Gary

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Golden Triangle Management Group, Inc.

File: B-234790

Date: July 10, 1989

DIGEST

1. Protest that contracting agency improperly tailored a solicitation to conform to office space offered by ultimate awardee is denied where the record shows that the specifications in fact accurately reflected the government's minimum needs and enhanced competition.

2. Use of 10-year amortization period for moving costs in the evaluation of proposals is unobjectionable where 10-year amortization period was consistent with 10-year price evaluation under the solicitation and with the protester's own offer of a lease for a 10-year term, and where, although the government has termination rights after 5 years, the agency expects to remain in the leased premises for the full 10-year lease period.

DECISION

Golden Triangle Management Group, Inc., protests the award of a lease to Beaumont Zane Alan Associates, Ltd. (BZA), under solicitation No. R7-67-88, issued by the General Services Administration (GSA) for office space. Golden Triangle contends that GSA improperly tailored the requirements of the solicitation to the office space it knew would be offered by BZA, and that, in evaluating the proposals, the agency improperly underestimated moving costs in computing the awardee's final evaluated price. We deny the protest in part and dismiss it in part.

GSA issued the solicitation on April 6, 1988, to provide for the continued housing of the Internal Revenue Service (IRS) and the Social Security Administration (SSA) in Beaumont, Texas. The agencies required more space than the 17,093 square feet they were occupying under an expiring lease with the protester and, at their request, GSA issued the solicitation for a minimum of 24,500 square feet, to a

maximum of 24,650 square feet.1/ The solicitation also identified as a special requirement the need for at least 9,240 net usable square feet on one floor and 4,860 net usable square feet on another floor for the IRS. The solicitation called for a 10-year lease term, with the government having termination rights after 5 years. The pertinent award factors were the average annual price per square foot for the 10-year lease term (discounted to net present value), and the cost of moving from the current space.

Of the offers received, two, BZA's and Golden Triangle's, were found to be in the competitive range; following negotiations, GSA requested best and final offers (BAFOs) from both firms. Both proposals indicated that space was being offered for a term of 10 years, with no renewal options. In evaluating the proposals, GSA added $46,040 in moving costs to BZA's 10-year prices (but not to Golden Triangle's prices for the 10-year term, since no move would be required if the lease was awarded to that firm). BZA's final evaluated price, including moving costs, was $6.73 per square foot, and Golden Triangle's, $6.85 per square foot. Award thus was made to BZA as the low, technically acceptable offeror.

IMPROPERLY-FORMULATED SPECIFICATIONS

Golden Triangle asserts that, in formulating the solicitation, GSA deviated from the IRS's stated requirement for 14,100 square feet of contiguous space and instead custom designed the solicitation to require space for the IRS on two different floors. The specifications were thus written, according to the protester, not to reflect actual needs, but rather to conform exactly to the existing floor plan of the space offered by the awardee, BZA. According to the protester, this was one part of an overall pattern of steering the award to BZA that constituted fraud or bad faith on the part of the agency.

GSA responds that while its preliminary discussions with the IRS indicated that the IRS desired contiguous space, GSA determined that such a requirement would be so difficult to satisfy in the Beaumont market that it would unduly limit competition. In order to enhance competition, an agreement was reached with the IRS under which GSA would solicit 9,860 and 4,860 square feet, respectively, on adjacent floors of

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1/ The lease actually was with Eastex Associates, but since Golden Triangle filed the protest on behalf of Eastex, for simplicity we refer to Golden Triangle as the lessor.

the same building. Further, GSA points out that BZA's existing space did not, as alleged by Golden Triangle, conform precisely to the solicitation specifications; each of the floors in BZA's building contained 14,300 square feet, and none of the floors, therefore, conformed exactly to the solicitation's specified space configuration for the IRS.

We find nothing improper in the agency's decision to solicit space on adjacent floors. GSA took this step, the record clearly shows, not to confer some advantage on BZA or other offerors, but solely to assure that there would be competition for the requirement. In so doing, GSA essentially determined that while IRS might prefer space on a single floor, this preference in fact was not part of the government's minimum needs such that limiting competition to Golden Triangle, the incumbent, was justified. Agency actions such as this, taken to enhance competition, generally are unobjectionable. See, e.g., General Motors Corp., Allison Gas Turbine Div., B-231733, Sept. 16, 1988, 88-2 CPD ¶ 262.

Golden Triangle further asserts, however, that tailoring the specifications to favor BZA was only one part of an overall pattern, aimed at steering the award to that firm, that constituted bad faith on the part of GSA. In order to show bad faith, a protester must submit evidence that the contracting agency acted with specific and malicious intent to injure the protester. Marlow Servs., Inc., B-229990.3, Apr. 19, 1989, 89-1 CPD ¶ 388. Using that standard, we find no evidence in the record to support the protester's contention.

In its comments on GSA's report on the protest, Golden Triangle further asserts that GSA omitted from the solicitation a requirement that the offered space meet seismic safety regulations that were adopted by GSA in 1976. According to the protester, the omission of the regulations allowed BZA (whose building, according to Golden Triangle, probably would not have conformed to the regulations) to participate in lease negotiations when it would otherwise have been ineligible. The allegation is untimely and will not be considered. Our Bid Protest Regulations provide that a protest based upon alleged improprieties in a solicitation which are, or should have been, apparent prior to the closing date for receipt of proposals (in this case, November 10, 1988), must be filed prior to that closing date. 4 C.F.R. § 21.2(a)(1) (1988); 120 Church St. Assocs., B-232139.3, Mar. 7, 1989, 89-1 CPD ¶ 246, aff'd, 120 Church St. Assocs.--Reconsideration, B-232139.4, May 23, 1989, 89-1 CPD ¶ ___. Here, the alleged failure to include seismic

safety requirements was or should have been apparent on the face of the solicitation; however, Golden Triangle did not protest the matter until it submitted its comments on GSA's report on May 2, 1989. Consequently, this aspect of the protest is dismissed as untimely.

UNDERESTIMATED MOVING COSTS

Golden Triangle asserts that GSA underestimated the impact of moving costs on the awardee's offered price by amortizing the costs over a 10-year period. According to the protester, the proper amortization period was 5 years since, under the terms of the solicitation, the government had the right to terminate the lease after 5 years. Had GSA used a 5-year amortization period in calculating moving costs, Golden Triangle's evaluated price would have been lower than the awardee's. In support of its position, Golden Triangle cites the GSA Supplement to the Federal Acquisition Regulation (GSAR), which, it asserts, provides that estimated moving costs should be amortized over the "firm" term of the lease. That provision states, in part, as follows:

> "If potential acceptable locations are identified through the advertisement or market survey and relocation costs (including estimated moving costs . . . amortized over the firm term of the lease) are not significant enough to preclude recovery of such costs through competition, the contracting officer may proceed to develop a formal SFO [solicitation] and negotiate with all interested parties . . . ." GSAR § 570.502(3)(ii) (emphasis added).

The regulation relied on by Golden Triangle is not controlling; it is applicable, not to the evaluation of offers for space, but to the more abstract initial determination of whether to negotiate succeeding leases for the continued occupancy of space in a building. In this regard, the introductory paragraph to the regulation (§ 570.502(a)) provides as follows:

> "General. Succeeding leases for the continued occupancy of space in a building may be entered into when a cost-benefit analysis has been conducted and the results indicate that an award to an offeror other than the present lessor would result in substantial relocation . . . costs to the Government that are not expected to be recovered through competition."

Prior to issuance of the solicitation here, GSA complied with this provision by conducting a market survey, based on which it made a determination that it could offset the costs of relocation with lower prices generated through competition. While the moving cost amortization requirement may have applied to this determination, it did not apply to GSA's subsequent evaluation of offers in response to the actual solicitation.

In any case, to the extent GSA should be required to spread moving costs only across years during which the lease will be in effect, we think GSA did so here. The solicitation sought proposals for a 10-year term and provided for evaluation of offerors' 10-year prices, and both Golden Triangle and BZA submitted unequivocal offers for a 10-year term, with no renewal options. The acceptance by the government of one of these proposals thus would result in a firm obligation on the part of the contractor to provide space for 10 years. As GSA also reports that it fully expects to remain in the space for the full 10 years, we think it was appropriate and reasonable to amortize the moving costs over the 10-year lease for evaluation purposes. We view the government's right to terminate after 5 years as serving a purpose similar to the standard termination for convenience clause included in other government contracts, which also has no effect on the contract term in proposal evaluation.

In its comments on GSA's report on its protest, Golden Triangle raises for the first time the additional objection that the total figure allocated to moving costs by GSA was too low based on moving industry experience. This allegation is untimely and will not be considered. Our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues; where a protester later supplements a timely protest with new and independent grounds of protest, the later raised allegations must independently satisfy the timeliness requirements of our Regulations, here, the requirement that protests be filed no later than 10 working days after the protest basis was or should have been known. 4 C.F.R. § 21.2(a)(2); Tri-States Serv., B-232322, Nov. 3, 1988, 88-2 CPD ¶ 436. Golden Triangle clearly could have raised the argument that GSA should have used a figure based on industry experience at the time it filed its initial protest objecting to the 10-year amortization period. Because Golden Triangle did not raise this issue until it filed comments on the agency report, this aspect of the protest is dismissed as untimely.

OTHER ALLEGATIONS

Golden Triangle raises a number of other objections which we have examined and find to be without merit. The protester asserts, for example, that prior to the submission of final BAFOs GSA improperly conducted negotiations with BZA after that firm failed to satisfy certain deficiencies concerning fire safety. According to Golden Triangle, rather than afford the firm a further opportunity to correct the deficiencies, GSA should have rejected the proposal as unacceptable. This argument rests on a basic misconception of negotiated procurements such as the one here. It is fundamental that, in a negotiated procurement, proposal deficiencies do not automatically warrant rejection; rather, where, as here, a proposal is deemed susceptible to correction, the agency should afford offerors an opportunity to make their proposals acceptable. Hollingsead Int'l, B-227853, Oct. 19, 1987, 87-2 CPD ¶ 372. Our review of the record indicates that in the course of negotiating this procurement, GSA requested corrections to various deficiencies in the proposals of both offerors. Thus, we find nothing unusual or improper in the agency's allowing BZA the opportunity to remedy the deficiencies complained of here.

The protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel