the subject items. On the other hand, FCI itself had taken no action to extend the acceptance dates of its offers. Thus, the offers for those items expired on the same date FCI sold to Heuga its interest in the joint venture through which its Bigelow Division would have serviced the underlying contract.

The record shows that on January 4, during the conduct of business with the agency's contracting office concerning another procurement, the vice president for marketing and authorized negotiator for the Bigelow Division of Fieldcrest Cannon (the offeror) informally advised the contracting office that in the event its offers for SINs 31-54 a and b should "come in line for award," it would need to withdraw

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1/ We note that some of the protest documents refer to the date of sale as December 31, 1988; however, since the Agreement for Purchase and Sale and the Assignment and Bill of Sale show December 30 as their date of execution, for purposes of this decision December 30, 1988, is referenced as the date of sale.

2/ Some of the protest documents refer to the Bigelow/Heuga entity as a "partnership," while others refer to it as a joint venture. Since, as the agency observes, the entity referred to itself as a joint venture in the (separate) offer it submitted in response to the subject solicitation, we will here also refer to the entity in that manner.

its offers because the company was no longer in the carpet tile business.

On or about January 23, the agency and an executive of a marketing firm representing FCI on a contingent fee basis (for the purpose of securing the contract for FCI) who was authorized to negotiate on behalf of FCI for this RFP, became aware of the probability that the offers submitted by FCI for the subject solicitation items were in line for award. According to the record, on January 23, the marketing firm executive advised the contracting officer that the joint venture of Bigelow/Heuga (through which FCI provided carpet tiles) had been sold to Heuga and was no longer associated with the Fieldcrest Cannon companies. The record further indicates that during this January 23 conversation with the contracting officer, the FCI marketing representative inquired as to whether "there could be a novation agreement or a joint venture established or some other way that Heuga could win this contract." The contracting officer requested a copy of the bill of sale and any other documentation that would substantiate the information provided by the marketing representative.

Also on January 23, the same marketing representative who was authorized to negotiate for FCI under the subject RFP for SINs 31-54 a and b received the authorization of Heuga USA to act as its sales representative to secure for Heuga USA the same contract. On January 24, the contracting officer informed FCI's manager for government sales, who was also an authorized negotiator for the corporation, that FCI's offers had expired and requested that he reinstate the offers and either extend them for 30 days or withdraw them if the firm wished to do so.3/ In compliance with GSA's request, on January 25 FCI telefaxed to the contracting

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3/ We note in this connection that the contracting officer's request that FCI first reinstate its expired offers and then withdraw them if the firm was no longer interested in receiving the award was unnecessary since FCI actually needed to do nothing regarding its expired offer if it did not wish to be considered for award. Although the agency had not requested that FCI extend its offer acceptance period prior to its expiration, we have held that the offeror is also responsible for extending its offer prior to its expiration if it is still interested in competing for award of the contract. Native American Trading Corp., B-234107, May 19, 1989, 89-1 CPD ¶ ___; Arsco International, B-202607, July 17, 1981, 81-2 CPD ¶ 46.

office a request to extend its offers for items 31-54 a and b through February 28, and on January 26 telefaxed a letter to the contracting officer withdrawing the offers. On February 7 and February 9, respectively, FCI confirmed (provided a "hard copy" of) the telefaxed extension and withdrawal of its offers.

However, by letter dated January 25, addressed to the contracting officer on FCI letterhead, the FCI marketing representative stated, with reference to the FCI offers for items 31-54 a and b:

> "We want to and intend to service this contract but are at this stage somewhat undecided as to whether a novation designed to make Heuga the primary party to the contract might not more fairly reflect the realities of the situation. We are exploring this possibility with [Heuga] and with our attorneys. . . ."

According to the record, a letter dated January 27, addressed to the contracting officer and bearing the signature of that same marketing representative stated:

> "The fax signed by [FCI's manager for government sales/authorized negotiator] . . . withdrawing our offer on Item 31-54 was based on misunderstanding and should be considered void and of no effect."

Clearly, there was a conflict between the communications the agency had received from FCI's manager for government sales/authorized negotiator (January 26) and its vice president for marketing/authorized negotiator (January 4)--both of whom had indicated FCI was withdrawing from the procurement--and its marketing representative (January 25 and 27) who indicated to the contrary. In view thereof, the contracting officer, on January 30 and February 1, inquired of FCI officials--including the manager for government sales/authorized negotiator--concerning the company's intentions regarding the withdrawal of its offers. The company officials responded that FCI remained firm in the withdrawal of its offers for items 31-54 a and b. On January 30, GSA notified FCI's marketing representative that in reference to his January 25 and January 27 letters, FCI's offers for the items in dispute had been withdrawn, and FCI was, therefore, no longer under consideration for the award of these items.

Subsequently, this protest of "GSA's January 30, 1989 letter" to FCI's (and Heuga's) marketing representative was filed in our Office "on behalf of Heuga [USA]." The agency

has withheld award of the items in dispute pending the resolution of this protest.

The protester's position is that because Heuga purchased FCI's interest in Bigelow/Heuga and, by implication, because that was the entity through which FCI would have provided the required goods), Heuga is the "successor party in interest" of FCI's low offer for items 31-54 a and b and intended to hold open "its" offers for those items until contract award. Therefore, Heuga contends, since FCI had sold its interest in the company through which it marketed carpet tile, it was without authority to withdraw the offers.

The protester expresses the view that, at best, FCI's withdrawal of the offer was only "a withdrawal of [FCI's] interests in these SINs" but had no effect upon Heuga's interest in them. Alternatively, Heuga maintains, in essence, that to the extent FCI did have authority to withdraw its offer "on Heuga's behalf," the withdrawal was a "mistake based upon a misunderstanding by a . . . representative [of FCI] of the relationship between Heuga and [FCI]," which, when discovered, "Bigelow [FCI] acted promptly to rescind the withdrawal notice" (emphasis added) through the marketing representative's January 27 letter.4/

The protester alleges that GSA was on "constructive" notice, prior to receiving FCI's withdrawal of its offers, that FCI

4/ In this connection, we note that in stating its case, the protester interchangeably refers to the actions of officials of the offeror--the Bigelow Division of Fieldcrest Cannon (FCI)--and FCI's marketing representative for this solicitation, as one and the same "Bigelow," in a manner that is suited to the protester's representation of the facts. Thus, for example, the protest is worded in a manner that conveys the inaccurate impression that the offeror, which it refers to as "Bigelow," acknowledged in the marketing representative's January 25 letter that Heuga was "the real party in interest" to the FCI offers, but by letter dated January 26 (signed on behalf of FCI's manager for government sales and authorized negotiator) "erroneously" withdrew them, and after recognizing its "mistake" corrected it by "rescinding" the January 26 notice of withdrawal by the marketing representative's letter dated January 27, who, as previously stated, the record indicates was also retained on February 23 as a sales representative for securing award of items 31-54 a and b for Heuga.

had sold its joint venture interest in the carpet tile business to Heuga and "considered Heuga to be its successsor in interest" to its offer for SINs 31-54 a and b. On the basis of this allegation, Heuga contends the agency improperly accepted FCI's withdrawal of its offers without ascertaining FCI's "status as an offeror," and refused to reinstate the offers as requested by the marketing representative.

Heuga states that in view of the conflicting expressions of intent (received from FCI officials on one hand, and from FCI's marketing representative on the other hand), the agency had a duty to request and obtain clarification from the offeror and to resolve "ambiguities" concerning FCI's intent to withdraw its offer. The protester suggests that because the agency did not rescind FCI's withdrawal of its offers, it failed in these duties, and in so doing, violated federal procurement regulations requiring full and open competition. The protester also alleges that GSA improperly accepted FCI's telefaxed withdrawal of its offers and that these allegedly improper actions on the part of the agency are prejudicial to Heuga's "contract rights" under the solicitation.

Heuga requests a ruling that GSA's exclusion of the offers submitted by FCI from further consideration based on FCI's withdrawal of them is arbitrary and unreasonable, and that GSA should reverse its determination in this regard and "reinstate Bigelow as an offeror." (Emphasis added.)

DISCUSSION

The issue central to Heuga's protest is the propriety of GSA's acceptance of FCI's withdrawal of its offers for SINs 31-54 a and b. Heuga's protest is based upon its contention, in essence, that as purchaser of FCI's 50 percent interest in its carpet tile business--the joint venture of Bigelow/Heuga--Heuga is or would be the successor in interest to FCI's low offers for the subject SINs, but for GSA's acceptance of FCI's withdrawal of the offer.

In our view the very posture of Heuga's protest bespeaks its merits. The record shows that the transfer of FCI's interests in the Bigelow/Heuga joint venture to Heuga took place on December 30, the same day that the subject FCI offer expired. Furthermore, prior to the date when the parties became aware that FCI's offers were in line for award (on or about January 23), neither Heuga nor FCI manifested any interest in maintaining the viability of the offers, pending award. Indeed, there has been no showing of record that between those dates Heuga exercised or

manifested any possessory interests with respect to the offers in which it now claims to have a contractual right by virtue of the December 30 transaction, even though the acceptance period of the offers had expired.

This assessment of Heuga's position with respect to the FCI offers is supported by the agency's telephone contact record of a January 23 telephone conversation between the marketing representative and one of the contracting officials. According to the contact record the marketing representative called to advise the contracting officials of the sale of Bigelow/Heuga. The contact record goes on to state, "[The marketing representative] asked if there could be a novation agreement or a joint venture established or some other way that Heuga could win this contract. . . ." It would appear that if, as Heuga now contends, the FCI offer had properly been a part of the December 30 transfer of interests from FCI to Heuga such that Heuga was the successor in interest to the offers, there would have been no need for Heuga to devise some procedure by which "Heuga could win this contract."

On the other hand, the actions of the FCI officials with respect to that firm's offers are clearly indicative of its authority and desire to be excluded from consideration for award. First, although not recognized by the agency as an official withdrawal of its offer, on January 4, the vice president for marketing of the Bigelow Division of Fieldcrest Cannon informally advised the contracting office that it would withdraw its offer for SINs 31-54 a and b if it became eligible for award because the company was "no longer in the tile business." When on January 24 the contracting officer requested that FCI extend its offer acceptance dates if it was interested in the contract award or, in the alternative, withdraw the offers, an FCI official who was also an authorized negotiator for the firm complied with the contracting officer's request by giving the requested extension of the acceptance period to effectuate a revival of the offers.

Consistent with FCI's prior expressions of its desire to withdraw its offers, however, on the next day after it purportedly revived its offers, a letter signed for the same official who extended the acceptance period was telefaxed to the contracting officer withdrawing FCI's offers "effective

immediately."5/ Contrary to Heuga's contentions, on February 1 and February 7, the agency obtained, respectively, oral and written confirmation from FCI officials of its intention to withdraw its offers.

In our view, the agency's action in excluding FCI's offers from further consideration for award was not improper, arbitrary or unreasonable. The expiration of an offer operates to preclude the government's creation of a contract with the offeror by acceptance of the offer, and it confers on the offeror the right to refuse to perform any contract awarded to it. MKB Mfg. Corp., B-208451, Mar. 1, 1983, 83-1 CPD ¶ 204. However, an offeror may waive its right to refuse to perform a contract if, following the expiration of its acceptance period, the offeror is still willing to accept award of the contract on the basis of the offer as submitted. See 57 Comp. Gen. 228, at 230 (1978), 78-2 CPD ¶ 59; International Logistics Group, Ltd., B-223578, Oct. 24, 1986, 86-2 CPD ¶ 452. Although, in response to the contracting officer's request, FCI by letter dated January 25 stated it would extend the period during which it would accept award, since the offeror had given the agency to understand that it was no longer interested in the award because the manufacture and sale of carpet tile required by the solicitation was no longer a part of its business, it is clear that the action FCI took to revive the offers was only for the purpose of subsequently withdrawing it--an action which as we have noted previously was unnecessary. See John Bankston Construction and Equipment Rental, Inc.--Request for Reconsideration, B-225711.2, Mar. 31, 1987, 87-1 CPD ¶ 372.

Under the circumstances of this case, it is our view that FCI's actions demonstrated that on January 25 when it purportedly extended its acceptance period, it was not willing to accept award of the contract--one of the conditions required for an offeror to revive its expired offer or waive its right of refusal to perform the contract. There is, in fact, no evidence of record that FCI would have been willing, or was even capable, to perform the contract if it received the award. Thus, the actions by which FCI purportedly revived its offers on January 25 were void and

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5/ The record indicates that the FCI official/authorized negotiator for whom the withdrawal letter was signed was out of town (as he had previously informed the contracting officials he would be) and was, therefore, unable to sign the letter at the time of its issuance.

of no effect because it was not done for the purpose of enabling FCI to receive the award but supposedly for the purpose of enabling it to withdraw its offers. Since the revival was of no effect, there were no FCI offers for the subject requirement after December 30 and, therefore, Heuga could not have been a "successor party in interest" to its offers.

Even if it is considered that FCI validly revived its offers on January 25, it effectively withdrew them on January 26. Heuga argues two points against the validity of FCI's withdrawal. First, Heuga maintains that the withdrawal letter was invalid because it was "based on a misunderstanding." However, FCI officials confirmed the withdrawal of its offers at least twice after its intent to withdraw was contradicted by the firm's marketing representative and, otherwise, its actions in no way suggest that it intended to accept award of and perform the contract. Further, the contractual agreement between FCI and its marketing representative provides that the representative "shall not incur . . . obligations for, or on behalf of, FCI" and further, that "FCI reserves the right . . . to cancel a submitted bid [here, offer] for any reason." These contract clauses indicate that final decisions and actions on behalf of FCI with respect to the firm's contractual commitments were to be made by the corporate officials, not by the marketing representative. We, therefore, conclude that the marketing representative's decisions and actions were superseded by those of the FCI officials, particularly those officials who are also designated authorized FCI negotiators. Since the record does not corroborate the marketing representative's statement that the withdrawal letter should be considered void and of no effect, we conclude that the marketing representative's January 27 letter was ineffective to rescind the January 26 withdrawal of the FCI offers.

Secondly, Heuga contends the January 26 telefaxed withdrawal was invalid on the bases that the telefax did not satisfy the solicitation requirement for withdrawal by written notice and the withdrawal notice was not actually signed by the FCI official whose name appears in the letter as signatory, but by the individual who prepared the letter. Concerning the first of these objections, since the telefaxed withdrawal was properly confirmed by written notice, it met the requirements of FAR § 52.215-10(g) (FAC 84-5). With respect to the fact that the withdrawal was signed for the FCI authorized negotiator by the preparer of the letter, since the telefaxed withdrawal was subsequently confirmed by the signatory, it may properly be considered to have been ratified by that official. On this issue, we

conclude that if FCI's offer was validly revived, it was also validly withdrawn, effective January 26, and the marketing agent's representations to the contrary are of no consequence with respect to reviving the withdrawn offer. We, therefore, further find on this basis that following these events there was no FCI offer before GSA for the subject items to which Heuga could be successor in interest.

Finally, we recognize that the parties have set forth arguments concerning whether Heuga, as purchaser of Bigelow/Heuga, meets the federal procurement requirements (see CCD Distributors, Inc., 66 Comp. Gen. 344 (1987), 87-1 CPD ¶ 312) to qualify as an assignee of the FCI offers. However, based on the record before us, it is our view that it not necessary that we reach a determination on whether Heuga is acceptable to the agency as the assignee of FCI's offer based on the assets of the Bigelow/Heuga joint venture that were transferred. Rather, the record indicates that prior to GSA's determination that it would no longer consider FCI for award, Heuga had not provided GSA with the necessary documentation to prove its status as a successor in interest to the offer. Since GSA had no information to confirm Heuga's representation of itself as successor in interest to the offers, it had no basis to recognize Heuga as such or to conclude that the withdrawal of the offers by FCI officials was without authority.

The protest is denied.

James F. Hinchman
General Counsel